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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re Marriage of RICHARD
and FRAN SCHOENFELD.

B281835

(Los Angeles County
Super. Ct. No. BD409279)

RICHARD SCHOENFELD,

Appellant,

v.

FRAN SCHOENFELD,

Respondent.

APPEAL from orders of the Superior Court of Los Angeles County, Colin P. Leis, Judge. Affirmed in part and dismissed in part.

Katherine B. Warwick for Appellant.

Law Office of Leslie Ellen Shear, Julia C. Shear Kushner, Leslie Ellen Shear; Law Office of Ron W. Saxman, Ron W. Saxman and Diana D. Cooper for Respondent.

Richard Schoenfeld appeals from the trial court’s postjudgment order denying his request to terminate the monthly spousal support he pays to his former wife, Fran Schoenfeld, and the order awarding Fran¹ attorney fees in connection with his request. We affirm the order denying the motion to terminate spousal support and dismiss the appeal from the award of attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Dissolution of the Marriage

A stipulated judgment dissolving the Schoenfelds’ 24-year marriage was entered on June 9, 2006. The judgment required Richard to pay Fran spousal support of \$2,250 per month “until [Fran] remarries, dies or upon further order of court.”² The judgment did not recite a marital standard of living, nor did it address the income or earning potential of either party.

2. Richard’s Request To Terminate Spousal Support

On July 18, 2016 Richard filed a request for an order terminating his spousal support obligation and requesting termination of an order requiring him to maintain life insurance naming Fran as a beneficiary.³ Richard’s request did not identify

¹ As is customary in family law matters, we refer to the parties by their first names for convenience and clarity.

² The judgment also required Richard to pay Fran child support of \$1,500 per month for each of their two children until each child reached the age of majority.

³ Although Richard seeks termination of a requirement he maintain life insurance naming Fran as the beneficiary, the record on appeal does not contain such an order. The stipulated

any specific change in circumstance that had occurred since the stipulated judgment, but generally alleged he “cannot afford to continue to pay spousal support” given his current salary. The request also stated Richard had “just completed a Chapter 13 Bankruptcy plan filed in 2011, occasioned by the debt he incurred to buy out [Fran’s] interest in the family residence.”

Richard’s declaration in support of his request stated Fran did not need support to maintain the standard of living enjoyed during the marriage and Fran’s health was “good.” Richard’s declaration also stated his gross income from employment was \$9,533 per month. Attached to Richard’s income and expense declaration were six paystubs for the period May 23, 2016 to June 26, 2016 showing Richard earned \$2,200 per week and had been paid a total of \$50,462.70 year-to-date for 2016.

Fran filed a responsive declaration opposing Richard’s request for termination and requesting an upward modification of spousal support to meet her basic living expenses. Fran declared her only income was the spousal support she received from Richard. She stated she had not worked full-time since her eldest child was born in 1990 and has been unable to find work recently. Fran further stated she has scoliosis and short-term memory deficits, which would affect her ability to work. Fran alleged Richard was the CFO and general manager of his family’s catering company and his income was higher than he stated in his declaration. In fact, Fran stated, Richard’s income was higher than it was at the time of the judgment. Fran’s

judgment states only that “the Court reserves jurisdiction over the payment of, maintenance, termination, surrender and distribution of the life insurance presently in [e]ffect and issued during the marriage.”

declaration also contained allegations regarding the marital standard of living.

Richard submitted a reply declaration “to correct errors” in Fran’s response. Richard declared he currently earned approximately \$65,000 less per year than he did in 2006 when the marriage was dissolved. He further disputed various statements made in Fran’s declaration, including her assertions regarding the marital standard of living and her assets. The declaration also listed current job openings for which Fran would allegedly be qualified.

Fran filed evidentiary objections to Richard’s declarations mainly based on relevance, hearsay and lack of foundation. Richard filed a response to the objections, which attached documentation of Fran’s assets in the form of her bank statements. Richard also attached his form W-2’s for 2013 through 2016, which showed he earned a high of \$203,200 in 2014 and a low of \$138,200 in 2016.⁴

3. The Hearing on Richard’s Request for Order

On September 28, 2106 Fran requested the opportunity to present live testimony at the hearing on Richard’s request for termination of support. Specifically, Fran stated her attorney would elicit testimony from Richard regarding his income and benefits and Fran intended to testify regarding her assets and expenses. Richard objected to Fran’s request on the grounds it

⁴ Richard’s declaration stated he earned a salary between \$112,200 and \$114,400 each year during 2013 through 2016. The remainder of his employment income was vacation and bonuses, which were between \$15,000 and \$80,000 during the same time period.

did not provide for his direct testimony or cross-examination of Fran. Richard's objection stated, "In the event that oral testimony is required by the Court, both Parties should be included."

A hearing on Richard's request for termination of spousal support was held on February 2, 2017. The court placed the parties under oath and asked Richard who owned the catering company that employed him. Richard answered the company was owned jointly by his father's trust and his late-uncle's trust. The court then asked Richard to identify the material change in circumstance that had occurred since the judgment in 2006. Richard replied, "I had a couple of different jobs. I used to have a base salary of almost \$175,000. Now I have a base salary of \$114,000." Following this response the court inquired, "Any other change of circumstance?" Richard essentially replied "no": "Basically, just my income has dropped dramatically. I no longer have company-provided medical insurance. That is about \$600 a month that I didn't have before. I no longer have a company-furnished automobile with gas and insurance. So I have a lot of expenses I didn't have before." The court then asked, "But you worked previously for employers who were not family-owned or family-related businesses; is that correct?" Richard stated it was correct.

After hearing briefly from Fran's counsel regarding her request for an increase in support, the court stated it was taking the evidentiary hearing off calendar, finding good cause to do so. The court then issued its rulings, "Because there hasn't been a showing of a change in circumstance . . . , the court's denying the request by [Richard] for termination or modification of spousal support and denying the request for termination of the life

insurance provision.” The court also denied Fran’s request for an increase in support, explaining, “[G]iven that there is no marital standard of living finding in the judgment, the court can’t determine what the marital standard of living was and whether, in the interim, respondent hasn’t enhanced her style of living since dissolution, and respondent can’t create a change of circumstance by taking on a more expensive lifestyle” Fran’s counsel objected, arguing the court could hear evidence regarding the marital standard of living and make a ruling whether Fran’s standard of living or needs had changed since the marriage. The court stated it did not believe it could make an after-the-fact finding regarding the marital standard of living.

Prior to the conclusion of the hearing Richard’s counsel informed the court, “[O]ne of the things we had intended to do here today was to challenge their claim of a marital standard of living. And in addition to that, we are prepared to put on evidence that absolutely challenges as perjury the statement by respondent that she is not employable because of a variety of physical limitations. I would like at least to make a record that we are prepared to go forward in that fashion if the court is willing to hear it.” The court denied the request to present additional evidence.

4. Fran’s Request for Attorney Fees

While Richard’s request for order was pending, Fran filed a request for attorney fees of \$15,300. The request was accompanied by a declaration from Fran and a declaration from her attorney. Her attorney stated the fees were necessary to respond to Richard’s request for termination of spousal support. Richard opposed the request on the grounds the amount was excessive and Fran’s attorney had not submitted information

regarding his billing rates or statements showing time spent on the matter. Fran's attorney subsequently submitted a supplemental declaration attaching his itemized billing statements for this case.

The court held a hearing on the request for attorney fees on November 10, 2016. After hearing argument the court granted Fran's request for payment of her attorney fees and ordered Richard to pay Fran's attorneys \$15,300 within 20 days. The court stated the fees were subject to reallocation based on evidence to be developed at the hearing on Richard's request for termination of spousal support. Richard's attorney did not raise the issue at the February 2017 hearing.

5. The Notice of Appeal

On April 3, 2017 Richard filed a notice of appeal from the court's denial of his request for termination of support even though no written order had yet been entered. The court's order after hearing was not filed until April 17, 2017. Pursuant to rule 8.104(d)(1) of the California Rules of Court, we treat the premature notice of appeal as filed immediately after entry of the written order.

DISCUSSION

1. The Trial Court Did Not Abuse Its Discretion in Denying Richard's Request To Terminate Spousal Support

a. Governing law and standard of review

Family law courts retain jurisdiction to modify spousal support at any time even if the parties stipulated to the amount

of support. (Fam. Code, § 3651, subds. (a) & (e).)⁵ However, “[a] motion for modification of spousal support may only be granted if there has been a material change of circumstances since the last order. . . . Absent a change of circumstances, a motion for modification is nothing more than an impermissible collateral attack on a prior final order.” (*In re Marriage of Khera & Sameer* (2012) 206 Cal.App.4th 1467, 1479; accord, *In re Marriage of West* (2007) 152 Cal.App.4th 240, 246.) The party moving to modify or terminate spousal support has the burden to show a material change in circumstance, which means “a reduction or increase in the supporting spouse’s ability to pay and/or an increase or decrease in the supported spouse’s needs. It includes all factors affecting need and the ability to pay.” (*West*, at p. 246.) “Circumstances accounted for in the previous order cannot constitute a change of circumstances.” (*Khera & Sameer*, at p. 1476.)

“Whether a modification of a spousal support order is warranted depends upon the facts and circumstances of each case, and its propriety rests in the sound discretion of the trial court[,] the exercise of which this court will not disturb unless as a matter of law an abuse of discretion is shown.” (*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 357-358.) “Appellate review of orders modifying spousal support is governed by an abuse of discretion standard, and such an abuse occurs when a court modifies a support order without substantial evidence of a material change of circumstances.” (*In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 398; accord, *In re Marriage of West*,

⁵ Statutory references are to this code unless otherwise stated.

supra, 152 Cal.App.4th at p. 246 “[a] spousal support order is modifiable only upon a material change of circumstances since the last order”; “[w]here there is no substantial evidence of a material change of circumstances, an order modifying a support order will be overturned for abuse of discretion”].)

b. *The trial court did not err in refusing to allow Richard’s proffered testimony*

Richard contends the trial court abused its discretion by refusing to hear testimony at the hearing on his request for termination of spousal support. Generally, a party in a family law proceeding has the right to present live witness testimony. (§ 217; *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1356-1357) Section 217, subdivision (a), provides, “At a hearing on any order to show cause or notice of motion brought pursuant to this code, absent a stipulation of the parties or a finding of good cause pursuant to subdivision (b), the court shall receive any live, competent testimony that is relevant and within the scope of the hearing and the court may ask questions of the parties.” Subdivision (b) states, “In appropriate cases, a court may make a finding of good cause to refuse to receive live testimony and shall state its reasons for the finding on the record or in writing.”⁶

⁶ Rule 5.113(b) of the California Rules of Court identifies the factors a court must consider in making a finding of good cause to refuse to receive live testimony under section 217: “(1) Whether a substantive matter is at issue—such as child custody, visitation (parenting time), parentage, child support, spousal support, requests for restraining orders, or the characterization, division, or temporary use and control of the property or debt of the parties; (2) Whether material facts are in controversy; (3) Whether live testimony is necessary for the court to assess

Richard argues the trial court was required under section 217 to hear live testimony regarding the marital standard of living and Fran's current physical limitations. However, Richard failed to establish this proposed evidence had any relevance to his request for termination of support. As discussed, Richard had the burden to show a material change in circumstances, such as a decrease in his ability to pay or a decrease in Fran's needs. Richard addressed these points in his papers, which included an Income and Expense Declaration, and in his response to the court's questions concerning changed circumstances. The additional testimony proffered by Richard's counsel at the hearing had no bearing on these factors. Even if the marital standard of living was the more modest version Richard recounted, it would not make it more or less likely that Richard currently has the ability to pay the previously ordered support. Similarly, even if Fran's current physical condition was better than she contended, Richard did not suggest she was now more able to support herself than she had been in 2006⁷ or that

the credibility of the parties or other witnesses; (4) The right of the parties to question anyone submitting reports or other information to the court; (5) Whether a party offering testimony from a non-party has complied with Family Code section 217(c); and (6) Any other factor that is just and equitable."

⁷ The mandatory Judicial Council form FL-180 used to incorporate the parties' stipulated judgment contained the preprinted caution that, "It is the goal of this state that each party will make reasonable good faith efforts to become self-supporting" However, the stipulation itself did not include a *Gavron* warning, and Richard did not contend as a basis for terminating Fran's spousal support that she had been advised in 2006 that she should make reasonable efforts to assist in

her needs were any less than they had been at the time of the judgment. In other words, the mere rebuttal of Fran’s evidence would not carry Richard’s burden to make an affirmative showing of change in circumstance. Given the issues to be decided and the testimony proffered, the trial court’s decision not to permit live testimony was within the sound exercise of its discretion. (See § 217; see also Evid. Code, §§ 350, 352; *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1432.)

Furthermore, even if the trial court had erred in refusing to hear testimony, Richard has failed to show that error resulted in a “miscarriage of justice”—that is, that a different result would have been probable if the error had not occurred.” (*Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1480; accord, *Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc.* (2014) 225 Cal.App.4th 786, 798 [appellant’s burden on appeal to show both error in admitting or excluding evidence and prejudice—that it is reasonably probable a more favorable result would have occurred absent the error].)

c. The trial court did not err in failing to consider the section 4320 factors

Richard argues the trial court erred by not considering each factor enumerated in section 4320 before refusing to terminate spousal support. Section 4320, titled “Determination of amount due for support,” sets forth certain factors a trial court must

providing for her support needs and had failed to heed the court’s warning. (See *In re Marriage of Gavron* (1988) 203 Cal.App.3d 705; see also § 4330, subd. (b) [codifying *Gavron* warning].)

evaluate when ordering spousal support.⁸ In deciding a request to modify or terminate a spousal support order, “the court considers the same criteria set forth in section 4320 as it considered when making the initial order” (*In re Marriage of Terry* (2000) 80 Cal.App.4th 921, 928.)

Contrary to Richard’s assertions, the trial court was not required to consider the section 4320 factors given its finding Richard had not shown a material change of circumstances. As discussed, a “prerequisite to modification or termination of spousal support is a material change of circumstances.” (*In re Marriage of Shimkus* (2016) 244 Cal.App.4th 1262, 1272; see also *In re Marriage of Khera & Sameer*, *supra*, 206 Cal.App.4th at p. 1480 “[m]odification of spousal support based on consideration of the section 4320 factors constitutes error where the evidence does not show a material change of circumstances”].) As its title suggests, the section 4320 factors aid the court in determining the amount and duration of support, but these factors need not be considered when the threshold showing of change of circumstances has not been made.

⁸ The factors identified in section 4320 include the duration of the marriage, the earning capacity of each party, “the needs of each party based on the standard of living established during the marriage,” “[t]he marketable skills of the supported party,” “the possible need for retraining or education to acquire other, more marketable skills,” “[t]he extent to which the supported party’s present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties,” “[t]he age and health of the parties” and “[a]ny other factors the court determines are just and equitable.”

2. *This Court Lacks Jurisdiction To Review the Order Awarding Attorney Fees*

The trial court's order awarding Fran attorney fees to respond to Richard's request for order was directly appealable. (See *In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1311 [order on "request for pendente lite attorney fees is appealable"]; *In re Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119 ["a direct appeal lies from a pendente lite attorney fees order where nothing remains for judicial determination except the issue of compliance or noncompliance with its terms"]; see also *In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368-369 ["[w]hen a court renders an interlocutory order collateral to the main issue, dispositive of the rights of the parties in relation to the collateral matter, and directing payment of money or performance of an act, direct appeal may be taken"].)

The order awarding attorney fees was entered on December 16, 2016 and directed Richard to pay Fran's counsel within 20 days. The time for Richard to appeal from that order expired 60 days from service of the filed-endorsed copy of the order or 180 days after entry of the order. (Cal. Rules Court, rule 8.104(a)(1).) The record does not contain a proof of service showing the date the signed order was served on or by Richard; thus his time to appeal expired on June 14, 2017, 180 days after entry of the order. (See *Montgomery Ward & Co. v. Imperial Casualty & Indemnity Co.* (2000) 81 Cal.App.4th 356, 372-373 ["while it appears more likely than not the clerk of the court mailed a copy of the file-stamped judgment to all parties . . . , there is no definitive evidence in the record this was so. . . . Accordingly, we conclude the time for appeal did not expire until 180 days after the date of entry of the judgment"].)

Richard's notice of appeal was timely filed on April 3, 2017. However, the notice of appeal stated Richard was appealing the court's denial of an evidentiary hearing pursuant to section 217 and the denial of his request for order terminating spousal support. There was no mention of the December 16, 2016 order awarding attorney fees. Likewise, the civil case information statement filed on May 5, 2107 referred only to the court's February 2, 2017 order denying the termination of spousal support and attached only the corresponding order. Again, there was no reference to an appeal of the award of attorney fees.

Our jurisdiction in this appeal is limited in scope by the timely filing of a notice of appeal identifying the judgment or order from which the appeal is taken. (See *Conservatorship of Edde* (2009) 173 Cal.App.4th 883, 889-890 [appellate court's "analysis is limited only to review of the order" identified in notice of appeal]; *Soldate v. Fidelity National Financial, Inc.* (1998) 62 Cal.App.4th 1069, 1073, [separately appealable order "is not reviewable on appeal, unless [the order] is expressly specified in a notice of appeal"]; see also *Morton v. Wagner* (2007) 156 Cal.App.4th 963, 967 ["while a notice of appeal must be liberally construed, it is the notice of appeal that defines the scope of the appeal by identifying the particular judgment or order being appealed"].) Even construing the notice of appeal liberally, it cannot be read to encompass an appeal of the attorney fee award. Thus, the appeal from that award must be dismissed.

DISPOSITION

The order denying Richard's request to terminate spousal support is affirmed. The purported appeal from the order awarding Fran attorney fees is dismissed. Fran is to recover her costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.*

* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.