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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

In re the Marriage of AMEDEO and
NELLY CESANA.

AMEDEO CESANA,

Appellant,

v.

NELLY CESANA,

Respondent.

A134092

(Contra Costa County
Super. Ct. No. MS275183)

Amedeo Cesana appeals from a postjudgment support order, contending the court erred in denying his motion to terminate spousal support and in ordering him to pay a portion of Nelly Cesana’s attorney fees. We shall affirm.

Factual and Procedural Background

Nelly and Amedeo Cesana ended their 24-year marriage in 1985 with the entry of a stipulated judgment of dissolution that incorporated the terms of a marital settlement agreement. The agreement provided that Nelly receive spousal support equal to 30 percent of Amedeo’s income, with a maximum of \$9,000 per month. In the years following the divorce, Amedeo’s financial circumstances varied greatly. As a result, the parties did not observe the terms of the settlement agreement but followed a subsequent oral agreement that Amedeo support Nelly to the best of his ability. Amedeo made payments to Nelly in varying amounts over the years until the present dispute arose in 2008.

While the couple was still married, Amedeo had been the principal in a business that involved the design and operation of systems for distribution, management, and payments in the freight industry. Around the time of the divorce, the business was forced into bankruptcy, which led to the oral modification of the settlement agreement. Shortly after the divorce was final, Amedeo remarried and he and his new wife Rhonda started a series of new businesses in the same industry, which ultimately led to the formation in 1996 of Global Logistics Villages, Inc. Prior to 2007, Amedeo owned 60 percent of the new company and Rhonda owned 40 percent. However, Amedeo developed non-Hodgkin's lymphoma and in late 2007 transferred his interest in the company to Rhonda, making her the sole shareholder.

From 2004 to 2007, Nelly worked as a part-time receptionist for Amedeo and Rhonda at a rate of \$3,000 a month. Amedeo did not pay spousal support during this period. In July 2007, Nelly's employment was terminated and Amedeo began paying Nelly \$1500 a month in spousal support.

In January 2008, Amedeo received a letter from Nelly's attorney indicating that he owed a significant amount of spousal support arrearages. Amedeo was shocked and "very, very upset" by the letter. In March 2008, Amedeo transferred to Rhonda his interest in the family home. Around the same time, at the age of 71, Amedeo partially retired and reduced his annual salary from \$180,000 to \$60,000.

On June 16, 2008, Nelly obtained an order to show cause requesting a determination of spousal support and spousal support arrearages. Nelly also requested that Amedeo pay her attorney fees under Family Code section 2030.¹ In response, Amedeo sought to terminate spousal support.

On November 2, 2011, after six hearing dates throughout 2010 and 2011, the court issued a tentative decision, which among other things, ordered Amedeo to pay Nelly \$1,500 per month in spousal support, denied Nelly's request for spousal support arrearages and reimbursements, and ordered Amedeo to pay \$15,000 of Nelly's attorney

¹ All statutory references are to the Family Code unless otherwise indicated.

fees. The court found, as relevant to Amedeo's claims on appeal, that Nelly's monthly expenses were \$3,000 and her monthly income was \$1,087 and that Amedeo's monthly income was \$10,131 and his monthly expenses were \$6,611. With respect to the court's calculation of Amedeo's income, the decision states: "[Amedeo] is currently employed by Global Logistics Village, Inc. He currently receives a salary of \$60,000 a year from the corporation which is wholly owned by his current wife, Rhonda Cesana. She receives an annual salary of \$140,000 per year. The court finds that while Rhonda has a significant management role in the company, and certainly performs more than just a clerical or administrative function, that it is inequitable and unreasonable to divide the collective income received by [Amedeo] and his wife in anything other than an equal manner [f]or purposes of calculating the amount of income available for the payment of spousal support." The court recognized that Amedeo "brings unique skills to the business which according to the testimony offered at trial [have] not been replaced by any other individual. And, while [Amedeo] certainly has a right to retire, he has not done so." Accordingly, for purposes of determining current support, the court found "that [Amedeo's] earning potential is one-half of the \$200,000 total paid to [Amedeo] and his wife, or \$100,000." With respect to the attorney fees award, the court found "based on the disparity of income between the parties, but taking into account the debt incurred by [Amedeo], that some but not all of [Nelly's] fees should be paid by [Amedeo]."

Amedeo objected to the tentative decision on the ground that the court improperly considered his wife's income in determining his ability to pay spousal support and attorney fees. The court overruled the objection as follows: "The court found in its tentative decisions that [Amedeo] should have attributed to him income in the amount of \$100,00 for the purpose of determining his ability to pay spousal support. In so doing, the court did not allocate a portion of [Amedeo's] wife's income to [Amedeo]. Rather, the court found that the means by which [Amedeo] and his current spouse had allocated income generated by the business owned by the two of them was inequitable." The court continued, "[Amedeo] argued that during his most recent illness he had transferred all ownership of the family business to his current spouse. He then argued that his income

was totally dependent upon whatever amount she chose to pay him as the owner of that business. The court rejected that argument in rendering its tentative decision. The court found that the transfer of the family business to [Amedeo's] spouse was done solely for estate planning purposes, and that for all intents and purposes, the family business continued to be community property for the purpose of determining management and control. The court further finds based upon the history of the business, the training and expertise of both [Amedeo] and [his current] spouse, that an allocation of income between [Amedeo] and his spouse such as that proposed by [Amedeo] constituted an artificial self-serving allocation of income so as to diminish [his] spousal support obligation. . . . Indeed, expert testimony received at trial suggested that [Amedeo's] wife should be allocated even less than one half of the income drawn by the parties from the business which they run. The court, however, found that an equal division of income was appropriate at this time in [Amedeo's] career.” With respect to the calculation of Amedeo's expenses, the court “took into consideration the fact that [his] monthly expenses totaled \$13,222.34 per month” but that “the expenses that were listed were the expenses of both [Amedeo] and his current wife.” Thus, “[o]ne half of those expenses would amount to \$6,611 per month, thereby leaving [Amedeo] sufficient monies with which to pay the support that the court has ordered.”

Amedeo filed a timely notice of appeal.²

² Nelly has not appealed from the denial of her motion for support arrearages and reimbursements.

We note that the record on appeal designated by Amedeo, although sufficient to allow review, is incomplete. The register of actions shows that the matter was tried before the superior court on October 18 and 19, 2010, April 22, May 20, 23 and 24, and June 15, 2011. Although Amedeo's designation includes the reporter's transcript of the first six hearings at which the evidence was received, he did not designate the reporter's transcript of the June 15 hearing at which closing arguments were made. Likewise, he did not designate the parties' posttrial points and authorities, filed on June 8 and 9, as part of the clerk's transcript. The record contains the trial court's tentative statement of decision and ruling on objections, but Amedeo did not designate his written objections to the court's tentative decision, filed on August 9, or the reporter's transcript from the September 28 hearing, at which the objections were argued, for inclusion in the record on appeal.

Discussion

I. The trial court did not abuse its discretion in awarding spousal support.

“An award of spousal support is a determination to be made by the trial court in each case before it, based upon the facts and equities of that case, after weighing each of the circumstances and applicable statutory guidelines. [Citation]. . . In awarding spousal support, the court must consider the mandatory guidelines of section 4320. Once the court does so, the ultimate decision as to amount and duration of spousal support rests within its broad discretion and will not be reversed on appeal absent an abuse of that discretion.”³ (*In re Marriage of Kerr* (1999) 77 Cal.App.4th 87, 93.) However, under section 4323, subdivision (b), the court may not consider “[t]he income of a supporting spouse’s subsequent spouse . . . when determining or modifying spousal support.”

Amedeo contends that the court violated section 4323, subdivision (b) by considering the income and assets of his current wife for the purpose of determining his ability to pay support. In *In re Marriage of Romero* (2002) 99 Cal.App.4th 1436, 1444-1445 the court held that this provision prohibits both direct and indirect consideration of a subsequent spouses’ income and that to “avoid any absurd or unreasonable results,” a trial court “must not only exclude the new spouse’s income, but also the additional expenses resulting from the remarriage.” (*Id.* at p. 1445.) Recognizing the complications inherent in such calculations, the court observed that “where the actual numbers would produce an inequitable result, the trial court must exercise greater discretion based on all the available facts and every appropriate consideration.” (*Id.* at pp. 1445-1446.)

³ Section 4320 provides in relevant part: “In ordering spousal support under this part, the court shall consider all of the following circumstances: [¶] (a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage . . . [¶] . . . [¶] (c) The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living. [¶] (d) The needs of each party based on the standard of living established during the marriage. [¶] (e) The obligations and assets, including the separate property, of each party. [¶] . . . [¶] (h) The age and health of the parties. [¶] . . . [¶] (k) The balance of the hardships to each party. [¶] . . . [¶] (n) Any other factors the court determines are just and equitable.”

Contrary to Amedeo's argument, the trial court here did not violate section 4323, subdivision (b). The court did not improperly consider Rhonda's income in determining his ability to pay spousal support. Rather, the trial court found that Amedeo and his wife had allocated their income in a self-serving manner so as to minimize his spousal support obligation. The court imputed additional income to Amedeo based on what it concluded was a fair and reasonable allocation. (See *Millington v. Millington* (1968) 259 Cal.App.2d 896, 918 [husband "cannot by a unilateral act, through his control over the corporate structure, regulate the flow from the spigot from which the wife's thirst must be quenched"]; *In re Marriage of Berger* (2009) 170 Cal.App.4th 1070, 1083 [father cannot unilaterally and voluntarily arrange his business affairs in such a way as to effectively avoid paying child support].) Substantial evidence supports the court's conclusion and allocation.

Prior to 2008, both Amedeo and Rhonda worked on the business equally and treated their income as equally earned. Rhonda did a majority of the marketing and administration in addition to running the operations while Amedeo's work focused on the technical and design aspects of the business. Each spouse "complemented each other" and the "none of those businesses would have existed" without both of their contributions. For most of this time, Amedeo and Rhonda received only one check as their family income and shared all expenses. The couple considered this amount their joint wages. In 2004, after learning that under that compensation system Rhonda was not receiving credit for contributions to social security, the couple separated their income. Having determined that their combined annual wages would be \$300,000, they decided that Amedeo was to be paid \$180,000 and Rhonda was to be paid \$120,000. Rhonda, however, considered these numbers arbitrary because they were "partners in every sense of the word." By 2008 Rhonda was being paid \$140,000 a year.

Amedeo testified that in 2008 when he reduced his work schedule by two-thirds, he took a corresponding pay cut, reducing his salary from \$180,000 to \$60,000. He emphasizes that two new employees were hired to perform some of the work he previously performed. The fact remains, however, that Amedeo continued to work for

and provide his extensive experience and expertise to the business. His income and expense declarations filed in 2008 through 2010 show that he worked about 30 hours a week, not the 9 to 16 hours he claimed. Moreover, while a reduction in salary may have been justified by Amedeo's reduction in hours, it does not necessarily justify the reallocation of income between Rhonda and Amedeo. Viewing the history of the business and how wages were distributed between Amedeo and his wife Rhonda, it was within the trial court's discretion to determine that the equal distribution that applied throughout the companies' existence continued despite the reduction in Amedeo's hours. Accordingly, the court did not err in finding that Amedeo's annual income was \$100,000.⁴

Contrary to Amedeo's further argument, the court did not improperly compel Amedeo to continue working. Amedeo relies on *In re Marriage of Reynolds* (1998) 63 Cal.App.4th 1373, 1378 in which the court found an abuse of discretion in imputing income to a retired spouse absent evidence of the spouse's "ability, opportunity, and willingness to work." In this case, however, as the court noted, while Amedeo is entitled to retire, he has not done so. Thus, not only does he have the ability, opportunity, and willingness to work, he is working.

We also reject Amedeo's argument that the court overvalued Amedeo's assets, including the family home and the business, or improperly allocated to him 100 percent of the value of those assets. Having rejected the self-serving transfer of his share of the home and business into Rhonda's name, the court stated that "[f]or purposes of making decisions in this case, the court will consider all assets *so transferred* to be the property and assets of [Amedeo]." (Italics added.) Nothing in the trial court's explanation suggests

⁴ Amedeo argues that the court erred in evaluating his ability to pay spousal support when it based its decision on the pre-tax amount of his income. He suggests that he and Rhonda are in the 46 percent income tax bracket and that his take home salary should have reflected this reduction. It does not appear from the limited record before this court that this issue was raised in the trial court. Amedeo's income and expense declarations use the pre-tax value and income taxes are not claimed as an expense. The after-tax value of his income is referenced briefly in his opening brief on appeal but it is only in his reply brief that he argues the court's failure to use the after tax value was reversible error. Accordingly, the issue has been waived.

that it was considering as Amedeo's assets more than the percentage he transferred to Rhonda. Nor does the decision suggest that the court overvalued those assets. The court recognized the lack of equity in the family home and acknowledged that while the business has been successful, its future stability "relies on its relationship with one major customer." Moreover, the court did not rely heavily on the parties' assets in calculating support. The decision was based primarily on the disparity of the parties' income.

Finally, Amedeo has failed to establish that the court abused its discretion in calculating his monthly expenses. As set forth above, section 4323 required the court to exclude from the calculation all additional expenses resulting from Amedeo's second marriage. (*In re Marriage of Romero, supra*, 99 Cal.App.4th at p. 1445.) Contrary to Amedeo's argument, this does not mean that all of the couple's joint expenses should be allocated to him as if Rhonda were not present. Rather, the court has broad discretion to determine which expenses are properly allocated to the supporting spouse based on the entire financial picture. For example, the court in *Romero* found that a particularly large mortgage payment would not have existed but for the remarriage so that it was error to consider it as husband's expense in determining his ability to pay spousal support. (*Id.* at pp. 1445-1446 [there is no per se "formula" to calculate how much of the shared expenses to exclude; rather "the court must determine what expenses are reasonable based only on [the support obligor's] net monthly income"].) In this case, Amedeo seems to suggest the entire \$13,222.34 in joint expenses included in his income and expense declaration should have been allocated to him. Some of the expenses, however, are clearly the product of his second marriage, including the cost of supporting his wife's mother and the full cost of groceries, restaurant expenses, gifts, clothes and the like. Amedeo has made no attempt on appeal, nor apparently did he do so in the trial court, to further refine what part of this amount is properly allocated to him. Therefore, the court reasonably divided the joint expenses in half based on the same evidence it used to allocate the couple's income.

II. Attorney Fees

“[A] motion for attorney fees and costs in a dissolution proceeding is left to the sound discretion of the trial court. [Citations.] In the absence of a clear showing of abuse, its determination will not be disturbed on appeal.” (*In re Marriage of Sullivan* (1984) 37 Cal.3d 762, 768-769.) “[T]he trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made.” (*In re Marriage of Cueva* (1978) 86 Cal.App.3d 290, 296.)

Amedeo’s challenge to the attorney’s fee award rests in large part on his argument that the court erred in calculating the parties’ income and expenses as discussed above. Having rejected each of his arguments in this regard, we must likewise reject his argument that the court improperly relied on the disparity of the parties’ income in awarding attorney fees. In addition, contrary to Amedeo’s suggestion, the court considered the substantial debt Amedeo incurred in defending Nelly’s claim for arrears in making its final award. In all, the court ordered Amedeo to pay \$15,000 of the approximately \$50,000 in fees Nelly incurred in the litigation. Based on the record before us, we cannot say that this award constitutes an abuse of discretion.

Disposition

The decision below is affirmed.

Pollak, J.

We concur:

McGuinness, P. J.

Jenkins, J.