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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re the Marriage of DEBORAH KNIBB
and JOHN C. BAINE III.

DEBORAH KNIBB,

Appellant,

v.

JOHN C. BAINE III,

Respondent.

A140293

(Contra Costa County
Super. Ct. No. D10-00004)

We are asked to review a post-dissolution decision following trial on various contested issues concerning the division of assets and spousal support in this marital action. We affirm.

I. BACKGROUND

Appellant Deborah Knibb (Dr. Knibb) and respondent John C. Baine III (Dr. Baine) were married for approximately 20 years. They are both veterinarians and for many years practiced veterinarian medicine together in a firm known as Animal Clinic of Alamo, Inc. (ACA). Dr. Knibb filed a petition for dissolution of the marriage on January 5, 2010. At the time, the couple had three children in their teen years (two girls, ages 16 and 13, and a boy, age 17).

The case proceeded with some difficulty, as evidenced by frequent changes of counsel for the parties. Dr. Knibb has now been represented at various times by six

different lawyers, five of whom eventually withdrew; at certain times in the trial court, she represented herself pro se; and she is currently represented by a sixth lawyer on appeal. For his part, Dr. Baine was represented by counsel until August 2011, at which point he declared personal bankruptcy and his lawyer withdrew. Dr. Baine appeared pro se for the remainder of the trial court proceedings, and is representing himself pro se on appeal.

There were numerous allegations by both parties of domestic violence against each other, none of which was ultimately sustained. At different points, Dr. Knibb accused Dr. Baine of possession of child pornography, abuse of animals, professional misconduct, and harassment and discriminatory treatment of employees, among other things. Dr. Baine denied all of these accusations, and contended that Dr. Knibb was trying to use alleged bad acts as a tactic to gain an advantage on other matters pending for decision in the case.

Despite this contentious atmosphere, Dr. Knibb and Dr. Baine appear to have been able to agree upon most issues concerning child custody and child support, two of their three children having grown into adulthood during the protracted, three-and-a-half year course of the case. Throughout the proceedings, however, they remained sharply at odds over issues of property division.

A significant point of friction involved operational control of the parties' joint business, ACA. At first, they stipulated to an arrangement under which Dr. Knibb was given control. But when Dr. Baine complained in June 2010 of alleged diversion of funds by Dr. Knibb, the court issued a temporary ex parte order giving control of the business to Dr. Baine and directing Dr. Knibb to restore to ACA the funds she was charged with diverting. After a hearing on July 19, 2010 at which Dr. Knibb appeared and objected to the ex parte order, the court decided to "leave the order in place until we have a long-cause hearing because it seems to be working."

Because the parties could not agree on a valuation of ACA, the court ordered that a forensic accountant be retained to examine the issue of valuation. Dr. Baine retained someone for this purpose, but the accountant never pursued the engagement, apparently

because Dr. Baine failed to pay him. In the meantime, Dr. Baine decided to abandon ACA and file for bankruptcy in June 2011. This left Dr. Knibb in charge of what was, by then, an increasingly distressed enterprise. She was forced to close the business in August 2011. Both Dr. Baine and Dr. Knibb then found separate employment with other veterinarian firms.

A status-only trial on dissolution was held on July 19, 2010, and on that date, by stipulation, the court entered judgment terminating the marriage. After unsuccessful efforts to reach a settlement of all remaining issues, certain issues concerning spousal support and division of community assets were bifurcated and tried over the course of multiple days in January, March, and April 2013. The court eventually issued a Statement of Decision Following Trial on September 19, 2013 (Statement of Decision). By its terms, the Statement of Decision states it is “final and effective immediately.”

In its Statement of Decision, the court valued ACA at zero, denied Dr. Knibb’s request for an award of long-term spousal support, and with the exception of two retirement accounts, divided the disputed community assets and liabilities in a manner that left Dr. Baine and Dr. Knibb owing nothing to one another.¹ With respect to the retirement accounts, the court reserved jurisdiction and deferred to an unspecified “later date” the characterization and allocation those accounts, expressly leaving in place “all previous orders” relating to the accounts, and reminding the parties that they have “on-going fiduciary obligations.”

The court also denied requests for attorneys fees and sanctions from both parties, finding as follows. “Regarding the requests for attorney’s fees as sanctions, the court finds that both parties equally share responsibility for dragging out the litigation and for driving their community property veterinary practice—which was clearly the most

¹ Except for the value of an emerald ring in Dr. Knibb’s possession which Dr. Baine claimed was a family heirloom bequeathed to him by his mother (the court gave Dr. Knibb the option of returning the ring without further obligation, or paying Dr. Baine for it), the court calculated that, on a net basis, after offsetting the liabilities assigned to each party against the assets divided between them, “the amounts each party owes to the other are fully satisfied.”

significant community asset—into the ground. It is difficult to envision another case in which the misdeeds of the parties could be so evenly shared.”

Dr. Knibb timely appealed.

II. DISCUSSION

On appeal, Dr. Knibb contends the court erred by (1) issuing an ex parte mandatory injunction giving Dr. Baine operational control of ACA and directing her to repay funds to the business, (2) declining to determine the allocation of retirement funds or to award any spousal support to her, and deferring those issues to an unspecified future date, and (3) ordering her to return an emerald ring to Dr. Baine or pay him its equivalent value, which it found to be \$7,000; ordering her to pay \$12,500, an amount which it found to be the fair value of four horses previously owned by the couple; and ordering her to pay outstanding property tax on a boat the couple once owned. We address each of these three contentions in turn.

A. *The Ex Parte Order Directing Dr. Knibb to Repay Funds to ACA and Giving Dr. Baine Control Over ACA*

The thrust of Dr. Knibb’s primary argument on appeal is that the court erred in issuing the ex parte order of July 1, 2010 giving Dr. Baine operational control of ACA and directing her to repay funds to the business. We note preliminarily that, as an interim order, the July 1, 2010 order is not itself appealable. The same is true of the July 19, 2010 order leaving the ex parte order in place pendente lite. But since Dr. Knibb’s attack on the July 1 and 19 orders forms the predicate for this entire line of argument—she contends that, in its Statement of Decision, the Court erred by adopting the ex parte order permanently, without re-examining whether that order should have been entered in the first place—we will address her attack on these interim orders, on the merits.

Former Civil Code section 4359—now recodified without substantive change at section 2045 of the Family Code²—“provides authority for the trial court to issue ex parte orders restraining ‘any person’ from in any way disposing of any property within the

² All further unspecified statutory references are to the Family Code.

court's jurisdiction (with two exceptions not pertinent here) pending a hearing.” (*In re Marriage of Van Hook* (1983) 147 Cal.App.3d 970, 976–977 (*Van Hook*); see Civ. Code, former § 4359, added by Stats. 1970, ch. 311, § 3, repealed by Stats. 1993, ch. 219, § 39.5.) The procedural requirements for issuance of an ex parte order under section 2045 are set forth separately in section 242, subdivision (a), which specifies that such an order must be made returnable pursuant to an order to show cause (OSC) and a hearing must be held on the OSC within 21 days. (§ 242, subd. (a).) Although Civil Code former section 4359 did “not explicitly provide for the issuance of preliminary injunctions,” just as its successor statute, section 4045, does not, the appellate court in *Van Hook* concluded that “an ex parte restraining order issued pursuant to section 4359 can be converted into a preliminary injunction following a hearing.” (*Van Hook, supra*, 147 Cal.App.3d at pp. 977–978.) We interpret section 2045 the same way.

In this case, the court’s temporary order issued on July 1 was validly converted into a preliminary injunction following a timely hearing. On its face, the temporary order required a showing of cause why it should not be made permanent and set a timely hearing date within 21 days, on July 19, 2010. Dr. Knibb then filed written opposition on July 14, 2010 and appeared at the hearing with counsel, and at the hearing the court decided to leave the temporary order in place pending a “long-cause hearing” (which did not commence, it turned out, until January 2013). Dr. Knibb now argues that the court proceeded to decision on July 19 even though it only had Dr. Baine’s version of events, but the declaration she filed in opposition to the OSC admitted the alleged diversion of money from ACA without authorization.³ If and to the extent Dr. Knibb wished to argue

³ Of the total amount taken from ACA, \$150,000 was from a pooled retirement account held by Dr. Baine and Dr. Knibb as trustees for themselves and their employees, and \$34,705.76 consisted of customer revenues withdrawn or diverted from ACA’s bank account. At the July 19th hearing, Dr. Knibb’s counsel indicated that Dr. Knibb felt she was justified in taking these funds because she believed Dr. Baine was engaging in the same conduct and “[i]t’s one of those chicken and egg kind of things,” but did not deny the funds were taken without authorization. Dr. Knibb now appears to claim that, in early July 2010, she *did* comply with the court’s ex parte order by depositing the \$150,000 she withdrew back into the Schwab pooled account at that time, but she then adds that she

that the court’s July 19 order giving Dr. Baine control over ACA threatened to cause her irreparable harm at any point prior to the property division trial, nothing prevented her from seeking appellate relief by writ petition. She did not do so.⁴ By the time of the property division trial, the aspect of the order concerning control of the ACA was moot—ACA having failed in the meantime—except to the extent the parties continued to point fingers at one another for dissipating its value, an argument that neither side appears to have “won” (in its Statement of Decision the court found both parties equally blameworthy for failing to preserve ACA’s value).

Dr. Knibb insists the July 1 ex parte order was improper, characterizing it as a mandatory injunction that changed the status quo between the parties. We disagree with her characterization. The order required affirmative conduct (restoration of funds to ACA), but it did so, plainly, to restore the status quo ante, before Dr. Knibb diverted the funds. And that prior status quo was one in which, pursuant to the Automatic Temporary Restraining Order (ATRO) prohibiting disposition community assets without spousal consent (see § 2040), Dr. Knibb was subject to a bar on such unilateral transfers. The July 1 ex parte order requiring her to repay funds she transferred in violation of the ATRO was simply incidental to the terms of that existing prohibition. (See *People v. Mobile Magic Sales, Inc.* (1979) 96 Cal.App.3d 1, 13 [injunction requiring mobile homes to be removed from mobile home park is “incidental” to the injunction’s objective to restrain further statutory violations and therefore is prohibitive in character]; *People ex rel. Brown v. iMergent, Inc.* (2009) 170 Cal.App.4th 333, 342 [injunction prohibiting defendants from selling products and services without required statutory disclosures is prohibitory—“any aspects of the injunctions that require defendants to engage in

transferred the funds into a retirement account maintained in her name at Citibank. Perhaps she felt this maneuver was justified as a matter of self-help protection, but it still left her in default of the court’s order.

⁴ Instead, in August 2010, Dr. Knibb discharged her attorney and filed a pro se motion to change venue to another county on the grounds that “there is reason to believe an impartial trial cannot be had” The motion was denied as frivolous and Dr. Knibb was sanctioned \$2,500 for filing it.

affirmative conduct are merely incidental to the injunction's objective to prohibit defendants from further violating” the law].)

Accordingly, since there was no infirmity in either of the underlying interim injunctive orders issued in July 2010, we reject Dr. Knibb’s claim that, in its Statement of Decision, the court erred by leaving in place the July 19 order, which effectively converted that order into a permanent injunction. Dr. Knibb argues that she did not receive a “fair trial” on the issue of whether she improperly diverted funds from ACA and that the court simply adopted an improperly issued *ex parte* mandatory injunction. But the premise of her argument is incorrect, as we have explained—there was no error in connection with the *ex parte* order or the later order leaving it in place *pendente lite*.

At the property division trial, in any event, there was unrebutted trial testimony from Dr. Baine—consistent with the original showing he made in seeking the *ex parte* order—that Dr. Knibb had taken money out of the business without his consent. By that point, Dr. Knibb had been in default of the order to restore the funds she withdrew for nearly two-and-a-half years. In its Statement of Decision, the court was sharply critical of Dr. Baine’s actions as well, particularly his abrupt departure from ACA, leaving Dr. Knibb potentially saddled with debts that Dr. Baine managed to discharge in bankruptcy. But given the mixed state of the evidence concerning who was at fault for the failure of ACA, we cannot say it was an abuse of discretion for the court to leave in place “all previous orders,” including the order directing Dr. Knibb’s to repay money to ACA, or to decline to revisit whether it should have given Dr. Baine operational control over ACA in July 2010.

B. *Retirement Accounts and Spousal Support*

Dr. Knibb next attacks the court’s Statement of Decision for leaving unresolved the parties’ disputes concerning allocation of retirement accounts and long-term spousal support. She contends, in essence, that the court failed to make necessary findings on these issues and therefore abused its discretion by failing to exercise any discretion at all. (See *In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 515 [“trial court's failure to

exercise discretion is itself an abuse of discretion”].) Specifically, with respect to the retirement accounts, Dr. Knibb argues the court declined to make any allocation of the funds in the retirement accounts or to determine any amount to be awarded to her, instead simply reserving jurisdiction to rule on these issues at some indefinite date in the future. And with respect to her request for spousal support, she argues the court failed to consider the relevant statutory criteria governing whether to award her spousal support, and with this issue as well, improperly reserved jurisdiction to revisit the issue, if appropriate, sometime in the future. We reject both of these arguments.

1. Retirement Accounts

Upon dissolution of a marriage, the trial court may divide spouses’ interests in deferred payment retirement funds in either of two ways. “The trial court may either determine the present value of community property rights and award them to one spouse with offsetting community or other assets to the other (commonly called the cash out method), or it may divide the community interest in kind between the spouses, reserving jurisdiction to supervise future payments to each spouse.” (*In re Marriage of Bergman* (1985) 168 Cal.App.3d 742, 749 (*Bergman*)). Since many contingencies may affect valuation of retirement assets, “[w]hether to divide a contingent community asset by cash-out valuation or by in-kind partition upon reserved jurisdiction lies within the trial court’s sound discretion.” (*In re Marriage of Moore* (2014) 226 Cal.App.4th 92, 101.) The court does not, however, “have authority to retain an open-ended jurisdiction over the division of the community interest.” (*Bergman, supra*, at p. 758.)

We see no abuse of discretion in the court’s decision to reserve jurisdiction to address the characterization and allocation of the retirement accounts on a future unspecified date. One of these accounts—an account maintained at Charles Schwab from which Dr. Knibb withdrew \$150,000 without Dr. Baine’s consent in June 2010—was a pooled account held on behalf of Dr. Baine and Dr. Knibb for themselves and for former

employees of ACA. The other account, maintained at Citibank, was a retirement account held by Dr. Baine alone. In July 2010, Dr. Knibb was ordered to repay the \$150,000 she withdrew from the Charles Schwab pooled account. If there was anything “open-ended” about the manner in which the court dealt with the parties’ retirement accounts in its Statement of Decision, Dr. Knibb brought that situation about by failing to comply with the order to repay the funds she withdrew from the pooled account at Schwab. Compliance with that order was, and is, entirely within Dr. Knibb’s control. Given Dr. Knibb’s failure to comply by the time of the property division trial, it was not unreasonable for the court to defer resolution of disputed retirement account issues until she complied. “ ‘Family law court is a court of equity. . . .’ . . . ‘Those who seek equity, must do equity and have “clean hands”. . . .’ . . . ‘Family law cases “are equitable proceedings in which the court must have the ability to exercise discretion to achieve fairness and equity. . . .” ’ ” (*In re Marriage of Boswell* (2014) 225 Cal.App.4th 1172, 1174–1175 (*Boswell*), citations omitted.) Because Dr. Knibb, in effect, obstructed the court’s ability to characterize and allocate the total community assets in the retirement accounts in a full and fair way by failing to repay the money she withdrew, she is in no position to argue that the court erred by deferring decision on the issue. (*Ibid.*; cf. *Ironridge Global IV, Ltd. v. ScripsAmerica, Inc.* (2015) 238 Cal.App.4th 259, 266 [appeal dismissed on equitable grounds pursuant to disentitlement doctrine where appellant tried to avoid compliance with a court order by transferring stock to a third party].)

Once Dr. Knibb replenishes the Schwab account as she was ordered to do, the court can, at that point, characterize the parties’ retirement account assets⁵ and make an

⁵ It appears to be undisputed that all amounts in Dr. Baine’s Citibank retirement account are community property, and that the contributions made by Dr. Knibb into the pooled Schwab account on her own behalf are community property as well (no contributions on behalf of Dr. Baine appear to have been made into the Schwab account). But because some portion of the contributions to the pooled Schwab account were made on behalf of former employees of ACA and thus were not owned by the community,

appropriate allocation of the total amount of community assets in *both* accounts, before any unauthorized withdrawals. The date she complies will be the date certain that the court's reserved jurisdiction may be invoked (by either party) to resolve the parties' retirement assets dispute, using either the "in-kind" or the "cash-out" method. (See *Bergman, supra*, 168 Cal.App.3d at p. 749.) If Dr. Knibb still has not complied with the order to replenish the pooled Schwab account by the time either party reaches an age at which he or she is entitled to begin making penalty-free withdrawals from these accounts—or on some earlier date agreed upon by the parties—the court may proceed at that time to make a "cash-out" allocation of the retirement assets, treating whatever unpaid amount Dr. Knibb still owes the community for failing to repay the \$150,000 as an offset against her share of the total allocable community retirement fund assets in both accounts.

This approach to a "cash-out" analysis would apply, of course, to both parties. Dr. Knibb filed a declaration in August 2010 in which she alleged that Dr. Baine "sold . . . retirement stocks [held in his Citibank retirement account] without notifying the court," or her, and withdrew \$35,000 from the pooled Schwab retirement account as a "loan" to ACA—which he has presumably now discharged in bankruptcy—thus, in her view, diverting some \$187,000 from the community, an amount that exceeds what she was alleged to have diverted. If true, Dr. Baine's actions may have been in violation of the ATRO, not to mention his fiduciary duties to Dr. Knibb. When the court does eventually resolve the parties' retirement account issue, it should address these allegations. Neither party should be allowed to receive a windfall in any allocation of community retirement assets for having made improper unilateral withdrawals from community retirement account funds. If both parties are shown to have made improper withdrawals from their

identifying the amount of community assets funds in that account (or that should have been in that account had it not been prematurely depleted) may require some fact-finding.

respective retirement accounts, the court may wish to consider simply making an “in-kind” division under which neither of them is entitled to receive anything from the other in respect of the retirement accounts.⁶

2. 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 making its spousal support order, the trial court possesses broad discretion so as to fairly exercise the weighing process contemplated by section 4320, with the goal of accomplishing substantial justice for the parties in the case before it. ‘The issue of spousal support, including its purpose, is one which is truly personal to the parties.’ [Citation.] In awarding spousal support, the court must consider the mandatory guidelines of section 4320. [Fn. omitted.] 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. [Citation.] ‘Because trial courts have such broad discretion, appellate courts must act with cautious judicial restraint in reviewing these orders.’ ” (*In re Marriage of Kerr* (1999) 77 Cal.App.4th 87, 93.)

The court’s spousal support analysis is set forth in some detail in the Statement of Decision, where the court finds, *inter alia*, that (i) Dr. Knibb, as a licensed veterinarian, “possesses significant marketable skills,” and was able to find employment without difficulty when ACA failed, (ii) through her efforts in the couple’s jointly operated business, and through her election to work part time for some periods of time during which she devoted most of her time to parental duties, Dr. Knibb contributed to the furtherance of Dr. Baine’s career, (iii) Dr. Baine has the ability to pay spousal support, (iv) both parties are living below the standard of living they enjoyed together during

⁶ It may be, for example, that little to nothing remains in either retirement account, both parties having improperly liquidated the assets in those accounts in the course of these proceedings.

their marriage, and “neither party will be able to replicate or even approximate the marital standard of living,” (v) each party has “financial obligations that one would expect” for middle class adults in the circumstances they find themselves in, including costs of housing, and to the degree Dr. Knibb has greater debts, it is because Dr. Baine obtained a discharge of his debts in bankruptcy, an option Dr. Knibb had not yet taken as of the property division trial but that was still open to her.

After undertaking an analysis of these and other factors militating in favor and against an award of long-term spousal support for Dr. Knibb, and after systematically tying each factor considered to the relevant subdivisions of section 4320, the court concluded that in light of “the respective needs, income, and assets of both parties,” Dr. Knibb “does not have a current need for an award of long-term spousal support.” And in explaining this conclusion, the court observed that the equities of the situation are “in equipoise,” favoring neither party. While it denied Dr. Knibb’s request for a long-term spousal support award, the court did show receptiveness to considering the issue further at a later date should circumstances change, expressly reserving jurisdiction to do that until October 1, 2023. That caveat is not abdication of responsibility to resolve the issue of spousal support, as Dr. Knibb argues it is. To the contrary, it simply is a backstop reminder to the parties that for some period of time the court will remain open to revisiting the issue of long-term spousal support should Dr. Knibb prove to have more difficulty supporting herself independently than it expects she will.

Having reviewed the record, we conclude that the court arrived at a fair and equitable resolution of the spousal support issue after giving it careful consideration. The court’s findings are supported by substantial evidence and take into account all relevant statutory factors under section 4320.

C. *The Emerald Ring, the Horses, and the Property Taxes on the Boat*

Finally, Dr. Knibb mounts a sufficiency of the evidence challenge to the court’s resolution of disputes concerning three miscellaneous items of property and debt. At the property division trial, Dr. Baine argued that (1) Dr. Knibb absconded with an emerald ring, which the court found was worth \$7,000 based on its claimed insurance value,

(2) Dr. Knibb “sold or gave away” four horses and never compensated or gave him credit for their value (the court found that, when purchased, the horses collectively had a value of \$72,000, but that after discounting heavily for depreciation, they had a value of \$12,500 when Dr. Knibb disposed of them), (3) and that, as an offset against debts owed the community by Dr. Knibb, an outstanding property tax bill from County of Solano on a boat the couple once owned should be assigned to her. The court agreed with Dr. Baine on each of these points. Dr. Knibb now takes exception, arguing that there was insufficient evidence to support the court’s valuation of the ring or the horses, and that there was no evidence that she had an ownership interest in the boat or that the tax bill was directed to her.

We see no error here. “When reviewing the sufficiency of the evidence, this court must view all factual matters most favorably to the prevailing party and in support of the judgment.” (*In re Marriage of Cairo* (1988) 204 Cal.App.3d 1255, 1261.) In attacking the trial court’s findings with regard to the emerald ring, the horses, and the property taxes owed on the boat, Dr. Knibb is essentially attempting to reargue on appeal factual disputes that were for the trial court to resolve. Because she did not request specific findings on any of these issues, we imply the necessary findings to support the judgment. Dr. Knibb appears to have “no appreciation for the rules on appeal, i.e., the substantial evidence rule and the rules relating to the exercise of discretion by the trial court and the review thereof by the Court of Appeal. [Citation.] These rules are well known. They need not be repeated. We hold that where, as here, the family law court makes a fair and equitable ruling on contested issues of fact, its express or implied factual determinations are binding on appeal. The appellate court may not substitute its discretion for that of the trial court unless the appellant can demonstrate, as a matter of law, that the trial court’s judgment is arbitrary, capricious, whimsical, or exceeds the bounds of reason. (*Boswell, supra*, 225 Cal.App.4th at p. 1176.) No such showing has been made here.

III. DISPOSITION

The trial court’s Statement of Decision Following Trial filed September 19, 2013 is affirmed. Dr. Baine shall recover costs.

Streeter, J.

We concur:

Ruvolo, P.J.

Reardon, J.

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