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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Marriage of RONALD B. LANDAU
and CAROL A. FRANCIS.

RONALD B. LANDAU,

Appellant,

v.

CAROL A. FRANCIS,

Respondent.

B232575

(Los Angeles County
Super. Ct. No. BD404193)

APPEAL from a judgment of the Superior Court of Los Angeles County. Donna Fields Goldstein, Judge. Affirmed.

Ronald B. Landau, in pro. per., for Appellant.

Olsen & Olsen and Casey A. Olsen, for Respondent.

Appellant Ronald B. Landau (husband) appeals from the order that he pay attorney fees of \$30,000 on behalf of respondent Carol A. Francis (wife) pursuant to Family Code section 2030 and 2032.¹ Husband contends the trial court erred in (1) calculating wife's ability to pay her own attorney fees; (2) concluding that husband had the ability to pay those fees; and (3) not ordering the fee award to be paid in installments. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND²

Husband (a tax attorney and director at KPMG) and wife (a psychologist) were married on May 18, 1991 and had two children: M.L. born July 1993 and J.L. born November 1997. The couple separated on January 31, 2004. A status only judgment of dissolution was entered on December 21, 2005, leaving issues of custody, support and property division reserved for future determination.

In April 2005, the parties stipulated that wife's monthly income was \$1,666 and husband's was \$14,583. Based on these figures, the parties agreed to temporary monthly spousal support of \$1,700 and child support of \$1,800 (\$900 per child) beginning May 1, 2005. In August 2005, the parties stipulated that, for purposes of determining permanent spousal and child support, wife's annual income would be \$20,000 in 2005 (i.e. \$1,666 per month); \$25,000 in 2006 (i.e. \$2,083 per month); \$30,000 in 2007 (i.e. \$2,500 per month); \$35,000 in 2008 (i.e. \$2,916 per month); \$40,000 in 2009 (i.e. \$3,333 per month); \$45,000 in 2010 (i.e. \$3,750 per month); and \$48,000 in 2011 (i.e. \$4,000 per month) (the 2005 stipulation). The 2005 stipulation was approved and deemed a court order on December 14, 2005.³

¹ All future undesignated statutory references are to the Family Code.

² Wife's request that we take judicial notice of the Los Angeles Superior Court Summary and California Court of Appeal Docket Register of Actions, copies of which she attached as exhibits to her Respondent's Brief, was previously denied.

³ In her Respondent's Brief filed December 15, 2011, wife complains that the stipulation was not part of the record on appeal. The stipulation was one of six trial

Sometime after the stipulation, husband changed jobs and substantially increased his income. By January 2008, husband's annual income was \$323,270 (i.e. \$26,939 per month). In October 2008, wife purchased husband's interest in the family home with a \$377,000 equalizing payment; wife obtained the funds from her parents. Husband's October 2009 Schedule of Assets and Debts lists total assets of \$1,781,350, including two homes he owned with his second wife: one in Torrance valued at \$800,000 and a second in Big Bear Lake valued at \$375,000; the Torrance property was encumbered by a \$521,340.45 loan but the Big Bear home was unencumbered. It is not apparent from the Schedule what became of the \$377,000 equalizing payment wife made in October 2008, but the Big Bear home was purchased shortly after wife made the \$377,000 equalizing payment. In addition to real property, husband identified a total of \$3,100 in two checking accounts, \$79,000 in an IRA and \$40,000 in a Keogh as husband's separate property. Husband also claimed a community property interest in other IRAs and a profit sharing plan.

The multi-day trial on the reserved issues began on October 1, 2009. On October 12, husband was ordered to pay monthly child support of \$3,603. The trial court filed a tentative written statement of decision on February 23, 2011. The Final Statement of Decision on Reserved Issues was filed on July 28, 2011. The court found that, at the time of trial, husband's monthly income was \$23,750; and that wife's monthly income was \$3,750. In addition to orders regarding property division, the court ordered no change in husband's monthly child support obligation of \$3,603 but, commencing January 2, 2011, husband's spousal support obligation was reduced from \$1,700 to \$1,500. Husband was ordered to pay wife \$40,000 as sanctions pursuant to section 2107, subdivision (c), for his failure to disclose to wife the substantial increase in his income after he changed jobs.

exhibits husband designated to be included in the Clerk's Transcript, none of which were included in that transcript. Husband's request to the superior court clerk that the exhibits be included in a supplemental Clerk's Transcript was denied. But on December 21, 2011, husband lodged all six trial exhibits in this court.

No pendente lite attorney fees had been awarded. In the final judgment, the court found husband had acted as his attorney's co-counsel, actively participating in drafting pleadings and examining witnesses; he had incurred \$107,742 in attorney fees, of which he had paid \$45,000. It found that wife had incurred \$86,114.23 in attorney fees and had paid her counsel \$38,520.03. It ordered husband to pay directly to wife's attorney \$30,000 in attorney fees pursuant to section 2030. The court denied the parties' motions for attorney fees as sanctions pursuant to section 271, observing that the case involved "complex custody issues during these proceedings which did result in the generation of substantial attorney's fees and were not easily resolved. . . ." Judgment was entered on September 29, 2011. Husband timely appealed.

DISCUSSION

A. The 2005 Stipulation Was Substantial Evidence of Wife's Income

Husband contends the 2005 stipulation, which the trial court took into account in making its order that husband pay \$30,000 in attorney fees, was not sufficient evidence that wife's monthly income was \$3,750. As we understand his argument, it is that the 2005 stipulation was irrelevant to the question of attorney fees because it was intended to be used only for purposes of determining support and, even assuming it was relevant, it was not credible in light of other evidence that wife's actual income was more than the stipulated amount. We find no error.

"Pursuant to Family Code sections 2030 and 2032, the trial court is empowered to award fees and costs between the parties based on their relative circumstances in order to ensure parity of legal representation in the action. It is entitled to take into consideration the need for the award to enable each party to have sufficient financial resources to present his or her case adequately. In assessing a party's relative need and the other party's ability to pay, it is to take into account ' " *all evidence concerning the parties' current incomes, assets, and abilities.* ' ' ' [Citation.]" (*In re Marriage of Falcone and Fyke* (2012) 203 Cal.App.4th 964, 974-975 (*Falcone*), italics added.) Specifically,

section 2032, subdivision (b) directs the court to take into consideration the circumstances of the respective parties described in section 4320, which identifies the circumstances to be considered in ordering spousal support.

The trial court has broad discretion to rule on a motion for fees and costs under sections 2030 and 2032. “[T]he record must reflect that the trial court actually exercised that discretion, and considered the statutory factors in exercising that discretion.” [Citation.]” (*Falcone, supra*, 203 Cal.App.4th at p. 975.) We will not reverse such a ruling absent a showing that “no judge could reasonably have made the order, considering all of the evidence viewed most favorably in support of the order.” (*Ibid.*) Husband has not demonstrated any abuse of discretion in this case.

In its written statement of decision, the trial court analyzed each factor to be considered in making an attorney fees award, including the applicability of each section 4320 factor. It expressly took into account the “earnings, earning capacity, earned and unearned income, assets and standard of living of each party,” and based on husband’s high income, concluded that husband had the ability to pay attorney fees and that wife did not have that ability. Although the 2005 stipulation states that it is “for purposes of determining spousal and child support,” it was nonetheless relevant evidence of wife’s income for purposes of assessing attorney fees. Unless the stipulation were expressly to provide otherwise, where the parties have stipulated to one of the circumstances listed in section 4320 (in this case the supported party’s earning capacity), the trial court should not be precluded from considering the stipulation as evidence in its section 2032 analysis.

Husband introduced other evidence of wife’s income that conflicted with the 2005 stipulation, namely the Income and Expense Declarations in which wife listed monthly expenses that exceeded her income, and wife’s online profile in which she describes herself as having an annual income of between \$100,000 and \$150,000. The trial court was entitled to credit this evidence if it had been persuaded by it but was not required to do so, and did not. That wife’s expenses exceeded her stipulated income does not establish that her actual income is substantially more than the stipulated amount. From

the 2007 Income and Expense Declarations which showed increasing credit card debt and a \$57,000 loan, the trial court could reasonably have inferred that wife was using cash advances and the loan proceeds to pay her monthly expenses. And it could reasonably have concluded that the online profile was mere puffery and not as credible as the 2005 stipulation. Under these circumstances, husband has not shown that the trial court abused its discretion by considering the 2005 stipulation in determining wife's income for the purpose of assessing attorney fees.

B. Husband's Financial Ability to Pay Wife's Attorney Fees Is Supported By Substantial Evidence

Husband contends there is no substantial evidence that he has the financial ability to pay wife's attorney fees. He argues that the trial court did not deduct his spousal and child support obligations from his monthly income. We find no error.

In making an attorney fee award under section 2030, the trial court must consider the respective incomes and needs of the parties and must determine their ability to pay. (*In re Marriage of Keech* (1999) 75 Cal.App.4th 860, 866-867 (*Keech*) [attorney and accountant fees order in the amount of \$500 per month, leaving husband with just \$593 a month to meet his own expenses, reversed and remanded for determinations required by section 2030 and 2032].) A fee award may be ordered from "any type of property, whether community or separate, principal or income." (§ 2032, subd. (c).)

Here, the trial court's decision reflects consideration of all of the relevant factors, including the parties' respective assets, incomes and ability to pay. The court expressly stated that it took into account the support orders, and the Dissomaster attached to the statement of decision includes the support amounts. The court found that husband's monthly income at the time of trial was \$23,750. This was the monthly salary husband declared in his October 2009 Income and Expense Declaration, in which husband listed monthly expenses of \$7,987. Husband's Income and Expense Declaration did not include the \$5,306 he paid wife in monthly spousal and child support beginning in October 2009. Assuming husband's expenses remained stable in 2010, he had a positive

cash flow after expenses of \$10,457 in 2010 (\$23,750 monthly income, less \$7,987 monthly expenses, less \$5,306 support payments). By contrast, wife had a negative cash flow of \$7,541 for that same period (monthly income of \$3,750, plus monthly spousal support of \$1,700, plus monthly child support of \$3,603; less monthly expenses of \$16,594). Husband's substantial monthly positive net cash flow and wife's negative one constitutes substantial evidence that husband had the greater ability to pay \$30,000 of wife's attorney fees.

C. No Error in Awarding Lump Sum Payment of Attorney Fees

Husband contends it was an abuse of discretion for the trial court to order attorney fees paid in one lump sum rather than installments. He argues that the trial court did not consider husband's liquid assets in fashioning the order. We disagree.

A motion for attorney fees is addressed to the sound discretion of the trial court and its exercise of that discretion will not be disturbed on appeal absent a showing that no judge could reasonably make the challenged order. (*Keech, supra*, 75 Cal.App.4th at p. 866.) The trial court also has discretion to tailor the order to accommodate the payor spouse's financial circumstances. (Cf. *County of Orange v. Dabbs* (1994) 29 Cal.App.4th 999, 1005-1006 [non-custodial parent's obligation to reimburse county for support payments].) Accordingly, even if the amount of an attorney fee award is reasonable, it may be an abuse of discretion to order the award paid in a lump sum rather than in manageable installments. For example, in *In re Marriage of Schulze* (1997) 60 Cal.App.4th 519, 530-533 (*Schulze*), the court affirmed an order requiring husband to pay \$7,500 of the wife's attorney fees, but reversed the order to the extent it required the fees to be paid forthwith. The court reasoned that, in the absence of any liquid assets, it was unreasonable not to allow the husband to pay the fee order in manageable installments, consistent with the income he had left after he paid the support orders.

Here, the record does not show that husband requested installment payments. Having failed to do so, he has not preserved the issue for appeal. (*Doers v. Golden Gate Bridge, Highway and Transp. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1.)

Even if husband had preserved the issue for appeal, the evidence belies his claim that he has no assets to pay the attorney fees order. In its discussion of fees, the trial court noted that wife used loans to pay husband \$377,000 for his share of the family residence in 2008. The record on appeal does not show what became of those funds. However, husband owned an unencumbered vacation home valued at \$375,000, which he and his second wife purchased in May 2009. Husband has not shown that he was unable to use the equity in the Big Bear Lake house to obtain a loan to pay wife's attorney fees. Husband's positive cash flow suggests he could repay the home loan in just three months. We find no abuse of discretion.

DISPOSITION

The judgment is affirmed. Wife shall recover costs on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.