Filed 3/14/17 Marriage of Stern CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re Marriage of CYNTHIA and DAVID A. STERN.	B261278 (Los Angeles County Super. Ct. No. BD577141)
CYNTHIA STERN, Appellant, v. DAVID A. STERN, Respondent.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas Trent Lewis, Judge. Affirmed.

Merritt McKeon for Appellant Cynthia Stern.

Reuben Raucher & Blum, Stephen L. Raucher, Stephanie I. Blum and Pokuaa Enin for Respondent David A. Stern.

Cynthia Stern appeals from the judgment entered after trial on her petition for dissolution of her marriage to David A. Stern. Cynthia challenges the provisions of the judgment regarding the award of spousal support to her, the *Epstein* credits and *Watts* charges in favor of David and the division of community assets, as well as the court's failure to award attorney fees. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Pretrial Proceedings*

Cynthia and David were married on December 14, 1983 and separated on January 14, 2013.[1] At the time of their separation, they had one adult son. The primary community assets were the family's residence, various furnishings and artwork, David's construction management company, various pension accounts and the proceeds from the July 2013 sale of Mesa West, a Costa Mesa apartment building in which they were partial investors. Cynthia, who did not work outside the home, continued to reside at the family residence; and David paid her living and medical expenses.

Pretrial litigation was hostile. After the sale of Mesa West Cynthia sought and won orders that the funds be placed into her counsel's client trust account and that David provide an accounting for all expenditures from those proceeds. She also filed a request for spousal support and sought an award of attorney and expert fees of nearly $224,000. On November 8, 2013 the court ordered David to pay $8,425 in monthly temporary spousal support, less $2,425 for loan payments, property taxes and insurance on the family

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[1] David filed a petition for legal separation on January 25, 2013, followed by Cynthia's filing of a petition for dissolution of the marriage on February 1, 2013. The cases were consolidated, and Cynthia's petition was designated the lead case.

residence, which he was ordered to pay directly. The court ordered Cynthia to pay all other household expenses and issued a *Gavron*[2] warning that she make a reasonable good faith effort to become self-supporting. The court found the fees requested to be unreasonable and improperly inflated by Cynthia's multiple changes of counsel, delays in complying with discovery and frequent filing of unmeritorious ex parte applications. The court ordered that each party be paid $50,000 from the Mesa West proceeds for attorney fees. The trial setting conference previous scheduled for February 2014 was continued to May 5, 2014.

On February 14, 2014, after futile attempts to procure Cynthia's compliance with David's discovery requests, Cynthia's fifth counsel filed an ex parte application to withdraw (citing an irremedial breakdown in the attorney-client relationship) and to continue all discovery and trial deadlines. The ex parte requests were denied. The motion to withdraw was eventually granted on April 17, 2014, and Cynthia was left to represent herself. After her counsel had withdrawn, Cynthia refused to meet and confer regarding the pending trial preparation deadlines and filed a motion to disqualify the judge presiding over the case for colluding with her former counsel in awarding fees. The motion was denied.

At the May 5, 2014 trial setting conference Cynthia accused David of hiding assets and claimed she had the deeds to prove her assertion, although she reported she had given them to her prior counsel and no longer had them in her possession. The court cautioned her, "I will say this to you, [Ms.] Stern, and listen carefully. If a joint statement of property does not include anything on it when it's presented for trial, the [court] is going to ignore it.

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[2] *In re Marriage of Gavron* (1988) 203 Cal.App.3d 705.

And so you standing up and saying, 'We own lots of property. I have all these deeds,' is going to be ignored. . . . So if you want any piece of property to be a subject of the trial, you'll have to be very specific about it, all right? . . . If you intend to prove its existence and the ownership, you will need to have the exhibits and the witnesses for it." The court declared the case ready for trial and transferred it to Department 2 to obtain a trial date. Trial was set for June 26, 2014.

2. *Trial*

Cynthia appeared for trial accompanied by what she called a "strategic consultant" (actually, a disbarred lawyer), from whom she solicited guidance from the rear of the courtroom. Having failed to designate any exhibits or witnesses, Cynthia attempted to introduce subpoenaed documents as impeachment of David's figures. The court allowed her to call David as a witness; she then attempted to prove he had concealed community assets through his testimony.

David introduced exhibits and testified on each of the disputed issues. As to spousal support he presented evidence his income for 2012, on which the 2013 award of temporary support had been based, was an aberration and his income during 2013 and the first four months of 2014 was substantially lower and consistent with his average income from 2007 through 2011. David also testified that Cynthia possessed marketable skills; alternatively, she was old enough (65 at the time of trial) to collect social security benefits. David testified he had paid the loan installments and other expenses for the family residence for five months from his post-separation income; and, based on his own opinion and that of a designated expert, testified the house had a fair rental value of $8,500 during the months Cynthia had lived in it alone.

Trial was continued to allow Cynthia to obtain additional records through subpoena, but she was again unsuccessful. The parties made closing arguments on July 17, 2014, and the court filed a memorandum of intended decision on July 21, 2014. David filed objections to the memorandum on August 4, 2014; the next day Cynthia filed a request for findings on contested issues of fact. The court accepted David's challenge to the allocation of *Epstein* credits (recognizing David's payment of community debts with his separate assets) and modified the final balance sheet contained in the memorandum of decision. The court did not modify the previously issued memorandum in any other respect.

Judgment was entered on October 31, 2014. The trial court ordered David to pay monthly spousal support of $3,000 commencing on September 1, 2014; ordered Cynthia to vacate the family residence, which was awarded to David; divided the parties' other assets (allocating the remainder of the Mesa West funds to Cynthia and dividing David's Westec pension plan account equally between the parties); and directed David to make an equalization payment of $258,914.50. The court allocated $144,500 to David in *Watts* charges for Cynthia's exclusive use of the family residence during the parties' separation and $11,371 in *Epstein* credits for post-separation home loan payments made by David from his earnings. The court reserved jurisdiction on the issues of attorney fees and David's request for sanctions under Family Code section 271.[3]

Explaining its reasoning in its statement of decision, the court stated, "[O]nly David presented credible, admissible evidence concerning the separate property and community property estates.

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[3] Statutory references are to this code.

The court adopts the values contained in David's property balance sheet." Further, "[w]hile Cynthia claims that David impaired her ability to value the assets of the marriage, she only speculates and provides no admissible, credible evidence that David interfered with her ability to value any asset. Simply put, Cynthia designated no witnesses; and she identified no exhibits for her case-in-chief." On the issue of spousal support the court stated, "Cynthia presented no credible evidence on the issue of spousal support except her claims that she contributed to David's career. This is an indisputably long term marriage. . . . The only evidence that quantifies David's ability to pay is contained in his closing argument where he proposes spousal support up to $3,000 monthly." The court acknowledged it had considered Cynthia's eligibility for social security income in setting the amount.

DISCUSSION

1. *The Trial Court Did Not Abuse Its Discretion in Setting the Amount of Spousal Support*

"Permanent spousal support 'is governed by the statutory scheme set forth in sections 4300 through 4360. Section 4330 authorizes the trial court to order a party to pay spousal support in an amount, and for a period of time, that the court determines is just and reasonable, based on the standard of living established during the marriage, taking into consideration the circumstances set forth in section 4320.' [Citations.] The statutory factors include the supporting spouse's ability to pay; the needs of each spouse based on the marital standard of living; the obligations and assets of each spouse, including separate property; and any other factors

pertinent to a just and equitable award.[4] (§ 4320, subds. (c)-(e), (n).) 'The trial court has broad discretion in balancing the applicable statutory factors and determining the appropriate weight to accord to each, but it may not be arbitrary and must both recognize and apply each applicable factor.'" (*In re Marriage of Blazer* (2009) 176 Cal.App.4th 1438, 1442-1443 (*Blazer*).) """"Because trial courts have such broad discretion, appellate courts must act with cautious judicial restraint in reviewing [spousal support] orders."""" (*In re Marriage of Drapeau* (2001) 93 Cal.App.4th 1086, 1096.)

"[W]e review spousal support orders under the deferential abuse of discretion standard" and "examine the challenged order for legal and factual support." (*Blazer, supra,* 176 Cal.App.4th at p. 1443.) "'A trial court's exercise of discretion will not be disturbed on appeal unless, *as a matter of law,* an abuse of discretion is shown—i.e., where, considering all the relevant circumstances, the court has "exceeded the bounds of reason" or it

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4 "The first of the enumerated circumstances, the marital standard of living, is relevant as a reference against which the other statutory factors are to be weighed. [Citations.] The other statutory factors include: contributions to the supporting spouse's education, training, or career; the supporting spouse's ability to pay; the needs of each party, based on the marital standard of living; the obligations and assets of each party; the duration of the marriage; the opportunity for employment without undue interference with the children's interests; the age and health of the parties; tax consequences; the balance of hardships to the parties; the goal that the supported party be self-supporting within a reasonable period of time; and any other factors deemed just and equitable by the court." (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 302-304, fns. omitted.)

can "fairly be said" that no judge would reasonably make the same order under the same circumstances.'" (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 480; accord, *In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 208.) "'To the extent that a trial court's exercise of discretion is based on the facts of the case, it will be upheld "as long as its determination is within the range of the evidence presented."'" (*Blazer,* at p. 1443, quoting *Ackerman,* at p. 207.)

Cynthia argues the award of spousal support must be reversed because the court failed to address each of the factors set forth in section 4320: "In ordering spousal support under this part, the court shall consider all of the following circumstances . . . ." Courts, however, have not read the statute so literally. The most widely cited cases reviewing orders under section 4320 recognize that not every enumerated factor is relevant to all determinations of spousal support. For instance, in *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269 (*Cheriton*) the court stated, "In ordering spousal support, the trial court *must* consider and weigh all of the circumstances enumerated in the statute, to the extent they are relevant to the case before it." (*Id.* at p. 303, fn. omitted; accord, *In re Marriage of Williamson* (2014) 226 Cal.App.4th 1303, 1316 (*Williamson*); see *In re Marriage of Geraci* (2006) 144 Cal.App.4th 1278, 1297 [section 4320 requires the court to "recognize and apply each applicable statutory factor in setting spousal support"]; *In re Marriage of Shimkus* (2016) 244 Cal.App.4th 1262, 1278 [same].) The obligation of the court to identify and consider relevant factors is also circumscribed by the evidence presented by the moving party—in this case Cynthia. As the trial court explained in its statement of decision, Cynthia failed to submit any admissible evidence in support of her request for spousal support other than

assertions she had contributed to the growth of David's business during the marriage, an asset David had already conceded belonged to the community.[5] (See *In re Marriage of Shaughnessy* (2006) 139 Cal.App.4th 1225, 1235 [in exercising its discretion trial court must apply established legal principles and base its findings on substantial evidence].)

All other evidence relevant to the court's spousal support determination was provided by David. Although David's accountant had submitted evidence that Cynthia's marital standard of living as of the close of 2013 would require a monthly payment of $6,060 (see § 4320, sud. (a)), that figure serves principally as "a reference point against which the other statutory factors are to be weighed." (See *Cheriton, supra*, 92 Cal.App.4th at p. 303; accord, *Williamson*, *supra*, 226 Cal.App.4th at p. 1316.) "'[T]he trial court may fix spousal support at an amount greater than, equal to or less than what the supported spouse may require to maintain the marital standard of living, in order to achieve a just and reasonable result under the facts and circumstances of the case.'" (*In re Marriage of Khera & Sameer* (2012) 206 Cal.App.4th 1467, 1483-1484.) David presented evidence his income in 2012, on which the award of temporary support had been based, had been an aberration and that his income in 2013 and 2014 had declined, placing it more in line with his income from 2007 through 2011. (See *In re Marriage of Tydlaska* (2003) 114 Cal.App.4th 572, 575 ["[a]n order for spousal support must be based on the facts and

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[5] Cynthia also accused David of domestic violence but under questioning by the court conceded the episode consisted of one shoving incident that, according to David, was instigated by Cynthia and was never reported to any authorities. (See § 4320, subd. (i).)

circumstances existing at the time the order is made'"].) Further, he presented evidence he had liquidated assets during those years to maintain the couple's standard of living at an artificial level. (See *Williamson,* at p. 1316 ["spouse 'cannot reasonably demand support at the actual marital standard of living if that standard had itself been unreasonably high under the circumstances'"]; *In re Marriage of Ackerman*, *supra*, 146 Cal.App.4th at p. 208 [court not restricted by marital standard of living; "[a]verage income is particularly appropriate where, as here, there was evidence the parties lived beyond their means"].) Accordingly, the court's departure from the marital standard of living was based on the evidence before it and was not an abuse of discretion.

David also testified the couple had married after he had completed his engineering degree and been licensed. (See § 4320, subd. (b) [identifying as factor "[t]he extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party"].) He expressed his belief Cynthia possessed marketable skills (§ 4320, subd. (a)(1)) and noted, in the alternative, she was eligible for social security benefits, a fact the court relied on in its statement of decision. Also relevant to this case were "[t]he obligations and assets, including the separate property, of each party." (§ 4320, subd. (e).) The court extensively reviewed the parties' assets, separate and community, and, in addition to a share of David's pension, awarded Cynthia the more liquid assets, including the remaining Mesa West funds and an equalizing payment of $258,914.50 for the purpose of providing Cynthia with the necessary means to establish a new residence and achieve financial stability. Although David was awarded the family residence, the court allocated the goods and furnishings to Cynthia. The court

also determined jewelry valued at $400,000 had been gifted to Cynthia by David. (See § 852.)

Notably, Cynthia does not specify the applicable factors she believes the court failed to address in its statement of decision, and we have identified none. In sum, the trial court's award of $3,000 in monthly spousal support was adequately explained and achieved "substantial justice for the parties." (*Cheriton, supra,* 92 Cal.4th at p. 304; accord, *In re Marriage of Geraci, supra,* 144 Cal.App.4th at p. 1297.) There was no abuse of discretion.

2. *The Court Did Not Abuse Its Discretion in the Determination of Watts Charges and Epstein Credits*

"'Where one spouse has the exclusive use of a community asset during the period between separation and trial, that spouse may be required to compensate the community for the reasonable value of that use.' [Citation.] The right to such compensation is commonly known as a '*Watts* charge.' [Citation.] Where the *Watts* rule applies, the court is 'obligated either to order reimbursement to the community or to offer an explanation for not doing so.'" (*In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 978; see *In re Marriage of Watts* (1985) 171 Cal.App.3d 366, 373-374 (*Watts*).) Conversely, when a spouse uses separate property funds after separation to pay a preexisting community obligation, the paying spouse may seek an "*Epstein* credit" for those payments upon division of the community estate. (See *In re Marriage of Epstein* (1979) 24 Cal.3d 76, 84-85 (*Epstein*).) *Watts* charges are in essence "'usage charges'" and *Epstein* credits are "'payment credits.'" (*In re Marriage of Jeffries* (1991) 228 Cal.App.3d 548, 552.)

Cynthia contends she was not aware she would be liable for *Watts* charges based on her exclusive use of the family residence

and urges us to remand the case on this issue to allow her to contest the opinion of David's expert setting the monthly rental value of the home at $8,500. This argument is meritless. Cynthia was represented by counsel until April 17, 2014: Any one of her lawyers would have understood the effect of her continuing to live in the house. Indeed, the record shows that in September 2013 Cynthia's counsel at the time executed a stipulation and order consolidating the petitions for separation and dissolution that acknowledged David's intention to pursue a *Watts* claim. Moreover, Cynthia had an opportunity at trial to present evidence disputing the expert's rental valuation (either directly or as impeachment) and failed to do so. There is no basis for remand on this issue.

Cynthia's contention the court improperly awarded *Epstein* credits for the loan payments David made from his separate earnings after he moved out of the house is equally misconceived. She argues the payments were improperly credited because David had been ordered in November 2013 to make them as part of her temporary spousal support. (See, e.g., *In re Marriage of Jeffries, supra,* 228 Cal.App.3d at p. 552 ["'reimbursement should not be ordered where the payment on account of a preexisting community obligation constituted in reality a discharge of the paying spouse's duty to support the other spouse,'" quoting *Epstein, supra,* 24 Cal.3d at pp. 84-85].) David, however, did not request credit for the payments made pursuant to the temporary spousal support order; he sought reimbursement only for payments made before the date of that order. Accordingly, the court did not abuse its discretion in awarding him credit for those payments.

3. *The Trial Court Did Not Abuse Its Discretion by Designating Certain Assets To Be Divided in Kind*

Cynthia contends the judgment is impermissibly flawed—and thus void—because the court directed four assets be divided in kind and failed to assign values to them: DC9, LLC, the empty shell corporation that had held the couple's Mesa West investment; a community investment in a Chinese hotel corporation, which David testified was now worthless; pension loans that had been repaid with some of the Mesa West proceeds but had not been fully extinguished; and a $35,000 judgment in favor of Westec that David testified was uncollectible. According to Cynthia, by failing to quantify and equally divide those assets, the court violated section 2550, which requires a court to "divide the community estate of the parties equally."

Orders dividing marital property are reviewed for an abuse of discretion (*In re Marriage of Dellaria & Blickman-Dellaria* (2009) 172 Cal.App.4th 196, 201; *In re Marriage of Quay* (1993) 18 Cal.App.4th 961, 966); "trial courts possess broad discretion to determine the manner in which marital property is divided in order to accomplish an equal division." (*In re Marriage of Cream* (1993) 13 Cal.App.4th 81, 88.) In appropriate circumstances courts may divide certain assets "in kind," to "avoid[] valuation problems," "eliminate[] the need to place a disproportionate risk of loss on either party," prevent "charges of favoritism," "apportion[] the risk of future tax liabilities equally" and "provide[] the parties with the most post-dissolution economic stability." (*In re Marriage of Brigden* (1978) 80 Cal.App.3d 380, 391.)

Cynthia has failed to identify any basis for finding the trial court abused its discretion by choosing to divide in kind these four assets. The court expressly found that "[o]nly David presented

credible, admissible evidence in support of the value of any asset." Cynthia had an opportunity to dispute this evidence and failed to do so. Consequently, the court's decision to allocate equally these illiquid (and probably worthless) assets, as well as any potential risk associated with them, was not an abuse of its broad discretion.

4. *The Trial Court's Reservation of Jurisdiction Over Attorney Fees Was Not an Abuse of Discretion*

Cynthia requested an award of attorney fees in her petition for dissolution of marriage and contends the trial court should have ordered fees payable to her notwithstanding her failure to put on any evidence at trial supporting her request. Rather than award fees in the judgment, the trial reserved jurisdiction to determine issues related to attorney fees at a later time, as permitted by California Rules of Court, rule 5.390(b)(10).[6] Cynthia remained free to pursue fees in that bifurcated proceeding, which is not presently before us. The court did not abuse its discretion in bifurcating that issue.

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[6] Rule 5.390 of the California Rules of Court authorizes a court on its own motion to bifurcate "one or more issues before trial of other issues if resolution of the bifurcated issue is likely to simplify the determination of the other issues," including "[a]ttorney's fees and costs."

DISPOSITION

The judgment is affirmed. David is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

SMALL, J. *

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