Filed 6/12/17 Marriage of Franke CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re Marriage of JEFFREY and BONNIE JANE FRANKE. JEFFREY ALLAN FRANKE, Respondent, v. BONNIE JANE FRANKE, Appellant.	B269097 (Los Angeles County Super. Ct. No. BD377508)

APPEAL from an order of the Superior Court of Los Angeles County, Tamara Hall, Judge. Reversed and remanded for further proceedings.

Bonnie Jane Franke, in pro. per., for Appellant.

Gould-Saltman Law Offices and Richard Gould-Saltman for Respondent.

Appellant Bonnie Jane Franke appeals from a postjudgment order denying a request to modify spousal support.[1] Bonnie contends the family law court erred by finding it did not have jurisdiction to modify spousal support, and the error was prejudicial because she demonstrated a material change in circumstances. We conclude that the family law court had jurisdiction to modify the support order, and the error was not harmless. The evidence showed that the parties stipulated to a modification of spousal support when Bonnie was suffering from a temporary disability, with the expectation that she would return to work and become self-supporting. Bonnie has now alleged that she became permanently disabled, and the parties' failed expectations constitute a change of circumstances. Therefore, we reverse and remand to allow the family law court to exercise its discretion.

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

FACTS AND PROCEDURAL BACKGROUND[2]

Bonnie and Jeffrey were married in 1986 and had three children together. Bonnie holds a three-year nursing hospital diploma, while Jeffrey has a bachelor's degree from Stanford University and a master's degree from the University of Southern California. Jeffrey filed a petition for dissolution in October 2002. Both parties were represented by counsel during the dissolution proceedings. In April 2005, the family law court entered a stipulated judgment prepared by Bonnie's counsel. The judgment gave sole legal and physical custody of the children to Bonnie, and provided for Jeffrey to pay child support of $1,000 per child per month.

In addition, Jeffrey would pay spousal support of $1,000 per month to Bonnie until June 30, 2012. However, "The Court retains jurisdiction to extend spousal support beyond June 30, 2012 if [Bonnie] makes an application for an extension of spousal support before that date. [¶] . . . The Court finds that [Bonnie] has been advised that it is the

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[2] On the court's own motion, we take judicial notice of the appellate record and unpublished opinion in Bonnie's prior appeal, docket number B256682. (See *Forbes v. County of San Bernardino* (2002) 101 Cal.App.4th 48, 50–51; Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).) The facts about Bonnie's requests for modification of spousal support on November 15, 2013, and April 22, 2014, are from the appellate record in the prior appeal. (*In re Marriage of Franke* (July 7, 2015, B256682) [nonpub. opn.].)

policy of this State that each person shall become self-supporting. The Court further finds that [Bonnie] is in good health and has a nursing degree and that there is a reasonable expectation that she will be able to re-enter the job market after a period of re-training." Jeffrey immediately moved out of the area, and within a few years, he moved out of the state.

Bonnie had difficulty raising the children and maintaining a job due to her outdated training and other issues. She began employment at a hospital in May 2011. She required surgery on July 27, 2011, and was hospitalized for several weeks. Her doctor approved her to return to limited duties in January 2012. She became unable to work again on February 23, 2012. Her doctor placed her on temporary disability and ordered that she could not work for two months, but anticipated that she could return to work on April 23, 2012. She had exhausted her state disability benefits the prior year.

Bonnie and Jeffrey agreed to increase and extend her spousal support payments during this time. Bonnie prepared a written stipulation, which she signed on February 23, 2012, and Jeffrey signed on March 4, 2012. Neither party was represented by counsel in connection with the stipulation. Bonnie's doctor eventually extended the date of her return to work.

The court entered the stipulated order on May 17, 2012, modifying the 2005 judgment as follows: "1. The parties hereby agree that [Jeffrey] shall pay to [Bonnie] the

sum of One Thousand Two Hundred Dollars ($1,200.00) per month for a further period of five (5) years, commencing on July 1, 2012 with the last payment being made on December 1, 2017. [¶] 2. All orders not inconsistent with the modifications made herein shall remain in full force and effect." The parties' youngest child completed high school in June 2012, and Jeffrey's child support obligations ceased.

On November 15, 2013, Bonnie, representing herself, filed a request for modification of spousal support from $1,200 to $3,811 a month, and to extend spousal support beyond the termination date in 2017. Bonnie's evidence showed that she was unable to work as of February 23, 2012, due to health issues, and had not returned to work since that date. She believed she was eligible for social security disability benefits, but an error delayed her receipt of benefits. In her income and expense declaration, she stated that her mortgage was $2,263 per month and her total expenses were $3,718. In a supplemental declaration, she stated that the house was in foreclosure as of February 2014, and she had recently qualified for food stamps. She provided evidence of Jeffrey's ability to pay, including his monthly salary of more than $12,000.

In Jeffrey's responsive declaration, he argued that the court had not retained jurisdiction over spousal support, because Bonnie had not made an application to extend support as required under the dissolution judgment. He argued that Bonnie was disabled and unemployed when the 2012 agreement was made and at present, so she had not

shown any failure of expectations underlying the 2012 agreement.

Jeffrey's appearance at the April 18, 2014 hearing on the request for modification caused Bonnie to lose her composure and request a continuance. She stated that she had not seen Jeffrey in more than 12 years. She asked that the court require Jeffrey to pay for a lawyer for her in order to level the playing field. The trial court took the matter off calendar, denied the request without prejudice for having failed to show a material change in circumstances, and told Bonnie that she would need to refile her request.

On April 22, 2014, Bonnie filed a request for modification of spousal support from $1,200 to $4,200 a month, and a permanent extension. In her declaration, she explained that her doctor determined on February 23, 2012, that she could not work for two months. It was anticipated that she would return to work on April 23, 2012, but the date was later extended. She was not eligible for state disability benefits because she had exhausted her benefits in 2011. Jeffrey was not truthful about his financial circumstances when they negotiated the stipulation in February 2012. He has advanced degrees, and he used coercion and intimidation to keep the amount of the spousal support payments low. He decided the amount of the modification and said he did not have to show his tax returns to her. She only recently learned that he had a much higher income in February 2012 than he had represented to her.

In Jeffrey's response, he argued that Bonnie's motion was an improper motion for reconsideration. He noted that after a dissolution judgment, parties have no fiduciary duty to disclose income information. In addition, there was no evidence of the nature of Bonnie's disability, or evidence that she made a diligent effort to find and maintain employment. Jeffrey denied that he made any false or misleading statements about his finances.

The family law court denied the request without prejudice for failure to show a material change in circumstance. Bonnie filed a notice of appeal from the orders denying the requests to modify spousal support. This appellate court affirmed the orders in a nonpublished opinion. (*In re Marriage of Franke* (July 7, 2015, B256682) [nonpub. opn.].)

On August 21, 2015, Bonnie filed the request for modification of spousal support that is at issue in the instant appeal. She sought to modify the May 17, 2012 order to provide a permanent spousal support award of $4,500 per month. She declared that she did not sign any judgment or agreement making spousal support non-modifiable or of finite duration. She was on unpaid disability leave when she signed the modification order in February 2012, with an expected return date of April 2012, but she was not cleared to return to work. She submitted a partially redacted decision of an administrative law judge for the Social Security Administration Office of Disability Adjudication and Review issued on April 20, 2015. In connection with the

receipt of disability benefits under the Social Security Act (20 C.F.R. § 404.929 et seq.), the administrative law judge found Bonnie had been permanently disabled since August 24, 2013. Specifically, the decision found Bonnie had hypertension, tachycardia, and degenerative disc disease of the cervical spine, in addition to redacted findings. Bonnie began receiving social security disability benefits of $1,365 per month in May 2015. Her mortgage was $2,263, and her home continued to be in the process of foreclosure.

Jeffrey filed a responsive declaration. To his knowledge, Bonnie was employed sporadically after entry of the dissolution judgment until March 2012. He had periods of unemployment and health issues as well, but did not miss any support payments. He stated again that the dissolution judgment provided spousal support would not be extended unless Bonnie made an application to extend it before June 2012. She did not make an application to extend it, but he agreed to extend it and increase her support without her filing an application. He agreed to extend it to 2017, with support to terminate at that time. He denied Bonnie's accusations of abusive behavior. Jeffrey argued that Bonnie's declaration showed she could meet her needs with her current spousal support and disability payments if she replaced her mortgage expense with a reasonable rent expense for a single person and associated utility costs.

A hearing was held on September 30, 2015. The family law court inquired whether it had jurisdiction under the May 17, 2012 order to extend support beyond December 1,

2017. Bonnie argued that she always left jurisdiction open in case she needed to change the support order. She stated that Jeffrey claimed he did not have much money and they could sign the stipulation themselves, but she always left the jurisdiction open with the court.

The family law court found that Bonnie had not filed a request to modify or extend spousal support prior to June 30, 2012, as provided for in the April 5, 2005 judgment. The stipulated order for support entered on May 17, 2012 did not allow for modification, and it did not reserve jurisdiction to the court to modify or extend support. The family law court determined that it had no jurisdiction under the May 17, 2012 order to modify or further extend spousal support. The court denied the request without prejudice. Bonnie filed a timely notice of appeal.

DISCUSSION

Standard of Review

"We construe a marital settlement agreement that is incorporated into a stipulated judgment under the general rules governing the interpretation of contracts. [Citations.] Where no extrinsic evidence is introduced, or the extrinsic evidence is not in conflict, we independently construe the agreement. [Citation.]" (*In re Marriage of Schu* (2014) 231 Cal.App.4th 394, 399 (*Schu*).) "The court's goal is to give effect to the parties' mutual intent." (*Ibid*.) "When the

language of the judgment incorporating the marital settlement agreement is clear, explicit, and unequivocal, and there is no ambiguity, the court will enforce the express language." (*In re Marriage of Iberti* (1997) 55 Cal.App.4th 1434, 1440.) "If ambiguous, the language in a marital settlement agreement should be construed in favor of support." (*Schu*, *supra*, at p. 400.)

"[E]rror alone does not warrant reversal. 'It is a fundamental principle of appellate jurisprudence in this state that a judgment will not be reversed unless it can be shown that a trial court error in the case affected the result.' [Citation.] '"The burden is on the appellant, not alone to show error, but to show injury from the error."' [Citation.] 'Injury is not presumed from error, but injury must appear affirmatively upon the court's examination of the entire record.' [Citation.] 'Only when an error has resulted in a miscarriage of justice will it be deemed to be prejudicial so as to require reversal.' [Citation.] A miscarriage of justice is not found 'unless it appears reasonably probable that, absent the error, the appellant would have obtained a more favorable result.' [Citation.]" (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 822–823.)

Jurisdiction to Modify Spousal Support

Bonnie contends the family law court had jurisdiction to modify and extend spousal support payments under the parties' stipulated support order of May 2012. We agree.

In a dissolution proceeding after a marriage of long duration, the family law court retains jurisdiction over spousal support indefinitely, unless there is a written agreement of the parties to the contrary or a court order terminating spousal support. (Fam. Code, § 4336, subd. (a).) "For the purpose of retaining jurisdiction, there is a presumption affecting the burden of producing evidence that a marriage of 10 years or more, from the date of marriage to the date of separation, is a marriage of long duration." (Fam. Code, § 4336, subd. (b).) In this case, the parties agreed to a stipulated judgment that terminated jurisdiction on June 30, 2012 unless Bonnie made an application for an extension of spousal support before June 30, 2012.

This type of spousal support order, known as a "Richmond" order from *In re Marriage of Richmond* (1980) 105 Cal.App.3d 352, sets spousal support for a fixed period and terminates jurisdiction at a future date based on evidence that the supported spouse will be self-supporting by the end of the period. (*In re Marriage of Prietsch & Calhoun* (1987) 190 Cal.App.3d 645, 665.) "In order to avoid the [prohibition of *In re Marriage of Morrison* (1978) 20 Cal.3d 437, 453,] against the trial court burning its bridges by fixing a definite date in the future at which time jurisdiction over spousal support will terminate, the court in a 'Richmond' order retains jurisdiction to modify both the amount and term for jurisdiction over spousal support conditioned upon the supported spouse, prior to the date set for termination of jurisdiction, filing a motion and showing

good cause why the order should be modified either as to amount or term of jurisdiction, or both. [¶] The effect of a 'Richmond' order is to tell each spouse that the supported spouse has a specified period of time to become self-supporting, after which the obligation of the supporting spouse will cease. The effect may be of greater psychological importance, than legal. However, if things do not work out as contemplated, the supported spouse can, upon a showing of good cause, request a change in the original order as to amount or as to the term for jurisdiction over the issue of spousal support." (*Id.* at pp. 665–666.)

The dissolution judgment required Bonnie to make an application for an extension of spousal support before June 30, 2012. California Rules of Court, rule 5.92, subdivision (a), explains the procedure for an application for a "request for order" in family law cases. (Cal. Rules of Court, rule 5.92(a)(1).) A request for order in family law proceedings is equivalent to a motion or notice of motion. (*Ibid.*) "*A Request for Order* (form FL-300) must be used to ask for court orders, unless another Judicial Council form has been adopted or approved for the specific request[.]" (Cal. Rules of Court, rule 5.92(a)(1)(B).) Alternatively, parties may stipulate in writing to a particular order and present the written stipulation to the court for entry of a modification order consistent with the stipulation. (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2016) ¶ 17:415, p. 17-131.) There is a mandatory form for stipulations establishing or modifying child support below

the presumptively-correct formula amount (FL-350), and an optional form for stipulations about child custody/visitation (FL-355). (*Id.* at ¶ 5:310.1, p. 5-151.) "Otherwise, unless a local court form applies, no particular form of written stipulation is prescribed." (*Ibid.*)

The dissolution judgment did not require Bonnie to file a "request for order" before June 30, 2012, in order to extend spousal support. It required her to make an application for an extension of spousal support. An order modifying spousal support can be made by a request for order or based on a stipulation of the parties. The parties' written stipulation in this case was an authorized method to extend spousal support. In fact, a stipulation of the parties is the preferred method to conserve resources. The intent of the parties at the time of the dissolution judgment was to allow Bonnie to seek an extension of spousal support payments if she was not self-supporting by June 30, 2012. Whether the finding that Bonnie required additional spousal support was based on an adversarial proceeding or the parties' agreement makes no difference. Jeffrey's interpretation of the provision to require Bonnie to file a request for order, even if the parties agreed on an extension, would lead to the absurd result of discouraging cooperation between the parties in reaching settlement of support issues, with a resulting waste of resources.

The evidence showed that Bonnie applied to extend the original spousal support order by stipulation of the parties before the termination of jurisdiction. Therefore, the family

law court retained jurisdiction over the issue of spousal support under the terms of the dissolution judgment. The May 2012 stipulated modification order did not expressly terminate the court's jurisdiction to modify spousal support further, so we must construe the order as retaining jurisdiction over the issue of spousal support under Family Code section 4336. We conclude the court erred in finding it had no jurisdiction to modify the existing spousal support order.

Changed Circumstances

Bonnie contends the order denying her request for modification was prejudicial error requiring reversal. We conclude there is reasonable probability that Bonnie would have obtained a more favorable result if the court had exercised jurisdiction, because Bonnie presented evidence from which the family law court could find a material change in circumstances between the May 2012 spousal support order and the present.

To warrant modification of a spousal support order, the family law court must find a material change of circumstances since the last spousal support order. (*In re Marriage of Shaughnessy* (2006) 139 Cal.App.4th 1225, 1237 (*Shaughnessy*).) "'The modification of a spousal support order is reviewed on appeal for abuse of discretion. In exercising its discretion the trial court must follow established legal principles and base its findings on

substantial evidence." (*Id.* at p. 1235, citing *In re Marriage of Schmir* (2005) 134 Cal.App.4th 43, 47.) "'In exercising discretion whether to modify a spousal support order, "the court considers the same criteria set forth in [Family Code] section 4320 as it considered when making the initial order . . . . [Citation.]"' [Citation.]" (*Shaughnessy*, *supra*, at p. 1235.)[3]

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[3] Family Code section 4320 currently provides: "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, taking into account all of the following:

"(1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.

"(2) The 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.

"(b) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.

"(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.

"(f) The duration of the marriage.

"(g) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.

"(h) The age and health of the parties.

"(i) Documented evidence, including a plea of nolo contendere, of any history of domestic violence, as defined in Section 6211, between the parties or perpetrated by either party against either party's child, including, but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party.

"(j) The immediate and specific tax consequences to each party.

"(k) The balance of the hardships to each party.

"(l) The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration as described in Section 4336, a 'reasonable period of time' for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, Section 4336, and the circumstances of the parties.

A material change of circumstances may be based on a "failed expectation" or "failed assumption" from the existing spousal support order that the supported spouse's disability was implicitly expected to change and permit employment. (*In re Marriage of Biderman* (1992) 5 Cal.App.4th 409, 413 (*Biderman*).) "'[I]n a subsequent order to show cause hearing for modification of support, [where] the assumption [in a prior order] is shown to have failed because [the supported spouse's] mental condition has not improved and continues to preclude employment in [the supported spouse's] profession, a change of circumstances is shown.' (*In re Marriage of Schaffer* (1984) 158 Cal.App.3d 930, 934; see *In re Marriage of Jacobs* (1980) 102 Cal.App.3d 990, 992–993; *In re Marriage of Andreen* (1978) 76 Cal.App.3d 667, 673.)" (*Biderman*, *supra*, at p. 413.)

In this case, the family law court could find that the parties expected Bonnie's temporary disability to improve, allowing her to resume work, obtain retraining, and become self-supporting by December 1, 2017. Instead, her disability became permanent, which limited her earning potential to minimal social security disability benefits. She has alleged a failure of the parties' expectations which qualifies as a

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"(m) The criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with Section 4324.5 or 4325.

"(n) Any other factors the court determines are just and equitable."

material change of circumstances. In February 2012, Bonnie was employed, receiving $1,000 per month in child support and $1,000 in spousal support, with a mortgage payment of $2,263. When her doctor placed her on a two-month disability leave that would be unpaid, Bonnie and Jeffrey signed the stipulated modification order. She expected to be able to return to work in April 2012. Her doctor extended her return date and no date to return to work is provided in the record. Under the parties' stipulated modification order, however, all orders in the dissolution judgment not inconsistent with the modification remained in full force and effect. Therefore, the reasonable expectation of the parties that Bonnie would be able to re-enter the job market after a period of re-training remained in effect.

The evidence that Bonnie submitted in connection with her August 2015 request to modify spousal support is that she is permanently disabled, not working, and has secured only limited additional income through social security disability benefits. The family law court could find failed expectations from the May 2012 order, which was based on a temporary disability and the parties' expectation that Bonnie would improve, re-enter the job market, and become self-supporting by December 1, 2017. We conclude that had the family law court exercised its jurisdiction, there was evidence of changed circumstances allowing the court to evaluate the adequacy of the spousal support award.

To the extent that Bonnie contends this appellate court should vacate and set aside the dissolution judgment based

on Jeffrey's failure to comply with provisions about life insurance policies or incidents of domestic violence more than 15 years ago or other matters, those issues are not before this court.

DISPOSITION

The order denying the request for modification of spousal support is reversed and remanded for further proceedings. Appellant Bonnie Jane Franke is awarded her costs on appeal.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

DUNNING, J.*

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