Filed 4/3/17 Marriage of Cedeno CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| In re the Marriage of EDUARDO and BERTILA CEDENO,<br><br>EDUARDO CEDENO,<br><br>Appellant,<br><br>v.<br><br>BERTILA CEDENO,<br><br>Respondent. | B269241<br><br>(Los Angeles County Super. Ct. No. VD064747) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Debra Cole-Hall, Judge. Affirmed as modified.

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Daniel M. Lee for Plaintiff and Appellant.

Guagenti & Damsky and Michael S. Damsky for Defendant and Respondent.

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Appellant Eduardo Cedeno challenges the family court's denial of his request for an order terminating his spousal support obligations to respondent Bertila Cedeno. Eduardo[1] argued that because Bertila had begun receiving Social Security benefits and pension payments, she no longer needed spousal support. The family court denied Eduardo's request to terminate spousal support, and instead reduced Eduardo's monthly obligations from $1,700 to $1,150. We affirm, subject to a modification to allow Eduardo to recover a $650.49 overpayment.

## FACTS AND PROCEEDINGS BELOW

In 2009, the family court entered a judgment of dissolution, ending the marriage of Bertila and Eduardo after 24 years. At the time, Eduardo's income was $7,000 per month, while Bertila had not been employed since before the marriage. The court awarded Bertila $1,700 per month in spousal support. Eduardo kept the marital home in Long Beach, and paid Bertila for her share of the value of the couple's equity in the property. After the divorce, Bertila moved to Miami, where she lived in a small efficiency apartment. The family court imputed $320 per week in income to her, but Bertila testified that she was unable to find employment. As of September 2014, Bertila had approximately $124,000 in assets, obtained primarily from Eduardo's payment for her share of the equity in the marital home.

In 2014, Eduardo filed a request for an order terminating the spousal support. He claimed that Bertila was eligible to receive regular payments from two pensions, and that she would soon be eligible for Social Security payments as well. Eduardo also argued that Bertila had failed to make good faith efforts to become

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[1] We refer to the parties by their first names for the sake of clarity, and not out of disrespect.

self-supporting. Bertila opposed the petition, stating that she had not worked outside the home for 30 years, had a third grade education, lacked job skills, could not speak fluent English, was almost 65 years old, and had not been able to find employment. According to Bertila, the spousal support payments were her sole source of income.

After the family court ordered Bertila to provide documentation regarding her entitlement to Social Security and pension benefits, Bertila filed to begin receiving those benefits. In the spring and summer of 2015, she began receiving $1,116 per month in Social Security benefits, $368.74 per month from two Federal Express pensions,[2] and $304.95 per month from a Boeing pension. These benefits added up to $1,789.69 per month.

After a hearing in October 2015, the family court declined to terminate spousal support. Instead, it reduced the amount of spousal support from $1,700 to $1,150 per month, effective November 2015.

## DISCUSSION

Eduardo contends that the family court erred by merely reducing the amount of spousal support to Bertila to $1,150 per month, rather than eliminating the support entirely. He also contends that the court erred by failing to make retroactive its order reducing support, by failing to order Bertila to repay $650.49 in overpayments, and by failing to award Eduardo attorney's fees. The parties agree and we do also that Eduardo is entitled to a credit

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[2] In fact, Bertila receives $261.46 per month from one of the pensions, and was eligible to receive $107.28 per month from the second. In lieu of the monthly payment, Bertila opted to receive a single lump sum of approximately $16,000 from the second pension. In order to account for the potential income Bertila gave up, the family court deemed Bertila to be receiving $107.28 per month.

of $650.49 for overpayment. We will modify the judgment to give Eduardo credit for a $650.49 overpayment. We otherwise affirm.

## I. Reduction in Spousal Support

A court may modify or terminate an order of spousal support when there has been a material change in circumstances—in other words, a significant change in the supported spouse's need, or the supporting spouse's ability to pay. (*In re Marriage of Shimkus* (2016) 244 Cal.App.4th 1262, 1272-1273.) Family Code section 4320[3] defines the criteria trial courts must consider in determining the amount of spousal support. "In exercising discretion whether to modify a spousal support order, 'the court considers the same criteria set forth in section 4320 as it considered when making the initial order.' " (*In re Marriage of Bower* (2002) 96 Cal.App.4th 893, 899.)

Section 4320 provides as follows: "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.

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[3] Unless otherwise specified, subsequent statutory references are to the Family Code.

"(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.

"(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."

Eduardo contends that the section 4320 factors support terminating spousal support entirely. He points out that he lives in an area with a higher cost of living than does Bertila. He also notes that Bertila has over $100,000 in assets, and that her monthly expenses are relatively low. Furthermore, he points out that Bertila has not been employed since their marriage ended, and he argues that with diligent effort, she could have found employment. According to Eduardo, the trial court should have reduced the spousal support award dollar for dollar by the amount Bertila receives in pension and Social Security benefits. Because the amount of income from these benefits exceeds the $1,700 he was ordered to pay in spousal support, Eduardo contends that the family court should have terminated the spousal support.

In making these arguments, Eduardo essentially asks us to reweigh the section 4320 factors. That is not our function. We review a trial court's order modifying a spousal support award for abuse of discretion. (*In re Marriage of Schmir* (2005) 134 Cal.App.4th 43, 47.) "In exercising its discretion the trial court must follow established legal principles and base its findings on substantial evidence. If the trial court conforms to these requirements its order will be upheld whether or not the appellate court agrees with it or would make the same order if it were a trial court." (*Ibid.*, fn. omitted.)

In this case, there was ample evidence supporting the family court's determination. Eduardo's income had increased to $9,000 per month by 2015. Bertila was 59 years old at the time of the judgment of dissolution and 65 at the time of the hearing. She does not speak fluent English, has a third grade education, and says that she has not been employed since before she married Eduardo. She also declared that she moved to Miami because it has a lower cost of living than does Southern California, but in spite of this, she can afford to live only with a reduced standard of living in a small efficiency apartment. The family court was entitled to credit all of this testimony.

Furthermore, the family court drew a reasonable conclusion that Bertila's income and assets prior to 2015 were insufficient to provide for her needs according to the standard of living established during the marriage.[4] (See § 4320, subd. (d).) Accordingly, it was not a windfall for Bertila to receive Social Security and pension income while continuing to receive some spousal support income. In declining to reduce Bertila's income dollar for dollar to match her Social Security and pension benefits, the court also took into account the $320 in weekly income imputed to her under the original judgment of dissolution. It was reasonable for the trial court to conclude that Bertila's Social Security and pension income replaced the income she might have made from working, rather than substituting entirely for her spousal support. (See *In re Marriage of McLain* (2017) 7 Cal.App.5th 262, 270 [family court

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[4] Eduardo also argues that the family court should have terminated support because Bertila had "a separate estate, including income from employment, sufficient for [her] proper support." (See § 4322.) We disagree. The family court did not err in concluding that Bertila could not meet her needs with her existing assets and income alone. (See *In re Marriage of McNaughton* (1983) 145 Cal.App.3d 845, 850-851.)

does not abuse its discretion regarding spousal support by considering age of parties in their ability to obtain employment or to retire at customary age].)

## II. Retroactive Reduction

The family court issued its order reducing spousal support in this case on November 30, 2015. The court made the reduction in support effective November 1, 2015. Eduardo contends that the court erred by failing to make the reduction effective as of September 8, 2014, the date on which he filed his request for an order to terminate support. He argues that Bertila could have been receiving Social Security and pension benefits as early as the date he filed his petition, and that Bertila was responsible for delays in the case that led to the court's order being filed more than one year after Eduardo's request for order.

Under Family Code section 3653, subdivision (a), "[a]n order modifying or terminating a support order may be made retroactive to the date of the filing of the notice of motion or order to show cause to modify or terminate, or to any subsequent date." The family court's decision regarding retroactivity is reviewed for abuse of discretion. (See *In re Marriage of Cryer* (2011) 198 Cal.App.4th 1039, 1052.)

The family court did not abuse its discretion by deciding not to make its order retroactive. As we explain below (see Discussion part IV, *post*), the family court reasonably concluded that Bertila did not intentionally delay filing for Social Security and pension benefits, and that she was not culpable for any delay in the timing of the hearing.

### III. Overpayment

Eduardo contends that the trial court erred by failing to rule on his motion for a refund of support payments that he claims were made in excess of the amount ordered. In the 2009 judgment of dissolution, the trial court ordered Eduardo to pay $1,700 per month, or $20,400 per year, effective January 1, 2009. During the current proceedings, Eduardo submitted to the trial court a pay stub dated December 31, 2009, showing that his employer, Federal Express, had deducted $21,050.49 from his paychecks for the year to date under the heading "Garn - Child." He argued that the difference between these two amounts, $650.49, represented an overpayment of spousal support to Bertila, for which he was entitled to reimbursement. The family court did not order Bertila to repay any overpayment to Eduardo, and did not directly address the issue in its statements at the hearing or in the order.

At oral argument, Bertila conceded that Eduardo was entitled to reimbursement for the $650.49 overpayment. Accordingly, pursuant to our authority under section 906 of the Code of Civil Procedure, we modify the judgment of the trial court to require Bertila to pay Eduardo $650.49.

### IV. Attorney's Fees

Eduardo contends that the family court erred by denying his motion for an award of attorney's fees as a sanction for alleged misconduct by Bertila and her attorney. Eduardo claims that Bertila delayed the proceedings by failing to produce documents in a timely manner, that she made untrue statements regarding the production of documents, that she misrepresented the amount she was receiving in spousal support payments, and that her attorney falsely denied receiving a copy of Eduardo's points and authorities prior to the hearing.

Under section 271, subdivision (a), the family court "may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys." "The imposition of sanctions under section 271 is committed to the sound discretion of the trial court. The trial court's order will be upheld on appeal unless the reviewing court, 'considering all of the evidence viewed most favorably in its support and indulging all reasonable inferences in its favor, no judge could reasonably make the order.' " (*In re E.M.* (2014) 228 Cal.App.4th 828, 850, italics omitted.)

Under this standard, the family court did not abuse its discretion by requiring each party to bear his or her own attorney's fees. In every instance in which Eduardo alleges misconduct by Bertila and her attorney, there is a reasonable innocent explanation. If we draw all reasonable inferences in favor of the family court's decision, as we must (see *In re E.M.*, *supra*, 228 Cal.App.4th at p. 850), the family court's denial of Eduardo's motion was reasonable.

Eduardo alleges that Bertila made an untrue statement by claiming in December 2014 that she could not produce certain Social Security and pension documents because the documents did not exist. After the family court ordered her in March 2015 to provide documentation, Bertila produced the documents. These documents are in the record, and are dated between April and June 2015. Bertila testified that she did not know she was eligible for the pension benefits until Eduardo filed to terminate spousal support. It is entirely possible that Bertila in fact did not have these documents in her possession in December 2014, and that she only obtained the documents in the spring of 2015 after applying for the benefits. Although Bertila might have been able to obtain

the documents more quickly, Eduardo has not shown that Bertila intentionally made untrue statements or caused undue delay of the proceedings.

Eduardo contends that Bertila's income and expense statement misstated the amount of spousal support she had been receiving. The family court ordered Eduardo to pay $1,700 per month, but Bertila claimed that she was receiving only $1,569 per month. She claimed that after several years of underpaying, Eduardo was approximately five months delinquent in his support payments. Bertila's claims were incorrect. Eduardo's spousal support payments were deducted from his weekly paychecks at a rate of $393.81 per week. Bertila multiplied this amount by four and concluded that she was receiving $1,569 per month. As the family court pointed out, however, because most months contain more than 28 days, some months contain five weekly paydays. By paying $393.81 per week, Eduardo paid, on average, $1,700 per month. Although Bertila's claim was factually incorrect, it does not mandate a conclusion that she acted in bad faith. The family court reasonably concluded that Bertila had made an honest mistake.

Eduardo contends that Bertila's attorney falsely claimed that he had not received a copy of Eduardo's points and authorities prior to the hearing, and thus was unaware of Eduardo's claim that he was entitled to repayment of an overpayment of spousal support in 2009. Eduardo claims that he served the points and authorities on Bertila both by mail and by e-mail. The family court might have reasonably concluded that Bertila's attorney had forgotten that he received the points and authorities, or that he simply did not notice that he received them. In any case, the error did not prejudice Eduardo. Bertila's attorney did not request a continuance, and the hearing was concluded on the same day.

## DISPOSITION

The judgment of the trial court, dated November 30, 2015, is modified as follows. Following paragraph 3, a new paragraph 4 is inserted: "Respondent is ordered to pay Petitioner $650.49, no later than June 30, 2017." The judgment is otherwise affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.