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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re Marriage of LESLIE and  
THOMAS OVERSTREET.

B271522

(Los Angeles County  
Super. Ct. No. PD054501)

LESLIE OVERSTREET,

Appellant,

v.

THOMAS OVERSTREET,

Respondent.

APPEAL from an order of the Superior Court of Los Angeles County, Patricia Ito, Commissioner. Reversed and remanded.

Hugh A. Lipton and Brian G. Magruder for Appellant.  
No appearance for Respondent.

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In this marital dissolution action, Leslie Overstreet appeals from an order awarding \$5,000 in attorney fees and costs to Thomas Overstreet.<sup>1</sup> Thomas did not appear in this appeal. We reverse the order.

### **BACKGROUND**

On September 30, 2015, Thomas moved in the family court for modification of a stipulated child visitation order entered on May 11, 2015. He argued the order erroneously set the time at which he was to drop off—and Leslie was to pick up—their son on Tuesday mornings as 8:00 a.m., although a previously ordered 7:00 a.m. exchange time had been in place since 2013, and the earlier time better allowed their son to arrive at school on time on Tuesday mornings.

Leslie opposed the time change sought by Thomas, stating that the 7:00 a.m. time, which had been set to accommodate Thomas's work schedule, was no longer needed because he was now on disability. She proposed a new custody/visitation schedule keeping the 8:00 a.m. time, which she said did not cause their son to be late to school, and making other changes that would allow their son to stay with her on alternate weekends.

The family court's ruling on the request to modify the exchange time is not apparent in the appellate record.

At the same time that Thomas requested the schedule modification, he also sought attorney fees and costs, averring that Leslie should have stipulated to modify the visitation order. He submitted an income and expense declaration, in which he stated on page 1 that his gross monthly pay was \$8,532, and he was on disability. On page 2, he stated that his prior month's

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<sup>1</sup> We will refer to the parties by their first names for the sake of clarity, and not out of disrespect.

income from salary or wages was \$4,733.92, and entered that same amount as his average monthly income from salary or wages. He submitted four paystubs, showing his gross pay for those pay periods as follows: \$4,733.92 for each of the pay periods ending on August 31, 2015, August 15, 2015, and July 15, 2015; and \$4,548.07 for the pay period ending on July 31, 2015. (The paystubs show that Thomas was paid twice a month, and his statement that his average monthly income was \$4,733.92 was mistaken.) He stated that his estimated total monthly expenses were \$7,138.96.

Leslie opposed Thomas's request for attorney fees and costs, and sought an award of fees and costs against Thomas. She submitted an income and expense declaration, stating that her prior month's income from salary or wages was \$5,812, and her average monthly income from salary or wages was \$6,950.<sup>2</sup> She estimated her total monthly expenses to be \$8,095.11.

Leslie also objected to Thomas's income and expense declaration, arguing that he had failed to accurately state his disability income for the prior month. Subsequently, Thomas submitted an updated income and expense declaration, stating that his average monthly income from salary or wages was \$7,200 and his estimated total monthly expenses were \$5,072.31.

On December 9, 2015, the court issued a minute order in which it found, "[Leslie's] own pleadings demonstrate that she knew that the order filed on May 11, 2015 contained a clerical error regarding a time for exchange of the minor child. Nevertheless, [she] refused to agree to a correction despite [Thomas's] numerous requests. [Thomas] was forced to file the

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<sup>2</sup> Paystubs attached to the declaration showed that Leslie's work hours varied.

instant Request for Order, incurring attorney fees and costs as a result. [Leslie's] gross monthly average income as a registered nurse is \$6,950.00 per month. [Thomas's] monthly disability income is \$4,733.92. [Leslie] shall pay the sum of \$5,000.00 to [Thomas] at the rate of \$200.00 per month . . . .”

Leslie appealed the court's order. Thomas did not file a brief or otherwise appear in this appeal.

### **DISCUSSION**

Family Code section 2030 provides that in marriage dissolution actions, the family court “shall ensure that each party has access to legal representation” by ordering payment of attorney fees and costs from one party to the other “if necessary based on the income and needs assessment.” (Fam. Code, § 2030, subd. (a)(1).)<sup>3</sup> In considering a request for an award for attorney fees and costs, the court “shall make findings on whether an award . . . under this section is appropriate, whether there is a disparity in access to funds to retain counsel, and whether one party is able to pay for legal representation of both parties.” (§ 2030, subd. (a)(2).)

The family court may award attorney fees and costs “where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties.” (§ 2032, subd. (a).) “In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320.” (§ 2032, subd. (b).) “The parties’

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<sup>3</sup> All further statutory references are to the Family Code.

circumstances described in section 4320 “include assets, debts and earning ability of both parties, ability to pay, duration of the marriage, and the age and health of the parties.”” (*In re Marriage of Rosen* (2002) 105 Cal.App.4th 808, 829.)

The family court has significant latitude in awarding or denying attorney fees and costs, but in doing so, it must consider the statutory factors set forth in sections 2030 and 2032, as well as all the facts material to its decision. (*In re Marriage of Sharples* (2014) 223 Cal.App.4th 160, 165; *Alan S., Jr. v. Superior Court* (2009) 172 Cal.App.4th 238, 254.) Also, “in determining whether to award attorney fees to one party, the family court may consider the other party’s trial tactics.” (*In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1314.) An award “should be the product of a nuanced process in which the court should try to get the ‘big picture’ of the case,” and not a “truncated process” in which the court merely determines which party has the higher income. (*Alan S., Jr. v. Superior Court*, at p. 254.)

We review attorney fee awards for abuse of discretion. (*In re Marriage of Smith* (2015) 242 Cal.App.4th 529, 532.) “Applying the abuse of discretion standard, we consider de novo any questions of law raised on appeal, but will uphold any findings of fact supported by substantial evidence.” (*Ibid.*)

Here, the family court found that Thomas’s monthly disability income was \$4,733.92. The court appears to have relied solely on what Thomas mistakenly declared was his average monthly income, which his paystubs showed was actually his semimonthly income during August 2015—and which was inconsistent with both the \$8,532 gross monthly income he claimed on page 1 of his first income and expense

declaration, and the \$7,200 average monthly income he claimed on his updated declaration.

Thus, no substantial evidence supported the family court's finding that Thomas's average monthly income was \$4,733.92, and the court abused its discretion in awarding him attorney fees and costs based on that finding. Although the court properly considered Leslie's litigation tactics in reaching its decision, a need-based award cannot be based on a party's litigation tactics alone. Further, the court must make proper factual findings and must consider the factors set forth in sections 2030 and 2032—including the parties' relative financial resources and needs, whether there is a disparity in their access to funds to retain counsel, and whether one party could pay for legal representation for both parties—to determine whether an award is just and reasonable under the totality of the circumstances. (*Alan S., Jr. v. Superior Court, supra*, 172 Cal.App.4th at pp. 254, 258.)

Accordingly, we reverse the award of attorney fees and costs and direct the family court to reconsider Thomas's request for attorney fees and costs, taking into account the factors in sections 2030 and 2032 and resolving the factual inconsistencies regarding his income during the relevant period.

#### **DISPOSITION**

The family court's order that Leslie pay \$5,000 of Thomas's attorney fees and costs is reversed, and the matter is remanded for further proceedings consistent with this opinion.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.