

Filed 3/21/17 Zauner v. Defterios CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ALOIS ZAUNER,

Petitioner and Respondent,

v.

DINA DEFTERIOS,

Respondent and Appellant.

2d Civil No. B271922  
(Super. Ct. No. 1372562)  
(Santa Barbara County)

Dina Defterios appeals from an order awarding her \$15,000 in need-based attorney fees and costs to oppose a motion to modify child custody. (Fam. Code, §§ 2030; 2032, subd. (a).)<sup>1</sup> The trial court found that appellant's request for \$77,067.50 fees and \$17,459.77 costs was excessive and unreasonable. There was no abuse of discretion and we affirm.

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<sup>1</sup> All statutory references are to the Family Code.

### *Procedural History*

Appellant and respondent, Alois Zauner, had an unmarried relationship and are the parents of six-year old M. In 2015, respondent filed a motion to modify custody based on allegations of child abuse. A six-day evidentiary hearing commenced on August 3, 2015 and was scheduled to conclude in May or June 2016. On August 14, 2015 appellant brought a motion for need-based attorney's fees and costs. The trial court awarded \$10,000.

On January 20, 2016, appellant filed a second motion stating that respondent's monthly income was approximately \$100,000 and appellant's income was about \$1,300 a month. Appellant requested \$94,563.27 (\$77,067.50 fees and \$17,495.77 costs) and claimed that she had already incurred \$38,863.27 in fees and costs.

The trial court found that respondent had the ability to pay and awarded appellant \$10,000 fees and \$5,000 costs. It ruled that the request for fees and costs in excess of \$15,000 was unreasonable and excessive, that some of the fees were duplicative of work for which appellant was previously awarded fees, and that some of the claimed work was unreasonable and unnecessary.

### *Discussion*

We review for abuse of discretion. (*In re Marriage of Keech* (1999) 75 Cal.App.4th 860, 866; see also *Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448-1449.) When considering an award of fees and costs under section 2030, the trial court evaluates the respective incomes and needs of the parties, and any factors affecting the parties' respective abilities to pay.

(§ 2030, subd. (a)(2).) The court must consider whether “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).)

The trial court found that appellant had incurred \$33,363.27 in fees, noting that \$10,000 was paid by appellant’s uncle and \$10,000 was paid by respondent pursuant to the prior award. Appellant complains that she incurred \$33,363.27 in fees but was awarded only \$10,000. Section 2032, however, does not give appellant carte blanche authority to litigate the case without limitation notwithstanding respondent’s ability to pay. (*Kevin Q. v. Lauren W.* (2011) 195 Cal.App.4th 633, 645.) Nor is a party entitled to attorney’s fees merely because work was performed. (*Baxter v. Bock* (2016) 247 Cal.App.4th 775, 793-794.) Appellant has the burden of showing that the work was reasonably necessary, both as to the tasks performed and the amount of time billed for each task.

The billings attached to the moving papers are for legal services rendered from May 27, 2015 through December 23, 2015. Some of the fees are duplicative. For example, the services from May 27, 2015 through August 14, 2015 (131.25 hours x \$200/hour = \$26,250) were considered in the prior motion in which appellant was awarded \$10,000. Appellant cites no authority that she can resubmit the same billings for a new fee award.<sup>2</sup>

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<sup>2</sup> Appellant claims that the trial court abused its discretion in reducing the fee award by \$10,000 based on the loan from her uncle. The trial court found that “ten thousand of the fees have been paid by [appellant’s] uncle.” There is no finding that the payment was a gift or a loan, that the uncle was expected to pay

There are other discrepancies. Appellant claims that her attorney sent or read more than 450 emails and made 300 phone calls. The billing statements reflect 57 phone calls and 182 emails since the inception of the case. Appellant seeks attorney fees for “managing visitation,” but the opposition papers indicate that the visitation problems were caused by appellant’s last minute cancellations. Appellant claims that her attorney will spend at least 40 minutes a week managing visitation for five months pending continuation of the evidence hearing. The motion states that appellant’s attorney plans to expend “at least an additional 60 hours” research and investigating the case before the evidentiary hearing resumes and expects to spend 35 hours litigating motions.

Appellant argues that the trial court did not consider the billings attached to her fee request. That is belied by the Order After Hearing which states “some of the work claimed by [appellant’s] attorneys is duplicative of matters previously submitted to the Court for consideration and . . . some of the claimed work is neither reasonable or necessary.” Unlike *In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1314, the trial court did not refuse to consider the billing records. The trial court was clearly aware of the nature and extent of the attorney’s services based on its observation of the trial proceedings and the pretrial and discovery proceedings reflected in the file. (*In re Marriage of Cueva* (1978) 86 Cal.App.3d 290, 301.) Citing *Marriage of Cryer* (2011) 198 Cal.App.4th 1039, the trial court

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appellant’s fees, or that the trial court would have awarded an additional \$10,000 in fees but for the uncle’s payment.

ruled that the award may be augmented as necessary consistent with the parties' relative circumstances. (See § 2030, subd. (c).)

Appellant assumes that the failure to award 100 percent of the fees requested is an abuse of discretion, but that is not the law. "An award measured summarily by what the [party] has been billed or what his or her attorney is . . . owed is an abuse of discretion if it does not reflect consideration of whether the fees allegedly incurred were reasonably necessary." (*Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238, 255, italics omitted.)

Trial courts are in the best position to observe the parties' tactics and evaluate the appropriate amount of time and effort required. (*Baxter v. Bock, supra*, 247 Cal.App.4th at p. 794.) The instant case is no exception. "While we recognize the court awarded compensation for considerably less time than was actually expended, we are not in a position to second-guess its determination of reasonable necessity, let alone to declare its judgment 'clearly wrong' [citation] . . . [citation.]" (*Ibid.*)

Appellant's remaining arguments have been considered and merit no further discussion.

*Disposition*

The judgment (order awarding \$10,000 fees and \$5,000 costs) are affirmed. Respondent is awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Donna D. Geck, Judge

Superior Court County of Santa Barbara

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Bright & Powell and Kevin M. Mauseth, for  
Respondent and Appellant.

Misho Law Group and Jacqueline Misho, for  
Petitioner and Respondent.