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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re the Marriage of KAYTON and KAWANAA CARTER.	
KAYTON CARTER, Appellant, v. KAWANAA CARTER, Respondent.	C068599 (Super. Ct. No. 02FL07621)

Kayton Carter (father) appeals from orders appointing counsel for his three minor children and ordering father and Kawanna Carter (mother) to each pay half of counsels' fees.

Father contends (1) the trial court abused its discretion in ordering him to split responsibility for the fees with mother, because a prior order required mother to advance all

fees; and (2) the trial court violated his due process rights by depriving him of the opportunity to be heard.

We conclude:

1. The prior order requiring mother to advance fees was made with a reservation of jurisdiction to reallocate responsibility for the fees at a later date, and in any event did not prevent the trial court from issuing new and different orders. The trial court did not abuse its discretion in determining that both parents had the ability to split the fees.

2. The trial court did not deny father the opportunity to be heard. Although father contends he never received a hearing on an ex parte application to enforce the prior order requiring mother to advance the fees, the trial court reviewed his ex parte application, set the matter for hearing, and subsequently heard father's arguments in a hearing on June 23, 2011, before reaffirming its order that father and mother split the fees.

We will affirm the orders.

BACKGROUND

Father and mother have two sons and a daughter. As part of their marital dissolution proceeding, father and mother participated in custody mediation. Following the mediation, Judge Gweon ordered the appointment of Michael Jonsson as minors' counsel. With mother's assent, Judge Gweon further ordered mother to advance all fees for minors' counsel, but reserved jurisdiction to reallocate responsibility for the fees in the future. Judge Gweon also ordered the parties to participate in an Evidence Code section 730 custody evaluation

with Dr. Jacqueline Singer. Judge Gweon's minute orders were subsequently memorialized in an order signed by Judge Lueras.

Months later, father filed an ex parte request to modify visitation and to enforce the prior order regarding minors' counsel. Judge Gary denied the ex parte request but set the matter for regular hearing on May 25, 2011, and ordered the parties to provide current income and expense declarations.

Mother and father appeared before Judge Lueras on May 25, 2011, following completion of the Evidence Code section 730 evaluation with Dr. Singer. Father and mother disagreed as to whether the trial court should adopt Dr. Singer's recommendations. Mother asked that the matter be set for a long-cause hearing and that the trial court appoint minors' counsel because Mr. Jonsson was previously appointed but was not available "and there hasn't been any further appointment where we believe that would be appropriate." Father objected to a long-cause hearing. But the trial court said it would specially set the matter for a long-cause hearing; that existing orders would remain in place; and that it would appoint minors' counsel. Father asked that the appointment be done immediately.

Judge Lueras subsequently issued orders appointing Frank Dougherty as counsel for the two sons and Dianne Fetzer as counsel for the daughter. The orders expressed the court's finding that father and mother were able to pay the compensation and expenses for minors' counsel and ordered them to each pay half the fees for minors' counsel.

DISCUSSION

I

Father contends the trial court abused its discretion in ordering him to split responsibility for the fees with mother, because the trial court's prior order required mother to advance all fees and mother agreed. He recognizes that our review for abuse of discretion is deferential. Nonetheless, he argues the order requiring him to pay half the fees conflicts with the trial court's prior order that mother advance the fees, had the effect of "vitiating" mother's agreement to advance the fees, and was not supported by the evidence of their financial status. We disagree.

At the prior hearing on October 18, 2010, mother's counsel suggested that mother would advance the fees without prejudice, subject to the trial court's reservation of jurisdiction to reallocate responsibility for payment of the fees at a later date. The trial court so ordered. The subsequent order that father pay half the fees does not conflict with the prior order and does not vitiate any agreement by mother. In any event, in this context it was not error for the trial court to issue a subsequent and different order based on the evidence.

We turn next to father's contention that the order requiring him to pay half the fees is not supported by the evidence of his ability to pay. The trial court was obligated to "determine the respective financial ability of the parties to pay all or a portion of counsel's compensation." (Cal. Rules of Court, rule 5.241(b); Family Code, § 3153, subd. (b).) "Before

determining the parties' ability to pay: (A) The court should consider factors such as the parties' income and assets reasonably available at the time of the determination, and eligibility for or existence of a fee waiver . . . ; and (B) The parties must have on file a current *Income and Expense Declaration* [] or *Financial Statement (Simplified)*[]." (Cal. Rules of Court, rule 5.241(b).)

The record reflects that both father and mother were employed at the time of the challenged order and both had income. Mother is a neurosurgeon and father is an educator. Both filed current income and expense declarations with the trial court. The trial court made an express finding that they both had the ability to pay half the fees for minors' counsel. To the extent father believes this finding is factually incorrect, he can, under appropriate circumstances, ask the trial court to "redetermine the parties' ability to pay." (Cal. Rules of Court, rule 5.241 (b)(3).)

We do not reweigh the evidence on appeal, and we will not reverse the trial court unless there is a showing that "no judge could reasonably have made the order." (*In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 975.) On this record, we cannot say that the trial court abused its discretion.

II

Father also contends the trial court violated his due process rights by depriving him of the opportunity to be heard.

Father asserts the trial court never received his ex parte request and never heard it.

The record establishes, however, that father's ex parte application to enforce the prior order was reviewed and denied by Judge Gary. Judge Gary set the matter to be heard at regular hearing on May 25, 2011, and ordered the parties to provide current income and expense declarations. At the hearing on May 25, the trial court set the matter for a long-cause hearing. But both mother and father asked the trial court to appoint minors' counsel, and father asked that it be done immediately. At a subsequent hearing on June 23, 2011, the trial court heard father's argument that he did not have the ability to split the fees. After hearing father on the issue, the trial court reaffirmed its order that father and mother split the fees.

This record establishes that the trial court did not deprive father of an opportunity to be heard.

DISPOSITION

The trial court orders are affirmed.

MAURO, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.