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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

MELISSA SHURR,

Petitioner,

v.

THE SUPERIOR COURT OF SACRAMENTO
COUNTY,

Respondent;

BRETT SHURR,

Real Party in Interest,

C068887

(Super. Ct. No.
04F101857)

Melissa and Brett Shurr have been involved in a marital dissolution action since 2004.¹ In one of their prior appeals, this court remanded the matter to the superior court to strike a provision for a step down of child support, to redetermine

¹ We will refer to the Shurrs by their first names for clarity.

Brett's investment income, and to recalculate child and spousal support after eliminating certain expenses. (*In re Marriage of Shurr* (May 10, 2011, C059951) [nonpub. opn.].) On remand, Melissa peremptorily challenged Judge McBrien from retrying the matter pursuant to Code of Civil Procedure section 170.6, subdivision (a)(2) (hereafter section 170.6(a)(2)).² Judge McBrien struck the notice of disqualification, vacated the child support step down provision, and confirmed the remainder of his prior decision in all other respects.

Melissa now seeks a writ of mandate compelling the superior court to disqualify Judge McBrien and to vacate his subsequent order. She maintains that this court remanded the matter for a new trial within the meaning of section 170.6(a)(2) and hence she was entitled to disqualify Judge McBrien as a matter of right.

We disagree that the matter was remanded for a new trial. Accordingly, we will deny the petition for a writ of mandate.

BACKGROUND

Melissa and Brett were married in 1994, had a child in 1996, and separated in 2004. The superior court entered judgment of dissolution and ordered Brett to pay temporary child and spousal support. We need not recount all of the court proceedings that occurred thereafter. It will suffice to

² Undesignated statutory references are to the Code of Civil Procedure.

provide a synopsis of the proceedings underlying the present writ petition.

Following a two-day trial, Judge McBrien issued a minute order for temporary spousal and child support in February 2008, and issued a formal order on his ruling on September 4, 2008. Melissa appealed from the order, challenging a number of the underlying factual findings. For example, Melissa contended that the superior court found Brett's "other income" to be only \$881 per month, when the evidence showed it was much higher. Brett testified that in 2006 he received \$18,600 in investment income, or \$1,550 per month. On his most recent income and expense declaration he listed income of \$1,484.92 per month. Other evidence showed Brett received investment income of \$1,366.25 per month in 2007. On appeal, Brett did not refute the evidence or defend the superior court's factual determination.

In resolving this contention and the others Melissa raised regarding Judge McBrien's factual findings, this court held the superior court must "(1) recalculate [Brett's] investment income based on the evidence presented at trial; (2) eliminate from [Brett's] expenses any payments made by [Brett] for [Melissa's] health insurance; (3) eliminate mortgage interest and property tax amounts from [Melissa's] expenses for purposes of computing her income tax liability; and (4) recalculate [Brett's] income tax liability based on five exemptions rather than three. In addition, to the extent [Melissa] received any offsetting deduction from gross income for health insurance payments she

did not make, this should also be eliminated from the calculation.”

Melissa also contended that Judge McBrien erred in ordering a step down of temporary child support and temporary spousal support. This court agreed Judge McBrien erred in ordering a step down of child support. As for the step down of spousal support, this court said it “was intended to send a message to [Melissa] that her right to support was limited and that she must make reasonable efforts to become self-sufficient.” In response to Melissa’s contention that Judge McBrien did not consider all of the relevant evidence concerning Brett’s financial condition in deciding to deny permanent spousal support, this court stated, “As previously explained, this matter must be remanded to allow Judge McBrien to recalculate support levels based on correct findings of fact. At the same time, Judge McBrien will have an opportunity, if he did not do so already, to consider [Brett’s] entire financial condition at the time of the original order based on the evidence already in the record.”

In the disposition, this court reversed Judge McBrien’s order “insofar as the support calculations are based on erroneous findings as to [Brett’s] investment income, health insurance expenses, and number of income tax exemptions and as to [Melissa’s] home mortgage and property tax expenses and any health insurance expenses [Melissa] may have claimed that she did not in fact incur.” This court also reversed Judge McBrien’s order insofar as it ordered a step down in child

support and remanded the matter "for a recalculation of both spousal and child support from February 1, 2008, forward in accordance with this opinion and for any appropriate award of attorney fees."³

Melissa peremptorily challenged Judge McBrien under section 170.6, which permits a party to disqualify a trial judge where the judge's decision is reversed on appeal and remanded for a retrial.

Judge McBrien struck Melissa's notice of disqualification on the ground the case was "remanded to the trial court for a ministerial purpose" because it was remanded for the superior court "to recalculate spousal and child support based on specific evidence to correct a calculation error." On the same day, Judge McBrien issued an order stating, "The court has received and read the decision by the Court of Appeal in the

³ In the prior appeal, Melissa also challenged orders made by a different judge, Judge Balonon, concerning attorney fees. This court agreed with her appellate claims. In her writ petition, she appeared to argue that this court remanded the matter for a new trial within the meaning of section 170.6(a)(2) because we remanded for a determination of attorney fees. Therefore, in granting the alternative writ, this court directed the parties to address the following question: "Given that the June 16, 2008, and January 26, 2009, attorney fee orders were issued by Judge Balonon, why is petitioner entitled to peremptorily challenge Judge McBrien as to those orders?" Melissa clarified that she does not believe she is entitled to do so because Judge McBrien did not issue the attorney fee orders. She simply seeks to disqualify him on the ground that this court's reversal and remand of the support order directed the superior court to reexamine an issue of fact, which is the same as a remand for a new trial. Our review is limited accordingly.

above entitled matter. In view of that decision the court vacates the step down in child support beginning 7/1/08 that was included in the 2/08 decision. In all other respects the remainder of the decision is confirmed."

DISCUSSION

Melissa contends this court remanded the matter for a new trial within the meaning of section 170.6(a)(2), and hence she was entitled to disqualify Judge McBrien as a matter of right.

Section 170.6(a)(2) provides in relevant part: "A [peremptory challenge] may be made following reversal on appeal of a trial court's decision, or following reversal on appeal of a trial court's final judgment, if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter."

The language allowing a peremptory challenge on remand was added to the statute in 1985 to avoid any perceived bias against an appellant by a trial judge whose judgment or order had been reversed on appeal. (*Stegs Investments v. Superior Court* (1991) 233 Cal.App.3d 572, 575-576 (*Stegs*).) But the statutory limits in bringing such a challenge are vigilantly enforced to avoid abuse or judge-shopping. (*Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1252-1253 (*Peracchi*).)

For there to be a "new trial" there must first have been an original trial, a prior proceeding addressing the merits or terminating the action. (*State Farm Mutual Automobile Ins. Co. v. Superior Court* (2004) 121 Cal.App.4th 490, 499-501 (*State Farm*); *Burdusis v. Superior Court* (2005) 133 Cal.App.4th 88, 93.) Here, there is no dispute that the proceeding in

February 2008 was a two-day trial resulting in the order for temporary child and spousal support. It was a prior proceeding addressing the merits and resulting in a final judgment for purposes of appeal. (*In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368; *Greene v. Superior Court* (1961) 55 Cal.2d 403, 405.)

Thus, the dispute here centers on whether this court remanded the matter for a new trial. Melissa contends it did, pointing out that a new trial has been defined as the “‘reexamination’ of a factual or legal issue that was in controversy in the prior proceeding.” (*Geddes v. Superior Court* (2005) 126 Cal.App.4th 417, 424.) She argues Judge McBrien was not merely directed to perform a ministerial act or some specified task, such as recalculating interest. (*Stegs, supra*, 233 Cal.App.3d at p. 576; accord, *Peracchi, supra*, 30 Cal.4th at pp. 1257-1258; *Paterno v. Superior Court* (2004) 123 Cal.App.4th 548, 560 (*Paterno*).) She does not dispute that a majority of the tasks on remand involved nothing more than mathematical calculations, such as eliminating certain expenses and deductions before recalculating child and spousal support. She points out, however, that after this court concluded the evidence did not support a determination that Brett’s “other income” was only \$881, this court remanded the matter for the superior court to recalculate Brett’s investment income based on the evidence at trial. In Melissa’s view, that was a remand for a new trial.

But a “new trial” should put the parties in a position as if the original trial had not occurred. (See *Peracchi, supra*,

30 Cal.4th at p. 1253.) That did not happen in this case. This court's remand order did not require the parties to present any new evidence or argument. Instead, the remand order merely directed the superior court to make new calculations based on the existing evidence and argument, and based on the guidance from this court. Accordingly, this court did not remand for a new trial.

Our conclusion is supported by applicable case law. A new trial occurred in the case of *Hendershot v. Superior Court* (1993) 20 Cal.App.4th 860 (*Hendershot*), and also in the case of *Stegs, supra*, 233 Cal.App.3d 572, because in those cases the matter was remanded for the parties to present evidence. (*Hendershot, supra*, 20 Cal.App.4th at p. 864; *Stegs, supra*, 233 Cal.App.3d at p. 576.) Those cases involved the reexamination of factual issues. (See also *First Federal Bank of California v. Superior Court* (2006) 143 Cal.App.4th 310, 315 [holding that a remand for a hearing requiring the presentation of evidence and factual and legal determinations as to the nature and amount of attorney fees was a reexamination of an issue previously in controversy and hence, a retrial].)

This court also held that a new trial occurred in *In re Marriage of Herr* (2009) 174 Cal.App.4th 1463 (*Herr*), although in a different context. There, after issuing child and spousal support orders, the superior court purported to grant "reconsideration" on its own motion, but in fact ordered the parties to submit new evidence. (*Id.* at p. 1465.) This court held that "reconsideration" involves a change in the superior

court's ruling based on the evidence *already submitted*. (*Id.* at p. 1470.) But the superior court's order directing the parties to present new evidence had all the indicia of a "reexamination" of issues of fact. (*Ibid.*) That type of reexamination constituted a new trial. (*Ibid.*) *Herr* indicates that if a superior court merely reconsiders existing evidence or conducts a recalculation based on existing evidence, it is not conducting a new trial.

Indeed, the legislative history of the amendment to section 170.6 recognized a difference between revisiting a matter based on existing evidence or argument and conducting a new trial. As originally drafted, the 1985 amendment provided that a peremptory challenge could be made after reversal on appeal where the trial judge in the prior proceedings was assigned "to rehear the matter." (Assem. Bill No. 1213 (1985-1986 Reg. Sess.) as introduced Mar. 4, 1985, § 1.) A later version of the bill replaced "to rehear the matter" with "for a new trial," thus limiting the scope of peremptory challenges to "new trials" that follow reversal on appeal. (See Assem. Bill No. 1213 (1985-1986 Reg. Sess.) as amended May 15, 1985, § 1.) (See *State Farm, supra*, 121 Cal.App.4th at pp. 498-499.)

The 1985 amendment to section 170.6 was not intended "to eliminate all restrictions on the challenge or to counter every possible situation in which it might be speculated that a court could react negatively to a reversal on appeal." (*Peracchi, supra*, 30 Cal.4th at p. 1263.) The amendment was limited to remands for new trials. (*Peracchi, supra*, 30 Cal.4th at

pp. 1262-1263 [§ 170.6(a)(2) inapplicable where one count of defendant's criminal conviction reversed and judge's task on remand limited to resentencing]; *Paterno, supra*, 123 Cal.App.4th at p. 560 [no new trial where liability issue resolved on appeal and judge directed to try damages issue on remand]; *State Farm, supra*, 121 Cal.App.4th at pp. 498-499 [no new trial where writ granted on choice of law issue and matter remanded for further proceedings].)

This court did not direct the superior court to do anything on remand that resembled a new trial. We did not order the superior court to conduct a new evidentiary hearing or to reopen argument. We merely directed the superior court to eliminate the step down in child support, to eliminate specific expenses and deductions, to reconsider the *existing* evidence and recalculate Brett's investment income, and to thereafter recalculate both spousal and child support after making the aforementioned corrections. To paraphrase *Peracchi*, the superior court's function on remand required that it exercise its discretion in "light of what [already] occurred at trial,"

which is not equivalent to a new trial. (*Peracchi, supra*, 30 Cal.4th at p. 1254.)

DISPOSITION

The petition for writ of mandate is denied. Brett is entitled to costs on appeal. (Cal. Rules of Court, rule 8.493(a).)

_____ MAURO _____, J.

We concur:

_____ RAYE _____, P. J.

_____ HOCH _____, J.