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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of JEAN SANDERSON and ROBERT BRENT JUDD.	
JEAN SANDERSON JUDD, Respondent, v. ROBERT BRENT JUDD, Appellant.	D058650 (Super. Ct. No. D425232)

APPEAL from an order of the Superior Court of San Diego County, Lisa C. Schall, Judge. Affirmed.

INTRODUCTION

Robert Judd (Robert) appeals from the trial court's order of December 23, 2010 reducing monthly permanent spousal support to Jean Judd (Jean)[1] from $800 to $500 retroactive to July 1, 2010. He contends the trial court erred by failing to terminate

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1 As the parties share the same surname, we refer to them by their first names for clarity. (*In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 390, fn. 1.)

spousal support when he reached the customary retirement age of 65. Alternatively, he contends the trial court erred by failing to terminate or further reduce spousal support, as Jean was younger, healthier, and no longer needed spousal support.[2] We conclude these contentions lack merit and affirm the order.

BACKGROUND

Robert and Jean divorced in 1998, after approximately 35 years of marriage. As part of their marital settlement, Robert agreed to pay Jean monthly spousal support of $800 until either he or Jean died, Jean remarried, or the court ordered otherwise.

The spousal support amount was based on several agreed upon findings, including: "(1) [Jean] is 56 years of age, and has high blood pressure and a history of knee problems. [¶] (2) [Jean] is currently working fulltime as a medical records supervisor in a skilled nursing facility. [Jean] is currently grossing $2,080 per month from her employment. No significant increases in [Jean's] earnings are anticipated. [¶] (3) [Jean] is currently paying $83.00 per month for medical insurance coverage for herself[.] [¶] [Jean] will continue to reside in the family residence . . . after the dissolution of the parties' marriage. The residence trust deeds are in the process of being refinanced. It is anticipated that the first trust deed, property tax, and average maintenance expense for the residence after the pending refinance of the trust deeds will total approximately $883.00

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2 In her respondent's brief, Jean criticizes other aspects of the trial court's order. As Jean did not file a cross-appeal, we may only consider these criticisms to the extent they bear on whether any of Robert's claimed errors were prejudicial. (Code Civ. Proc., § 906; *Estate of Powell* (2000) 83 Cal.App.4th 1434, 1439; *Building Industry Assn. v. City of Oceanside* (1994) 27 Cal.App.4th 744, 758, fn. 9.)

per month[.] [¶] (5) [Robert's] gross earnings for 1997 were approximately $52,000. [Robert] has chosen to voluntarily terminate his position wherein he earns approximately $52,000 per year, and [Robert] anticipates, commencing on or about May 1, 1998, that his gross earnings in the foreseeable future, will be significantly less than $52,000 per year. The agreed upon spousal support anticipates [Robert's] earnings will be significantly below said $52,000 gross per year figure."

In June 2010 Robert filed an order to show cause seeking termination or modification of spousal support. In his income and expense declaration, he stated he was 70 years old, was a broadcast engineer, and was unemployed as of April 30, 2008, but earned $415 to $450 a day when able to work. In addition, he stated his average monthly income from pension payments was $112, from Social Security was $2,172, and from freelance work was $2,974. He stated he had one-time income of $120,000 from the sale of the house he and Jean had owned during their marriage, and other assets totaling $250,139. He stated his average monthly expenses were $6,507.

Jean opposed termination or modification of spousal support. In her income and expense declaration, she stated she was 68 years old and worked as an assistant to the director of medical records for a nursing home. In addition, she stated her average monthly income from wages was $2,910, from spousal support was $800, and from Social Security was $1,117. She stated she had other assets totaling $262,152 and her average monthly expenses were $3,620.

The trial court declined to terminate spousal support, but reduced it to $500 a month effective July 1, 2010. The trial court based its decision on, among other factors,

the length of the parties' marriage, the marital standard of living, Jean's improved marketable skills, her potential for investment income from the proceeds of the sale of the marital home, Robert's ability to pay spousal support, and the parties' respective ages and health.

DISCUSSION

I

Failure to Terminate Spousal Support Because of Robert's Age

Robert contends the trial court erred by failing to terminate spousal support after he turned 65. He asserts evolving case law supports his view that no supporting spouse may ever be required to pay spousal support after reaching customary retirement age and he invites us to establish his view as a rule of law. We decline the invitation.

"Spousal support is governed by statute. [Citations.] In ordering spousal support, the trial court *must* consider and weigh *all* of the circumstances enumerated in the statute, to the extent they are relevant to the case before it. [Citations.] The first of the enumerated circumstances, the marital standard of living, is relevant as a reference point against which the other statutory factors are to be weighed. [Citations.] The other statutory factors include: contributions to the supporting spouse's education, training, or career; the supporting spouse's ability to pay; the needs of each party, based on the marital standard of living; the obligations and assets of each party; the duration of the marriage; the opportunity for employment without undue interference with the children's interests; the age and health of the parties; tax consequences; the balance of hardships to the parties; the goal that the supported party be self-supporting within a reasonable period

of time; and any other factors deemed just and equitable by the court. ([Fam. Code,] § 4320, subds. (b)-(l).)"[3] (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 302-304, fn. omitted, second italics added.)

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[3] Further statutory references are also to the Family Code unless otherwise stated. Section 4320 provides: "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. [¶ (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 of any history of domestic violence, as defined in Section 6211, between the parties, 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, [s]ection 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 4325. [¶] (n) Any other factors the court determines are just and equitable."

" 'In making its spousal support order, the trial court possesses broad discretion so as to fairly exercise the weighing process contemplated by section 4320, with the goal of accomplishing substantial justice for the parties in the case before it.' [Citation.] In balancing the applicable statutory factors, the trial court has discretion to determine the appropriate weight to accord to each. [Citation.] But the 'court may not be arbitrary; it must exercise its discretion along legal lines, taking into consideration the applicable circumstances of the parties set forth in [the statute], especially reasonable needs and their financial abilities.' [Citation.] Furthermore, *the court does not have discretion to ignore any relevant circumstance enumerated in the statute. To the contrary, the trial judge must both recognize and apply each applicable statutory factor in setting spousal support.* [Citations.] Failure to do so is reversible error." (*In re Marriage of Cheriton*, *supra*, 92 Cal.App.4th at p. 304, italics added; accord, *In re Marriage of Geraci* (2006) 144 Cal.App.4th 1278, 1297.)

If we were to hold, as Robert requests, that trial courts are obliged to terminate spousal support whenever a supporting spouse attains customary retirement age, we would effectively be requiring trial courts to consider a supporting spouse's age to the exclusion of any other relevant section 4320 factor. Such a holding would directly conflict with the statutory requirement that trial courts consider *all* relevant section 4320 factors when deciding spousal support matters. We, therefore, have no power or willingness to grant Robert's request.

In re Marriage of Reynolds (1998) 63 Cal.App.4th 1373 (*Reynolds*), upon which Robert relies, does not compel a different result. In *Reynolds*, husband retired at age 67

and moved to terminate or reduce wife's spousal support. (*Id.* at pp. 1375-1376.) The trial court reduced spousal support, but based the reduced amount on husband's earning capacity, rather than his actual earnings. (*Id.* at pp. 1376-1377.) The appellate court reversed the trial court's order, holding the trial court could not base spousal support on the husband's earning capacity instead of his actual earnings because to do so would require him to work well past "the 'generally accepted retirement age of 65.' " (*Id.* at p. 1377, fn. omitted.) The court explained, "The 'capacity to earn standard' may only be applied where there is evidence of the ability, opportunity, and willingness to work." (*Id.* at p. 1378.) The court further held "that no one may be compelled to work after the usual retirement age of 65 in order to pay the same level of spousal support as when he was employed." (*Ibid.*) Instead, when a supporting spouse has a "bona fide retirement," the trial court may consider the retirement a material change in circumstance warranting a modification of spousal support. (*Id.* at p. 1379.)

Reynolds is distinguishable from the instant case in three key respects. First, the trial court in the instant case did not rely solely on Robert's earning capacity to determine the modified support amount. Robert presented and the trial court considered Robert's actual earnings. Second, Robert was not fully retired. He continued to work and he intended to continue to work even if the trial court terminated spousal support. Third, the trial court did not maintain Jean's spousal support at the same level it had been, but reduced it by a substantial amount. Thus, despite Robert's contrary characterization, the instant case does not involve a trial court compelling a supporting spouse to work beyond customary retirement age to pay a supported spouse the same level of spousal support.

Moreover, nothing in *Reynolds* contravenes the trial court's statutory mandate to consider *all* relevant section 4320 factors. Instead, *Reynolds* recognized what other appellate courts have—that supporting spouses may legitimately retire at a customary retirement age and, if they do, their retirement may be a changed circumstance that may warrant modification of spousal support depending on their actual retirement earnings. (See, e.g., *In re Marriage of Dietz, supra*, 176 Cal.App.4th at p. 404, fn. omitted; *In re Marriage of Sinks* (1988) 204 Cal.App.3d 586, 594-595.)

Concomitantly, appellate courts have also recognized, as we do here, that "a supporting party's retirement or cessation of gainful employment does not automatically compel a finding of a sufficient changed circumstance to warrant a decrease or termination of a support obligation. Rather, whether modification is warranted is governed by the surrounding circumstances and the trial court's consideration of relevant statutory criteria." (*In re Marriage of Stephenson* (1995) 39 Cal.App.4th 71, 80-81, fn. omitted; see also e.g., *In re Marriage of Crobarger* (1986) 178 Cal.App.3d 56, 58-60 [husband's retirement and reduced income did not require termination of spousal support and the trial court acted within its discretion by reducing support instead].)

The trial court's handling of spousal support in the instant case was consistent with the above authorities. Robert, therefore, has not demonstrated the trial court abused its discretion by failing to terminate spousal support upon his attainment of customary retirement age. To the contrary, the trial court would have abused its discretion had it done as Robert requested. (See *In re Marriage of Melton* (1980) 107 Cal.App.3d 559, 566 [trial court abused its discretion by establishing a future termination date for spousal

support where the parties had a long marriage; the wife worked and her financial circumstances had improved since the parties' divorce, but she continued to require financial assistance to meet her needs; and husband, while able to retire, intended to continue working].)

II

Failure to Terminate or Further Reduce Spousal Support Because of the Parties' Respective Ages, Health, and Financial Condition

Robert alternatively contends the trial court erred by failing to terminate or further reduce spousal support because Jean was younger, healthier, and no longer needed spousal support. We disagree.

As previously discussed, " '[w]hether a modification of a spousal support order is warranted depends upon the facts and circumstances of each case, and its propriety rests in the sound discretion of the trial court the exercise of which this court will not disturb unless as a matter of law an abuse of discretion is shown.' [Citation.] An abuse of discretion occurs 'where, considering all the relevant circumstances, the court has exceeded the bounds of reason or it can fairly be said that no judge would reasonably make the same order under the same circumstances.' " (*In re Marriage of Olson* (1993) 14 Cal.App.4th 1, 7; accord, *In re Marriage of Tydlaska* (2003) 114 Cal.App.4th 572, 575.

Here, the trial court decided to substantially reduce, but not terminate, spousal support after considering the length of the parties' marriage, the marital standard of living and, among other facts, that: (1) Jean had improved her marketable skills and had the

potential for some investment income, (2) Robert continued to work, intended to continue to work, and did not claim he was unable to pay spousal support, and (3) both parties were aged and had health issues, although Robert's health issues were more significant. Robert does not dispute these considerations, which were not one-sided, were appropriate under section 4320. He also does not dispute the sufficiency of the evidence to support them.

Rather, Robert's arguments in effect ask us to review the evidence anew and independently determine whether to terminate or further reduce spousal support. However, "[w]e are neither authorized nor inclined to substitute our judgment for the judgment of the trial court. Where the issue on appeal is whether the trial court abused its discretion, the showing necessary for reversal is insufficient if it merely emphasizes facts which afford an opportunity for a different opinion." (*In re Marriage of Baker* (1992) 3 Cal.App.4th 491, 498.) As Robert has not demonstrated no other reasonable judge would have made the same order under the same circumstances, he has not shown the trial court abused its discretion in this case.

DISPOSITION

The trial court's December 23, 2010 order reducing monthly spousal support from $800 to $500 is affirmed. Respondent Jean Judd is awarded costs on appeal.

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McCONNELL, P. J.

WE CONCUR:

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NARES, J.

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O'ROURKE, J.