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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of FAE MICHIEL and
ROBERT WAYNE KUHLKEN.

FAE MICHIEL KUHLKEN,

Respondent,

v.

ROBERT WAYNE KUHLKEN,

Appellant.

D059295

(Super. Ct. No. D410231)

APPEAL from an order of the Superior Court of San Diego County, Robert C. Longstreth, Judge. Reversed and remanded.

In considering the modification of spousal support, the family court is statutorily prohibited from considering a subsequent spouse's income. (Fam. Code, § 4323, subd. (b).)¹ Here, the court violated the statute by considering the income of Robert Kulken's new wife in denying his request for the termination of his spousal support obligation to

¹ Further statutory references are also to the Family Code.

his ex-wife, Fae Michiel Kulken (Michiel). Accordingly, we reverse the order and remand the matter for a new hearing.

FACTUAL AND PROCEDURAL BACKGROUND

The parties separated in 1995, after a 28-year marriage. For temporary spousal support, the parties agreed Robert would pay Michiel \$6,200 per month.

In August 2002 a judgment of dissolution was entered, which incorporates the parties' marital settlement agreement (MSA). Under the MSA, Robert is obligated to pay Michiel \$3,500 per month in permanent spousal support. The MSA gives the court continuing jurisdiction to modify support "based on a substantial change in circumstances."

Robert owns two family businesses, Central Meat and Provision Company (Central Meat) and Southern California Vendor Services, Inc. (Vendor Services). Vendor Services is a spinoff of Central Meat, for the purpose of tax and pension planning. The MSA divided the parties' community property interests, in part by awarding Robert his shares in the businesses, and shares of Central Meat in Michiel's name; his interest in Central Meat's employment benefit association; one-half of his interest in Vendor Service's pension plan; one-half of an IRA account in his name; two other IRA's in his name; part of the amount Central Meat owed under promissory notes; and the sale proceeds from a residential property awarded him previously.

Michiel was awarded part of the amount Central Meat owed under the promissory notes; one-half of an IRA in Robert's name; three IRA accounts in her name; one-half of Robert's interest in Vendor Service's pension plan; and two condominiums in the Pacific Beach area.

The MSA states the \$3,500 in monthly spousal support was based on the following findings: Robert's monthly income was \$25,888, consisting of \$8,763 in salary, \$16,667 in bonuses, and \$458 in unearned income; Michiel's monthly income was \$1,442, consisting of \$400 in earned income and \$1,042 in unearned income. Additionally, the MSA credits her with \$3,200 in monthly income from the investment of her share of "retirement benefits and other investments" awarded under the MSA, totaling approximately \$962,797, assuming a 4 percent annual rate of return. The MSA states, "This finding . . . assumes that Michiel can begin receiving all retirement benefits awarded to her [now] without penalty." The spousal support award was also based on the parties' 1999 income and expense declarations, which showed Robert's monthly expenses were \$4,858, and Michiel's monthly expenses were \$6,536.59.

In July 2009 Robert filed an order to show cause (OSC) for the termination of spousal support, based on his reduction of monthly income and Michiel's increase in income because of social security. His declaration states he was then 67 years old, and as of the preceding January he reduced his work hours to 25 per week, and his salary to \$70,000 per year.

Robert's latest income and expense declaration lists monthly expenses of \$6,725. It also states his new wife contributed varying amounts to household expenses, and her monthly income from a pension was \$5,122. Robert's income dropped to \$11,684, consisting of \$5,833 in salary, \$2,335 in social security, \$2,511 in dividend and interest, and \$1,005 in trust income from his one-fifth interest of the Kulken Family Real Property Trust. It lists \$78,000 in cash, \$110,000 in stocks, bonds and other liquid assets, and \$3.5 million in other real and personal property.

Michiel argued against any reduction of support. She explained Robert's claim of diminished work hours was belied by pay stubs she received from him in informal discovery that showed he worked 80 hours every two weeks. Further, she pointed out that Robert did not mention bonuses he routinely received. Also, Michiel argued Robert's reduced hours, and potential retirement, did not indicate an inability to pay support because he owned two businesses with substantial revenue.

Michiel's latest income and expense declaration lists monthly expenses of \$6,866. It lists total monthly income of \$6,841, including \$3,500 in spousal support, \$862 in social security, \$1,666 in investment income (as opposed to the \$3,500 anticipated in the MSA), and \$813 on a Central Meat promissory note. It also claims the income is offset by a \$680 monthly loss on her rental condominium. It lists \$11,000 in cash, \$58,000 in stocks, bonds and other liquid assets, and \$2.2 million in other real and personal property.

In reply, Robert filed a declaration verifying he was working only 25 hours per week. He stated Central Meat was operating at a loss. He claimed Michiel's investments had grown to more than \$1.5 million, and with social security, and exclusive of spousal

support, she should have an income of approximately \$9,833 per month, which would more than cover her expenses.

A hearing was held over two days in July and August 2010. Robert presented an expert on the best use of Michiel's rental condominium. Michiel presented an expert witness on a real estate issue pertaining to Central Meat's lease of property from the Kuhlken trust, of which Robert is a beneficiary.

Michiel testified she chose not to withdraw additional funds from assets she received under the MSA because, "I'm trying to have it earn as much as possible to last as long as possible," "I'm trying to be financially prudent in the way I live," and "it would be nice to leave my kids something." She testified her investments had grown an average of 3.5 percent a year since the MSA was signed.

Robert testified he and the parties' son were the operators of Central Meat, and Robert was the principal shareholder. Central Meat operated at a loss in 2008 and 2009, but he received stock dividends both years, and he and his son decided the amount of the dividends and the amount of his salary. He did not fear Central Meat would go out of business, and his companies held approximately \$1.5 million in retained earnings. He estimated Central Meat was worth approximately \$1.5 million, but he had no interest in selling it because he intended it to be a legacy for the parties' son. He was not withdrawing any funds from his retirement accounts, although he could do so without penalty.

The court determined Robert did not meet his burden of proof. The court noted Robert's new wife was contributing \$5,100 per month toward his expenses. The court

rejected Robert's argument that because of his drop in salary he would have to take withdrawals from his investments to continue the support payments to Michiel. The court stated, "I went through looking at the expenses and contributions to expenses from his wife and his income and concluded that I don't think that is the question."

Further, the court was not persuaded that Michiel's receipt of social security, or Robert's decrease in salary because of a cut back on his hours, constituted a *substantial* change of circumstances. Rather, the court found that since the parties were nearing retirement age when the MSA was signed, they must have contemplated that these types of expected changes would not be a substantial change of circumstances. Further, the court noted Robert had control over his businesses and substantial business assets. The court issued written findings, including the finding that Robert's "expenses are \$6,700 a month and his new wife is contributing \$5,100 per month."

DISCUSSION

I

"The income of a supporting spouse's subsequent spouse or nonmarital partner shall not be considered when determining or modifying spousal support." (§ 4323, subd. (b).) "Before . . . section 4323, subdivision (b) became effective in 1994, the prevailing approach was that the courts were allowed to consider a subsequent spouse's income in determining whether to modify spousal support." (*In re Marriage of Romero* (2002) 99 Cal.App.4th 1436, 1440 (*Romero*).) "In enacting [this] amendment to . . . section 4323, the Legislature stated its clear public policy against holding new spouses financially responsible for supporting former spouses." (*Romero, supra*, at p. 1446.)

"[T]he obligor's remarriage or nonmarital cohabitation might enhance his or her ability to pay spousal support to the extent the new mate income helps defray the obligor's living expenses, thus increasing the obligor's net income base. Nonetheless, by enacting [section 4323, subdivision (b)], the Legislature intended to exclude both direct *and indirect* consideration of new mate income in the spousal support equation—without exception." (Hogoboom and King, Cal. Practice Guide: Family Law (The Rutter Group (2011) ¶ 17:200.1, p. 17-52, citing *Romero, supra*, 99 Cal.App.4th at p. 1443.)

The court erred as a matter of law by considering the income of Robert's new wife in denying his request for modification of spousal support. Thus, we are constrained to reverse the order and remand the matter for a new hearing. (*Romero, supra*, 99 Cal. App.4th at p. 1446.)²

II

Michiel contends that given the totality of evidence, it is unlikely the court relied on the income of Robert's new wife. Michiel asserts the court "specifically noted that Robert's income alone was sufficient to cover his own expenses and continue paying spousal support." Her citation to the reporter's transcript, however, does not support the assertion. To the contrary, the court stated Robert "had expenses of [\$]6[,]8[00]. His

² To avoid an inequitable result, on remand the court "must not only exclude the new spouse's income, but also the additional expenses resulting from the remarriage. [¶] In other words, the court must consider only husband's part of the shared expenses." (*Romero, supra*, 99 Cal.App.4th at p. 1445.)

wife has an income of [\$]5,000. He is making [\$]10[,000] and owes [\$]3[,5[00]. Doing the math that doesn't necessarily mean he has to cash in retirement assets to do that." Moreover, the court's written findings of fact include the new wife's income. It appears likely that the court did rely on his new wife's income.

Additionally, Michiel suggests Robert invited the error because he "injected his new wife into the equation" by stating her income in his income and expense declaration. The standard form for the declaration, however, required him to list the name of any person living with him, the person's gross monthly income, and whether the person contributed to household expenses. This information is germane under section 4323, subdivision (a)(1), which provides "there is a rebuttable presumption, affecting the burden of proof, of decreased need for spousal support if the party is cohabiting with a person of the opposite sex." This provision is inapplicable to Robert because he is the supporting spouse.

It was Michiel who argued during closing that \$5,100 was available to Robert from his new wife's income. As a matter of law, however, the court could not properly consider the income.³

³ Given our holding, we do not reach Robert's alternative argument the court abused its discretion by not finding a substantial change of circumstances.

DISPOSITION

The order is reversed. The matter is remanded to the trial court for a new hearing.
Robert is entitled to costs on appeal.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

HALLER, J.