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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of AKIKO RAND and  
FREDERICK RAND.

AKIKO MORIMOTO,

Respondent,

v.

FREDERICK RAND,

Appellant.

D061912

(Super. Ct. No. D469703)

APPEAL from an order of the Superior Court of San Diego County, Lorna A.

Alksne, Judge. Affirmed.

Stephen Temko for Appellant.

Garret C. Dailey for Respondent.

Frederick Rand (Rand) appeals an order increasing the spousal support he is obligated to pay to his former wife, Akiko Morimoto (Morimoto). Rand contends the

court abused its discretion by modifying the spousal support award because Morimoto did not demonstrate a material change of circumstances. We affirm.

### BACKGROUND

The parties separated in April 2002 after a 14-year, eight-month marriage. The court entered a judgment of dissolution in November 2004. The incorporated May 2004 marital settlement agreement (MSA) set forth provisions regarding spousal support, child support and custody of the parties' then 13-year-old son and eight-year-old daughter.

The MSA required Rand to pay Morimoto \$2,400 per month in spousal support and further provided: "Wife shall make her best efforts to finish her academic program in nursing by June 2008. She will make her best efforts to obtain employment by December 2008. Spousal support shall be reduced to zero as of June 30, 2009, or one month after Wife commences employment, whichever occurs first. However, the Court shall thereafter reserve jurisdiction to modify Wife's spousal support upward for good cause shown upon the hearing of a properly-filed motion." The spousal support provision was based on Rand's employment and \$16,916 gross monthly income; Morimoto's lack of earned income and status as a student; the parties' expenses; their equal time with their children; and the income tax consequences of the spousal support award.

The MSA provided for joint legal and physical custody of the children and equal time for each parent. Rand was required to pay Morimoto a total of \$2,400 per month as child support. The support obligation for a child was to cease when that child turned 18 years old or became emancipated or until further court order.

In April 2008, the parties' son turned 18 years old. In May, Morimoto began working as a registered nurse. Later that month, the court entered a stipulated order requiring Rand to pay Morimoto \$1,600 per month for the support of their daughter beginning on July 1. There were no further orders regarding child or spousal support until the order that is the subject of this appeal. Under the terms of the MSA, spousal support was reduced to zero on June 1, one month after Morimoto became employed.

In 2010, Morimoto sought modification of the child custody, child support and spousal support provisions. Rand opposed the request. The parties resolved the custody issue by a stipulation allowing Rand a 16 percent timeshare with their daughter. A hearing on the remaining issues took place in May and June 2011.

Morimoto's most current income and expense declaration showed approximate monthly earnings of \$5,800; monthly investment income of \$600; monthly expenses of \$13,451 plus credit card payments; and assets of slightly more than \$1 million. The court found her current earnings were approximately \$5,800 and she had other income of \$934.<sup>1</sup>

Rand's most current income and expense declaration showed approximate monthly earnings of \$18,569 and \$5,000 in monthly bonuses; \$1,293 monthly in investment income; \$145 monthly in other income; monthly expenses of \$14,682; and assets of \$2,955,000. The court additionally imputed \$4,783 in investment income to Rand, based

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<sup>1</sup> The nature of this other income is unclear; it may be related to Morimoto's former employer's contribution to a retirement account. In any event, no one challenges the amount.

on the uncontroverted evidence of Morimoto's expert (*In re Marriage of Destein* (2001) 91 Cal.App.4th 1385), and found Rand had assets worth more than \$3,880,000.<sup>2</sup>

In November 2011, the court ordered child support of \$2,519 beginning in September 2010 and spousal support of \$3,000 beginning in December 2010. In January 2012, the court issued its statement of decision.

## DISCUSSION

"Spousal support is governed by statute. [Citations.] In ordering spousal support, the trial court must consider and weigh all of the circumstances enumerated in [Family Code section 4320<sup>3</sup>] to the extent they are relevant to the case before it." (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 302, italics omitted.) "Modification of a spousal support order may be made only on a showing of a material change in circumstances after the last order. [Citation.] Consequently, 'a modification order must be based on current facts and circumstances.' [Citation.] The moving party has the burden of showing a material change of circumstances since the last order was made. [Citation.]" (*In re Marriage of Tydlaska* (2003) 114 Cal.App.4th 572, 575.) "'Change of circumstances' means a reduction or increase in the supporting spouse's ability to pay and/or an increase or decrease in the supported spouse's needs. It includes all factors affecting need and the ability to pay." (*In re Marriage of West* (2007) 152 Cal.App.4th 240, 246.) "In exercising discretion whether to modify a spousal support order, "the court considers the

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<sup>2</sup> Evidence from Morimoto's expert and Rand's own testimony showed Rand had assets worth more than stated in his income and expense declaration.

<sup>3</sup> All further statutory references are to the Family Code.

same criteria set forth in . . . section 4320 as it considered when making the initial order . . . . [Citation.]" ' [Citation.]" (*In re Marriage of Shaughnessy* (2006) 139 Cal.App.4th 1225, 1235.) We review a modification order for abuse of discretion. (*Ibid.*; *In re Marriage of Tydlaska, supra*, at p. 575.)

Here, the spousal support provision in the 2004 MSA was based on three of the statutory factors: "[t]he extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account . . . [¶] . . . [t]he marketable skills of the supported party; . . . 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" (§ 4320, subd. (a)(1)); "[t]he 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" (§ 4320, subd. (c)); and "[t]he immediate and specific tax consequences to each party" (§ 4320, subd. (j)). The MSA expressly authorized the court to increase spousal support, and the 2012 statement of decision included a detailed discussion of virtually all of the statutory factors.<sup>4</sup> Of particular importance to the court was a balancing of the hardships to each party (§ 4320, subd. (k)) and other factors the court deemed "just and equitable" (§ 4320, subd. (n)). Under section 4320, subdivision (n), the court found Morimoto acted in good

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<sup>4</sup> The only statutory factor the court did not discuss was "[t]he extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party." (§ 4320, subd. (b).)

faith and had done extraordinarily well in obtaining her nursing degree and immediately obtaining fulltime employment; she did not expect any significant salary increases in the near future; she was not participating in a retirement plan; and without spousal support, she could not maintain the standard of living established in the last few years of marriage and would be unable to stay in her present home when child support terminated.

Morimoto obtained employment seven months earlier than the MSA contemplated. By the time of the hearing, her monthly earnings had increased from zero to more than \$5,000. Rand's earnings had increased from approximately \$16,000 to more than \$23,000 monthly. Rand's assets were worth more than three times Morimoto's and his investment income was more than six times hers. Their respective expenses were roughly equal to each other and equal to their expenses during the last few years of their long-term marriage.<sup>5</sup> Thus, since the date of the MSA, the discrepancy in the parties' income had widened while their expenses had stayed the same, leaving Rand easily able to maintain the marital upper-middle-class standard of living they had achieved as a couple, and leaving Morimoto unable to come close to maintaining that standard. (§ 4320, subs. (a), (d).) This constituted a material change in circumstance. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 482.)

The court did not abuse its discretion by increasing spousal support.

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<sup>5</sup> Rand argues Morimoto provided no credible evidence of her expenses at the time of the MSA or of her current expenses. Credibility is an issue for the trial court, and we will not second guess the court's implied finding that Morimoto's evidence was credible. (*In re Marriage of Greenway* (2013) 217 Cal.App.4th 628, 652.)

DISPOSITION

The order is affirmed. Appellant to pay respondent's costs on appeal.

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HALLER, J.

WE CONCUR:

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NARES, Acting P. J.

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O'ROURKE, J.