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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of CLAYTON P. and DAWN M. BOQUET.	
CLAYTON P. BOQUET, Appellant, v. DAWN M. BOQUET, Respondent.	D070153 (Super. Ct. No. D506961)

APPEAL from a judgment of the Superior Court of San Diego County, Harry L. Powazek, Judge. Affirmed.

Law Office of Patrick L. McCrary and Patrick L. McCrary for Appellant.

Law Office of Anita J. Margolis and Anita J. Margolis, Law Offices of Mary A. Lehman and Mary A. Lehman for Respondent.

Clayton Boquet appeals a judgment following the court's ruling granting his former wife Dawn's[1] motion for enforcement of a stipulation and order. Clayton contends the court erroneously (1) denied his request for a continuance; (2) found that Dawn was not previously given a warning under Family Code[2] section 4330 and *In re Marriage of Gavron* (1988) 203 Cal.App.3d 705 (*Gavron*); (3) considered their child's emancipation as a change in circumstance, and declined to find a change in Dawn's need for spousal support under section 4320; and (4) added implied terms into the marital settlement agreement and modified the parties' adjudicated property rights and obligations. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Clayton and Dawn were married in December 1990 and separated in November 2007. They resolved the issues of their dissolution of marriage in a May 2008 stipulated judgment awarding Clayton real property located on New Park Terrace, San Diego, and awarding Dawn real property located on Pleasant Ridge, San Diego. Clayton agreed to pay $118,107 and Dawn agreed to pay $9,017.50 on a Wells Fargo home equity line of credit (HELOC) that was in both their names and that was secured by Dawn's home. Clayton also agreed to pay Dawn $2,130 in monthly spousal support starting in January 2003. At some point before May 2011, the parties orally agreed that the HELOC would be paid off within three years.

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1 We refer to the parties by their first names to avoid confusion, and intend no disrespect.

2 Statutory references are to the Family Code unless otherwise stated.

By stipulation and order filed in August 2013, Clayton agreed to refinance the HELOC into his name only and pay off or otherwise terminate and discharge Dawn's liability with respect to its current outstanding balance of $123,000.00. Clayton agreed to pay at least $600 monthly towards the balance and, when the HELOC converted to an amortized loan in December 2014, to pay at least the minimum monthly amount due. The parties agreed: "The HELOC shall be, and remain, frozen so that no further amounts may be taken against, or drawn from, such account until it is paid off, after which the HELOC account shall be closed, and each party agrees not to borrow further sums from the HELOC."

In February 2015, Dawn moved the family court for enforcement of the stipulation and order, requesting a modification of spousal support payments in a "reasonable" amount. She also requested an order that Clayton pay at least an additional $1,727 monthly on his HELOC payments. She stated in a declaration that Clayton had not timely made his HELOC payments, and he had withdrawn $5,500 against the HELOC account without her consent. She explained, "After our son turned 18 years old in August 2011, Clayton's obligation to pay child support terminated. Thus, Clayton's financial liabilities decreased by $1,727 per month as of August 2011. At Clayton's request, I did not seek an increase in my spousal support after my child support payments ended to enable Clayton to pay down greater amounts monthly on the HELOC, which he has since failed to do. Our son . . . is a full time college student, and I pay his car insurance, car repairs, cell phone, food, clothing and any additional expenses not covered by his scholarship. In addition, I also pay approximately $200 per month towards the expenses

of our grandson . . . as shown in my income and expense declaration filed herewith. Despite the termination of Clayton's child support obligation, and notwithstanding the stip[ulation and] order requiring Clayton to pay off the HELOC as soon as feasible, he has made no effort to increase his payments above the minimum due monthly since his child support obligation terminated, nor has he provided any financial support to our son or grandchild." Dawn added, "As indicated above, Clayton has repeatedly made late payments on the HELOC, including his payment due in January 2015, in breach of his obligation under the stip[ulation and] order to make timely payments. This has further damaged my credit." (Some capitalization omitted.)

At a July 17, 2015 hearing, the family court explained to the parties that many of the issues raised in their papers required it to make credibility determinations; therefore, it preferred to hear oral testimony instead of ruling on the papers submitted. Clayton was self-represented and sought a hearing that day. Accordingly, the court commenced a review of the documents submitted, but ran out of time. It scheduled a full day of proceedings for September 29, 2015, warning the parties it would not grant any continuances: "In an abundance of caution, I'm going to order the following: I want a position statement from both parties as to each of the issues. . . . No further continuances."

On August 26, 2015, Clayton applied ex parte for a continuance, arguing he had "propounded multiple items of discovery for which no proper response has been made" and would "seek to compel responses in accordance with the Civil Discovery Act. These responses are necessary to bring all facts to the attention of the court." He also sought an

evidentiary hearing, stating "his former waiver was not a knowing waiver of that proceeding." The court summarily denied the application as lacking good cause.

During the September and October 2015 long cause hearing, Clayton's attorney cross-examined Dawn. Clayton called one witness, who owned a process serving company that Clayton had hired to verify if Dawn was cohabiting with somebody. Following the hearing, the court ruled: "I'm making a finding that there is not a breach of fiduciary duty. The breach of fiduciary ends at the time the marital status was terminated. That was in 2010. I am making a finding that there is breach of good faith in dealing and fairness. And I'm doing that just looking at the breach of the stipulation alone. The . . . $5,500 [Clayton] took, I don't think was in good faith." The court added: "[Dawn] has been more than reasonable, quite frankly, especially regarding this HELOC. You know, she had the ability to do a number of things, especially when [Clayton] withdrew the $5,500. She didn't. In fact, she entered into a stipulation that provided some certainty and additional time for [Clayton], which he violated—violated clearly."

At the end of the hearing, the court provided Clayton an opportunity to file additional documents regarding his efforts to address his obligations regarding the HELOC. Clayton did not file further documents.

On February 11, 2016, the court ruled regarding the HELOC: "[Clayton] is responsible for $24,809 which was diverted by [him] to prepare his taxes from the sale of the condo, plus $5,500 from the post-separation withdrawal by [Clayton] from the HELOC. Based on documents provided to the court and per the previous stipulation, [the] Court orders [Clayton] to refinance the HELOC within 45 days." As stated in an

attachment to findings and order after hearing dated March 25, 2016,[3] the court ordered as follows: "Pending pay off of the HELOC, [Clayton] is ordered to cooperate with refinancing the HELOC to a five-year term amortized loan with Wells Fargo Bank within 45 days of this hearing, or no later than [March 27, 2016]. Specifically, [Clayton] shall execute and notarize any and all required documents as may be necessary or expedient to facilitate such refinance. [Clayton] shall be required to pay, and remain current, on all monthly installments due on such refinanced HELOC." The court modified spousal support to $4,500 monthly, retroactive to March 2015.

DISCUSSION

I.

The Court Did Not Err by Denying the Continuance

Clayton contends that under section 218,[4] the court was required to automatically grant his August 26, 2015 request for a continuance so that he could "present his case and defend himself against the allegations of Dawn he was entitled to discovery on a broad spectrum of issues that were before the court."

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3 We grant Clayton's motion to augment the record filed March 6, 2017.

4 Section 218 states: "With respect to the ability to conduct formal discovery in family law proceedings, when a request for order or other motion is filed and served after entry of judgment, discovery shall automatically reopen as to the issues raised in the postjudgment pleadings currently before the court. The date initially set for trial of the action specified in subdivision (a) of Section 2024.020 of the Code of Civil Procedure shall mean the date the postjudgment proceeding is set for hearing on the motion or any continuance thereof, or evidentiary trial, whichever is later."

"Trial courts generally have broad discretion in deciding whether to grant a request for a continuance." (*Freeman v. Sullivant* (2011) 192 Cal.App.4th 523, 527; see *In re Marriage of Falcone* (2008) 164 Cal.App.4th 814, 823 ["[r]eviewing courts must uphold a trial court's choice not to grant a continuance unless the court has abused its discretion in so doing"].)

Clayton's claim lacks merit. In July 2015, Clayton declared his readiness to begin the proceedings and they started that day. That day, the court warned the parties it would grant no continuances. Moreover, at the subsequent hearing, Clayton's counsel took the opportunity to cross-examine Dawn, and he also presented testimony on an issue affecting the modification of spousal support: whether Dawn was cohabitating with someone else. On this record, Clayton has not demonstrated an abuse of discretion.

However, even if the court erred in denying Clayton's request for a continuance, he has not demonstrated any prejudice by pointing out what evidence he could have obtained if the court had granted it. (See Cal. Const., art. VI, § 13 [judgment may not be reversed on appeal unless error caused miscarriage of justice]; see also Code Civ. Proc., § 475 [no judgment shall be reversed unless error is prejudicial, appealing party suffered substantial injury, and different result would have been probable].)

II.

The Court's Error Regarding the Gavron *Warning Was Harmless*

Clayton contends the court erroneously concluded that Dawn was not timely given a *Gavron* warning, when in fact the May 23, 2008 judgment included the following preprinted language: "**NOTICE**: It is the goal of this state that each party will make

reasonable good faith efforts to become self-supporting as provided for in Family Code section 4320. The failure to make reasonable good faith efforts may be one of the factors considered by the court as a basis for modifying or terminating spousal or partner support." Clayton argues, "It is impossible to determine the weight that the court gave to the lack of the warning under [section] 4330. The matter must be returned to the trial court in order to weigh this factor among all other factors under [section] 4320."

The court told Dawn at a proceeding in which it ruled on her motion: "I'm also giving you a *Gavron* warning, ma'am. It wasn't in the marital settlement agreement. It should have been. I'm going to let you know that you have the obligation to become as self-supporting as possible under the circumstances. I already made a finding you're doing that, but do you understand that?" Dawn answered in the affirmative.

Dawn argues that any error was harmless because the court reiterated the warning and found that she had been complying with the warning to become self-sufficient. We conclude that a warning in the marital settlement agreement did not matter as the court made a factual finding Dawn was making efforts to be self-supporting. The transcript of the hearing shows that the court elected to increase spousal support based on its application of other factors, rather than on anything related to a *Gavron* warning.

III.

Changed Circumstances Supporting Modified Spousal Support

Clayton contends Dawn's motion seeking a modification of spousal support was brought long after their child was emancipated in August 2011; therefore, under the six-month time limit set forth in section 4326, the motion was untimely and the court could

not properly consider it as a changed circumstance. He also argues the court erroneously failed to make a finding that Dawn's needs were no longer met by the September 2009 spousal order.

In granting Dawn's motion regarding spousal support, the family court stated: "There's been a substantial change of circumstances for a number of reasons. One, the child has emancipated. More importantly, each party' s income has changed since the time of the previous court order. An estimation, [Clayton's] income has increased at least $7,000 a month. [Dawn's] has also increased maybe two grand, $2,500 a month. But I don't have to make a change of circumstances findings because there's no findings under [section 4320]. So this is a de novo finding. But I wanted the parties to understand that the incomes have changed."

The court continued: "So I'm making the following findings: As to spousal support specifically for [Dawn], she's single and one. Her gross monthly self-employment income is $6,870. She has a health insurance cost of $215. She has a mortgage interest deduction and property tax deduction of $1,286. She has union dues of $100. That would give her a net monthly adjusted income of $2,836." The court added: "For [Clayton], he has gross monthly W-2 wages, which includes a bonus income of $21,009. . . . He has health insurance costs of $493. He has a property tax deduction of $300. He has an estimated mortgage interest deduction of $1900. His tax status would be married filing jointly and four. That would result in a net monthly adjusted income of $16,670. [¶] Spousal support is set in the amount of $4,500 effective March [1, 2015]."

"Whether 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. [Citations.] Where [a] statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision." (*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358.)

We conclude that the family court did not abuse its discretion in modifying spousal support. It took into account reasonable factors, including the parties' income changes and their current expenses. It noted Dawn was making efforts to comply with the *Gavron* warning to become self-supporting. The court noted that the initial finding supporting the spousal agreement was not made under section 4320, therefore, it did not need to find changed circumstances. Dawn's request for enforcement of the order mentioned the child's emancipation, but just to show that at that time Clayton had requested she not seek increased spousal support, and promised that in turn he would pay down the HELOC loan. Clayton admitted at trial that he did not immediately increase his payments towards the HELOC after the child's emancipation. Although the court mentioned the child's emancipation as a changed circumstance that it considered, it disclaimed reliance on it. Likewise, the court considered that the parties' incomes had increased, but it did not focus on that. Rather, it acted under section 290 as a court sitting in equity; it had discretion to modify the spousal agreement in a reasonable manner to

remedy what it deemed was Clayton's lack of good faith and fair dealing. Clayton does not argue the modification was inequitable in that regard. Family courts always have jurisdiction to enforce orders and judgments. (§ 290.) The court did not abuse its discretion. Because neither Dawn nor the court relied on the child's emancipation, they were not bound by the six-month limit set forth in section 4326.

IV.

The Court Did Not Add Implied Terms Into the Marital Settlement Agreement

Clayton argues the family court erred by ordering him to refinance the HELOC within 45 days or alternatively pay off the loan within five years. He argues the court misstated the parties' understanding that the HELOC would be substantially paid off within three to five years of the settlement agreement's execution, but in any event, their agreement was not enforceable as a violation of the statute of frauds: "However, this was an oral agreement and was not reduced to writing. The agreement dealt with real estate and a loan secured by real estate that may take in excess of one year to execute. Such an agreement is not enforceable as it is a violation of the statute of frauds codified in Civil Code section 1624." He further argues, "What is in dispute between the parties is how quickly Clayton is required to pay off the balance of the HELOC. The judgment provides no terms with respect to any limitation on the amount of time necessary to pay off the HELOC, other than what would be included in the terms of the loan for the HELOC."

The statute of frauds is treated as a rule of evidence that may be forfeited if not properly raised. (*In re Marriage of Benson* (2005) 36 Cal.4th 1096, 1104, fn. 3; *Howard v. Adams* (1940) 16 Cal.2d 253, 257-258; see 1 Witkin, Summary of Cal. Law (10th ed.

2005) Contracts, § 347, p. 394 ["The statute of frauds must ordinarily be asserted in the lower court, and cannot be raised for the first time on appeal"].) The California Supreme Court explained, "it is settled that . . . a defendant waives his right to rely upon any provisions of the statute of frauds [citation] by failing to (a) demur to the complaint, (b) object to the introduction of testimony to prove the oral agreement at the time of trial, or (c) make a motion to strike such testimony." (*Pao Ch'en Lee v. Gregoriou* (1958) 50 Cal.2d 502, 506.)

Clayton does not point to the portion of the record where he raised the statute of frauds matter in the family court, and we have not found it in our independent search. Accordingly, he may not raise it on appeal for the first time, and we treat the matter as forfeited. But forfeiture aside, the family court did not err in finding that separate from the parties' oral agreement regarding a three-year time frame for Clayton to pay off the HELOC, the parties' original marriage dissolution agreement required them to resolve the HELOC issue "as soon as feasible." That Clayton caused the parties to be bound by a 30-year loan is manifestly not in keeping with that provision for early resolution of the HELOC issue. Therefore, the court's decision to require Clayton to pay off the HELOC within five years satisfies the parties' marriage dissolution agreement.

We conclude that the family court's order regarding the HELOC was not a misinterpretation of the parties' stipulation; rather, the court merely sought to enforce the terms of the stipulation that Clayton had repeatedly violated by delaying his payments, by borrowing money from the HELOC account without Dawn's permission, and by failing to convert the HELOC loan to a 5-year loan when it became amortized, despite the bank

creating favorable conditions for him to do so. As the court pointed out, Dawn had complied with her obligations under the stipulation, but Clayton's noncompliance had prejudiced Dawn. The record sufficiently supports the court's ruling.

VI.

Dawn's Attorney Fees Request

Dawn requests that we award her attorney fees on appeal under section 2030. Clayton correctly responds that Dawn's request for attorney fees on appeal must first be made in the family court. (§ 2030, subd. (c); *In re Marriage of Schofield* (1998) 62 Cal.App.4th 131, 140-141; *In re Marriage of Brown* (1995) 35 Cal.App.4th 785, 791-792, fn. 8.) The family court's February 19, 2016 order shows that it denied Dawn's request for attorney fees without prejudice. Accordingly, we will not further address the issue.

Dawn also requests that we award her attorney fees under section 271 as a sanction for Clayton filing this appeal. Her argument in its substantive entirety states: "Clayton's brief mischaracterizes the trial court's rulings and fails to provide the record and/or record citations in order to fabricate grounds for appeal that do not truly exist. Dawn contends the appeal was taken merely to extend the dispute and cause her to incur fees which, unlike Clayton, she can ill afford." Dawn does not cite to the record or case law to support her argument. The absence of cogent legal argument or citation to authority allows this court to treat the contentions as forfeited. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830; accord, Cal. Rules of Court, rule 8.204(a)(1)(C) [requiring each point in a brief be supported by citation to the record].)

Although we have found Clayton's individual claims meritless, we cannot conclude his appeal is frivolous. Accordingly, we decline the invitation to impose sanctions under section 271.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.