Filed 3/18/19 Braun v. Faciane CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CORINNE NICOLE BRAUN, Respondent, v. KIRBY FACIANE, Appellant.	D073658 (Super. Ct. No. DN171322) ORDER MODIFYING OPINION AND DENYING REHEARING **NO CHANGE IN JUDGMENT**

THE COURT:

It is ordered that the opinion filed on February 22, 2019 be modified as follows:

1. On page two, the fifth sentence of the first paragraph beginning "In April 2016" is deleted and the following sentence is inserted in its place:

> In April 2016, following a five-day trial at which both parties presented substantial testimony and evidence, the court renewed the restraining order against Faciane on a permanent basis. (See Fam. Code, § 6345, subd. (a).)

2. On page three, the third sentence of the second paragraph beginning "He commented," delete the words "issuance of the" and insert "basis for the existing" so that the sentence reads:

> He commented, quite appropriately, that he was not going to "revisit" or "second guess" the basis for the existing restraining order, in an effort to focus the parties on the issue most relevant to the hearing—the evidence of changed circumstances.

3. On page four, the third sentence of the first paragraph beginning "The real dispute here" is deleted and the following sentence is inserted in its place:

> The real dispute here is whether the changes identified by Faciane—his decision to stop consuming alcohol and his educational efforts regarding domestic violence—were sufficient to require dissolving a restraining order originally issued after a hearing in December 2012 and renewed in April 2016.

There is no change in judgment.

Appellant's petition for rehearing is denied.

McCONNELL, P. J.

Copies to: All parties

Filed 2/22/19 Braun v. Faciane CA4/1 (unmodified opinion)

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CORINNE NICOLE BRAUN, Respondent, v. KIRBY FACIANE, Appellant.	D073658 (Super. Ct. No. DN171322)

APPEAL from an order of the Superior Court of San Diego County, James A. Mangione, Judge. Affirmed.

Slattery Law Firm and Thomas W. Slattery for Appellant.

Gower Law & Mediation and Michael Gower for Respondent.

Kirby Faciane appeals from an order denying his request to dissolve a restraining order and raises two issues here. First, he contends the trial court improperly failed to consider facts relevant to the prior order in deciding whether there was a material change in the circumstances since the restraining order was entered. Second, he argues the court

improperly considered inadmissible evidence in its ruling. Neither argument persuades and, accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Braun and Faciane were married for four years and have one child together. In August 2012 Braun initiated divorce proceedings, and in December 2012 the court issued a one-year restraining order against Faciane. Braun then sought to extend the order permanently. She initially prevailed at the trial court in a decision that was later reversed and remanded for a new hearing. (*In re Marriage of Braun and Faciane* (July 31, 2015, D065568) [nonpub. opn.].) In April 2016, following that hearing, the court issued a permanent restraining order against Faciane after a five-day trial at which both parties presented substantial testimony and evidence.

In June 2017, Faciane filed a request to dissolve the restraining order on the basis of a material change of circumstances upon which the injunction was granted. Following a hearing in December 2017, the court denied the request, finding no material change.

DISCUSSION

A. *The Trial Court Did Not Err in Considering Evidence of a Material Change in Circumstances.*

A domestic violence restraining order may be modified or terminated by court order where the moving party shows a material change in the facts, or the law, or that the ends of justice would be served by granting the motion. (See Code of Civ. Proc., § 533.)

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1 We grant Respondent's request for judicial notice of previous filings and orders pursuant to Evidence Code sections 451-453, 459 and California Rules of Court, rule 8.252.

Faciane argues that the trial court failed to consider the facts that contributed to the previous order and thus could not properly compare them against the new circumstances. In other words, because the court "fail[ed] to revisit the reason why the restraining order was ordered, the trial court prejudiced Faciane by preventing him from demonstrating a 'material change in facts upon which the injunction or temporary restraining order was granted' . . . ." We review denial of a motion to dissolve a restraining order for abuse of discretion. (See *Salazar v. Eastin* (1995) 9 Cal.4th 836, 850.)

The record here shows that the court considered all relevant evidence. At the beginning of the hearing the judge stated that he had "read through everything [Faciane's counsel] has submitted." He commented, quite appropriately, that he was not going to "revisit" or "second guess" the issuance of the restraining order, in an effort to focus the parties on the issue most relevant to the hearing—the evidence of changed circumstances. Despite Faciane's insistence otherwise, such comments cannot be reasonably interpreted as suggesting that the court failed to take into account the facts upon which the prior order was granted. Instead, they reflect responsible, efficient courtroom management.

Faciane faults the trial court for "absurdly focusing on 'new facts' " rather than deciding whether there had been a material change of circumstances. He fails to recognize that new facts—something significantly new or different—are necessary to establish a *material* change. The real dispute here is whether the changes identified by Faciane—his decision to stop consuming alcohol and his educational efforts regarding domestic violence—were sufficient to require dissolving a restraining order issued 18

months earlier. The trial court did not abuse its discretion in deciding that any change was not material.

B. *The Trial Court Did Not Base Its Ruling On Braun's Counsel's Improperly-Argumentative Declaration.*

Faciane also argues the trial court erred by improperly considering inadmissible evidence. Specifically, he contends that several parts of Braun's counsel's declaration were inadmissible on various grounds. Faciane made these objections before the hearing, but the court did not address them, rendering them presumptively overruled under California Rules of Court, rule 5.111(c)(2). On the other hand, we also presume that the trial court relied only on admissible evidence in its analysis, and "[o]nly proof that [inadmissible] evidence actually figured in the court's decision will overcome" this presumption. (*In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1526). We review the trial court's evidentiary rulings for abuse of discretion. (*In re Marriage of Dupre* (2005) 127 Cal.App.4th 1517, 1525).

First, we agree with Faciane that Braun's counsel's declaration was highly argumentative and therefore improper. (See, e.g., *In re Marriage of Heggie* (2002) 99 Cal.App.4th 28, 30, fn. 3.) Nevertheless, Faciane's argument fails because there is no evidence, apart from its bare presence in the record, that the court based its ruling on any part of the improper declaration or otherwise took it into account. The record shows the court rejected his request to dissolve the restraining order because he failed to show a material change of circumstances since the prior order, not because of any aspect of Braun's counsel's declaration. More importantly, while an argumentative declaration is

improper, there is nothing inherently prejudicial about a court receiving a party's argument. Had it been done properly, the judge would have read the same argument in the memorandum of points and authorities rather than in the declaration.[2]

DISPOSITION

The order is affirmed. Braun is entitled to costs on appeal.

DATO, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.

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2 We decline to issue sanctions against Faciane.