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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of BETTY TATE-
SYLVESTER and PATRICK
SYLVESTER.

BETTY TATE-SYLVESTER,

Respondent,

v.

PATRICK SYLVESTER,

Appellant.

E053783

(Super.Ct.No. IND092989)

OPINION

APPEAL from the Superior Court of Riverside County. J. Michael McCoy,
Judge. Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Patrick Sylvester, in pro. per., and Jason E. Turner for Appellant.

Sheila A. Williams and Laura J. Fuller for Respondent.

In a dissolution of marriage proceeding, Patrick Sylvester, husband, made an application for an order to vacate an order filed on May 21, 2009, requiring Patrick to pay Betty Tate-Sylvester, Betty, \$124 per month as child support for two children, with

spousal support set at zero commencing April 15, 2009.¹ Patrick's motion to vacate was made more than six months after the support order. The grounds asserted by Patrick for vacating the 2009 spousal support order were that the prior order was obtained by fraud and perjury, but the information on which he relied was available to him prior to the earlier support order. The trial court denied the requested relief and Patrick appeals.

On appeal, Patrick claims that the court's order is not supported by substantial evidence and that the court did not examine all of the evidence and circumstances. We affirm.

BACKGROUND

Some historical information has been gleaned from the register of actions, which is included in the clerk's transcript.

On May 10, 2007, Betty filed a petition for dissolution of marriage with children. On September 27, 2007, the court awarded joint legal and physical custody of the children to Betty and Patrick. At the hearing of that same date, the court appointed an expert to evaluate Betty's business. The business was known as Black and White Ink Billing Company. The court ordered Betty to pay monthly spousal support to Patrick in the amount of \$1,135, to be reduced by the amount of Patrick's contribution of \$862 per month for the children's school costs, commencing July 15, 2007. Commencing July 1, 2008, Patrick's spousal support was reduced to \$838 per month.

¹ We will refer to the parties by their first names for purposes of clarity and not out of disrespect. (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1, and cases cited therein.)

On April 8, 2009, the court found that Betty's monthly income that was available for support was \$945 per month and that Patrick's income was \$1,300 per month. On May 21, 2009, the court ordered that spousal support would be set at \$0, commencing on April 15, 2009, and it ordered Patrick pay Betty \$124 per month for child support. On July 16, 2009, Patrick filed a motion to modify the child support order, which was treated as a motion for reconsideration by the court and denied.²

On January 4, 2011, Patrick made a motion to set aside the support order that had been entered on April 8, 2009 [*sic*]³, on the grounds of fraud and perjury. Patrick submitted an unsigned declaration of the court-appointed business evaluation expert, as well as the declaration of a forensic accountant to the effect that the business evaluator had relied solely on information prepared by Betty as internal business records, which was incomplete. The accountant's declaration asserted that the unwillingness of Betty to cooperate with requests to provide supporting documentation was indicative of an intent to conceal information. The declaration was accompanied by 284 pages of financial information from several of Betty's business bank accounts among other hearsay documents relating to her finances for 2008. The accountant noted that a schedule of bank account activity showed deposits totaling \$1,440,844.99, and estimated that the profit from Betty's business was \$699,786.04 for the year 2008.

² The marital status of the parties was dissolved on May 13, 2010, in a bifurcated proceeding.

³ The court made its findings on April 8, 2009, but made the support order on May 21, 2009.

Betty responded to the motion and opposed any modification. Betty denied that she underreported her income by \$400,000 in 2008 as suggested by Patrick, pointing out that the bank records on which Patrick's accountant relied were from an account representing transfers from the general account of the business to cover monthly payments for health insurance, life insurance, and other monthly payments. Betty also represented that her business had closed operations due to levies and liens imposed by the Internal Revenue Service and EDD (Employment Development Department). Betty included her 2008 income tax return which showed wages and salary of \$11,339, and business losses in the amount of \$260,033.

On April 15, 2011, the matter was heard and the court found Patrick had not met his burden of proof to set aside the support order that was made on May 21, 2009. On April 18, 2011, the court issued a written ruling on the matter. In the ruling, the court declined to consider the documents proffered by Patrick but accepted his representation as to their contents as there was no objection to his testimony about the contents. The court found Betty's business closed in January 2010 that she had little assets and substantial debt; it also found Patrick is self-employed, but his assets and debts were unknown. The court ordered Patrick to pay to Betty the sum of \$184 per month for child support, commencing May 1, 2011, and set spousal support at \$0, commencing February 1, 2011.

On June 2, 2011, Patrick appealed from the order made on April 15, 2011.

DISCUSSION

Patrick argues that the order denying his request to vacate the support order was not supported by substantial evidence. We disagree.

a. Standards of Review

We review support orders under the abuse of discretion standard of review. (*In re Marriage of Zimmerman* (2010) 183 Cal.App.4th 900, 906.) We review the trial court's findings of fact in connection with the support order under the substantial evidence standard of review. (*Ibid.*, citing *In re Marriage of Rothrock* (2008) 159 Cal.App.4th 223, 229-230.) We review an order refusing to set aside a support order under the same standard. (*Rothrock*, at p. 230.)

In reviewing for abuse of discretion, we consider whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered. (*In re Marriage of Connolly* (1979) 23 Cal.3d 590, 598.) When two or more inferences can reasonably be deduced from the facts, we will not substitute our deductions for those of the trial court. (*Ibid.*) The burden is on the complaining party to establish abuse of discretion. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.) The showing on appeal is insufficient if it presents a state of facts that affords only an opportunity for a difference of opinion. (*In re Marriage of Rothrock, supra*, 159 Cal.App.4th at p. 230.)

In reviewing the findings for substantial evidence, we examine the evidence in the light most favorable to the prevailing party and give that party the benefit of every reasonable inference. (*In re Marriage of Rothrock, supra*, 159 Cal.App.4th at p. 230.) We accept all evidence favorable to the prevailing party as true and discard contrary

evidence. (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1151.) We do not reweigh the evidence or reconsider credibility determinations. (*In re Marriage of Calcaterra & Badakhsh* (2005) 132 Cal.App.4th 28, 34.)

b. Analysis of the Merits

Family Code section 3692, prohibits a party from setting aside a support order simply because it was inequitable when made, or has become excessive or inadequate because of subsequent circumstances. However, Family Code section 3691 qualifies section 3692's prohibition against setting aside earlier support orders. Family Code section 3691 provides that a court may set aside an order where one party has committed perjury or fraudulently prevented the other party from fully participating in the proceeding. (Fam. Code, § 3691, subs. (a), (b).) An action or motion based on actual fraud shall be brought within six months after the date on which the complaining party discovered or reasonably should have discovered the fraud. (Fam. Code, § 3691, subd. (a).)

After the six-month time limit for relief under Code of Civil Procedure, section 473 expires, a judgment is subject to set aside on equitable grounds. (*Rapplevea v. Campbell* (1994) 8 Cal.4th 975, 981.) However, there is a one-year time limit for such equitable actions. (Code Civ. Proc., § 2122, subd. (a).) Code of Civil Procedure section 3691 is the exclusive set-aside remedy for support orders. (*In re Marriage of Zimmerman* (2010) 183 Cal.App.4th 900, 910-911.) Here, Patrick made a motion to set aside the prior support order, so he is subject to the six-month time limit set out in Code

of Civil Procedure section 3691. (*Zimmerman*, at p. 910.) The trial court did not abuse its discretion in denying his motion.

In any event, Patrick failed to show extrinsic fraud. An otherwise valid judgment may be set aside only for extrinsic fraud or mistake. (*In re Marriage of Melton* (1994) 28 Cal.App.4th 931, 937, citing *In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1068.) Extrinsic fraud occurs when a party is deprived of his opportunity to present his claim or defense to the court, where he was kept in ignorance or in some other manner fraudulently prevented from fully participating in the proceeding. (*Melton*, at p. 937.)

Patrick's forensic accountant prepared two declarations: one was prepared in March 2008, a year before the support order was made, while the other was executed on January 18, 2011. In the March 2008 declaration, the forensic accountant indicated he relied on the report and schedule prepared in 2008 by the business valuation expert appointed by the court, individual tax returns for both spouses for the tax years 2005 and 2006, corporate tax returns for Black and White Ink Billing Company, and bank statements for Palm Desert National Bank, Rabobank, Pacific Western Bank, and Wells Fargo Bank, relating to the business for the years 2005-2008.

In his second declaration, Patrick's forensic accountant noted that the appointed business valuation expert relied on internal records of Betty in preparing the March 2009 report, and questioned the reliability of the business valuation report and information about the profits of Betty's business. The 2011 declaration relied on the same documents as the 2008 report, which was the same information relied upon by the appointed business valuation expert, whose report was prepared in March 2009. It also listed the

same bank statements referred to in his 2008 declaration. Thus, all the information contained in the 2011 declaration by the forensic accountant was available and known to Patrick before the support order was made.

Because the information was known to Patrick before the original support order was made, he had the opportunity to show that Betty had underrepresented her earnings prior to the date of the hearing on his set-aside request, at which the court made its findings. Thus, he was not fraudulently prevented from fully participating in the proceeding.

There is substantial evidence to support the trial court's finding that Patrick failed to meet his burden of proof. Given the substantial evidence to support the findings, we conclude that the trial court did not abuse its discretion in denying Patrick the relief he sought.

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal.

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RAMIREZ
P.J.

We concur:

McKINSTER
J.

CODRINGTON
J.