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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of THOMAS and
DONNA SUPRA.

THOMAS SUPRA,

Appellant,

v.

DONNA SUPRA,

Respondent.

E054697

(Super.Ct.No. VFLVS033196)

OPINION

APPEAL from the Superior Court of San Bernardino County. David R. Proulx,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed with directions.

Sherry Lee Collins for Appellant.

Law Office of Kerrie C. Justice, Inc. and Kerrie C. Justice for Respondent.

I

INTRODUCTION¹

This appeal challenges an order denying the motion of appellant, Thomas Supra,

¹ All statutory references are to the Family Code unless stated otherwise.

to reduce or terminate spousal support for respondent, Donna Supra.² The family court ordered Thomas to continue to pay spousal support of \$350 a month, to apply for employment, and to pay Donna's attorney's fees of \$2,000.

We reverse the court's order and remand so the family court may make findings to support its calculation of a support order in light of changed circumstances regarding Thomas's loss of monthly income from the termination of his unemployment benefits.

II

FACTUAL AND PROCEDURAL BACKGROUND

A. The Original Judgment

Thomas and Donna were married in 1980. Thomas filed a petition for dissolution in 2005. Thomas earned about \$6,200 monthly as a supervisor for Northwest Pipe Company. His declared expenses were about \$4,800 monthly. The stipulated judgment ordered Thomas to pay Donna spousal support of \$1,000 monthly, plus \$250 monthly for medical costs until January 2010.³ The parties split the value of community property worth about \$250,000, including a house in Pinyon Hills, a house in Bullhead City, Arizona, and a retirement account worth about \$142,000.

In 2004, Thomas and his two brothers inherited property in Pennsylvania when their father died.

² For ease of reference, we use the parties' first names.

³ A child support order of \$1,000 monthly is no longer an issue.

B. The 2009 Modification

In May 2009, Thomas requested the court terminate his obligation to pay spousal support because he had lost his job, then paying a monthly salary of \$6,900. Thomas denied that he had quit voluntarily. He received severance pay for 19 weeks and unemployment benefits of \$450 a week. His employment had involved supervising specialized pipe manufacturing and 50 to 90 employees. As of September 2009, Thomas had not obtained new employment.

Donna opposed termination of support. She claimed Thomas's employment separation was voluntary because he planned to quit and move to Pennsylvania. She declared she earned about \$12 an hour, 5.5 hours a day, as a school bus driver. Donna's income was about \$1,172 per month. She spent part of her settlement from the dissolution to pay attorney's fees and to buy Thomas's interest in and to make improvements on the Arizona house. She used part of the retirement account to help her children buy cars and to visit her son in Oregon. She also paid some bills, leaving about \$12,000. She was waiting to have hip replacement surgery. She rented a room in her house to a close friend, Donald Moats, for \$350 a month.

On September 3, 2009, the court made findings about the respective situations of the parties. The court found Donna and Moats were cohabiting. (§ 4323, subd. (a).) The court found that Donna, age 53, had significant medical issues and a shortfall of \$1,228 between her income and expenses. Thomas, age 52, had a shortfall of \$850 but was not diligently seeking employment although he had the greater earning capacity. The court ordered Thomas to seek work at five locations a week. The court found a significant

change in circumstances due to Thomas losing his job and ordered Donna's spousal support to be reduced to \$350 a month, plus \$250 monthly for medical costs until January 2010.

C. The 2011 Modification

In April 2011, Thomas again sought to terminate spousal support because he had not found employment after an "exhaustive job search" and because his unemployment benefits had terminated. He also requested fees and sanctions because Donna had purportedly reneged on an agreement to reduce support. Thomas had no income and his expenses were \$1,188 a month. He was being supported by his current wife, who earned \$1,314 monthly.

In opposition, Donna again asserted that Thomas was not looking for work diligently but was planning to move to Pennsylvania. Meanwhile, although he claimed he had no income, Thomas was traveling to Pennsylvania and Oregon. Donna was struggling and had to be hospitalized for stress. Her salary had increased to about \$14 per hour and she had medical benefits. Her average monthly income was \$1,642.70. Her expenses were \$1,848. Moats, her housemate, paid rent of \$350. Donna had additional uncovered medical expenses from hospitalization.

Thomas testified that he kept records of his job search beginning in September 2009, contacting more than five employers a week. He included minimum-wage and supervisory jobs. He had 20 years of experience as a fabrication supervisor but he never received a job interview. He said he would be willing to apply for many of the jobs located by Donna that had been posted on the Internet. Thomas's only financial asset

was \$100,000 in a retirement account, part of his share of the community property. Any withdrawals before the age 59 and 1/2 were subject to penalty. Thomas was 54. He and his two brothers still had the house inherited from their father in 2004. One brother was living in the house without paying rent as compensation for the care he had given their parents.

The court made findings that the termination of unemployment benefits was *not* a change of circumstances and Thomas had not been diligent in seeking employment since September 2009. The court ordered Thomas to apply for all of the jobs identified by Donna and any additional jobs she found. The court concluded Thomas had not shown, as required by *In re Marriage of Bardzik* (2008) 165 Cal.App.4th 1291, that he lacked the present opportunity to work. The court found Thomas had the ability to earn at least \$350 monthly to pay Donna spousal support. The court suggested Thomas could also obtain rent from his brother in Pennsylvania. The court ordered Thomas to pay \$2,000 in attorney's fees to Donna to be obtained either from the Pennsylvania asset or his retirement fund. The family court did not state the amount of earned income it was imputing to Thomas or discuss how such an amount would be calculated given his loss of unemployment benefits in the amount of \$450 per week.

III

DISCUSSION

“Judgments and orders of the lower courts are presumed to be correct on appeal. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)” (*In re Marriage of Cohn* (1998) 65 Cal.App.4th 923, 928.) Spousal support orders are reviewed for abuse of

discretion. (*In re Marriage of Kerr* (1999) 77 Cal.App.4th 87, 93; § 4320.) In this case, however, the family court abused its discretion by not making the findings required for its spousal support order.

In seeking a support reduction, Thomas bore the initial burden of establishing he no longer had actual income because his unemployment benefits had terminated. The family court had to determine Thomas's earning capacity based on his circumstances (health, age, education, skills, job history) and the availability of employment. (*In re Marriage of Simpson* (1992) 4 Cal.4th 225, 234.) While Donna had to show that Thomas had both the ability and the opportunity to work, Thomas had to demonstrate his opportunities were limited. (*In re Marriage of Bardzik, supra*, 165 Cal.App.4th at pp. 1305, 1309.)

The family court could not impute income to Thomas without finding the "opportunity" element present. Sufficient evidence must support an implied finding that Thomas had the opportunity to work. (*In re Marriage of Cohn, supra*, 65 Cal.App.4th at p. 929.) "To rely on earning capacity in lieu of actual income '[t]he dispositive question is whether the evidence will sustain the inference that the party charged with support could, with reasonable effort, obtain employment generating the postulated (higher) income.' (*County of Yolo v. Garcia* (1993) 20 Cal.App.4th 1771, 1781.)" (*Cohn*, at p. 930.) "[F]igures for earning capacity cannot be drawn from thin air; they must have some tangible evidentiary foundation." (*Id.* at p. 931.) Even the imputation of minimum wage, must be supported by evidence. (*State of Oregon v. Vargas* (1999) 70 Cal.App.4th 1123, 1128, fn. 2) It is an abuse of discretion to deny a downward modification of

spousal support when the party charged with support has less or no income. (*In re Marriage of Mosley* (2008) 165 Cal.App.4th 1375, 1386-1387.)

In this case, the evidence showed an undisputed change of circumstances; Thomas had exhausted his unemployment benefits. Nevertheless, even if the evidence supported the family court's finding that Thomas was not looking diligently for a job, there was no evidence at all to support continuing the spousal support of \$350 monthly when Thomas had no income at all on which to base a finding of imputed income.

In September 2009, Thomas had been receiving \$450 weekly in unemployment benefits when the court ordered him to pay Donna \$350 monthly. After the unemployment benefits ended, Thomas had no income. The family court determined Thomas should be able to earn enough to continue to pay spousal support—but no evidence at all supported that finding. Although the court apparently took account of the various Internet ads submitted by Donna (but not admitted into evidence), the court did not make any findings about what jobs Thomas might qualify for or how much he could earn.

The Rutter Group offers practical advice on the evidence and findings required for an order based on imputed income: “A conclusory allegation and finding to the effect that the obligor ‘could make more’ will not support an imputed income order; there must be some specific quantification, or at least a range, and the basis therefor in the record.

[¶] One way to establish such range (whether for salaried employees or the self-employed) is to have a qualified expert perform a *vocational examination* . . . in connection with spousal support . . . and conduct a job survey of available employment

opportunities for a person with the obligor's skills, experience, background, etc. . . .”
(Hogoboom & King, Cal. Prac. Guide: Family Law (The Rutter Group 2012) § 6:455.9.)

None of those methods were used here. Instead, the court suggested Thomas could earn \$350 by charging rent to his brother for living in their father's house. We recognize the court did not base the spousal support order on Thomas's retirement account but the court mentioned the retirement account as a source to pay Donna's attorney's fees. We disagree the court could properly order Thomas to seek rent from his brother on a house owned by all three brothers or order Thomas to withdraw money from his retirement account.

As a general rule, the courts will not impute income from a residential property, as distinguished from rental properties. (*In re Marriage of Henry* (2005) 126 Cal.App.4th 111, 118, citing *In re Marriage of Destein* (2001) 91 Cal.App.4th 1385, 1389; *In re Marriage of Williams* (2007) 150 Cal.App.4th 1221, 1244.) The Pennsylvania house is occupied by one of Thomas's two brothers, a joint owner of the property. The value of the property or its reasonable rental value were not established. Furthermore, the record offers no evidence that Thomas could successfully demand rent from his brother. Under these circumstances, the court could not reasonably make an order effectively requiring Thomas's brother to pay spousal support to Donna. (*In re Marriage of Schlafly* (2007) 149 Cal.App.4th 747, 753.)

The imputation of income from the retirement account was also erroneous where the subject asset represents Thomas's "residual share of the community property awarded to him as part of the dissolution." (*In re Marriage of Reynolds* (1998) 63 Cal.App.4th

1373, 1380.) The evidentiary deficiencies in the record mean the \$2,000 award of attorney's fees was an abuse of discretion. (*In re Marriage of Sullivan* (1984) 37 Cal.3d 762, 768-769; *Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238, 253-255; §§ 2030, subd. (a)(2); 2032, subd. (a); and 4320.)

IV

DISPOSITION

We reverse and remand for further proceedings. On remand, the family court will certainly have more current information. The inquiry may need to refocus on the issue of Thomas's reasonable diligence in finding available employment opportunities for someone with his skills and experience. A new evidentiary hearing, at which both sides may introduce evidence of Thomas's earning capacity, is the best medium through which the court can make this determination. (*In re Marriage of Cohn, supra*, 65 Cal.App.4th at p. 931.)

That portion of the judgment denying Thomas's motion is reversed. The cause is remanded to the family court for further proceedings. The parties shall bear their own costs on appeal.

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CODRINGTON

J.

We concur:

RAMIREZ

P. J.

RICHLI

J.