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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of LaRON and REGINA
TAYLOR.

LaRON P. TAYLOR,

Respondent,

v.

REGINA P. TAYLOR,

Appellant.

E059177

(Super.Ct.No. SBFSS84666)

OPINION

APPEAL from the Superior Court of San Bernardino County. Raymond L.
Haight III, Judge. Affirmed.

Regina P. Taylor, in pro. per., for Appellant.

No appearance for Respondent.

Regina Taylor appeals from the trial court's order requiring her ex-husband LaRon Taylor to pay her \$1,000 a month in permanent spousal support. She contends that:

1. The trial court erred by using a computerized temporary support calculator.
2. The trial court erred by deducting expenses from LaRon's income that were due to his remarriage.
3. There was insufficient evidence that LaRon could no longer work overtime.
4. The trial court used incorrect figures for LaRon's current income and current child support.
5. The trial court erred by giving Regina a warning about the need to make reasonable efforts to become self-supporting (*Gavron* warning).

We find no prejudicial error. Hence, we will affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

LaRon and Regina¹ were married in 1993. In 2005, they separated, and LaRon filed this proceeding for dissolution of marriage.

In 2009, the trial court entered a judgment of dissolution. In the judgment, it also made a property division, awarded child custody, and ordered child support. However, it

¹ “As is customary in family law proceedings, we refer to the parties by their first names for purposes of clarity and not out of disrespect. [Citations.]” (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

awarded only temporary spousal support; it reserved jurisdiction over permanent spousal support.

In June 2012, the trial court held a trial on the sole issue of permanent spousal support. Both LaRon and Regina testified at the trial.

At the end of the trial, the trial court tentatively set the amount of support at \$1,200 per month. However, it indicated that this was “not . . . a final order” and it would issue a written statement of decision.

In August 2012, the trial court issued a tentative statement of decision. In it, the court made findings on all of the factors that must be considered in setting support under Family Code section 4320. Among other things, it found that Regina was “currently unemployable” for health reasons and continued to need spousal support. LaRon was currently paying Regina spousal support of \$1,618 a month.

It also found that LaRon reported monthly income of \$6,452.80 (if he did not work overtime) or \$8,373 (if he did work overtime) and monthly expenses of \$10,074.59. It noted that “[d]ue to budgetary issues, overtime may no longer be available.” It also noted LaRon’s testimony “that his health is deteriorating as a result of working extensive overtime.” Nevertheless, it found that LaRon had the ability to pay spousal support “in some amount.”

It concluded: “[LaRon] is currently not able to meet all of his financial obligations. He cannot continue to expect to receive overtime employment which is the only way he has been able to keep his head above water. It is reasonable to anticipate

that [LaRon] will in the near future experience a significant reduction in his income. It is clear that [LaRon] cannot continue to pay spousal support at the current rate. The court determines that the support ordered will be between 1/2 to 2/3rds of the current order. The Court has attached copies of [Xs]pouses it used to examine various spousal support amount options. After balancing the hardships, need and financial ability of the parties, the Court determines an appropriate support order to be \$1,000.00 per month.”

Regina filed written objections to the tentative statement of decision. The trial court overruled all of her objections. Thus, it filed a final statement of decision that was substantially identical to the tentative statement of decision. It then entered judgment accordingly.

II

THE USE OF XSPOUSE

Regina contends that the trial court erred by using XSpouse.

A. *Additional Factual and Procedural Background.*

We take judicial notice² that Xspouse is software certified by the Judicial Council for use in setting temporary spousal and child support in accordance with applicable guidelines. (See Cal. Rules of Court, rule 5.275.)

² By means of our tentative opinion (see AA. App., Fourth Dist., Div. Two, Internal Operating Practices & Proc., VIII, Tentative opinions and oral argument), we gave the parties notice of our intent to take such judicial notice. (Evid. Code, § 455, subd. (a).)

During the trial, LaRon's counsel provided the trial court with an Xspouse printout. It indicated that, based on LaRon's income, guideline temporary spousal support would be \$998. LaRon's counsel argued, however, that the amount ordered for permanent support should be even lower.

Regina objected to any consideration of the Xspouse printout. The trial court responded, "Well, you're not bound by it, but you can use them for guidance" "It's certainly not like . . . temporary support where when the number comes out, . . . I'm stuck with it. But I don't know any other way for me to start creating parameters. And in fact I run it with different scenarios involved for [the] purpose of giving me guidance [']cause otherwise I'm just pulling a figure out of my ear."

At the end of the trial, the trial court tentatively set support at \$1,200. It explained, "I tried to work a lot of scenarios trying to figure out what [LaRon] would be able to handle with all of his obligations and within those constraints what would be the best amount to help [Regina] along as much as possible" It also stated, "I didn't follow the guideline amount that I used which it was much higher. . . . I'm going to save the X[s]pouse . . . I sometimes do attach them to the statement of decision so you have as part of the record what I used I used different scenarios to see how it came out and I picked a figure that was in between the high and the low figures. That is often the case."

The trial court's tentative statement of decision stated, "The Court has attached copies of [X]spouses it used to examine various spousal support amount options." Four printouts, prepared using various pro forma figures, were attached. One was the printout

previously provided by LaRon’s counsel. The other three were evidently prepared by the trial court; they bore the date of the tentative statement of decision, not the date of the trial.

Regina objected to the tentative statement of decision on the ground that it used Xspouse. The trial court overruled the objection, stating, “The court did not use the various [X]spouse options to fix permanent spousal support.”

B. *Analysis.*

“Courts may properly utilize computer software programs to calculate *temporary* spousal support [Citations.] [¶] “But it would be an *abuse of discretion* and an ‘abdication of judicial responsibility’ to use a computer program to calculate *permanent* spousal support . . . since permanent spousal support must be fixed only after a consideration and weighing of the applicable factors set forth in Fam[ily] C[ode] § 4320. ‘No computer program can do this; it must be done by the judge.’ [Citations.]” (Hogoboom et al., Cal. Practice Guide: Family Law (The Rutter Group 2014) Support ¶ 6:190; see also *In re Marriage of Zywickiel* (2000) 83 Cal.App.4th 1078, 1081-1082; *In re Marriage of Schulze* (1997) 60 Cal.App.4th 519, 525-528; *In re Marriage of Olson* (1993) 14 Cal.App.4th 1, 5, fn. 3.)

Nevertheless, a court is not wholly forbidden to use temporary spousal support software in setting permanent spousal support. Quite the contrary, such software plays a legitimate role: “[I]n looking at different amounts the court might order for permanent support, the court, by using the computer program, is able to obtain a rapid calculation of

the tax effects of each amount to each party and determine the resulting net spendable income each party would have at different levels of permanent spousal support. Indeed, by going outside the basic computer program, the judge can even start with different amounts for net spendable income which the supported spouse might need and work backwards to the amount of spousal support to be ordered to result in that amount of net spendable income.” (*In re Marriage of Olson, supra*, 14 Cal.App.4th at p. 5, fn. 3.)

Here, there is no indication that the trial court relied on Xspouse to the point of abdicating its judicial responsibility. In its statement of decision, it carefully considered and made findings on each and every one of the factors listed in Family Code section 4320. As it stated, it used Xspouse solely to examine the likely mathematical effects of its potential decisions. For example, it ran one Xspouse using the lower amount for the father’s income and two using the higher amount. This is not prohibited.

Regina points out that the Xspouse provided by LaRon’s counsel suggested spousal support of \$998 a month, whereas the trial court ultimately ordered spousal support of \$1,000 a month. She concludes that the \$2 difference is “*obviously*” due solely to rounding. She relies on *In re Marriage of Schulze, supra*, 60 Cal.App.4th 519, which stated: “We do not think . . . ‘coincidence’ can explain the uncanny closeness of a permanent spousal support order with a proposed [computer-generated] temporary support order *in any case where the record does not show that the trial judge arrived at the permanent figure from the ground up* rather than using the temporary figure as a kind of baseline or ‘lodestar.’” (*Id.* at p. 526, italics added.) Here, however, as already

discussed, the trial court's detailed findings on each of the Family Code section 4320 factors do affirmatively demonstrate that it arrived at the permanent figure "from the ground up."

The trial court denied using Xspouse options to "fix" permanent support. The record does not show that this was false or disingenuous. Significantly, after the trial court considered all the factors set forth in Family Code section 4320, it found that permanent support should be somewhere between two-thirds and half of then-current support. The \$1,000 figure that it set was almost midway between two-thirds and half of then-current support, which was \$1,618.

Regina also complains that, even though the trial court said at the end of the trial that it had done Xspouse calculations, the printouts attached to the tentative statement of decision bore the date of the statement of decision, not the date of the trial. The legal thrust of her complaint is not entirely clear, although she seems to be suggesting that the trial court lied.

It must be remembered, however, that at the end of the trial, after considering whatever Xspouse calculations it had already done, the trial court *tentatively* set permanent support at \$1,200. Later, it did more Xspouse calculations, which it attached to the tentative statement of decision, and it set permanent spousal support at \$1,000. Thus, we see nothing sinister in the fact that the earlier Xspouse calculations were not attached. Once the trial court changed its mind about the correct amount of support, they were no longer relevant.

Finally, Regina argues that the trial court was guilty of bias and “ethical[] impro[priety]” because it relied on the Xspouse printout provided by LaRon’s attorney. The record shows, however, that the trial court also ran alternative Xspouse calculations on its own. In any event, Regina forfeited any claim of judicial bias by failing to seek to disqualify the trial judge below. (Code Civ. Proc., § 170.3, subd. (c); *People v. Farley* (2009) 46 Cal.4th 1053, 1110.)

In sum, we conclude that the trial court did not err by using Xspouse.

III

EXPENSES DUE TO LARON’S REMARRIAGE

Regina contends that the trial court erred by deducting expenses that were due to LaRon’s remarriage.

A. *Additional Factual and Procedural Background.*

According to LaRon’s May 2011 income and expense declaration, he was not living with a spouse; his average monthly expenses were \$4,155, including \$1,050 in rent.

By contrast, according to his May 2012 income and expense declaration, he was living with a wife; his average monthly expenses were \$10,074.59, including a mortgage payment of \$1,756.92 and a payment of \$500 for an air conditioner.

In its tentative statement of decision, the trial court noted that, in LaRon’s most recent income and expense declaration, “[m]onthly expenses are listed as \$10,074.59.” It

further noted that he was approximately \$100,000 in debt, specifically including for the air conditioner. It also noted his mortgage payment.

Regina objected to the statement of decision, stating, “the court refers to [LaRon]’s expenses of \$10,074.59 which exceed his gross income[;] the court must exclude the expenses which result from the obligor[’]s new marriage.”

The trial court overruled the objection.

B. *Analysis.*

Civil Code section 4323, subdivision (b) provides that “[t]he income of a supporting spouse’s subsequent spouse or nonmarital partner shall not be considered when determining or modifying spousal support.”

In *In re Marriage of Romero* (2002) 99 Cal.App.4th 1436 [Fourth Dist., Div. Two], this court held that “the trial court must not only exclude the new spouse’s income, but also the additional expenses resulting from the remarriage.” (*Id.* at p. 1445.) “[T]he court must determine what expenses are reasonable based only on [the] husband’s net monthly income. . . . [W]here the actual numbers would produce an inequitable result, the trial court must exercise greater discretion based on all the available facts and every appropriate consideration.” (*Id.* at pp. 1445-1446, fns. omitted.)

Here, however, there was no *evidence* that any of LaRon’s expenses were due to his remarriage. Regina tries to demonstrate this supposed fact by comparing his May 2011 income and expense declaration to his May 2012 income and expense declaration. The problem with this is that, while his May 2011 income and expense declaration is in

the file, it was never introduced into evidence.³ The May 2012 income and expense declaration, standing alone, gave no indication that any of LaRon's expenses were due to his remarriage. Thus, the trial court had no reason not to take the expenses in that declaration at face value.

IV

EVIDENCE REGARDING OVERTIME

Regina contends that there was insufficient evidence that LaRon could not work overtime.

A. *Additional Factual and Procedural Background.*

LaRon testified that his regular pay, without overtime, would be about \$80,000 a year; however, in 2011, due to overtime, he made about \$110,000.

He did not want to continue to work overtime. He was experiencing anxiety and chest pains; his doctor had told him that he had to rest. In his view, he could not work any more than he was already working.

³ During the trial, four exhibits were admitted into evidence; there was testimony about two other documents that were never formally introduced. LaRon's May 2011 income and expense declaration was not one of these.

In addition, the trial court took (or, at least, was asked to take) judicial notice of a number of documents already in its file. These included LaRon's May 2012 income and expense declaration, but again, not his May 2011 income and expense declaration.

Finally, the trial court's statement of decision recited that "[t]he court has taken judicial notice of all the minutes and orders in the case." The May 2011 income and expense declaration, however, was not a "minute" nor an "order."

Attached to LaRon's latest income and expense declaration were his three most recent pay stubs. These showed that he had not worked any overtime.

In its tentative statement of decision, the trial court found: "[LaRon]'s most recent income and expense declaration reflects a base monthly income of \$6,452.80. . . . The most recent child support calculation which was done on June 7, 2012 . . . used a monthly income for [LaRon] of \$8,373.00. [LaRon] testified that the difference between the two figures is the result of overtime he has worked."

It further found, "[LaRon] worked for many years in the jail and was allowed to work significant overtime. Due to budgetary issues, overtime may no longer be available."

Finally, it found: "[LaRon] contends he has been forced to work extensive overtime to pay his support and other obligations. He testified that the continuous overtime is having an adverse impact on his health."

B. *Analysis.*

Regina argues that there was no evidence that (1) LaRon worked in the jail or (2) overtime would not be available due to budgetary issues. Technically, she is correct. However, it does not appear that either of these findings was prejudicial. (See Cal. Const., art. VI, § 13; *In re Marriage of E. & Stephen P.* (2013) 213 Cal.App.4th 983, 994-995.)

First, it did not matter whether LaRon worked in the jail or elsewhere. This was irrelevant to spousal support.

Second, it did not matter whether overtime was infeasible for budgetary reasons or — as the trial court also found — for health reasons. “[E]arning capacity generally should not be based upon an extraordinary work regimen, but instead upon an objectively reasonable work regimen as it would exist at the time the determination of support is made. [Citation.]” (*In re Marriage of Simpson* (1992) 4 Cal.4th 225, 234-235.) LaRon’s paystubs showed that, as of 2012, he was no longer working overtime. Evidently, the trial court was convinced that this was objectively reasonable. Even though it misremembered that budgetary issues were involved, it would have come to the same conclusion based on LaRon’s health issues alone.

V

USE OF ERRONEOUS FIGURES

Regina contends that the trial court used erroneous figures for LaRon’s current income and current child support.

A. *Additional Factual and Procedural Background.*

About three weeks before trial, in connection with a then-pending order to show cause regarding child support, the parties stipulated, and the trial court ordered, that:

1. LaRon’s monthly gross income for 2011 was \$8,373.
2. LaRon would pay monthly child support as follows:

From March through December 2011: \$1,530

From January 2012: \$1,708

In addition, at trial, LaRon testified that he was currently paying \$1,708 a month in child support.

In its tentative statement of decision, the trial court found:

1. “At the hearing on child support, [LaRon]’s income was found to be \$8,373.00 per month.”

2. “[LaRon] currently pays \$1,530.00 in child support”

Regina objected to the statement of decision, arguing that the \$8,373 income figure was only for 2011, whereas in 2012, LaRon’s monthly income was actually \$9,817.

The trial court overruled the objection.

B. *Analysis.*

With regard to LaRon’s monthly gross income, the trial court did not err. As Regina does not dispute, for 2011, LaRon’s monthly income was \$8,373. However, as the trial court noted, according to LaRon’s most recent income and expense declaration, for 2012, his monthly income was only \$6,452. It also indicated that \$8,373 (for 2011) was a less meaningful figure than \$6,452 (for 2012), because the former included overtime. (See part IV, *ante.*)

Regina does not cite her asserted figure of \$9,817 (for 2012) to the record, and we have not found it on our own. Thus, she has not shown any error.

With regard to LaRon’s current child support, Regina has not shown that the claimed error was prejudicial. As the trial court noted, in about a year, when the couple’s

youngest child turned 18, LaRon would stop paying child support and would have that much more income available for spousal support. However, as it also noted, LaRon would still owe “substantial” child support arrearages. Thus, it does not seem to have considered his child support payments for any purpose. Certainly they do not show up anywhere in its Xspouse calculations. Thus, we see no reasonable probability (see *Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1161) that its use of a figure of \$1,530 rather than \$1,708 for LaRon’s current child support affected its ultimate decision.

VI

GAVRON WARNING

Regina contends that the trial court erred by giving her a *Gavron* warning.

A. *Additional Factual and Procedural Background.*

During the trial, the trial court commented: “[LaRon’s counsel] put it in that spousal support has been already paid in excess of half the term of the marriage kind of almost [*sic*] triggers a Gavron warning.”

In its tentative statement of decision, the trial court found: “[LaRon] has paid a substantial support order for a period of 7 years and 3 months on a marriage of 11 years and 4 months. [Regina] is 42 years of age; she cannot reasonably expect [LaRon] to support her for the remainder of her anticipated life. [Regina] should anticipate that this order will someday terminate. Due to [Regina]’s current lack of employability, the Court will not set a date when support will terminate. There is no evidence [Regina] has

introduced to show she will be permanently unable to work. The Court deems it appropriate to give [Regina] a Gavron warning.”

Regina objected: “The parties . . . obtained a vocational examination of [Regina] which concluded that at the present time she is unable to work. There is no evidence that [Regina] is not seeking to become self-sufficient. The parties . . . were married for over 10 years and as such this case is a marriage of long duration. There is evidence of [Regina]’s medical conditions which prevent her from working. Therefore a warning that [Regina] should try to become self-supporting is premature with her current present medical condition especially since this is a long-term marriage.”

The trial court overruled this objection. Accordingly, its judgment included the following *Gavron* warning:

“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, reducing or terminating spousal or partner support.”

B. *Analysis.*

In re Marriage of Gavron (1988) 203 Cal.App.3d 705 held that — at least after a lengthy marriage — a trial court could not reduce spousal support based on the supported spouse’s failure to become self-sufficient unless it gave “some reasonable advance warning that after an appropriate period of time the supported spouse was expected to become self-sufficient or face onerous legal and financial consequences.” (*Id.* at p. 712.)

The Legislature has codified *Gavron* by enacting Family Code section 4330, subdivision (b), which provides: “When making an order for spousal support, the court may advise the recipient of support that he or she should make reasonable efforts to assist in providing for his or her support needs, taking into account the particular circumstances considered by the court pursuant to Section 4320, unless, in the case of a marriage of long duration as provided for in Section 4336,⁴ the court decides this warning is inadvisable.”

Under Family Code section 4320, subdivision (l), one of the circumstances that the trial court is supposed to consider in setting spousal support is: “The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration as described in Section 4336, a ‘reasonable period of time’ for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court’s discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, Section 4336, and the circumstances of the parties.”

Giving a *Gavron* warning is a matter of discretion. (*In re Marriage of Schmir* (2005) 134 Cal.App.4th 43, 55-56.) “Generally, where a trial court has discretionary

⁴ Family Code section 4336, subdivision (b) creates a “presumption affecting the burden of producing evidence that a marriage of 10 years or more, from the date of marriage to the date of separation, is a marriage of long duration.”

Here, the parties had been married for 11 years 4 months, and the trial court found that the marriage was of long duration.

power to decide an issue, an appellate court is not authorized to substitute its judgment of the proper decision for that of the trial judge. The trial court's exercise of discretion will not be disturbed on appeal in the absence of a clear showing of abuse, resulting in injury sufficiently grave as to amount to a manifest miscarriage of justice. [Citations.] ““The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason” [Citations.]’ [Citation.]” (*In re Marriage of Mosley* (2008) 165 Cal.App.4th 1375, 1386.)

Here, a vocational evaluation of Regina determined, based on her treating physician's opinion, that she was currently unable to work. However, it also stated that “it is anticipated that she will at some time in the future be capable of returning to work whether on a full or part-time basis.” It listed a number of jobs to which she “might be well suited”

In light of this evidence, the trial court could reasonably give a *Gavron* warning. The trial court did not intend, and the warning did not state, that she was expected to become self-supporting while she was still medically unfit to work. The trial court made it clear that the warning only meant that, if she became able to work, she would be expected to try to do so.

Regina places great weight on the trial court's comment that “spousal support has been already paid in excess of half the term of the marriage” and that this “kind of almost triggers a *Gavron* warning.” She argues that this misstates the effect of Family Code section 4320, subdivision (*l*), which provides that, in a marriage *not* of long duration, a

spouse is expected to become self-supporting after half the length of the marriage; because this *was* a marriage of long duration, the half-the-length-of-the-marriage metric did not apply.

That is not how we interpret the trial court's remark. It was not stating its own opinion; it was attributing that opinion to LaRon's counsel. "[I]n any event, 'a judge's comments in oral argument may never be used to impeach the final order, however valuable to illustrate the court's theory they might be under some circumstances.' [Citation.]" (*Chalmers v. Hirschkop* (2013) 213 Cal.App.4th 289, 307.) Here, the trial court provided a full statement of decision, which supersedes any remarks it made during the trial. (*Develop-Amatic Engineering v. Republic Mortgage Co.* (1970) 12 Cal.App.3d 143, 151.)

In its statement of decision, the trial court did note that LaRon had paid spousal support for more than seven years, following a marriage of more than eleven years. However, there is no indication that it was applying the presumption of Family Code section 4320, subdivision (*l*). Indeed, it is apparent that it was *not* applying it; otherwise, it would have concluded that Regina was required to become self-supporting immediately. Instead, it correctly went on to conclude that Regina could not reasonably expect LaRon to keep on supporting her forever. "Although the marriage in this case was a lengthy one, that fact alone does not justify an unlimited spousal support award. In the absence of circumstances demonstrating that a spouse is incapable of becoming self-

supporting, [that spouse] cannot reasonably expect to receive spousal support indefinitely.” (*In re Marriage of Shaughnessy* (2006) 139 Cal.App.4th 1225, 1249.)

Separately and alternatively, we fail to see how giving a *Gavron* warning, even erroneously, could ever be prejudicial. A *Gavron* warning, as given in this case, merely puts a supported spouse on notice that he or she is expected to make “reasonable good faith efforts” to become self-supporting. It does not prejudge the question of what would constitute such reasonable, good-faith efforts — much less of whether the supported spouse has failed or ever will fail to make them.

We therefore conclude that the trial court did not err by giving Regina a *Gavron* warning.

VII

DISPOSITION

The judgment is affirmed. Regina shall pay LaRon’s costs on appeal, if any.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ

P. J.

We concur:

HOLLENHORST

J.

MILLER

J.

