

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

In re the Marriage of LARRY G. and
JEANNINE Y. WARKENTIN.

LARRY G. WARKENTIN,

Petitioner and Appellant,

v.

JEANNINE Y. WARKENTIN,

Defendant and Respondent.

F060699

(Super. Ct. No. R-1502-FL-5260)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John D. Oglesby, Judge.

Larry G. Warkentin, in pro. per., for Petitioner and Appellant.

Roger I. Stein for Defendant and Respondent.

-ooOoo-

This is an appeal from the denial of a motion for reconsideration of an order setting support for the adult disabled son of the parties to this dissolution proceeding. Appellant has not demonstrated any error, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 5, 2007, mother filed a motion seeking an award of support for the parties' adult disabled son, Robert Allen (Allen), of whom she was the legal guardian. At that time, mother was living in Idaho with Allen. She was being paid by the State of Idaho to care for Allen full time. Allen was receiving Supplemental Security Income (SSI) payments for his support. Father was living in California with the parties' five minor children, of whom he had legal and physical custody. Father had been ordered to pay spousal support to mother, and mother had been ordered to pay child support to father for the minor children. After multiple hearings, on May 5, 2008, the trial court (Judge Purcell) issued an order awarding spousal support and child support for the minor children, but denying support for Allen.

On February 19, 2009, a different judge (Judge Oglesby) modified the support orders and ordered father to pay \$1,319 for Allen's support. Father filed a motion for reconsideration of that order, which was denied. Mother again moved to modify child and spousal support, and father opposed. On October 28, 2009, the trial court entered an order reducing Allen's support to \$250, finding good cause to depart from the DissoMaster¹ guidelines, which called for an award of \$667. Mother filed a motion for reconsideration of the October 28, 2009, order. On February 8, 2010, the trial court apparently granted the motion and increased the support for Allen to \$667.² On February

¹ "The DissoMaster is one of two privately developed computer programs used to calculate guideline child support as required by [Family Code] section 4055." (In *re Marriage of Schulze* (1997) 60 Cal.App.4th 519, 523, fn. 2.)

² Only the first page of the February 8, 2010, order is included in the record. It does not contain the substance of the order. It refers to and incorporates an attached ruling, but the attachment is not part of the record. We glean the content of the order from references to it in a subsequent order.

24, 2010, father filed a motion for reconsideration of the February 8, 2010, order. He argued that the award of support for Allen was improper because Allen was not “without sufficient means,” which is a prerequisite to an award of support for an adult disabled child under Family Code section 3910, subdivision (a). Father asserted the increased support payment would result in elimination of Allen’s SSI benefits; under Idaho law, he contended, Allen would then be ineligible to have a state-paid caretaker, and mother’s income from caring for Allen would be eliminated, leaving the entire family in worse financial condition.

On March 23, 2010, the trial court issued an order denying father’s motion for reconsideration, finding father had presented no new facts, circumstances, or law in support of the motion. It left Allen’s support at \$667. Father now appeals from the March 23, 2010, order. He argues the May 5, 2008, order denying support for Allen was final and should not have been modified by the trial court; in subsequent orders, the trial court applied the law incorrectly because Allen was not “without sufficient means” (Fam. Code, § 3910, subd. (a)); and the trial court failed to require both parents to support Allen.

DISCUSSION

I. Appealability of March 23, 2010, Order

Code of Civil Procedure section 1008 authorizes a party to file a motion to reconsider an order, made as a result of another party’s motion, under certain circumstances. (Code Civ. Proc, § 1008, subd. (a).) At the time father filed his appeal from the order denying his motion for reconsideration, the prevailing view was that an order denying a motion for reconsideration is not an appealable order. (*Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal.App.4th 1625,

1633.)³ This rule applied in order “to eliminate the possibilities that (1) a nonappealable order or judgment would be made appealable, (2) a party would have two appeals from the same decision, and (3) a party would obtain an unwarranted extension of time to appeal. [Citations.]” (*Annette F. v. Sharon S.* (2005) 130 Cal.App.4th 1448, 1458-1459.) Code of Civil Procedure section 904.1 does not authorize appeals from orders denying motions for reconsideration, “and to hold otherwise would permit, in effect, two appeals for every appealable decision and promote the manipulation of the time allowed for an appeal.” (*Annette F.*, at p. 1459.) Father’s notice of appeal specified he was appealing from the nonappealable March 23, 2010 order denying his motion for reconsideration.

“The notice of appeal must be liberally construed.” (Cal. Rules of Court, rule 8.100(a)(2).) If the notice of appeal specifies that the appeal is from a nonappealable order, “the notice can be interpreted to apply to an existing appealable order or judgment, if no prejudice would accrue to the respondent” and if it is reasonably clear the appellant intended to appeal from the appealable order or judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 20, 22.) Although the notice indicated father was appealing from the March 23, 2010, order, both parties’ briefs address the propriety of the underlying February 8, 2010, support order. Consequently, both parties apparently understood that father intended to appeal the underlying support order, and no prejudice would accrue to either party if we were to construe the notice of appeal as encompassing the February 8, 2010, order, and to review both the denial of reconsideration and the support order.

³ This view has now been codified. Code of Civil Procedure section 1008, subdivision (g), was amended effective January 1, 2012, to provide: “An order denying a motion for reconsideration made pursuant to subdivision (a) is not separately appealable. However, if the order that was the subject of a motion for reconsideration is appealable, the denial of the motion for reconsideration is reviewable as part of an appeal from that order.” (Stats. 2011, ch. 78, § 1.)

II. Motion for Reconsideration

Code of Civil Procedure section 1008 provides, in pertinent part:

“When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown.” (Code Civ. Proc., § 1008, subd. (a).)

“Section 1008 allows the trial court to reconsider and modify, amend or revoke its prior order when the moving party shows a different state of facts exists.... ‘[T]he party seeking reconsideration must provide not only new evidence but also a satisfactory explanation for the failure to produce that evidence at an earlier time.’ [Citation.]” (*Mink v. Superior Court* (1992) 2 Cal.App.4th 1338, 1342.) This diligence requirement is also applicable when the motion for reconsideration is based on different law. (*Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1200 (*Baldwin*)). Thus, if the motion is based on different law, the moving party must provide a satisfactory explanation for failing to cite that law in arguing the first motion. A contrary rule would “remove all incentive for parties to expeditiously marshal the law in support of their case. If counsel need not explain the failure to earlier produce pertinent legal authority that was available, the ability of a party to obtain reconsideration would expand in inverse relationship to the competence of counsel. Without a diligence requirement the number of times a court could be required to reconsider its prior orders would be limited only by the ability of counsel to belatedly conjure a legal theory different from those previously rejected, which is not much of a limitation.” (*Id.* at p. 1199.)

Father's motion for reconsideration noted that the trial court, in making its February 8, 2010, ruling, relied on two cases, *Chun v. Chun* (1987) 190 Cal.App.3d 589 and *In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, which were not cited by the parties in their argument. He discussed those cases in the declaration supporting his motion. No other new or different facts, circumstances or law were identified in father's motion for reconsideration. In *Baldwin*, the court concluded the requirements for a motion for reconsideration were not met where the motion was based on a case not previously cited, but not newly decided, and was supported by a declaration that merely stated the case was found after the adverse order was made. (*Baldwin, supra*, 59 Cal.App.4th at pp. 1200-1201.) Father's declaration did not include any explanation for the failure to present and discuss those cases in connection with either the motion that resulted in the October 28, 2009, order or mother's motion for reconsideration that resulted in the February 8, 2010, order challenged by father's motion. We note that the *Chun* case was cited by the court in its May 13, 2009 order, in which the court denied father's motion for reconsideration of the order setting support for Allen at \$1,319. Because father's motion did not present new or different facts, circumstances, or law and a satisfactory explanation for the failure to present them earlier, it did not meet the requirements for a motion for reconsideration under section 1008, subdivision (a).

"A trial court's ruling on a motion for reconsideration is reviewed under the abuse of discretion standard." (*Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1457.) "An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice. [Citations.] The abuse of discretion standard affords considerable deference to the trial court, provided that the court acted in accordance with the governing rules of law.'" (*Kayne v. The Grande Holdings Limited* (2011) 198 Cal.App.4th 1470, 1474-1475.) "The burden is on the party complaining to establish an abuse of discretion" [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.)

The trial court's decision was in accordance with the legal requirements for a motion for reconsideration. Father has not established that the decision was beyond the bounds of reason. We find no abuse of discretion in the denial of father's motion for reconsideration.

III. February 8, 2010, Support Order

Father argues the May 5, 2008, support order "was clearly intended to be a final decision," and implies that it therefore should not have been modified. The portion of the transcript of the May 5, 2008, hearing that he cites, however, indicates the trial court intended to make a temporary order. After awarding child and spousal support in accordance with the DissoMaster amounts, the court stated:

"If you move your case on to trial, then the Court can consider other factors. And it's a more lengthy hearing about what support should be. And it is not guided by the DissoMaster at all. [¶] The DissoMaster is for a temporary basis. If you move your case to trial -- which you really should, because you have been here lingering for a while. That's when you are going to get the orders that best fit your needs."

In any event, with some exceptions not applicable here, "a support order may be modified or terminated at any time as the court determines to be necessary." (Fam. Code, § 3651, subd. (a).) Under this section, all child support orders, even those based on an agreement of the parties that includes an agreement that such support will not be modified, are modifiable prospectively. (*In re Marriage of Alter* (2009) 171 Cal.App.4th 718, 727 (*Alter*), minor children; *In re Marriage of Lambe & Meehan* (1995) 37 Cal.App.4th 388, 391-393, adult disabled child.) Thus, the May 5, 2008, order denying support for Allen was not final in the sense that it could not be modified subsequently, under appropriate circumstances. The May 5, 2008, order was, in fact, superseded by the February 19, 2009, order and the October 28, 2009, order, prior to entry of the February 8, 2010, order that father sought to have reconsidered. Father did not appeal the February 19, 2009, or October 28, 2009, order and those orders are not reviewable in this appeal.

“We review a child support order for abuse of discretion. [Citation.] In so doing, we determine “whether the court’s factual determinations are supported by substantial evidence and whether the court acted reasonably in exercising its discretion.” [Citation.] We do not substitute our own judgment for that of the trial court, but determine only if any judge reasonably could have made such an order.’ [Citation.]” (*Alter, supra*, 171 Cal.App.4th at pp. 730-731.) We are hampered in our review of the February 8, 2010, order by the absence from the record of the complete order. The substance of the order is reflected only in the subsequent March 23, 2010, order, which states: “The court’s previous ruling of February 8, 2010 stands: child support for the adult disabled son remains in the amount of \$667 (retroactive to November 1, 2009). This is the amount contained in the DissoMaster attached to the ruling of this court of Oct. 28, 2009.” (Capitalization omitted.)

Father contends an award of support for Allen was improper because the statutory requirements for such an award were not met. “The father and mother have an equal responsibility to maintain, to the extent of their ability, a child of whatever age who is incapacitated from earning a living and without sufficient means.” (Fam. Code, § 3910, subd. (a).) Father asserts that Allen was not “without sufficient means,” because the SSI payments he received were adequate to meet his needs. Father cites no evidence in the record demonstrating what expenses Allen incurred monthly, that they were met solely through SSI, or that mother did not contribute at all to his support out of her income.

Father argues at length that he should not be required to pay any support to Allen because, if Allen receives child support, his SSI will be reduced dollar for dollar, and this will have an adverse impact on the financial condition of the family as a whole. The Family Code, however, expresses a preference for private support. “In implementing the statewide uniform guideline, the courts shall adhere to the following principles: [¶] ... [¶] (h) The financial needs of the children should be met through private financial resources as much as possible.” (Fam. Code, § 4053, subd. (h).) Father’s argument

assumes instead a preference for public support of a disabled adult child. Father cites no authority permitting the trial court to reduce a parent's contribution to an adult disabled child based on fear that an award of support will reduce the public support the disabled adult receives. (See *Elsenheimer v. Elsenheimer* (2004) 124 Cal.App.4th 1532, 1540, refusing to consider SSI received by the mother in determining support to be paid by the father, because it would "transfer a significant portion of father's burden of meeting the children's needs to the government," contrary to the intent expressed in Family Code, sections 3900 and 4053, subdivision (h).)

Additionally, "[t]he guideline is intended to be presumptively correct in all cases, and only under special circumstances should child support orders fall below the child support mandated by the guideline formula." (Fam. Code, § 4053, subd. (k).) Father has cited no evidence in the record of special circumstances justifying deviation from the guideline amounts, other than his claim that awarding child support will reduce the amount of SSI Allen receives. Father makes no showing that the DissoMaster calculation followed by the trial court failed to properly apply the guideline formula. The calculation took into account all of the dependent children. The trial court ordered support in accordance with those calculations.

On appeal, the order or judgment of the trial court is presumed correct; error must be affirmatively demonstrated by the appellant. (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 556-557.) The appellant must present an adequate record and adequate argument, supported by citations to appropriate authorities and to relevant portions of the record, to establish the claimed error. (*Id.* at p. 557.) Father has not established that the trial court abused its discretion when it ordered that father pay child support for his disabled adult son in accordance with the DissoMaster calculations. We find no error in the order.

DISPOSITION

The order is affirmed. Mother is entitled to her costs on appeal.

HILL, P. J.

WE CONCUR:

CORNELL, J.

POOCHIGIAN, J.