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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of LAURENCE A. and
PORNPAM TOSSEY.

LAURENCE A. TOSSEY,

Respondent,

v.

PORNPAM TOSSEY,

Appellant.

G044484

(Super. Ct. No. 07D007061)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James L. Waltz, Judge. Reversed.

Law Offices of William J. Kopeny and William J. Kopeny for Appellant.

Law Offices of Catherine Lawler and Catherine A. Lawler for Respondent.

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Pornpam Tossey (Pam)¹ appeals from the trial court’s judgment on reserved issues following dissolution of her marriage to Laurence A. Tossey. She challenges the court’s decision to continue imputing income to her when she failed to demonstrate she searched for a customer support job or other employment. The court, however, refused to allow her to present any evidence concerning her job search or job availability, and instead announced at the outset of the trial on reserved issues that the evidence was “close[d]” even before the trial began. Pam also challenges both the trial court’s decision not to require Laurence to pay a portion of her attorney fees and the court’s decision to impose *Watts* charges (*In re Marriage of Watts* (1985) 171 Cal.App.3d 366 (*Watts*)) for her exclusive use of the couple’s jointly-owned home while they were separated. As we explain, the due process violation requires reversal of the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Pam and Laurence were married in September 1988 and separated almost 19 years later in July 2007. They had adopted a newborn son in 1998 and when he was three, Pam, who had been a successful software engineer for more than a decade, stayed home as a full-time parent. Laurence remained employed as a software engineer at Broadcom, Inc. Throughout the divorce proceedings, the couple could not agree on custody and visitation issues for their son, nor on financial support.

Pertinent here, the spousal support issue came to a head at trial in April 2009, where Laurence sought to impute income to Pam because she was not

¹ She refers to herself as Pam in her briefing, and we similarly refer to the parties by their first names for clarity and ease of reference, given they have the same last name, and intend no disrespect in doing so. (See *In re Marriage of Olsen* (1994) 24 Cal.App.4th 1702, 1704, fn. 1.)

working despite trial court admonitions to seek employment. (Fam. Code, § 4330, subd. (b) [“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”]; all further undesignated statutory references are to the Family Code.) Pam admitted she recognized in July 2007 when she and Laurence separated that she would have to return to work. The court concluded Laurence demonstrated at trial that Pam had both the ability and opportunities to earn income and chart a path towards becoming self-supporting, but had failed to do so in almost two years postseparation. (See § 4320, subd. (1) [goal of spousal support is that party shall become self-supporting].)

In its tentative statement of decision in July 2009, the trial court suggested Laurence had demonstrated Pam’s ability to work. Michael Bonneau, a vocational examiner, “aptly summarized [Pam’s] education and work experience as a senior software engineer. While Mr. Bonneau agreed [Pam] needed to refresh her skills and training, he testified that in his opinion, and based on her age, education, and past employment, [Pam] has an ability to work.” Specifically, Bonneau “match[ed] [Pam’s] skill set and work experience with employment opportunities,” including a half-dozen currently-available customer service positions at technology and other companies listed in Bonneau’s April 1, 2009, supplemental report. The trial court concluded Pam “has both ability and opportunity to earn income” and that doing so was in her son’s best interests. The court noted that while it was “more than confident [Pam] can earn substantially higher income, at this time . . . the court will follow Mr. Bonneau’s suggestion that a more modest income of 2,500 dollars [per month]” represented her current earning capacity based on available customer support positions, instead of more than twice that for software engineer positions. The trial court warned, however, that

Pam “is on notice that at the [ensuing] review . . . , the court is poised to reconsider and modify support based on her earning capacity estimated to be 6,000 dollars [per month]. At the forthcoming review hearing, the court reserves jurisdiction to modify support up or down and to do so prospectively.” The court, however, did not enter its judgment from the April 2009 trial until December 2009.²

The trial court’s December 2009 ruling finally determined some issues litigated in the April 2009 trial, including child custody and some particulars of property and retirement asset division. This “judgment” also set a child support figure, but the court expressly reserved for further consideration the issue of permanent spousal support. The court observed that “with the sale of the family residence outstanding, and [Pam’s] search for full time employment on-going, establishing permanent spousal support is too speculative.”

In the meantime, for purposes of calculating child support and temporary spousal support, the court reaffirmed its earlier statement of decision to impute “a more modest income of \$2,500.00 per month” to Pam for customer service work, “on the basis of her stale skills, notwithstanding [she] has done little if anything to refresh her skills.” The court cautioned, however, that Pam “is on notice that at the review following the close of escrow [on the couple’s marital home], the court will assess her earning capacity if not fully employed.” The court recognized that the “duty to make reasonable and good faith efforts to becoming self-supporting . . . is often a ‘process’ and requires a

² As we note below, the trial court did not enter a final, appealable judgment until September 2010. While protracted proceedings are sometimes unavoidable and neither party objected below or complains of the delay here, a glacial pace to family law litigation can create a host of problems. (Cf. *In re Marriage of Schaffer* (1999) 69 Cal.App.4th 801, 809 [10 different judges conducted proceedings over 15-year course of case]; *Biden v. Rosen* (1993) 19 Cal.App.4th 27, 38 [similar; piecemeal litigation obfuscates issues].)

‘transition’ versus some big epiphany or overnight event. That said, the court has noted [Pam] has not made solid strides to re-focus and transition to the work place. [S]he has done little to nothing toward re-freshening her skills and looking for work. Instead, she has been protecting her role as the supported spouse and primary nurturing parent . . . a role she must now share.” (First ellipsis added, second in original.) Consequently, the court reiterated: “In about four months, the court may impute additional income more commensurate with her skills, education and training. [Pam] is urged to make a diligent and good faith effort to become employed.” But as the court expressly noted, it “put on ‘pause’ the establishment of permanent spousal support . . . for now.” (Original ellipsis.)

Pending the subsequent trial on reserved issues and factoring in Pam’s imputed income of \$2,500 a month, the court in December 2009 ordered Laurence to pay Pam \$3,000 a month in “temporary spousal support.” The issues reserved for trial included permanent spousal support, potential *Watts* charges for Pam’s postseparation use of the marital home, and attorney fees.

The court set the trial on reserved issues for March 29, 2010, but delayed starting the trial to allow the parties to confer, and during this unreported caucus the parties resolved several matters, including unspecified “reimbursement issues,” which the court noted in a minute order. The court’s pretrial minute order also reflects that the court determined it would “hear this case today” but, after an unreported discussion with the parties, the court set the parameters for the hearing: (1) the “[i]ssue before the court is the imputation of income to [Pam] for support,” (2) the court apparently determined at the outset “it will compute [*sic*: impute?] an income to [Pam],” but (3), in doing so, the court would “not hear from [Pam’s] vocational expert, David Laine, and excuse[d] the witness,” and (4) the court would “not hear any argument on the *Watts* charge issue,” nor

apparently any evidence on that issue either. The parties on appeal do not explain the basis for this procedural arrangement, nor the procedural decisions the court reached during the “trial.”

The court opened the trial on reserved issues with the following announcement: “I’ve considered — I do consider the evidence at close [*sic*: closed?]. The trial record is finished, so we are not going to reopen the trial to take any further evidence, that is my ruling.” The trial court apparently viewed the trial as having concluded in April 2009.

The trial court thus heard only argument and no evidence at the March 2010 trial on reserved issues. Laurence’s attorney argued, “I don’t think Ms. Tossey wants to work. This court gave her a self-sufficiency warning in 2008. [¶] This court gave her another self-sufficiency warning in 2009, and Ms. Tossey sits here today claiming she cannot find a job.” After Laurence’s attorney also argued Laurence was entitled, as an alternative to potential *Watts* charges against Pam in his favor, to a credit for asserted overpayment of support and to be reimbursed for property expenses he paid while Pam resided in the marital home, Pam’s attorney asserted *Watts* did not apply because “[t]here was no kick-out order” giving Pam exclusive right to the family home. In any event, Pam specifically pointed to a contested factual dispute over Laurence “now seeking to charge his son and his wife, former wife, a fair-rental value for a house *he voluntarily left.*” (Italics added.)

Pam’s counsel expressed “surprise[.]” that “[w]e weren’t allowed to put on any additional evidence.” Specifically, “I was rather surprised at that, because my understanding from your statement of decision [i.e., the December 2009 judgment] was that there would be a hearing on these issues.” Concerning Pam’s employment efforts in

particular, counsel questioned, “[H]ow can the court go back to the trial almost a year ago and just assume that no efforts have been made, and especially in this [economic] climate”

Counsel acknowledged, “Ms. Tossey is still unemployed” but, “if she could find a job, she would,” however, the court “did not let me put on any additional testimony as to what has been happening over the past year” Counsel stated, “I will represent to the court, just because she sits here today and is unemployed, doesn’t mean that she hasn’t been looking. Doesn’t mean she hasn’t been trying.” “Again, I wasn’t allowed to put any of that evidence on,” including Pam’s testimony regarding her employment efforts. Pam’s attorney addressed her counterpart’s argument: “You know, [Laurence’s] counsel says [Pam] does not want to work. Well, that is sheer speculation on her part and it’s inappropriate . . . , I think.”

The court, however, responded, “Well, Ma’am, I’ll just say [this]. I heard the evidence at [the April 2009] trial and I formed certain judgments and it was my considered judgment, given her credibility, that she did not make a legitimate effort to find work.” The court declined to adjust Pam’s \$2,500 monthly imputed income figure either up or down. Based on the court’s evaluation of “the applicable Fam[ily] C[ode] § 4320 factors,” the court set Laurence’s permanent spousal support obligation at \$1,700 a month. The court explained it had evaluated those factors in setting the temporary support amount in December 2009 and “reserved calculating a *permanent* spousal support order until after the residence was sold and after the court allowed the passage of *more time* for [Pam] to secure fulltime employment.” (Original italics.) The court then “re-assessed all the [section] 4320 factors” following the March 2010 trial on reserved issues, at which the court observed Pam “is still not employed and . . . again claims her

earning capacity is zero.” The court reiterated its finding from December 2009 that Pam “has earning capacity of at least 2,500 dollars [per month].” (Original emphasis.)

The court also concluded *Watts* charges were appropriate and that, since the parties’ incomes were equal after factoring in Laurence’s support payments and Pam’s imputed income, there was no reason for Laurence to pay any portion of Pam’s legal bills. Consequently, the trial court denied each party’s request to charge the other with some portion of their respective attorney fees. The trial court finally entered judgment in September 2010, and Pam now appeals.

II

DISCUSSION

Pam argues the trial court violated due process when it refused to hear her evidence. We agree. In *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281 (*Carlsson*), the trial judge refused to allow husband’s attorney to finish his evidentiary presentation and abruptly ended the trial by walking off the bench. Here, in barring Pam’s evidentiary presentation altogether, the effect was the same: “summary termination of the trial infring[ing] on [the] fundamental right to a full and fair hearing.” (*Id.* at p. 291.)

In *Carlsson*, the wife on appeal defended the judgment on grounds “there is no such thing as ‘structural error’ in a civil case.” (*Carlsson, supra*, 163 Cal.App.4th at p. 292.) But the court explained that the “structural error” label was not dispositive; rather, “‘Denying a party the right to testify or to offer evidence is reversible per se.’ [Citations.] As the state Supreme Court has recently stated: “‘We are fully cognizant of the press of business presented to the judge who presides over the [Family Law] Department of the Superior Court . . . , and highly commend his efforts to expedite the

handling of matters which come before him. However, such efforts should never be directed in such manner as to prevent a full and fair opportunity to the parties *to present all competent, relevant, and material evidence* bearing upon any issue properly presented for determination. [¶] Matters of domestic relations are of the utmost importance to the parties involved and also to the people of the State of California. . . . To this end a trial judge should not determine any issue that is presented for his consideration until he has heard all competent, material, and relevant evidence the parties desire to introduce.” [Citation.]” (*Id.* at p. 291, original italics.)

The *Carlsson* court explained that though the recent Supreme Court case in *Elkins v. Superior Court* (2007) 41 Cal.4th 1337 “involved a different issue than that posed here — whether a local rule that required parties to present their case in contested dissolution trials by means of written declarations was inconsistent with certain statutory provisions [citation] — the court’s pronouncements have a direct bearing on this case.” (*Carlsson, supra*, 163 Cal.App.4th at p. 292.) Specifically, “[t]he high court noted that ‘[a]lthough some informality and flexibility have been accepted in marital dissolution proceedings, such proceedings are governed by the same statutory rules of evidence and procedure that apply in other civil actions.’ [Citation.] ‘Ordinarily, parties have the right to testify in their own behalf [citation], and a party’s opportunity to call witnesses to testify and to proffer admissible evidence is central to having his or her day in court.’ [Citation.] Emphasizing a party’s ‘fundamental right to present evidence at trial in a civil case’ [citation], the *Elkins* court went on to declare, “‘One of the elements of a fair trial is the *right to offer relevant and competent evidence on a material issue*. Subject to such obvious qualifications as the court’s power to restrict cumulative and rebuttal evidence

. . . , and to exclude unduly prejudicial matter [citation], denial of this fundamental right is almost always considered reversible error” [citations].” (*Ibid.*, original italics.)

Here, Laurence defends the trial court’s judgment because “[i]t is very clear that Judge Waltz did not believe Ms. Tossey’s presentation regarding her job search.” The problem, however, is that the court did not allow her to present *any* evidence at the trial reserved on this very issue. As the *Carlsson* court explained, “““The trial of a case should not only be fair in fact, but it should also appear to be fair.” [Citations.] A prime corollary of the foregoing rule is that “A trial judge should not prejudge the issues but should keep an open mind until all the evidence is presented to him.” [Citation.]” (*Carlsson*, *supra*, 163 Cal.App.4th at pp. 290-291.) Having earlier heard Pam’s testimony in this proceeding certainly afforded the trial court with an informed perspective on which to evaluate any new testimony she might have provided at the trial on reserved issues. But the trial court could *not* weigh the credibility of testimony it did not hear.

Laurence suggests Pam’s offer of proof concerning her job search was insufficient. To our dismay, neither party provides a record citation to Pam’s offer of proof. Laurence unhelpfully cites only a minute order reciting that the trial court “hear[d] opening statements and offers of proof from counsel[] on reserved issues.” While we located nothing in the transcript of the trial on reserved issues to suggest Pam’s attorney made an oral offer of proof specifying Pam’s employment efforts, it would have been futile to do so. (Evid. Code, § 354, subd. (b) [party need not make a “futile” offer of proof]; see, e.g., *Tomaier v. Tomaier* (1944) 23 Cal.2d 754, 760 [“When the trial court states that it will not receive evidence, a specific offer of proof is not necessary and would be idle under the circumstances”].) The trial court already had rejected Pam’s

written offer of proof in her pretrial brief, dismissed without any explanation her vocational expert, and declared at the outset of the trial on reserved issues that the evidence was closed. No further offer of proof was required.

Laurence's attorney insists, "The complaint that Wife was not afforded a hearing is in the writer's opinion . . . nothing more than a stalking horse because, had the court entertained testimony as opposed to offers of proof/argument [and] documenting evidence, the result would have been the same inasmuch as the evidence proposed by [Pam's] attorney . . . showed **nothing new.**" (Original boldface.) Not so. First, this argument "is akin to asking that a football team be declared the winner where the referee stopped the game in the fourth quarter, on the ground that the team had a sizeable lead and a comeback by the opponent was unlikely. [Husband] was entitled to a full and fair trial. Because the court did not afford him one, the integrity of the process was fatally compromised." (*Carlsson, supra*, 163 Cal.App.4th at p. 294.) The same is true here.

Second, Pam's written pretrial offer of proof was sufficient. She stated in her pretrial brief that she would "attempt to show this court that in spite of her desire and efforts to find employment in her chosen field, or in another field commensurate with her former skills and education, she has not been able to do so. She has, however, continued to take classes to[ward] that end, *while working through [a] temporary placement agency.*" (Italics added.) She also stated she had "[c]ontinued to search for jobs on Monster.com, Dice.com, and CyberCoders.com." Indeed, her placement agency efforts actually yielded a customer support position, albeit temporary, providing "customer services for the Cirque d[u] Soleil production of 'Kooza' in Irvine," for which she had worked through mid-February. While *after a full and fair hearing*, a reasonable trier of fact might find Pam could not be excused from *also* looking for customer service work if

she could not “find employment in her chosen field” or a “commensurate” one, Pam’s offer of proof suggested she had indeed looked for such work. Presumably Pam’s vocational expert had something to say on the availability of relevant jobs and it was not a sufficient basis to exclude him simply because Pam had not *actually obtained* a customer service or other suitable job — given the trial court totally barred her evidence on the availability of such jobs.

In sum, due process required affording Pam the opportunity to present testimony regarding her job search and on all contested issues at the trial on reserved issues, including *Watts* charges. Because the trial court erred in barring Pam’s evidence, the judgment must be reversed, including the trial court’s decision not to apportion attorney fees. That decision rested on the court’s conclusion the parties’ actual or imputed income and resources were equal, but *that* determination in turn rested on the erroneous exclusion of Pam’s evidence in calculating her imputed income and Laurence’s permanent spousal support obligation.³

³ We deny as moot Pam’s request for judicial notice (Evid. Code, § 452) or, alternatively, that we receive evidence on appeal (Code Civ. Proc., § 909) of post-2008 employment statistics from the state Employment Development Department’s website.

III

DISPOSITION

The judgment is reversed. Pam is entitled to her costs on appeal.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

IKOLA, J.