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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of JANNA JEAN
MCCONNELL and ROBERT H. GREGG
II.

JANNA JEAN MCCONNELL,

Respondent,

v.

ROBERT H. GREGG II,

Appellant.

G045853

(Super. Ct. No. 07D005483)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Theodore R. Howard, Judge. Motion to augment the record. Order affirmed. Motion denied.

Law Offices of Jeffrey W. Doeringer and Jeffrey W. Doeringer for Appellant.

Law Offices of Levin & Margolin and Lionel P. Levin for Respondent.

* * *

Appellant Robert H. Gregg II (husband) appeals from a pendente lite order that he forthwith pay respondent Janna Jean McConnell (wife) \$350,000 for attorney fees in their dissolution action. He argues her failure to check the box seeking fees in the original petition was an admission she did not need them. Husband also asserts there was insufficient evidence to show he had the present ability to pay the amount ordered, the court abused its discretion in setting the amount and payment terms, and the order was arbitrary and capricious as punishment for husband filing a writ petition in this court. None of these arguments persuades and we affirm the order.

Husband filed a motion to augment the record with a judgment dismissing Millennium Dental Technologies, Inc. (MDT), a joined party, claiming it refutes “innuendos and actual distorted assertions about [him] and . . . MDT” in the respondent’s brief. As the order is not relevant to issues before us, we deny the motion.

FACTS AND PROCEDURAL HISTORY

Husband and wife were married for 12 and a half years. Husband has a dental practice he began before the marriage, which continued during the marriage and thereafter. During the marriage he incorporated MDT to sell dental devices he had developed prior to the marriage. He subsequently obtained a patent for the devices, which was assigned to MDT. Husband’s father owns .64 percent of MDT and the remaining shares are owned equally by husband and another shareholder. Husband also provides services to Institute for Advanced Laser Dentistry (IALD), which does training for MDT.

In August 2010, wife filed a motion for attorney fees and costs. It was supported by declarations of counsel and wife’s expert. The court set it for the same day as the trial in September. When the trial was continued to December without a decision

on the motion, wife sought to have it set before the new trial date. This was not done. A 15-day trial on certain valuation issues was concluded in March 2011 without wife's lawyer having been paid. In a hearing following the trial the motion for attorney fees was discussed, with the court giving a tentative ruling that it would award wife \$125,000 for attorney fees payable over time. It ordered a further evidentiary hearing held in May 2011; additional declarations were also filed.

After the hearing the court ordered husband to pay \$350,000 forthwith, \$300,000 in attorney fees and the balance in costs. In making its decision it found that in litigating the "complicated and contentious" issues, wife's lawyer "pull[ed] the laboring oar" and that although the fees for each side were comparable, husband's lawyer had been substantially paid while wife's had not, having had to litigate a months-long trial without payment. In arriving at the amount ordered, the court "conduct[ed] a line-by-line review of billings" by wife's law firm, deducted almost \$12,000 from the amount requested, and found the balance reasonable and necessary.

After considering a variety of factors, the court ruled "[t]he balancing of hardships . . . favor[ed wife.]" It found, among other things, wife did not have sufficient skills to obtain employment in the current market. It also looked at husband's ability to pay, finding his claim he lacked the ability not credible because of how easy it had been for him to pay his own lawyer "in spite of testimony of insolvency." It also was unable to fully evaluate wife's assets because husband was attempting "to block the sale of the community stock interest awarded her by an in-kind division" that could result in her inability to use proceeds to pay her lawyer. Her separate property was insufficient to cover the fees.

Husband filed a motion to reconsider or clarify the award or, alternatively, for a new trial. The court denied the motion except it clarified its finding about

husband's ability to pay. It added a finding that his testimony lacked credibility because his dental practice and MDT provided him with "a luxurious residence" rent free and other "perks."

Additional facts are set out in the discussion.

DISCUSSION

1. Lack of Request in Petition

Husband's first argument, that wife is not entitled to attorney fees because she did not seek them in her dissolution petition, is easily disposed of. Failure to check the box requesting fees was not an admission of any kind, including that she did not "need" fees. A party may seek need-based attorney fees at any time by filing a motion or order to show cause. (Family Code §§ 2030, 2031, 2032 (all further statutory references are to this code); see Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2012) ¶ 3:270, p. 3-101 [right to fees not limited to request in petition].)

2. Failure to Properly Organize Brief

Although the claim discussed above was discrete and introduced by an appropriate heading, we cannot say the same for the remainder of the brief. Of the many headings and subheadings, a few were clear but many were vague and failed to give an adequate description of the claim raised. Moreover, arguments on the same issues were scattered throughout the brief instead of being confined to one distinct argument under a separate heading, as required by the Rules of Court. (Cal. Rules of Court, rule 8.204(a)(1)(B) ["Each brief must: . . . [¶] State each point under a separate heading or subheading summarizing the point"].) Failure to follow this rule forfeits the arguments. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.) We will address

the claims as best we can understand them but, because of the problematic brief, may not consider all the loose and disparate claims strewn throughout it.

3. *Ability to Pay*

To require one party to pay the other's attorney fees, the court must find the paying party "has or is reasonably likely to have the ability to pay." (§ 270.) In assessing husband's ability to pay the trial court may consider his salary and any other relevant evidence, including income and assets. (*In re Marriage of Sullivan* (1984) 37 Cal.3d 762, 768.) It may also consider his ability to earn, not just current earnings. (*Id.* at p. 769.)

Husband argues he does not have the ability to pay. He faults the trial court's finding that he had his fees paid by others and a rent-free "luxurious residence" and other "perks" from his practice and MDT. He claims all the evidence shows that, although he had borrowed to pay his own fees, he can no longer borrow and cannot even pay his own lawyer. He also asserts the evidence shows his perks are gone. Husband cites to his testimony, and that of his expert and another shareholder in MDT, about the weak financial condition of the dental practice and MDT and that he owes \$100,000 in rent.

Whatever husband's evidence, the trial court clearly did not believe his claim he lacked the ability to pay. It is the sole judge of credibility and "may reject any evidence as unworthy of credence, even uncontradicted testimony. [Citation.]" (*In re Marriage of Falcone and Fyke* (2012) 203 Cal.App.4th 964, 979.)

Moreover, there was contrary evidence husband fails to mention. For example, his June 2010 income and expense declaration shows a \$300,000 to \$400,000 interest in real and personal property. There was also evidence the income generated by his dental practice was increasing, going from a monthly average of \$18,600 in December 2009 to not quite \$30,000 in March 2011. Further, husband, as the sole shareholder of his dental practice, controls it and compensation and perks he receives

from it. Husband's expert testified husband received \$470,000 in perks from his practice in 2010. The court was not required to give substantial weight to the claim MDT loaned the practice money to pay for those perks.

Husband is also the president and board chairman of MDT and "effectively controls [it], giving him 'the ability to fashion a reasonable combination of perquisites and compensation to him . . .'" (*Gregg v. Superior Court* (June. 28, 2011, G045211) [nonpub.opn] p. 5 [husband's petition to have MDT valued].) Further, he directs that payment for the services he provides to IALD be paid to his dental practice in the amount of \$16,500 per month. (*In re Marriage of Dick* (1993) 15 Cal.App.4th 144, 159-160 [court may consider assets husband put in control of third parties].)

Husband's claim there was no evidence to support the court's finding he lived in a "luxurious residence," is belied by the evidence the house was worth \$1.8 million. Further, he does not pay the \$6,175 monthly rent to MDT for the house.

In his reply brief husband challenges the evidence on which wife relies. Some of it was contained in her lawyer's declarations filed in the trial court. But husband did not object to that evidence and the trial court was entitled to rely on it as are we.

In sum, the court had sufficient evidence to support its finding husband has the ability to pay the attorney fees.

4. Amount and Time of Payment

Husband challenges the amount and terms of payment of the award on several grounds. He asserts the award cannot be upheld because, among other things, the court failed to make findings on the parties' relative incomes. Citing *In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 631, he argues it "appear[s]" such a finding is required and failure to make it is reversible error.

Nothing in *Duncan* supports this claim. Nor is there any statutory requirement of such a finding. Section 2032, subdivision (b), requires the court to "take

into consideration” a variety of factors, including income, but it does not mandate the court make findings on them. Likewise, section 2030, subdivision (a)(1) requires the court to consider income, among other things, but again does not speak of findings. Subdivision (a)(2), on the other hand, states “the court shall make findings” as to certain factors, but none of them is income. Moreover, it is implicit in the court’s findings about wife’s inability to obtain employment that it considered the parties’ incomes.

Husband mentions the court refused to allow an expert to testify about a vocational evaluation of wife. If he intended this to be the basis of his appeal it fails, lacking a required heading (Cal. Rules of Court, rule 8.204(a)(1)(B)) and any reasoned legal argument in support. Thus it is forfeited. (*Benach v. County of Los Angeles, supra*, 149 Cal.App.4th at p. 852.)

It is also a reasonable inference the court considered husband’s obligations and his previous payments to wife when it found that, in balancing the parties’ respective hardships, wife was entitled to an attorney fee award.

We reject husband’s claim the court did not consider whether fees were reasonably necessary. The court specifically made such a finding after conducting a line-by-line review of the bills and deducting amounts it did not believe were proper. That the court did not agree with husband’s examples of purported excessive billing is neither here nor there. The trial court has wide discretion setting the amount of attorney fees and costs and the judge’s knowledge and experience are sufficient to support the award. (*In re Marriage of Dick, supra*, 15 Cal.App.4th at p. 167.) We will not reverse absent a showing of abuse of discretion, which husband has not made.

Equally without merit is husband’s claim the award is onerous because, together with a prior payment, it equals about 93 percent of wife’s fees. He claims, without support, that “case law has rarely, if ever, seen” such as award.

In making an award of attorney fees, the court must “ensure that each party has access to legal representation . . . by ordering, if necessary based on the income and

needs assessments, one party . . . to pay . . . *whatever amount is reasonably necessary* for attorney's fees and for the cost of maintaining . . . the proceeding" (§ 2030, subd. (a)(1), italics added.) The court takes into account, among other things, "whether there is a disparity in access to funds to retain counsel, and whether one party is able to *pay for legal representation of both parties*. If the findings demonstrate disparity in access and ability to pay, the court shall make an order awarding attorney's fees and costs." (§ 2030, subd. (a), italics added.) "In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately" (§ 2032, subd. (b).)

The statutory language makes clear the court is required to ensure that a party without sufficient resources is able to hire counsel by ordering the other party, who is able to do so, to pay the amount reasonably necessary. It allows for the possibility that one party will pay for lawyers for both parties. It sets no limit on the percentage of total fees to be paid. Further, husband was able to pay his lawyers substantial sums, by May 2011, almost \$450,000 while wife's counsel went for months without payment, including 22 days of trial. This is contrary to the language and spirit of the statutes.

Likewise, we are not persuaded by the argument that the award of more than wife requested is further evidence of abuse of discretion. We do not agree with the characterization of wife's request. Although her lawyer did state in argument, in reference to the prior tentative of \$125,000, that payment of \$10,000 per month "at the very, very least" was "at least a step in the right direction," he also said wife had a balance of more than \$350,000. This supports the award no matter what counsel stated in argument.

Finally, husband challenges the order he pay the fees forthwith, claiming this puts him "in immediate practical contempt" and will interfere with his ability to pay

his own lawyer. Again, this portion of the order is based on and supported by the court's disbelief in husband's claim he could not pay the fees.

5. Alleged Judicial Retaliation

Finally, husband claims the court made its award in retaliation for the success of his petition for writ of mandate. He notes the tentative decision was for payment of \$125,000 over time. The final order was \$350,000 forthwith.

Husband points to the finding in the award that his attempt to block wife's sale of her stock in MDT interfered with the court's ability to completely consider wife's assets to determine whether she could pay some of her own attorney fees and how much. He argues that his writ petition was filed after the court heard argument on the fee petition and took the matter under submission. Our opinion issuing the writ ordered the trial court to strike the order requiring husband to transfer half of the MDT stock to wife so she could sell it. (*Gregg v. Superior Court, supra*, G045211, p. 7.) It was filed after the first hearing. And the final trial court order awarding fees was filed thereafter.

Husband's argument is flawed and baseless. The \$125,000 tentative ruling was followed by an evidentiary hearing. And the statement of intended decision was issued after that second hearing. By its own statement the court based its order on what happened in that hearing, not on some imagined retaliation for the writ petition. There is not a shred of evidence supporting husband's conjecture and we reject it. Nor does husband point to any substantive evidence that the amount is "arbitrary or capricious." His "conjur[ing]" is not enough.

DISPOSITION

The order is affirmed. The request to augment the record is denied. Wife is entitled to attorney fees on appeal.

RYLAARSDAM, ACTING P. J.

I CONCUR:

BEDSWORTH, J.

ARONSON, J., Concurring and Dissenting:

I concur in the majority's opinion, except for its summary rejection of appellant Robert Gregg's contention the trial court erred in ordering a forthwith payment of \$350,000. Substantial evidence supports the amount of the order, but I do not see the basis for the trial court's conclusion Gregg has the means to immediately pay \$350,000. The majority opinion offers no factual support for its cursory two-sentence rejection of Gregg's claim, and merely cites the trial court's disbelief of Gregg's claim he lacked the ability to pay any fees at all. (Maj. opn. *ante*, at pp. 8-9.) This hardly addresses Gregg's claim that he had no ability to immediately pay a \$350,000 lump sum.

There is simply insufficient evidence Gregg had the necessary liquidity to make a forthwith payment of \$350,000. (See *In re Marriage of Schulze* (1997) 60 Cal.App.4th 519, 531 [trial court unreasonably rejected installment payments on attorney fee order because appellant lacked liquid assets to comply].) I would remand the matter for the trial court to consider installment payments consistent with Gregg's income.

ARONSON, J.