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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of KATHRIN and NOEL  
TURNER.

KATHRIN TURNER,

Respondent,

v.

NOEL TURNER,

Appellant.

G045973

(Super. Ct. No. 10D010712)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,  
Theodore R. Howard, Judge. Reversed.

Law Offices of Brian G. Saylin and Brian G. Saylin for Appellant.

No appearance for Respondent.

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In this marital dissolution case, Noel Turner (husband) challenges the court's pendente lite award of attorney fees and costs to Kathrin Turner (wife).<sup>1</sup> Because the court failed to make the statutorily mandated finding on whether husband had the ability to pay the fees and costs of both parties, we reverse.

## FACTS

Husband and wife were married in November 1994 and have two minor children. In November 2010, wife petitioned for dissolution of the marriage.

On December 9, 2010, wife applied for an order to show cause (OSC) and ex parte temporary orders seeking, inter alia, child and spousal support of \$40,000 per month (based on monthly household expenses of *at least* \$40,000 per month), as well as a “preliminary contribution” of \$50,000 in attorney fees and \$20,000 for a forensic accountant. Wife declared that during the year from October 2009 to October 2010, approximately \$17 million had been deposited into their personal bank account. She did not believe she and husband were earning any less money now, but did not know where the money was being deposited. She declared that husband runs the family business, Turner New Zealand, which imports meats and seafood from New Zealand, and that an additional company called Moxxor distributes an Omega-3 supplement. She declared she

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<sup>1</sup> The court's order granting wife's motion for pendente lite attorney fees is appealable. (*In re Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119 [direct appeal lies from “pendente lite attorney fees order where nothing remains for judicial determination except the issue of compliance or noncompliance with its terms”].) This is true even though the order was expressly subject to retroactive modification by the court: “No single fees and costs order is an “all or nothing” proposition. Need-based awards may be *augmented* or *modified* as necessary during the entire pendency of the case, consistent with the parties' “relative circumstances” [citation].” (*In re Marriage of Cryer* (2011) 198 Cal.App.4th 1039, 1056; Fam. Code, § 2030, subd. (c).)

and husband owned many businesses, in California, Germany and New Zealand, but she did not know how much they were worth or much they earned.

In response to the ex parte request, husband declared wife was in possession of \$63,000 (most of which he had given her). He “vehemently” disputed wife’s allegations of earnings, declaring, “This country is in a recession and it cuts across the board. I have no monies to fund her. She doesn’t say why she doesn’t use some of the \$100,000 in her possession.” He asked that the attorney fees and forensic costs issue be deferred to the hearing on the OSC. The hearing was set for January 20, 2011.

In reply, wife acknowledged she had \$60,000, but stated the monthly household expenses were \$40,000. She declared it was her understanding that husband had depleted the bank account into which \$17 million had been deposited, but that husband had several other bank accounts.

Judge Clay M. Smith made temporary orders awarding wife the exclusive use of the family home and a 2010 Jaguar.

The appellate record does not disclose the date on which the hearing on wife’s OSC actually commenced. But the reporter’s transcript for April 22, 2011, reflects some judicial frustration with the pace of the proceeding. Judge Theodore R. Howard (to whom the case had been assigned) observed that this was now the seventh day of what had been estimated to be a five-hour hearing.<sup>2</sup> The court stated that on the previous day, it had expressed its concern that discovery was being conducted during trial. Nonetheless, the court allowed the chief financial officer (Derek Poon) of husband’s business entities to be called out of order as a witness in husband’s case-in-chief (during wife’s presentation of her case). Poon testified for over 120 reporter’s transcript pages about the earnings and income of the entities, as well as credit card accounts. When Poon

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<sup>2</sup> The record does not contain the reporter’s transcripts for the hearings on the prior six days.

finished testifying, wife's counsel would not agree to Poon's excusal as a witness because wife's counsel had not received documents subpoenaed from Poon, and therefore could not question Poon about them. Husband's counsel stated he had brought the documents on a Compact Disk; the court observed that while the Compact Disk might have been satisfactory during discovery, it was of no use to wife's counsel here in trial.

The court concluded the case was approaching one of two outcomes: (1) a mistrial, or (2) the court appointing an Evidence Code section 730 evaluator or a special master "to go through all of this and try to determine where the money is [or] if there's any money." The court noted wife had possibly failed to account for business-related expenses in calculating the money available for support, but that husband had perhaps not included in his calculation some payments made for the parties' benefit. The court noted husband was not paying the court-ordered temporary support on grounds he had no money to make the payments. The court reminded wife's counsel that wife bore the burden of proof to show husband's ability to pay. The court suggested referring the case to a referee and two accountants to determine what money was available for support. Wife's counsel expressed frustration about the delay such an appointment would cause, arguing that wife had not received an attorney fee award or any support payments from husband, while money was being spent to support husband. The court replied that if the evidence showed husband had concealed assets, wife would have "incredible" remedies under Family Code section 271. Wife's counsel agreed. The court stated this would be among the issues that the referee or special master would "ferret out."

Wife's counsel argued that husband's counsel had been paid about \$60,000 to date and that wife was entitled to "a fair playing field." The court stated, "Well, I have no problem making an interim order for the payment of counsel and expert fees at this point in time." The court stated wife was entitled to an interim award of attorney fees "to level the playing field in view of the apparent circumstance that [husband's counsel] and his team have been paid . . . \$86,000 to this point."

But the court refused to make a temporary support order beyond the temporary support order already in effect until it received the referee's report, noting that husband had not yet presented his case other than the testimony of Poon, who had been called out of order.

Ultimately, the court ordered husband to pay wife \$70,000 in attorney's fees to "level the playing field" and "equalize the access" "to the legal process." Husband's counsel asked the court whether the order was "without prejudice to deal with the issue of allocation of fees at the time of trial." The court replied, "This order is always of that nature because I don't have the full information. I can't make [a Family Code section] 4320 analysis at this time . . . as I am required to do on any final order of attorney's fees."

The court stated the order was payable forthwith. Husband's counsel asked, "How could he pay that forthwith?" The court replied, "Right now I'm not going to deal with that issue. I do not have the evidence in this case as you've already pointed out." Husband's counsel stated, "That's why I don't think the court should make that order now." The court replied, "You got paid. And that's all I know. Not only did you get paid but your expert got paid . . . \$6,000. So that's the state of the evidence that's been presented to me by your witness."

The court continued the matter to May 4, 2011 to hear husband's evidence, since husband had not yet put on his case with the exception of Poon, who had been called out of order. At the May 4, 2011 hearing, Poon again testified, this time for over 100 reporter's transcript pages. Husband's forensic accountant had received about \$21,000.

The court stated it had already made at least a partial order on attorney fees and anticipated it would decide the matter of costs that day. The court then stated, "The other matter has to do with the spousal and child support. The court finds that the evidence is so convoluted and byzantine . . . as to the finances of these parties that the

court is going to order” an Evidence Code section 730 investigation concerning the cash or the equivalent available for spousal and child support. The court continued the hearing pending its receipt of the Evidence Code section 730 report.

The court then addressed who would pay the Evidence Code section 730 expert and estimated that the expert’s initial retainer fee would be about \$10,000. The parties agreed to list a commercial building for sale to raise the necessary funds. But wife’s counsel stated the property was worth several million dollars and might take a year or more to sell. Wife’s counsel argued husband should pay the \$10,000, but the court stated, “I’m told they don’t have the money.” The court asked Poon whether he knew of a “spare” \$10,000 available from the entities or husband’s personal finances to pay the expert’s retainer fee. Poon replied he did not. The issue of the obtaining the necessary \$10,000 retainer fee was settled when the parties agreed to list the commercial building for rent, in addition to for sale. When wife’s counsel alleged husband’s company had been making other payments, the court noted that part of the problem was that it had not given husband’s counsel the opportunity to present his evidence. The court asked why wife had not sought a contempt hearing.

The court awarded wife \$20,000 in accountant’s fees. The court stated, “Since I’m spending money [husband] says he doesn’t have, why not[?]” The court stated the reason for the award was that more forensic work is required of the petitioning party than the responding party since the petitioner bears the burden of proof, and that husband’s accountant had been paid \$21,000 so far compared to \$5,000 paid to wife’s accountant.

Wife’s counsel stated for the record what he believed the evidence already presented did show for purposes of calculating support. On that basis, wife’s counsel objected to the court’s ordering of an Evidence Code section 730 investigation.

The court stated it did not have enough information to make a finding as to whether there was money available to pay for the Evidence Code section 730 investigation.

Husband's counsel requested a statement of decision, including findings on the earnings income of both parties. Husband's counsel observed (and the court confirmed) that because the court had suspended the hearing (pending receipt of the Evid. Code, § 730 report), husband had yet to put on his case in defense (other than the testimony of Poon).

On August 31, 2011, the court finally made its orders, inter alia, awarding wife the \$70,000 in pendente lite attorney fees and \$20,000 for a forensic accounting expert. The court issued written findings that (1) it found the finances and businesses were convoluted and therefore ordered an Evidence Code section 730 investigation into the available cash flow, or equivalent, for purposes of calculating spousal and child support, and (2) the "court makes no findings nor orders regarding the payment of the retainer for the Evidence Code [section] 730 investigation." It made no findings regarding husband's ability to pay the ordered \$90,000 in fees and costs.

## DISCUSSION

Husband contends the court failed to comply with the mandates of Family Code sections 270, 2030, and 2032, when it ordered him to pay \$90,000 of wife's pendente lite attorney fees and accountant costs.<sup>3</sup>

A review of the Family Code statutes that govern need-based attorney fee awards in marital dissolution cases reveals the court did fail to follow the statutes' mandates. Section 270 applies to all awards of attorney fees and costs under the Family

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

Code and states: “If a court orders a party to pay attorney’s fees or costs under this code, the court shall first determine that the party has or is reasonably likely to have the *ability to pay*.” (Italics added.) Other Family Code statutes apply specifically to attorney fee awards in marital dissolution proceedings. Section 2030 authorizes awards in dissolution cases. Section 2032 prescribes additional requirements for section 2030 awards. Section 4320 (referenced in § 2032, subd. (b)) sets forth the “circumstances” to be considered by a court, to the extent relevant.

Under section 2030, a court must “ensure that each party has access to legal representation” during the pendency of a marital dissolution proceeding by ordering one party to pay the other party’s reasonably necessary attorney fees and costs, “if necessary based on the income and needs assessments.” (*Id.*, subd. (a)(1).) When a party requests attorney fees and costs, the court must make the following findings: (1) whether an award of attorney fees and costs is appropriate; (2) whether there is a disparity in access to funds to retain counsel; and (3) whether one party is able to pay for legal representation of both parties. (§ 2030, subd. (a)(2).) “If the findings demonstrate disparity in access and ability to pay, the court shall make an order awarding attorney’s fees and costs.” (*Ibid.*) Section 2030 applies to pendente lite awards; the statute specifies that the court must ensure that each party has access to representation, “including access early in the proceedings.” (§ 2030, subd. (a)(1).)

Section 2032 controls and supplements section 2030. Section 2032 permits a court to make an award of attorney fees and costs under section 2030 where “the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties.” (§ 2032, subd. (a).) Section 2032 further provides, “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, taking into consideration, to the extent relevant, the

circumstances of the respective parties described in Section 4320.” (*Id.*, subd. (b).) As to the source of the payment, the “court may order payment of an award of attorney’s fees and costs from any type of property, whether community or separate, principal or income.” (*Id.*, subd. (c).)

Section 4320 (referenced in § 2032, subd. (b)) sets forth the “circumstances” to be considered by the court, if relevant. Those circumstances include the supporting party’s ability to pay. (§ 4320, subd. (c).)

“In assessing one party’s need and the other’s ability to pay, the court may consider evidence of the parties’ current incomes, assets, and earning abilities.” (*In re Marriage of Rosen* (2002) 105 Cal.App.4th 808, 829.) In calculating a party’s ability to pay, a court should consider that party’s obligations and expenses, such as for spousal and child support and the party’s need to pay his or her own legal fees. (*In re Marriage of Keech* (1999) 75 Cal.App.4th 860, 867-868.) The party moving for a fee award bears the burden of establishing his or her need for the money in light of the parties’ relative financial positions. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 824.)

A pendente lite attorney fee award is reviewed for abuse of discretion. (*In re Marriage of Keech, supra*, 75 Cal.App.4th at p. 866.) But “[w]hile the family court has considerable latitude in fashioning or denying an attorney fees award, its decision must reflect an exercise of discretion and a consideration of the appropriate factors as set forth in code sections 2030 and 2032.” (*In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1313-1314; see also *Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238, 242.) Furthermore, a court may *not* base the dollar amount of an award solely on the attorney fees paid by the non-applicant spouse for his or her own representation. (*In re Marriage of Keech*, at pp. 869-870.) The amount expended by husband for his own fees “does little more than allow informed speculation that the court decided to require husband to pay at

least as much for wife's attorney fees as he did for his own. That is not the standard by which the court was to determine the amount of the award." (*Ibid.*)

On appeal, husband bears the burden of proving the court abused its discretion by awarding wife attorney fees and costs. (*In re Marriage of Lopez* (1974) 38 Cal.App.3d 93, 114, disapproved on a different point in *In re Marriage of Morrison* (1978) 20 Cal.3d 437, 453.) Husband has met his burden by showing that the court failed to make the statutorily mandated findings. "If a court orders a party to pay attorney's fees or costs under this code, the court *shall first determine that the party has or is reasonably likely to have the ability to pay.*" (§ 270, italics added.) Here, the court could not determine whether husband had any funds available to make payments. The court found the evidence was so convoluted that an Evidence Code section 730 evaluation was necessary to sort it out. The court expressly made no findings regarding the payment of the expert's \$10,000 retainer fee.

In *In re Marriage of Rosen, supra*, 105 Cal.App.4th at pages 814-815, this court reversed a trial court's spousal and child support award because the trial court calculated spousal support based on the husband's cash flow two years before trial and ignored his recent tax return which reflected his income had decreased substantially. (*Id.* at p. 824). In *Alan S. v. Superior Court, supra*, 172 Cal.App.4th at page 242, this court determined the trial court abused its discretion by ordering the husband to pay the wife's attorney fees without considering, inter alia, the husband's negative cash flow and child support obligation. In *In re Marriage of Keech, supra*, 75 Cal.App.4th 860, an appellate court reversed a trial court's attorney fee order (*id.* at pp. 862-863), because the trial court's order left the husband only "\$93 per month after payment of his court-ordered obligations"; nor did the record reflect "any consideration of the husband's needs to pay his *own* outstanding legal fees during that period" (*id.* at p. 868).

Here, the court failed to determine husband had the ability to pay wife's attorney fees and costs. Instead, the court based its award on the fact that husband had

previously made payments to his own attorney and accountant. In doing so, the court abused its discretion.

The record in this case suggests wife faced many obstacles in gathering the evidence necessary to establish husband's ability to pay. Wife alleged the community owned 24 different businesses, and she successfully moved the court for an order compelling husband to make the access codes, user names, and passwords available to her of "each and every [c]ommunity [p]roperty business." This order was made on April 20, 2011, during the course of the extended hearing on wife's OSC. This order should not have been necessary. Parties who obfuscate or withhold evidence of their ability are not immunized from attorney fee and cost orders. Under section 271, a court may order an attorney fee award as a *sanction* against an uncooperative party, provided, again, that the uncooperative party has the ability to pay. For example, in *In re Marriage of Quay* (1993) 18 Cal.App.4th 961, 969-970, the record was replete with documentation of the husband's delays, obstructions and refusal to provide an accounting of the proceeds from a sale of stock, forcing the wife's attorneys to bring motions to comply. The appellate court affirmed the trial court's award of attorney fees under the predecessor statute to section 271.

Thus, if wife's allegations regarding husband's ability to pay are ultimately proved to be true, both a needs-based order and a sanctions order are potentially available. But the prospect of an ultimate remedy does not excuse the court's noncompliance with the mandate of section 270. "[T]he court shall first determine that the party [ordered to pay] has or is reasonably likely to have the ability to pay." (*Ibid.*)

DISPOSITION

The order of August 31, 2011, awarding wife pendente lite attorney fees and costs is reversed. Husband is awarded costs on appeal.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.