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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of NIHAL G. and  
GREGORY L. FOLEY.

GREGORY L. FOLEY,

Respondent,

v.

NIHAL G. FOLEY,

Appellant.

G049070

(Super. Ct. No. 10D009323)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Glenn R. Salter, Judge. Affirmed.

Law Office of Ronald B. Funk and Ronald B. Funk for Appellant.

Dawn E. Wardlaw for Respondent.

\* \* \*

Nihal G. Foley (wife) appeals from the judgment filed in the dissolution of her marriage to Gregory L. Foley (husband). She contends the trial court abused its discretion by determining \$195,000 had been paid toward a community debt, ordering a step-down in spousal support such that it would be reduced to zero after the end of three years, and declining to award her attorney fees. We reject these contentions and affirm the judgment.

## BACKGROUND

The parties married in 1998, had two children, and separated in 2012, following which husband petitioned for dissolution of marriage. The court entered temporary orders, after which the parties stipulated to temporary spousal support to wife in the monthly amount of \$4,000 and husband having primary physical custody of the children. A status-only judgment of dissolution was entered in December.

After resolution of child custody and visitation, the remaining issues were tried. These issues included the debt owed by the community to wife's parents and "the characterization of the Wells Fargo Bank account in [wife's] name." Wife testified that over the years she and husband had borrowed \$405,000 from her parents and that approximately \$95,000 had been repaid.

According to husband's testimony, he never saw the money or documentation showing a loan of \$405,000 from wife's parents. But he did sign a "simultaneous death agreement" that in the event of their simultaneous deaths the borrowed money would be repaid to wife's parents. Husband believed the document they signed "says \$405,000. It was whittled down to \$325,000. But, again, I don't know if that is an accurate reflection of what money was supposedly borrowed by [wife]." To repay the loan, husband wrote checks to wife from their joint Chase account. He also set

up automatic payments from that account that were wired to wife's separate Wells Fargo Bank account, to which he did not have access.

Before the date of separation, wife wired "family money . . . to Turkey to [her] mother" from her Wells Fargo Bank account. Wife claimed the money in that account belonged to her family in Turkey even though she admitted she deposited the money husband gave her each month into that account.

Another issue for resolution at trial was the amount of spousal support husband would be required to pay. Husband had a high school education and had not worked since 2007, when he earned about \$80,000 as the Director of Human Resources for a Marriott reservation call center. He is waiting to search for employment depending on the amount of the custody orders. The source of family support has been dividends from husband's stock in Submar, a family-run corporation.

Wife has a degree in Hotel Management and used to work in that capacity at the Ritz Carlton. She has not worked since 2007, is not looking for a job, and does not plan to work. She will repay her parents when husband gives her the money. Wife considers her job as helping and taking care of a student who is renting a room in her home. She has three other renters, as well as listings on Craig's List for possible renters. Wife receives \$3,550 collectively from her renters.

The court took the matter under submission and issued a statement of decision, as requested by husband. It found wife's parents had "loaned the community \$405,000 with the expectation and understanding the money would be repaid" and that \$195,000 had been repaid. (Boldface omitted.) This consisted of the \$95,000 wife admitted to paying and "the \$100,000 [she] sent to her parents for which there is no other reasonable explanation." (Boldface omitted.) Although wife "claimed the Wells Fargo Bank account was hers, held jointly with her parents in Turkey[,] . . . her parents were never listed as signatories on the account and the account was used to transfer money to

[wife's] parents, ostensibly to repay the loan debt . . . ." The court ruled wife's "characterization of the account not credible." (Boldface omitted.)

As for spousal support, the court considered the factors set forth in Family Code section 4320. It awarded \$4,000 per month in spousal support for one year, reducing it to \$2,500 per month the next year, \$1,000 per month for the third year and then to zero, with the court retaining jurisdiction.

The court denied wife's request for attorney fees and costs. Additional facts are set forth in the discussion.

## DISCUSSION

Wife contends the court erred in determining the amount of money that had been repaid to her parents, ordering a step down in spousal support payments, and denying her an award of attorney fees. She acknowledges the standard of abuse of discretion applies to all three claims. (See *In re Marriage of Sullivan* (1984) 37 Cal.3d 762, 768 [attorney fees]; *In re Marriage of Morrison* (1978) 20 Cal.3d 437, 454 [spousal support]; *In re Marriage of Sivyler-Foley & Foley* (2010) 189 Cal.App.4th 521, 526 [community property division].)

"Generally, 'the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered.'" (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 197.) Factual findings are reviewed for substantial evidence and "will be upheld 'as long as [the trial court's] determination is within the range of the evidence presented.'" (*Ibid.*) We do not reweigh the evidence or make determinations as to credibility (*id.* at pp. 204, 205) and "view[] the entire record in the light most favorable to the prevailing party . . . resolv[ing] all conflicts in the evidence and draw[ing] all reasonable inferences in favor of the findings." (*In re Marriage of Duffy* (2001) 91 Cal.App.4th 923, 931.)

### *1. Amount of Repayment*

Wife contends the court erred in finding \$195,000 had been repaid to her family on the \$405,000 loan. We disagree.

Wife asserts there is no evidence “more than \$95,000 was repaid” to her family. She acknowledges she made a wire transfer from her Wells Fargo bank account to her family in Turkey. Although she testified the amount transferred was \$200,000, the bank statement shows a transfer of \$100,000. Wife claims, however, the Wells Fargo bank account belonged to her immediate family and there was no “evidence that this money came from the community.”

But the court found wife’s characterization of the account was not credible, a determination by which we are bound. (*In re Marriage of Ackerman, supra*, 146 Cal.App.4th at p. 197.) Moreover, there *was* evidence the money she transferred came from community funds and she failed to carry her burden to show otherwise. Husband testified that to repay the loan, he, among other things, set up automatic payments from their *joint* Chase account to wire money to wife’s separate Wells Fargo Bank account. And wife admits “some of the money in [the Wells Fargo] account was money that [husband] had paid toward the family loan.”

The commingling of community and separate property funds “creates a rebuttable presumption that all the funds in the account are community property.” (*In re Marriage of Prentis-Margulis & Margulis* (2011) 198 Cal.App.4th 1252, 1281.) “The party claiming that property acquired during the marriage, which is presumed to be community property, is actually separate property has the burden of overcoming this presumption by a preponderance of the evidence.” (*In re Marriage of Sivyver-Foley & Foley, supra*, 189 Cal.App.4th at p. 526.) “[A] spouse who has commingled community and separate funds can defeat the presumption with evidence, employing traditional family law tracing methods, such as direct tracing or the family expense method of tracing.” (*In re Marriage of Prentis-Margulis & Margulis*, at pp. 1281-1282.)

Husband's belief about the amount repaid does not qualify as a tracing method. Because wife presented no evidence to rebut the presumption that the \$100,000 she wired to her family was community property, the court did not abuse its discretion in determining that \$195,000 had been repaid to her family rather than \$95,000.

Wife maintains that the community never made a request for reimbursement. Because she does not explain or present any authority why a request for reimbursement was required where the \$100,000 was used to repay a loan owed by the community, the contention is forfeited. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.) Unlike the cases she cites, *In re Marriage of Feldner* (1995) 40 Cal.App.4th 617, 624-626, *In re Marriage of Williams* (1989) 213 Cal.App.3d 1239, 1243, and *In re Marriage of Lister* (1984) 152 Cal.App.3d 411, 416, this case does not involve the right to reimbursement to the community.

## 2. *Spousal Support*

Wife concedes the court considered the factors set forth in Family Code section 4320 but claims it abused its discretion when it made an erroneous finding of fact, ordered a step down decrease in spousal support, and set her income from renting out rooms in her home. We are not persuaded.

### 2.1 *Factual Finding*

Wife asserts the court erroneously concluded she would quickly regain her hotel management skills, in part, because "she has not been out of the hospitality industry that long" based on husband's testimony that she has not worked since 2007. According to wife, both her Income and Expense Declaration and husband's trial brief indicate her job ended in 1999. But all this shows is a conflict in the evidence. Because we may not reweigh the evidence, and the court's finding as to how long wife has been out of the hospitality industry is supported by husband's testimony, we thus affirm it. In any event,

the record shows the court realized wife would require time for retraining in either the hospitality industry or some other field regardless of whether she had been unemployed from 1999 or 2007.

## *2.2 Step-Down Order in Spousal Support*

Wife argues the court erred in ordering a step-down spousal support order because there was no evidence showing she would have the “ability or opportunity to work” “in the hospitality industry at any time, much less within two or three years.” We are not persuaded.

Neither husband nor the court attempted “to impute an earning capacity to” wife. Thus, *In re Marriage of Bardzik* (2008) 165 Cal.App.4th 1291, 1309, *In re Marriage of Henry* (2005) 126 Cal.App.4th 111, 120, and *In re Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1329, cited by wife for this proposition, are inapposite.

Wife does not deny that the court’s step-down order qualified as a type of *Richmond* order. (*In re Marriage of Richmond* (1980) 105 Cal.App.3d 352, 356.) “The effect of a ‘*Richmond*’ order is to tell each spouse that the supported spouse has a specified period of time to become self-supporting, after which the obligation of the supporting spouse will cease. . . . However, if things do not work out as contemplated, the supported spouse can, upon a showing of good cause, request a change in the original order as to amount or as to the term for jurisdiction over the issue of spousal support. A ‘*Richmond*’ order psychologically prepares the supported spouse for the time when he or she must be self-supporting. It also places the burden of showing good cause for a change in the order upon the one who is most able to exercise the control necessary to meet the expectations the trial judge had in making the order.” (*In re Marriage of Prietsch & Calhoun* (1987) 190 Cal.App.3d 645, 665-666.)

*Richmond* orders “properly serve to limit “the duration of support so that both parties can develop their own lives, free from obligations to each other . . . .”

[Citations.] A *Richmond* order may be appropriate ‘even upon the dissolution of a “lengthy” marriage.’ [Citation.] Where, as here, ‘it can reasonably be inferred from the evidence that the supported spouse is capable of self-support, such an award is deemed justified.’” (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 311.)

Here, the court found wife’s hotel management degree and ability to speak both Turkish and English gave her an advantage and “an ability to engage in gainful employment if she re-establishes her hotel management/hospitality skills.” It recognized, however, that wife’s experience in hotel management was dated, having left in 2006 to raise the children, and that she “would need to re-establish her skills before she could rejoin it.” At the same time, wife “will not have the children on a regular basis so she will have sufficient opportunity to develop her skills and obtain employment.” The court believed \$4,000 per month in spousal support for the first year would “allow [wife] an opportunity to seek retraining and retooling whether she chooses to remain in the hotel management/hospitality industry or chooses a new field.” The following year, “spousal support shall drop to \$2,500 per month for one more year,” based on the court’s anticipation that wife’s hotel management degree and the fact “she has not been out of the hospitality industry that long” would allow her to “quickly regain her skills.” Spousal support would “drop to \$1,000 per month” the year after that, and then to zero, after which the court would retain jurisdiction. (Boldface omitted.)

In sum, the court had before it evidence wife was well-educated, with a degree in hotel management. She had time to train for a job, whether in hotel management or another field, consistent with her duties to her children. The court’s finding wife could prepare herself to earn money, and actually begin to do so within a few years’ time, was not speculative, but inferable from the evidence.

Additionally, “[t]he termination of spousal support in this case is not absolute.” (*In re Marriage of Cheriton, supra*, 92 Cal.App.4th at p. 311.) Therefore, if wife “is unable to support herself by the anticipated termination date, she may move to

extend the support order. The order in this case is appropriately worded to permit her to do so” (*ibid.*), as it states “[s]pousal support shall terminate on the death of either party, remarriage of [wife] or further order of the Court.” The court did not abuse its discretion.

### 2.3 Rental Income

Wife admits the gross rent she receives from those who rent rooms in her home totaled \$3,550, which is what the court set as her monthly income. But she contends that amount did not take into account the mortgage and utilities.

Husband counters that wife “never testified nor proffered any evidence as to what portion of these she believed should be deducted from her income, nor any rationale as to why she should be entitled to these deductions. Her Income and Expense Declaration also does not have the required attachment setting forth any deductions she is claiming.” Wife responds by criticizing husband’s failure to object to her Income and Expense Declaration. But because it was wife’s burden to prove she was entitled to these deductions, we reject her claim. Regardless of whether husband objected to the declaration on that basis, the court properly found her income was \$3,550 a month based on the evidence presented.

### 3. Attorney Fees

Wife argues the court abused its discretion in denying her an attorney fees award because she was unable to pay them whereas husband could. She relies on *In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295. But in that case, the trial court failed “to make a needs-based analysis.” (*Id.* at p. 1315.) Here, in contrast, the court found wife earned “monthly income from renting out rooms in her house as well as receiving monthly spousal support” and could not say husband “has the ability to pay for legal representation for both parties.” The court also considered the fact husband “simply does not have a stable or certain source of income” and that it had already placed the burden

on husband “the risk of any reduction in dividend payments . . . by ordering him to pay spousal support whether he receives the projected \$200,000 a year or not.” The court may have criticized wife for failing to “indicate . . . what she thinks the award should be” but it nevertheless properly exercised its discretion in denying an award of fees to wife. Wife’s claims to the contrary constitute a request that we reweigh the evidence, which we may not do.

#### DISPOSITION

The judgment is affirmed. Respondent Gregory Foley shall recover his costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.