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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of DENISE C. ARCIERO
and PHILIP M. ARCIERO.

DENISE C. ARCIERO,

Respondent,

v.

PHILIP M. ARCIERO,

Appellant.

G049374

(Super. Ct. No. 06D007302)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David S. Weinberg, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Law Offices of Steven R. Grecco, Dawn E. Wardlaw and Steven R. Grecco
for Appellant.

Law Offices of Steven E. Briggs, Steven E. Briggs and Luis A. McKissick
for Respondent.

I. INTRODUCTION

This is a substantial evidence appeal in a high asset divorce case. After no less than seven years of litigation, 2006 to 2013, the trial court entered an order requiring Philip Arciero to pay \$300,000 as his contributory share of his ex-wife Denise's attorney fees. The order provided it was all payable in installments, including three large lump sum payments of \$60,000 by December 15, 2013, another \$60,000 by December 15, 2014, and \$100,000 by December 15, 2015. (The balance of the \$300,000 was to be paid in \$2,000 monthly installments.) Philip now attacks this order, primarily asserting there was no substantial evidence to support the required payment schedule on the theory that the evidence of his ability to make those payments was "speculative." (He also makes two collateral arguments based on the idea Denise has the ability to pay her own fees.) But there was indeed substantial evidence of Philip's ability to pay the \$300,000. On this record we must conclude his net wealth is *at least* something like \$2 million, and that doesn't even include another \$2.4 million as the value of his interest in land known as the Arciero Ranches, so we find sufficient evidence to support the judgment.

II. FACTS

Philip and Denise commenced divorce proceedings back in August of 2006, with Denise filing the initial petition. There were no minor children at the time. Philip is the half owner of a family construction business known as Arciero Brothers; his sister owns the other half.

The case dragged on for the next six years until, in August of 2012, the parties reached a stipulation for judgment on many of the property issues, including division of the \$922,252 net proceeds from the family residence – with Denise keeping 90 percent of those proceeds (\$848,252) and Philip the remainder (\$74,000). But the big issue – the value of Philip's interest in Arciero Brothers itself – was left for another day.

That day came in October 2012, when the court found that 90 percent of Philip's half – which is to say 45 percent of the company – was community property.¹

In the wake of the court's decision on the characterization issue, on May 17, 2013, the parties entered into another stipulation resolving the remaining property issues and the spousal support issue.² As to the property division, Denise got the house in Costa Mesa she was living in at the time, a certain Mercedes automobile, and all bank accounts then standing in her name. Philip got all the stock in Arciero Brothers, the personal property then in his possession, two motorcycles and trailers in his possession, a membership in Dove Canyon Country Club, and all bank accounts then in his name. As part of this division, Philip was to pay Denise a \$700,000 equalization payment.

We must bookmark the May 17, 2013 stipulation, for later discussion. We think it important the stipulation did not spell out any *actual values* of any of the respective items divvied up. The stipulation thus does not tell us what the value of Philip's interest in Arciero Brothers really amounts to. All we know is that the parties considered the respective allocations so lopsided that it would take \$700,000 to equalize the division of community property.

The May 17 stipulation left little undone³ except the attorney fee contribution (if any) to be made by Philip on Denise's behalf. That issue was litigated in a hearing that began three days later and finished the case. We have already spoiled the ending: Philip was to pay \$300,000 in attorney fees. The payout was structured in a combination of three large installment payments and a continuing lower monthly

¹ The court noted there was no dispute that five percent of the company was clearly Philip's separate property, having been acquired in 1980, prior to the parties' marriage a year later.

² Spousal support was resolved by the parties agreeing that Philip's income was \$27,000 a month, and Philip would pay spousal support of \$10,000 a month. A nice touch – kudos to both sides for thinking ahead on this one and thus sparing the trial court support modification proceedings based on only marginal changes – is that Denise would not be allowed to request an increase in support unless Philip's income increased beyond \$30,000, and Philip would not be allowed to seek a decrease unless his income dipped below \$24,000.

³ There were, additionally, claims by Denise for the expenses incurred in certain discovery matters that were handled as a preliminary. Philip does not attack the outcome of these claims, which resulted in his having to pay \$25,000 in what amount to discovery sanctions by December 1, 2013.

payment made over a three-year period. Specifically, Philip had to make lump sum payments of \$60,000 in December 2013, \$60,000 in December 2014, and \$100,000 in December 2015. In addition, Philip was required to pay \$2,000 month from September 2013 through December 2016. It is from the attorney fee provision of the final⁴ judgment that Philip appeals.

However, as Detective Columbo would say, there is just one more thing: the value of a significant separate property asset in Philip's possession in the form of an interest in an entity known as Arciero Ranches. What are the "Arciero Ranches"? Philip's appellate briefing is not pellucid on the topic. There is no exposition, or attempt at exposition, of where "Arciero Ranches" fits into the general universe of assets possibly available to Philip. There is no reference to, say, expert testimony as to the value of the Ranches and Philip's share in them. However, there's enough in the reporter's transcript to give us a pretty good picture of how the fact of Philip having an interest in "Arciero Ranches" might have affected the trial judge's decision.

Philip conceded on the stand that there was a "sale of the ranches" then (as of 2013) in progress. And he told the judge the sale was reasonably certain to be consummated: "As far as I know, the deal is going to go through." He further admitted he "expect[ed] to receive under the deal that's in escrow" \$2.4 million consisting of four annual installments of \$600,000 each, yet to come. And in fact those four installments were in addition to a first annual installment of \$600,000 that had *already* been received. The trial judge then asked Philip directly: "Do you anticipate, assuming nothing interrupts this sale to completion, getting four more annual installments of roughly the

⁴ Ascertaining the one final judgment in a family law case for purposes of determining appealability isn't always easy. (See *In re Marriage of Schaffer* (1999) 69 Cal.App.4th 801, 808 [likening family cases to strung out caravans].) That said, we can be fairly confident in this case. While the case was litigated piecemeal over a seven-plus year period, the final "judgment" filed October 25, 2013, though it did not encompass all the issues previously resolved by stipulation or order, left no more issues to be resolved. (See *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 741 [final judgments "leave nothing to be decided between one or more parties and their adversaries"].) It was thus the "final" judgment in the case. Philip timely appealed from the October 25, 2013 final judgment.

same amount; is that correct?” To which Philip answered, “That’s correct.” Philip further testified the sale was to Chinese investors who had already put \$10 million into a total \$40 million deal.

In oral argument at the end of the hearing, Philip’s attorney backed away from this admission, emphasizing that he had been committed to paying “certain debts,” including capital gains taxes – the main idea being that, at least in his mind, the income from the sale of the ranches had already been allocated. We should note, however, that the trial judge went out of his way to ascertain from Philip that “there is no agreement” that he had “in writing with respect to any of the individuals or entities that you allege you owe money to in connection with the money you obtain from the ranch as it being already pledged or dedicated to these items; is that right?” Philip’s answer was that the only entities that absolutely had dibs on the money received from the sale of the ranches were Denise or the IRS. The court followed up on the answer and ascertained that no one was going to intercept any funds from the sale of the ranches. It was simply Philip’s *intention* to make sure that both IRS and Denise got paid first.

III. DISCUSSION

Preliminarily, we note that there is one issue that Philip’s briefing (wisely) omits from consideration. Philip presents no challenge to the *amount* of the attorney fee award he is being required to pay Denise, \$300,000 in this instance. It is a wise move because, as Denise’s brief details, much of the reason for the delay in the case may be attributed to discovery recalcitrance on Philip’s part – no less than 10 separate discovery production motions.

That said, what he *does* argue is that there is no substantial evidence he possessed sufficient assets to pay the award. Of course, on appeal all conflicts in the evidence are resolved in favor of the judgment under review, so for Philip to prevail he would have to show uncontroverted evidence that the entirety of his assets, including his separate property, were insufficient to pay the total \$300,000 award, even over the three-

year period which the judgment envisions. And that Philip fails to do. Conspicuously missing from Philip's argument and this record is a simple, clear balance sheet of all his assets and liabilities. We are unable to find any such information.

But we do know a few things. In the income and expense declaration Philip submitted in regard to the May 20 hearing, he lists \$200,000 as the total value of his property. But that figure most assuredly did not include a relatively formidable fleet of cars and boats purchased for him by Arciero Brothers, a fleet which included, on the automotive side: a Maserati (\$67,000), a Porsche (\$175,000), and an Aston Martin (\$40,000 down payment); plus a Howard boat (\$145,000), and a McKenna yacht (\$200,000 down). Philip's income and expense declaration manifestly did not include the value of the money source for these purchases, Arciero Brothers.

What was the value of that money source, Arciero Brothers, plus the total value of his other assets? The trial court had these facts in front of it: In the May 17 stipulation, which did include Arciero Brothers, Philip agreed to a \$700,000 equalization payment. But the trial court also had the fact that Denise got about 91 percent of the net proceeds from the family house, about \$850,000, while Philip only received \$74,000. A trial judge looking at these numbers would not have to be a math whiz to estimate that the value of Philip's assets could credibly be estimated to be *at least* \$2 million.⁵

But on top of that \$2 million, there was substantial evidence Philip would receive another \$2.4 million (gross to be sure) over the forthcoming four-year period. And while Philip points out that the sale of the ranches to Chinese investors had, as of May 2013, not been completed, he admitted those investors had already sunk \$10 million into the deal. A reasonable trial judge could conclude that given such an investment,

⁵ From the house proceeds Denise started with \$848,000 and Philip with \$74,000. And we know that Philip had to pay Denise (not the other way around) an equalization payment of \$700,000. So the value of the assets which Philip got would have to be around \$2.1 million to make a \$700,000 equalization payment make sense. E.g., Denise's \$848,000 plus a \$700,000 equalization would equal about \$1,548,000, while \$74,000 plus \$2 million in assets (\$2,074,000) minus \$700,000 equalization would equal \$1,474,000 – which is pretty close and, if anything, suggests the \$2 million estimate is slightly low.

there was little likelihood they would walk away from the deal. Moreover, Philip's briefing fails to consider the implication of the sale itself: Even if the sale didn't go through, the evidence shows Philip has an interest in an asset that a court could credibly value at \$2.4 million.⁶ Philip's argument that there was no evidence of his ability to pay the fee award is meritless.⁷

Philip's two collateral arguments center not on *his* assets, but Denise's. The first one is that Denise was left with assets that would allow her to pay her own fees. We recognize this is true. Denise came out of the divorce with at least \$1.578 million (but, we note, geese and gander and all that, the equalization payment, like the attorney fee award, is to be paid in installments). However, as we have just noted, the judge could find a large disparity in assets between the parties coming out of the divorce. Including his interests in Arciero Ranches, Philip's total assets easily exceed \$3 million, and that's crediting his argument that \$800,000 of the \$2.4 million yet to come has been spoken for.⁸ Denise's assets, even after the equalization payment, would not exceed \$2 million. Given this disparity in assets, the trial judge's decision to have Philip pay \$300,000 of Denise's fees easily passes abuse of discretion muster. (See Fam. Code, § 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."]; *In re Marriage of Sorge* (2012) 202 Cal.App.4th 626, 662-663 [trial court could "appropriately consider" one party had significantly greater net worth than the other].)

⁶ But, Philip might say, he testified that he had \$800,000 in debt that he had to pay on receipt of the proceeds of the sale of the ranches. There are two answers to this point: First, that \$800,000 does not affect the \$2 million in assets that Philip had coming out of the May 13 stipulation, and second, 4 times \$600,000 equals \$2.4 million, and subtracting \$800,000 still leaves \$1.6 million.

⁷ The two cases from this court on which Philip mainly relies, *In re Marriage of Schulze* (1997) 60 Cal.App.4th 519 and *Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238 are distinguishable. In each of those cases, an aggressive fee award left the payor husband with practically nothing. Here, there is evidence that Philip's net worth exceeds \$2 million as against a total fee award to be paid in installments of \$300,000. The difference is \$1.7 million, a figure nowhere near available to either payor spouse in *Schulze* or *Alan S.*

⁸ And that's after one deducts the \$700,000 equalization payment from what had to have been assets in excess of \$2 million, plus the \$1.6 million value of Philip's interest in the ranches after the \$800,000 in debt to which he testified.

The reasonability of the trial court's decision is supported by Philip's trial tactics. An important factor in a trial court's discretion on fee awards is a party's trial tactics. (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1167.) This brings us back to the 10 separate motions Denise was forced to file to obtain discovery from Philip. Philip's reply brief is silent in defending that issue. That silence illustrates how readily the trial court could conclude that equity required Philip to bear the significant portion of Denise's fees because Philip himself had engendered much of those fees by his own tactics.

Philip's final argument is an attack on two purported deficiencies in Denise's income and expense declaration: The first purported deficiency is that Denise failed to list all her assets on the declaration, and in that regard Philip points to her house and a certain life insurance policy. The second deficiency is that Denise only estimated her household expenses. We conclude, however, that Philip is estopped to complain about Denise's income and expense declaration and any error is harmless. Philip's own income and expense declaration was manifestly deficient by his own lights, given its failure to give a value for Arciero Brothers or his interest in Arciero Ranches. And in any event, the reason both sides' income and expense declarations were sparse is that by the May 20 hearing, most of the assets had already been divided in two separate prior stipulations for judgment. That is, there was no prejudice. Each side was fully able to argue its position on what it knew the other side already had.

IV. DISPOSITION

The judgment of the trial court filed October 25, 2013, is affirmed. Denise shall recover her costs on appeal. We leave to the trial court in its discretion the question of whether, and if so how much, Philip should be required to pay Denise for the fees she has incurred in this appeal. (See *In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 407-411 [generally discussing issue of attorney fees on appeal in family law case].)

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

THOMPSON, J.