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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of WALKER E. and
SUSAN M. ROYCE.

WALKER E. ROYCE,

Respondent,

v.

SUSAN M. ROYCE,

Appellant.

G051122

(Super. Ct. No. 02D09814)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Clay M. Smith, Judge. Affirmed.

John R. Schilling for Appellant.

Law Offices of Marjorie G. Fuller and Marjorie G. Fuller; Law Offices of
Stabile & Cowhig and Thomas P. Stabile for Respondent.

* * *

Susan M. Royce (wife) appeals from a postjudgment order reducing her spousal support. The parties agree there were changed circumstances justifying a reduction of spousal support. But wife objects to the scope of the reduction. We conclude the trial court properly exercised its discretion and affirm the postjudgment order.

FACTS

1. The evidence

Walker E. Royce (husband) and wife were married in February 1989 and divorced in 2002, a marriage of over 13 years. They have no children. In the divorce each party received over \$1 million in assets. The 2007 judgment awarded spousal support to wife and included a so-called *Gavron* warning (*In re Marriage of Gavron* (1988) 203 Cal.App.3d 705, 711), informing her that the spousal support may be reduced or eliminated in the future unless she made a serious effort to seek employment and become self-supporting. A 2008 stipulation fixed wife's spousal support at \$10,500 per month.

In 2014, husband sought to terminate or modify spousal support. During the trial, Carmen Groe, who claimed to have been a close friend and business partner of wife for 35 years, testified she told wife about “a really great job opportunity at [Groe's] company. [¶] . . . [¶] I had an opportunity for her at my company, and it was job-specific, because we both have a specific skill that was related to the type of work that I do and that she does.” Wife did not respond to the offer. She told Groe that working would interfere with visiting with her children and grandchildren. She told Groe she hated husband and used the term “punish.”

The parties stipulated to the admission of a report by David Laine, an expert in vocational rehabilitation counseling. The report opined that wife could obtain

part-time employment with an income of between \$650 and \$1,950 per month or a full-time office support position with an income of between \$1,733 and \$2,600 per month.

Husband testified he was demoted in 2011 and was no longer in a management position. His wages and salaries, including vested stock amounted to \$341,000 in 2013. In addition, husband receives book royalties of a few thousand dollars per year. In a declaration attached to his request for modification husband stated his 2014 earnings represented a reduction in excess of 20 percent from 2010. Evidence concerning the extent of husband's income and changes, if any, between 2010 and 2014 are apparently contained in trial exhibits not furnished to us. Some of these exhibits are copied in the clerk's transcript but without the corresponding exhibit numbers.

Wife testified she and Groe had been friends and had owned property together. She has had no contact with Groe since January 2013. Wife first stated she did not believe she and Groe had discussed job opportunities, but later added that the job Groe had offered was in San Diego where she does not live. She also testified she applied for part-time jobs since receiving Laine's report. Wife did not recall being told that she had an obligation to become self-supporting. She prepared a list of what she characterized as "the 95 jobs [she'd] applied for." This document, one of two exhibits presented to us, is peculiarly unenlightening. It fails to disclose the name of a single potential employer and is limited to apparent job designations such as "PT Adm. Assist," "PT Clerical," "Ex Assist," and "MV Real Estate," each only accompanied by a date.

Wife claimed monthly expenses of \$13,800. In addition to her \$10,500 monthly spousal support, she expended an additional \$70,000 over five years. She testified to medical problems, including being stressed and takes prescription medications for rapid heart rate, high blood pressure, cholesterol, acid reflux, and hormone treatment. Wife had laparoscopic knee surgery in 2010 and "female surgery" in 2014. During 2012-

2013, she traveled extensively, including a number of trips within California and Arizona, as well as trips to the Carolinas, Florida, Nevada, Spain, and Paris.

Wife called Dennis Sperry, a certified public accountant. Sperry testified to the various records and reports he had reviewed on which he based his written report and an updated report. According to Sperry, husband's 2012 wages were \$444,051 plus deferred income (401K plan) of \$90,250. For 2013, these figures were respectively \$327,093 and \$119,100. The total balance in the 401K plan was \$1,300,162. In addition, husband owned stocks, bonds, and other assets with a value of \$1,050,000.

2. The trial court decision

After a trial covering several days over four and one-half months, the court issued a detailed nine-page order.

The court recognized "this [case] to be an unusual and very difficult" one. Acknowledging "the general rule that [husband] is required to show a change in circumstances after the most recent order," it found husband's downward trending income justified re-examining the spousal support order. But to evaluate wife's efforts to become self-supporting, the court noted it had permitted the introduction of evidence of the pre-2010 events "to gain a more complete understanding of [wife's] efforts to become self-supporting." It cited *In re Marriage of Schaffer* (1999) 69 Cal.App.4th 801 (*Schaffer*) for the proposition it could consider her "entire post-judgment conduct, rather than only her conduct after the most recent order."

The court found wife displayed "an historic pattern of avoiding trying to become self-supporting." And while both the 2007 judgment and a 2010 order stated wife would need \$9,000 per month to live at the marital standard of living, her monthly expenses averaged over \$14,000. The court concluded wife had "abused the purpose of spousal support, treating it as a fixed and permanent annuity, rather than a limited remedy

to enable her to maintain the marital standard of living until such time as she may need less assistance.”

The trial court also analyzed the factors set forth in Family Code section 4320, including the parties’ marital lifestyle, their obligations and assets, the length of the marriage, the absence of minor children that needed to be supported, and the tax impact of support payments. Husband was 58 years old, well employed, lived within his means, and saved for his retirement, but expected to retire in one year. Wife was 65 years of age, has medical issues, received \$977 in retirement income, and spousal support of \$10,500. She has \$400,000 in liquid assets and \$244,000 in other assets. Based on the expert’s testimony, wife can work part-time at \$15 per hour, and would earn \$867 per month and, in one year, will be eligible for Social Security.

Balancing the hardships to each party, the court noted husband “has a reasonable and legally justified expectation that [wife] would make good faith efforts to contribute to her own needs,” but she “has intentionally and unjustifiably refused to do so.” The court recognized wife had “limited earning capacity and remains in need of some support.” Wife was “given repeated *Gavron* admonitions and she [h]as ignore[d] them . . . , she has purposefully maintained a lifestyle above the marital standard of living in order to continue to demonstrate a need for substantial spousal support.”

The court then reduced spousal support to \$7,500 per month. Beginning in October 2015, when wife will be eligible for Social Security and husband intends to retire, spousal support will be further reduced to \$4,500 per month. Starting October 2017, spousal support shall be reduced to zero, “with the Court retaining jurisdiction over the issue of spousal support.”

DISCUSSION

1. Issue presented

Wife does not dispute the reduction of support to \$7,500 per month. She acknowledged: “There is no question there was a changed circumstance consisting of Walker’s reduction in income justifying a reduction in spousal support The question is, at the time of the hearing, when this Court immediately reduced Susan’s spousal support to \$7,500 per month, did the Court have the discretion to reduce her spousal support further to the ultimate step-down level of zero?”

2. Standard of review

Both sides also agree the standard of review on an order modifying spousal support is a deferential abuse of discretion standard. As husband notes, “[i]n exercising its discretion, the trial court must follow established legal principles and base its findings on substantial evidence. If the trial court conforms to these requirements, its order will be upheld whether or not the appellate court agrees with it or would make the same order if it were a trial court.” (*In re Marriage of Schmir* (2005) 134 Cal.App.4th 43, 47.)

3. The court did not err in permitting Groe to testify.

Citing Family Code section 217, wife contends the court erred in allowing Groe to testify. Subdivision (c) of that statute provides: “A party seeking to present live testimony from witnesses other than the parties shall, prior to the hearing, file and serve a witness list with a brief description of the anticipated testimony. If the witness list is not served prior to the hearing, the court may, on request, grant a brief continuance and may make appropriate temporary orders pending the continued hearing.”

Wife complains that, although Groe's name appeared on husband's witness list, it only described her as testifying "to facts in support of [husband's] request for modification of spousal support." We need not decide whether Family Code section 217, subdivision (c) requires a more detailed description because, even if the description here was rather pithy, the remedy contained in the statute is to grant a continuance, not prohibit the witness from testifying altogether. And here the court offered wife an opportunity for such a continuance if she could show prejudice.

When husband called Groe to testify, wife's lawyer objected based on the asserted violation of Family Code section 217, subdivision (c). The court responded, "I'm going to conditionally overrule the objection. [¶] I say conditionally because if there is some prejudice here after we hear the testimony that you can point to, if you need additional time to be prepared to respond to it or to cross-examine, I would be inclined to give you that time. [¶] . . . But I think in the interest of justice and what appears to be, at least arguably, technical compliance with 217, we should go forward." The record does not reflect wife subsequently requested a continuance or attempted to establish she was prejudiced by the succinctness of the "brief description of the anticipated testimony." The court did not err and no miscarriage of justice resulted from permitting Groe to testify.

Wife now argues she was prejudiced by Groe's testimony because of the nature of the testimony to the effect wife "did not respond when told of a potential job in San Diego . . .; that [wife] told her working would interfere with visiting her kids and grandkids . . .; that [wife] said she 'hated' Walker and wanted to 'punish' him for leaving her." But any such "prejudice" does not differ from any testimony that may be offered by an adverse witness. The "prejudice" would have been the same if husband had furnished wife with a more detailed summary of Groe's anticipated testimony. Wife has failed to demonstrate how or why husband's "brief description of [Groe's] anticipated testimony" prejudiced her.

4. *The trial court properly relied on the Schaffer case.*

As noted, the petitioner must demonstrate a material change in circumstances since the last order to support the modification of a support award. (*Schaffer, supra*, 69 Cal.App.4th at p. 803.) *Schaffer* explained this rule's purpose is "to prevent repeated attempts to modify support orders without justification, not to circumvent the goal that supported spouses become self-supporting within a reasonable period of time." (*Id.* at pp. 803-804.) It applied this rationale in holding that, even though the court had made a prior support order some three years earlier, it was appropriate for the court to consider the supported spouse's entire history, or the lack thereof, in seeking gainful employment. *Schaffer* stated, "Employability and the efforts one makes to become self-supporting are not always just a matter of one or two years: Sometimes it takes longer periods for patterns to emerge. The Family Code, for example, provides as a guideline that a reasonable period of time for a spouse to become self-supporting is generally one-half the length of the marriage. (Fam. Code, § 4320, subd. (k).) The statutory guideline flies in the face of a reading of the material change of circumstance rule that would prevent a trial judge from looking at long-term patterns of job training and employability." (*Id.* at p. 810, fn. omitted.)

Wife contends it was not "appropriate" for the court to apply *Schaffer*. She contends that because in *Schaffer* the petition was initiated by wife to continue her support, the burden of proof was on wife, while here it was on husband as the moving party. She states husband "provided no evidence that Susan had not made reasonable efforts to become self-supporting." We disagree. Groe's testimony and the evidence provided by Laine supply substantial proof that wife could work to assist in her support, but refused to make any efforts to accomplish this goal. Other factual differences between *Schaffer* and the situation and conduct of wife in the present case do not persuade us we should ignore the principles expressed in *Schaffer*.

By, in effect, arguing lack of substantial evidence through the recitation of evidence that would have supported a different result, wife asks us to re-weigh the evidence. This we are not permitted to do. “[I]n reviewing the questions of fact decided by the trial court, the substantial evidence rule applies. An appellate court must view the evidence most favorably to the respondent[] and uphold the judgment if there is any substantial evidence to support it.” (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 425.) “[T]he superior court sits as a finder of fact with the power to judge credibility, resolve conflicts, weigh evidence, and draw inferences, and hence . . . on review of its ruling by appeal . . . all presumptions are drawn in favor of the factual determinations of the superior court and the appellate court must uphold the superior court’s express or implied findings if they are supported by substantial evidence.” (*Montez v. Superior Court* (1992) 4 Cal.App.4th 577, 583.) Here, the trial court relied on *Schaffer* in considering the evidence relevant to wife’s efforts to seek gainful employment prior to the 2010 support order. And we conclude it acted properly in doing so.

5. The court did not err in considering husband’s indicated desire to retire in one year.

The trial court reduced support, effective October 1, 2015, to \$4,500 per month, stating “at which point [wife] will be at full retirement age for purposes of social security and [husband] intends to be retired.” The latter part of the ruling was based on husband’s testimony, “I would like to retire soon, within the next year; hopefully, move on to something new and more rewarding.”

Wife notes the uncertainties implied in this statement both as to the actual date of retirement and the effect it would have on husband’s income. This is true. But the court wisely maintained jurisdiction over the issue of spousal support and, if husband decides not to retire or increases his income after retirement, this might well constitute a changed circumstance permitting wife to seek a modification of the current support order.

“A material change of circumstances may consist solely of an increase in the supporting spouse’s ability to pay, but if that is the *only* change, then to obtain an increase in support there must also be a showing that the amount of support previously ordered had not been adequate to meet the supported spouse’s reasonable needs at that time.” (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 482-483.) “[I]ncreased ability to pay is a proper basis for an increase in spousal support if the prior award were inadequate, regardless of whether the needs of the supported spouse have changed.” (*In re Marriage of White* (1987) 192 Cal.App.3d 1022, 1029; see also *In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 364.)

It is therefore not necessary for us to attempt to bring certainty to this issue now, even if we could do so.

DISPOSITION

The postjudgment order is affirmed. Respondent is awarded costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

THOMPSON, J.