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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re Marriage of ZHIXUN and DONGLI  
SUN.

H037398  
(Santa Clara County  
Super. Ct. No. 6-10-FL004961)

ZHIXUN SUN,

Appellant,

v.

DONGLI SUN,

Respondent.

Petitioner Zhixun Sun (husband) appeals from orders granting a motion by respondent Dongli Sun (wife) for temporary spousal support and denying husband's motion to vacate or modify the order. We find no error.

**I. FACTS**

Husband and wife were married on December 23, 2007 and separated March 24, 2008. Husband apparently petitioned for dissolution but the record does not contain the petition itself.<sup>1</sup> On February 25, 2011, prior to trial on the dissolution petition, wife filed a motion for spousal support, seeking \$1,500 per month. Wife's income and expense

<sup>1</sup> Both parties appear in propria persona. Husband elected to proceed by way of an appellant's appendix rather than a clerk's transcript as allowed by California Rules of Court, rule 8.124. (Further references to "rules" are to the California Rules of Court.) The record before us consists of appellant's and respondent's appendices and transcripts of hearings held in June and September 2011.

declaration showed her monthly income to be \$1,800. Husband opposed the request. His income and expense declaration showed his average monthly income to be about \$7,643.

*A. The July 14, 2011 Order*

A hearing was held on June 16, 2011, at which both husband and wife testified. Husband argued that wife's income statement was untrue but he presented no evidence in support of the argument. Wife stated that she had lost her job in April and had recently started a new one but had not yet been paid. The trial court found that wife's monthly income was \$1,800 and husband's was \$7,643, they had no minor children, and the monthly support amount based upon those findings and calculated pursuant to established guidelines was \$1,699. Accordingly, the court ordered husband to pay temporary spousal support of \$1,699 per month. Since wife had filed her motion at the end of February 2011, the court made the order retroactive to March 1, 2011 and ordered husband to pay the arrears in installments of \$500 per month. The court also issued an earnings assignment order that allowed the payments to be deducted from husband's paycheck. The court set a hearing for September 15, 2011, to review wife's efforts to find employment. The written orders were filed July 14, 2011.

*B. The September 8, 2011 Hearing*

Husband filed a motion to modify the temporary spousal support order. Husband argued that \$2,199 per month (\$1,699 plus \$500) came to more than half his disposable income and the payment worked a hardship on his mother and his adult daughter. At the hearing on September 8, 2011, there was no certified Mandarin translator present so the court relied upon wife's adult son to translate for his mother who does not speak English. Wife testified that she had lost her previous job and had a temporary job earning \$1,500 per month. Husband produced no conflicting evidence but again insisted that wife's prior declaration was untruthful. The trial court continued the matter to September 15, 2011, ordering both sides to exchange updated income and expense declarations before that hearing.

C. *The September 15, 2011 Order*

By the September 15, 2011 hearing, wife had not completed the income and expense declaration form. She did file a narrative declaration explaining that she could not further substantiate the income from her previous job because she had been paid in cash. In her current job she worked as a maid and looked after two seven-year-old boys in her employer's home. She testified that she was earning on average \$1,600 per month at that job; the amount varied depending upon how often the family needed her to watch the children. Husband had two witnesses present. The trial court reminded him that the matter had been estimated to last only 10 minutes so that he should choose which of the two he wanted to testify. Husband chose witness, Daniel Chu, who testified that he had employed wife as a babysitter from September 2009 to April 2011. According to Chu, he had paid wife \$1,365 twice a month for the first year, then \$1,420 twice a month until the employment was terminated.

Wife mentioned that husband had not yet paid her anything. Husband acknowledged that he was aware that the trial court had ordered him to pay spousal support but he wanted the order suspended. The trial court reminded him that the order was in place and denied his request to set it aside. The trial court set October 28, 2011, for trial. Husband filed a notice of appeal on September 23, 2011.

**II. APPEALABILITY**

We must first decide which orders petitioner challenges, whether the challenged orders are appealable, and whether the appeal is timely. The notice of appeal purports to appeal from a judgment or order entered September 20, 2011, but there is no judgment or order bearing that date. Appellant's notice designating the record on appeal, which was filed the same day as the notice of appeal, identifies the proceedings of June 16, September 8, and September 15, 2011, as proceedings that are to be included in the reporter's transcript. The rule is that we liberally construe a notice of appeal in favor of its sufficiency so as to permit, if possible, a hearing on the merits. (*In re Marriage of*

*Macfarlane & Lang* (1992) 8 Cal.App.4th 247, 252; rule 8.100(a)(2).) Accordingly, we shall construe the notice of appeal as including the orders issued following the proceedings listed on the notice designating the record, which are the temporary spousal support order filed July 14, 2011, the September 8, 2011 order continuing the hearing and directing the parties to exchange updated income information, and the September 15, 2011 order denying husband's motion to vacate or modify the temporary spousal support order. Of those, only the first and the last are appealable. "Generally, no order or judgment in a civil action is appealable unless it is embraced within the list of appealable orders provided by statute." (*Lund v. Superior Court* (1964) 61 Cal.2d 698, 709.) One exception to that rule is where the order finally resolves a collateral matter. Both the July 14, 2011 order and the September 8, 2011 order fit that exception and are, therefore, appealable. (*In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368-369 [temporary support orders are appealable]; *In re Marriage of Campbell* (2006) 136 Cal.App.4th 502, 506 [order denying motion to terminate temporary support order is appealable].) The September 8, 2011 order merely continued the hearing and directed the parties to exchange documents. It does not finally resolve any matter and is not appealable.

As to timeliness, as pertinent here, an appeal must be filed within 60 days of the clerk's mailing a file-stamped copy of the judgment or order or 180 days from entry of the judgment or order, whichever is earlier. (Rule 8.104(a)(1), (3).) Husband's September 23, 2011 notice of appeal was filed just eight days after the September 15, 2011 order and, therefore, an appeal from that order is timely. An appeal from the July 14, 2011 order would be untimely if the clerk had mailed the file-stamped copy to husband on or about the date the order was filed. But there is no proof of mailing in the record before us and our independent inquiry of the superior court did not uncover any

such document. Accordingly, the 180-day rule applies and an appeal from that order is timely as well.<sup>2</sup>

### III. DISCUSSION

#### A. Standards of Review

On appeal we start with the presumption that the order is correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) That means we must accept as true all the evidence that supports the trial court's findings and decision. We do not weigh conflicts in the evidence. Our only job, as it pertains to a factual challenge, is to decide whether on the entire record there is any substantial evidence, contradicted or uncontradicted, in support of the trial court's findings. (*Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 951.)

With regard to the amount of temporary spousal support, the trial court has broad discretion. (*In re Marriage of Blazer* (2009) 176 Cal.App.4th 1438, 1442.) Accordingly, we review the trial court's order for abuse of discretion, reversing only where the order exceeds the bounds of reason. (*In re Marriage of de Guigne* (2002) 97 Cal.App.4th 1353, 1366.) The abuse of discretion standard also applies to the court's denial of husband's motion to modify the prior order. Unless there have been changed circumstances, a motion for modification is nothing more than an impermissible collateral attack on a prior final order. A trial court abuses its discretion if it changes an existing support order absent evidence of changed circumstances. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 480.)

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<sup>2</sup> Husband mentions two rulings that we shall not review: an October 5, 2011 order striking husband's motion to disqualify the judge and the November 16, 2011 judgment. Neither ruling is properly before us because both were entered *after* husband commenced this appeal. Indeed, trial was not held until November 2, 2011. We cannot construe the notice of appeal so broadly as to encompass proceedings that had not yet taken place.

*B. The July 14, 2011 Order*

Husband's only argument relating to the temporary support order is that wife made more money than she said she did and the trial court erred in believing wife's account. As to the original order, wife's declaration and oral testimony showed that her income had been \$1,800 per month through April 2011. Husband disputed her account but offered no conflicting evidence. Accordingly, the only available evidence on the point supports the trial court's finding regarding wife's income. The trial court applied the standard guideline calculations to the parties' stated income and expenses and arrived at the figure of \$1,699 per month for temporary spousal support. Husband offers no challenge to the court's calculation nor do we detect any abuse of discretion in the manner in which the court made its determination.

*C. The September 15, 2011 Order*

Husband argues that the evidence of wife's income through April 2011 was "disproved" by her former employer, who testified that he had paid wife roughly twice the amount wife had declared. According to husband, Mr. Chu was telling the truth and wife was not. But husband offered Mr. Chu's testimony as part of an impermissible collateral attack on the prior order directing him to pay temporary spousal support. The evidence was not relevant to the question that was then before the trial court, which was whether the parties' circumstances had changed since the court had issued that prior order. Husband offered no evidence of changed circumstances. Accordingly, the trial court did not abuse its discretion in denying the motion.

Husband also argues that the trial court erred in denying him the opportunity to present the testimony of his second witness because the testimony would have supported husband's contention that the marriage was a sham and should be annulled.<sup>3</sup> Such

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<sup>3</sup> Husband had also petitioned to amend his dissolution petition to seek an annulment based upon wife's alleged fraud and incapacity.

evidence could have had no bearing upon the trial court's refusal to modify a prior spousal support order. Moreover, the trial court specified that husband could argue the annulment issue at trial. Accordingly, any error was harmless.

**IV. DISPOSITION**

The orders of the trial court of July 14, 2011, setting temporary spousal support, and September 15, 2011, refusing to vacate or modify the temporary spousal support order, are affirmed. Respondent is entitled to her costs on appeal.

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Premo, J.

WE CONCUR:

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Rushing, P.J.

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Elia, J.