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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re Marriage of MARIA and JORGE CALIENES.	B217517 (Los Angeles County Super. Ct. No. KD059868)
MARIA CALIENES, Respondent, v. JORGE LUIS CALIENES, Respondent; GLADYS DOMINGUEZ, Respondent; SAMUEL R. WASSERSON, Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Susan Lopez-Giss, Judge. Affirmed.

Samuel R. Wasserson, Inc. and Samuel R. Wasserson for Appellant.

Jorge Luis Calienes, in pro. per., for Respondent.

No appearance for Respondent Maria Calienes.

No appearance for Respondent Gladys Dominguez.

Samuel R. Wasserson appeals from the trial court's order denying the *Borson*[1] motion he filed seeking attorney fees on behalf of his client, Gladys Dominguez, who had been joined as a claimant in the dissolution proceeding between her daughter, Maria Calienes, and her daughter's former husband, Jorge Luis Calienes. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 10, 2003 Maria[2] filed a petition to dissolve her marriage of 20 years to Jorge. The court entered an order dissolving the marriage on June 9, 2004 and continued the matter for trial of disputed property claims. On January 9, 2006 Jorge filed a motion seeking to join Dominguez in the dissolution action, claiming a community interest in real property located in Pomona that Dominguez had bought with the assistance of her daughter. According to the complaint in joinder, Maria had used community funds obtained from the refinancing of the couple's home to make a down payment toward purchase of the Pomona house.[3] The court granted the motion.

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[1] *In re Marriage of Borson* (1974) 37 Cal.App.3d 632 (*Borson*).

[2] Because Maria Calienes and Jorge Calienes share the same last name, we refer to them by their first names for convenience and clarity. (See *In re Marriage of Herr* (2009) 174 Cal.App.4th 1463, 1464, fn. 1.)

[3] In a responsive declaration to the motion for joinder, Maria characterized the Pomona real estate as an "HUD property" subject to income and use restrictions. According to Maria, she and Jorge had wanted to purchase the property "as it was a fantastic deal," but they did not qualify under federal guidelines. Maria arranged for her elderly mother (who was living in Florida) to purchase the home and paid the $8,200 down payment. The total purchase price was approximately $274,000. Dominguez lived in the home from 2003 to some time in 2005 and then sold it for a profit of more than $185,000, which Dominguez used to purchase a home in Florida. Dominguez was subsequently ordered not to transfer or encumber the Florida property pending resolution of the couple's disputed property claims.

In June 2006 Dominguez retained Wasserman, who was already representing Maria in the litigation, to represent her as well.[4] In October 2006 Dominguez filed an application for an order to show cause seeking attorney fees and costs under Family Code section 2030[5] sufficient to defend herself against Jorge's claim. In a declaration filed in support of the application, she stated, "It will require at least $5,000 for me to have counsel to represent me through these proceedings. Mr. Wasserson has agreed to accept a limited retainer in order to assist me in obtaining the necessary funds to maintain and defend this legal action." After a hearing on the application, the court ordered Jorge to pay Dominguez $5,000 in monthly installments of $500. In July 2007, after paying approximately $1,000 of the court-ordered fees, Jorge filed a motion to vacate the fee order and for other relief. The court ordered the hearing on Jorge's motion continued until trial.

Trial commenced on September 17, 2007 on the bifurcated issue whether the down payment for the Pomona property had been made with community funds. The court excused Dominguez from attending trial based upon her health and travel plans, although Wasserson appeared on her behalf. On February 21, 2008, following several days of testimony heard over the preceding five months, the trial court ruled Maria had used community funds to make the down payment.

Pending that determination, Wasserson, acting on behalf of Dominguez, filed an additional request for attorney fees on January 16, 2008. According to a declaration submitted by Wasserson in support of the motion, $3,000 of the previously awarded $5,000 remained unpaid. In addition, he requested the court award Dominguez another $9,980.50 payable by Jorge "as his contributive share" of the attorney fees incurred by his client. On June 12, 2008 Wasserson filed another fee motion on Dominguez's behalf seeking an additional $7,465.35 in fees and acknowledging the remaining portion of the

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[4] On September 5, 2007 Wasserson submitted an executed substitution of attorney on behalf of Maria, withdrawing from her representation and substituting her in propria persona.

[5] Statutory references are to the Family Code unless otherwise indicated.

previously awarded $5,000 had been obtained from Jorge by writ of execution. Attached to the motion was a letter dated May 26, 2008 from Dominguez purporting to authorize Wasserson "to seek relief from the Court in obtaining orders for payment of attorney fees from Jorge Calienes . . . whether or not [Wasserson] has substituted out of the case . . . ." Wasserson caused a substitution of counsel to be filed on Dominguez's behalf on June 17, 2008 (executed by Dominguez on May 28, 2008), authorizing his withdrawal from her representation and placing her in propria persona.

The hearing on the fee requests trailed until May 7, 2009.[6] Reminded of the pending requests, the court informed Wasserman the motion was denied "without prejudice to you amending to serve the petitioner." Wasserman objected, advising the court he had served Maria with the motion, prompting the court to respond, "I just want you to understand the denial is without prejudice to you filing the same motion against the petitioner." Wasserman timely appealed from this ruling.

DISCUSSION

1. *The Statutory Scheme Governing Borson Motions*

Section 2030, subdivision (a)(1), provides: "In a proceeding for dissolution of marriage . . . and in any proceeding subsequent to entry of a related judgment, the court shall ensure that each party has access to legal representation to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party, . . . to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding." "Whether one party shall be ordered to pay attorney's fees and costs for another party, and what amount shall be paid, shall be determined based upon, (A) the respective incomes and needs of the parties, and (B) any factors affecting the parties' respective abilities to pay." (§ 2030, subd. (a)(2); see also

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[6] We have not been provided with enough of the record to be able to account for this delay. At least part of it seems to have been caused by the filing of bankruptcy petitions by Maria and Dominguez.

§ 2032, subds. (a)-(b).)[7] "[A] motion for attorney fees and costs in a dissolution proceeding is left to the sound discretion of the trial court. [Citations.] In the absence of a clear showing of abuse, its determination will not be disturbed on appeal. [Citations.] '[The] trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made.'" (*In re Marriage of Sullivan* (1984) 37 Cal.3d 762, 768-769.) However, "although the trial court has considerable discretion in fashioning a need-based fee award [citation], the record must reflect that the trial court actually exercised that discretion, and considered the statutory factors in exercising that discretion." (*In re Marriage of Braud* (1996) 45 Cal.App.4th 797, 827.)

"The issue, generally framed, is how courts are to achieve, particularly in low and middle income cases, the legislative goal of assuring *'each party* has access to legal representation to preserve each party's rights . . . .' (§ 2030, subd. (a)(1), italics added; see also . . . § 2032, subd. (b) [goal that '*each party,* to the extent practical, . . . have sufficient financial resources to present the party's case adequately' (italics added)]; Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2008) ¶ 5:180, p. 5-75 . . . ['Several Family Code statutes authorize pendente lite attorney fee awards in various types of Family Code proceedings. In each case, the purpose is to ensure, to the extent possible, that the litigating parties are on an equal footing in their ability to present their cases . . . .']).)" (*Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238, 241-242, fn. omitted.)

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[7] Section 2032, subdivision (a), mandates that any award must be "just and reasonable under the relative circumstances of the respective parties," and subdivision (b) directs the court to "tak[e] into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320." Section 4320 lists a number of factors, including but not limited to, earning capacity (subd. (a)); ability to pay, taking into account such things as assets and standard of living (subd. (c)); respective needs (subd. (d)); obligations and assets (subd. (e)); age and health (subd. (h)); and the overall balance of hardships (subd. (k)).

In a family law case, an attorney who expects to be discharged by the client may file a motion pursuant to section 2030 seeking attorney fees and costs on behalf of his or her client directly from the opposing party, as long as the attorney is still counsel of record and has the former client's express or implied consent to bring the motion. (*Borson, supra,* 37 Cal.App.3d at pp. 637-638.) The trial court need not rule on a so-called *Borson* motion before a substitution of counsel is filed. (See *In re Marriage of Erikson & Simpson* (2006) 141 Cal.App.4th 707, 709.) A *Borson* motion is typically deemed to be made on behalf of the former client because it "avoid[s] a circuity in litigation—[former counsel] suing [the wife for fees] and she then asking the court to order [the husband] to pay what she has paid." (*Borson,* at p. 638; see also Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2009) ¶¶ 14:308 to 14:310.)

2. *The Trial Court Did Not Abuse Its Discretion in Denying the Fee Motion Without Prejudice To Refiling It Against Maria*

As a preliminary matter, we have strong reservations about two issues Wasserson did not address in his initial briefing to this court. First, Wasserson assumes, without explanation, that he has standing to bring this appeal. While we acknowledge a few courts have recognized a lawyer's standing to appeal directly from the denial of a *Borson* motion (see, e.g., *In re Marriage of Kelso* (1998) 67 Cal.App.4th 374, 383, fn. 3 ["[a]ppellant's 'standing' to pursue this appeal may be upheld by adhering to the theory of *Borson* itself, that appellant is acting 'on behalf' of [his client]"]),[8] other authority strongly suggests *Borson's* fiction that allows an attorney to pursue fees in the trial court, ostensibly on behalf of his or her former client, does not extend to conferring standing on the attorney to appeal independently from the denial of the fee motion. (See, e.g., *In re Marriage of Tushinsky* (1988) 203 Cal.App.3d 136, 142 ["an attorney is not a party aggrieved within the meaning of section 902 of the Code of Civil Procedure with respect to a ruling on a request for attorney's fees under [the predecessor to § 2030]"]; *Meadow*

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[8] In response to an invitation from this court for supplemental letter briefing, Wasserson argued an attorney with standing to file a *Borson* motion in the trial court should necessarily have standing to appeal an adverse ruling.

v. Superior Court (1963) 59 Cal.2d 610, 615-616 [attorney's interest in fees is derivative of client's right to recover those fees].)

Second, Wasserson provides no authority—and we have found none—for the proposition a third party claimant in a dissolution proceeding is eligible for a fee award under section 2030. To be sure, section 2030, subdivision (d), permits a court to order a third party to pay the fees of either of the spouses, but nothing suggests the third party is eligible for a corresponding fee award. Indeed, the express purpose of section 2030 is to level the playing field for the spouses—not for any party who happens to become involved in the litigation. (See *Alan S. v. Superior Court, supra,* 172 Cal.App.4th at pp. 241-242.)

We need not resolve these questions, however, because the portion of the record provided to us amply supports the trial court's order. Although Wasserson argues the trial court failed to consider the appropriate factors under section 2030—in particular, his client's inability to pay his fees—an omission that in itself could be an abuse of discretion, we disagree with his contention. In circumstances like this, in which the proceedings have necessarily touched on many of the factors affecting the relative needs and equities of the parties, we can reasonably infer findings to support the award. (See *People v. Johnson* (1987) 193 Cal.App.3d 1570, 1573-1577 [in ruling on evidentiary objections under Evid. Code, § 352, "the content and context of the argument that preceded the court's ruling, and the nature of the ruling itself, adequately demonstrates a reflection and weighing of Evidence Code section 352 factors"]; see also *In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 549-550, fn. 11 ["[u]nder the doctrine of 'implied findings,'. . . appellate courts . . . must presume the trial court made all factual findings necessary to support the judgment for which there is substantial evidence"]; *Centinela Hospital Assn. v. City of Inglewood* (1990) 225 Cal.App.3d 1586, 1595 ["[a]s all intendments are in favor of the judgment, we presume the trial court decided all material issues"].)

As pointed out by Jorge, appearing in propria persona, the trial court ruled after the first phase of the trial that Maria had in essence defrauded Jorge over the course of

years by withdrawing funds from their joint account and commingling those funds with her separate property. She then used those commingled funds to her own advantage by making the down payment on the Pomona property and arranging the transaction to accrue to the benefit of Dominguez, her mother, rather than to the community. In ruling on the *Borson* motion, the trial court did not reject the evidence of Dominguez's need; to the contrary, the court invited Dominguez to file the motion against Maria, having concluded Maria took advantage of the community's interest in the Pomona property. In short, the court evaluated the circumstances affecting the parties and concluded it would not be equitable to force Jorge to pay Dominguez's fees. Answering Wasserson's objection that Jorge had joined Dominguez in the lawsuit, the court pointed out he had been forced to do so by Maria's improper use of community funds to purchase the Pomona property. There was no abuse of discretion.

DISPOSITION

The order of the court denying the *Borson* motion is affirmed. Jorge Luis Calienes is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.