Filed 6/29/09 Marriage of Lukas and Knable CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of LINDA M. LUKAS and CHARLES KNABLE.	
LINDA M. LUKAS, Respondent, v. CHARLES KNABLE, Appellant.	G040499 (Super. Ct. No. 01D009685) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Russell D. Davis, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed and remanded.

Ronda A. Middleton for Appellant.

Brian G. Saylin for Respondent.

* * *

Former spouses Chuck Knable and Linda Lukas[1] filed competing orders to show cause to modify prior orders of the court regarding spousal and child support. The trial court found in favor of Linda, and Chuck now appeals, arguing the trial court abused its discretion by reducing his spousal support and retroactively modifying the earlier child support order. While we find no abuse of discretion with regard to spousal support, we conclude the trial court did impermissibly modify the child support order retroactively. We therefore reverse the order and direct the court to enter a new order consistent with this opinion.

I

FACTS

Linda and Chuck were married in 1974 and separated in October 2001. Their divorce became final in July 2005. They had one child, Chase, born in August 1989, who was therefore 15 at the time of the divorce. The judgment awarded Chuck and Linda joint legal custody of Chase, and Chuck primary physical custody.

Support orders were also entered. The court concluded that Chuck's salary was $1,308 per month and Linda's was $4,958. Linda was directed to pay Chuck $775 per month in child support until Chase's 19th birthday or until he was no longer a full-time high school student residing with a parent, whichever came first. Linda was also directed to pay spousal support in the amount of $600 per month until October 2009, at which time the amount would be reduced to $400 per month. Other orders were also entered concerning community property and the details of Chase's visitation.

Since the orders were entered, Chuck has suffered changes to his health. He was diagnosed with a condition called spinal stenosis in late 2005. As a result, he is no longer able to work. According to Chuck, he now lives off $813 a month in Social Security and $100 a month from a retirement account. Chuck's brother moved in with

[1] We refer to the parties by their first names for the reader's convenience. No disrespect is intended. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475, fn. 1.)

him to help him both physically and financially. Linda stopped paying child support to Chuck in March 2005 and spousal support in December 2006.

In April 2007, Chuck filed an Order to Show Cause (OSC) to, among other things, increase spousal support based on a change in circumstances and determine arrearages as to both child and spousal support. In response, Linda filed a competing OSC to terminate spousal support and modify child support. According to her September 2007 income and expense declaration, her income was $3,557 per month in commission sales from her business as a real estate broker.

In April 2008, the trial was held before Russell Davis acting as temporary judge. During the trial, Linda testified that her monthly income was now between $2,400 and $2,700 with expenses of $4,530 per month. She testified that other than her real estate business, she had no other sources of income.

At the conclusion of the trial, the court ruled, with respect to child support, that Linda had discharged $425 of the $775 monthly child support obligation from April 1, 2005 to April 1, 2007. With respect to spousal support, the court considered Linda's income, and found the relevant period to determine her income was the prior 12 months. The court found Linda's testimony regarding the decline in the real estate market credible, and determined that her average monthly income during that period was $1,111. The court also found that Chuck had failed to meet his evidentiary burden to establish that deposits in various other bank accounts should be considered Linda's income. The court therefore found that Chuck did not establish a change in circumstances sufficient to justify an increase in Chuck's spousal support, but that Linda did establish a change in circumstances sufficient to decrease it. The court decreased spousal support to zero. (Various other orders were also entered that are not part of this appeal.)

II

DISCUSSION

Lack of a Statement of Decision

We note that neither party in this matter requested a statement of decision, a failure that disadvantages Chuck on appeal. A statement of decision facilitates appellate review. (*People v. Landlords Professional Services, Inc.* (1986) 178 Cal.App.3d 68, 70.) It "provides the trial court's reasoning on disputed issues and is our touchstone to determine whether or not the trial court's decision is supported by the facts and the law. [Citation.]" (*Slavin v. Borinstein* (1994) 25 Cal.App.4th 713, 718.)

When there is no statement of decision, we presume the trial court made whatever findings were necessary to support the judgment. (*Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 140.) The appellant must overcome this presumption by affirmatively showing error on an adequate record. (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1320-1321.) We will not speculate that the trial court erred.

Spousal Support

"The modification of a spousal support order is reviewed on appeal for abuse of discretion. In 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, fn. omitted (*Schmir*).) "For a change in circumstances to exist there must have been a material change since the entry of the previous order. In other words if the circumstances in question existed at the time of the previous order those circumstances presumably were considered when the previous order was made and bringing them to the court's attention years later does not constitute a 'change' in the

circumstances. Nor has there been a change in circumstances merely because a different trial judge disagrees with the previous order." (*Ibid.*, fns. omitted.)

Chuck's key focus on this issue is the change of circumstances due to his health and on Linda's income, specifically, the trial court's conclusion that her income was only $1,111 per month, an amount not apparently reflected elsewhere in the record. He also argues the trial court failed to take into account the relevant statutory factors.

We address the last issue first. We cannot know whether the trial court completely analyzed the relevant factors under Family Code section 4320 because a statement of decision was not requested, and Chuck points to no authority suggesting that the court was required to provide such an analysis in its order. As noted above, when a statement of decision is not requested, it is the appellant's burden to affirmatively demonstrate error, and on this point Chuck has failed to do so. (*Brown v. Boren, supra,* 74 Cal.App.4th at pp. 1320-1321.)

With respect to the change of circumstance, the court's reasoning becomes clearer when the parties' relative incomes are compared. Even if we assume that Linda's income was $2,700, per her testimony, that was a decrease from $4,958, as reflected in the 2005 order, of approximately 46 percent. Chuck's income, meanwhile, had decreased from $1,308 to $913, a decrease of approximately 31 percent. Further, Chuck's brother, who assisted him financially as well as physically, had moved in with him.

Given these facts, the court did not abuse its discretion in eliminating Chuck's spousal support. We find no abuse of discretion in the court's decision to focus on Linda's recent income, rather than income several years prior. There was more than sufficient evidence from which the trial court could find that Linda's own change in income was so dramatic that it was no longer reasonable for her to continue to support Chuck. Abuse of discretion is sometimes described as whether the court exceeded all bounds of reason. (*In re Marriage of Loyd* (2003) 106 Cal.App.4th 754, 759.) We find no grounds here for such a conclusion and therefore no error.

Child Support

Chuck claims that the trial court erroneously modified the its prior order regarding child support. The order reflects that the court's order discharged $425 of the $775 Linda owed per the initial order from April 1, 2005 to April 1, 2007. (Chuck's order to show cause was filed on April 2, 2007.)

The modification of a child support order can only be prospective. It cannot affect amounts previously accrued. (Fam. Code, § 3651, subd. (c)(1); see *County of Santa Clara v. Wilson* (2003) 111 Cal.App.4th 1324, 1326-1327.) The court, however, has discretion to deny enforcement of a child support order under certain limited circumstances, including an arrearage that accrues when the nonpaying parent has sole custody of the child. (*In re Marriage of Trainotti* (1989) 212 Cal.App.3d 1072, 1075 (*Trainotti*); *In re Marriage of Okum* (1987) 195 Cal.App.3d 176, 182.)

Linda claims the court did not retrospectively modify the order, but refused enforcement in its discretion. She argues that Chase came to live with her in March 2005 and "primarily lived with her" thereafter. By Linda's own admission, "[t]he arrearage was set using these salient facts." Linda's claim as to Chase's living arrangements, however, is squarely contradicted by evidence in the record. According to Chase's affidavit, he lived solely with Linda for one month in March 2005. In April, he decided to move back in with his father, and thereafter he split his time: "I primarily live with both parents as I split my time fairly equally between them." The court found, in its order, that Chase lived 60 percent of the time with Linda and 40 percent of the time with Chuck. The court then "exercised its equitable discretion under *Trainotti*" to discharge part of Linda's child support obligation.

The exception set forth in *Trainotti* does not extend to this set of facts. In that case, and the cases upon which it relied, the court found that the trial court had discretion to offset child support arrearages during the period when the parent "had the *sole physical custody* of the child." (*Trainotti, supra*, 212 Cal.App.3d at p. 1075, italics

added.) It did not address the court's discretion to modify a prior order when the nonpaying parent had less than sole physical custody, which was clearly the case here.

California's public policy requires parents to support their minor children, and the Legislature has reflected this policy by giving strong statutory protections to child support orders. (Fam. Code, §§ 3651, subd. (c)(1), 4502, subd. (a); see *In re Marriage of Hamer* (2000) 81 Cal.App.4th 712, 722.) We decline to chip away at these protections in the name of equitable discretion absent a compelling reason, such as the facts present in *Trainotti*, where one parent had sole physical custody during the period of arrearage.

We therefore find that by misapplying *Trainotti*, the trial court abused its discretion. On remand, the trial court shall enter an order requiring Linda to pay all child support arrearages.

III

DISPOSITION

The trial court's order of May 21, 2008 is reversed. The court is directed to enter a new order consistent with this opinion. In the interests of justice, each party is to bear his or her own costs on appeal.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

O'LEARY, J.