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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

REBECKA L. MENDENHALL, Plaintiff and Respondent, v. STEVEN P. GARVEY, Defendant and Appellant.	B148819 (Super. Ct. No. BF001724)

APPEAL from an order of the Superior Court of Los Angeles County, James D. Endman, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Iverson, Yoakum, Papiano & Hatch, Neil Papiano and Gioia M. Fasi for Defendant and Appellant.

Kolodny & Anteau, Stephen A. Kolodny and Jeff M. Sturman for Plaintiff and Respondent.

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INTRODUCTION

Defendant Steven P. Garvey appeals from an order that awards plaintiff Rebecka L. Mendenhall $140,000 in pendente lite attorney's fees and $25,000 in expert witness fees in connection with her request to increase defendant's child support payments. Under the collateral order doctrine, the order is appealable. (*Lester v. Lennane* (2000) 84 Cal.App.4th 536, 561.)

Defendant contends the superior court abused its discretion in awarding plaintiff pendente lite fees and costs, in that plaintiff has greater assets than does defendant, it was error to consider purported community property assets of defendant's subsequent spouse in awarding fees and costs, the superior court improperly failed to consider a certain document before making its ruling and plaintiff's discovery strategy has generated excessive attorney's fees. We reject defendant's contention and affirm the order.

PROCEDURAL AND FACTUAL BACKGROUND

On February 22, 1993, plaintiff secured a paternity judgment against defendant. The judgment ordered the payment of a certain sum in child support. On May 9, 1996, defendant sought a downward modification of child support. Plaintiff agreed to a downward modification, which the court ordered on August 2, 1996. Defendant failed to make all payments required under the modification order, prompting plaintiff to file an order to show cause re contempt on June 3, 1999. Per stipulation and concomitant court order, the parties agreed to modify the August 2, 1996 support order. They further agreed and the court ordered that upon prompt payment as required in the October 8, 1999 order, the court would dismiss the contempt proceeding.

On March 6, 2000, plaintiff sought an upward modification of child support based on a Ninth Circuit Court of Appeals decision that apparently gave defendant the right to receive approximately $3 million. Plaintiff thereafter commenced discovery.

Upon taking the deposition of Gerald Chapnick (Chapnick), defendant's former business manager, plaintiff learned that Chapnick's firm performed business management services for defendant, Candace Garvey and Garvey Management Group until September 28, 1999. The business of Garvey Management Group was to "provide the services of [defendant] as a spokesman." According to defendant's current business manager, Karen Bobo, Candace Garvey owned Garvey Management Group. Services defendant rendered while married to Candace Garvey were the primary source of the business's revenue. In addition, Garvey Management Group and Candace Garvey paid a substantial portion of defendant's personal expenses, primarily utilizing income generated by defendant's activities.

Plaintiff and her son reside in Georgia. Defendant and his family moved from California to Utah in February 2000. In late June 2000, plaintiff was served with a petition, filed in Georgia, in which defendant requested that that state "domesticate" California's child support order as a prelude to requesting that the Georgia court modify the order. It was Candace Garvey who hoped to have the matter transferred to Georgia, believing such a transfer "would be favorable" to defendant.

In July 2000, plaintiff requested that the superior court restrain and enjoin defendant from attempting to modify that court's child support order in Georgia while plaintiff had a modification request pending in California. The superior court set the matter for hearing in August 2000. Shortly thereafter, plaintiff amended her request for relief to include a request for pendente lite attorney's fees and associated costs. Defendant opposed plaintiff's request for an injunction.

On August 21, 2000, the superior court denied plaintiff's request for an injunction but found it had continuing jurisdiction over modification of child support until another state acted pursuant to the provisions of the Uniform Interstate Family Support Act. The superior court further reserved jurisdiction to order pendente lite attorney's fees and associated costs.

Approximately two weeks later, defendant's Georgia attorney requested modification of child support on an emergency basis. Plaintiff opposed the request. The Georgia court ordered that the matter before it would not proceed until the instant proceeding had been completed. Defendant then sought a writ of mandate or prohibition on the question of the California court's jurisdiction. This court denied the petition on November 21, 2000. The California Supreme Court denied review on January 10, 2001.

Discovery efforts resumed, with plaintiff subpoenaing Candace Garvey's and Garvey Management Group's financial records. The superior court ordered the issuance of letters rogatory, entitling plaintiff to take depositions wherever the records were located. Defendant's counsel had no objection to the use of this procedure.

Shortly thereafter, Candace Garvey objected to the production of the requested documents on the ground that production would violate her right of privacy. Plaintiff sought to compel production. Following a hearing, the superior court ruled that defendant's and Candace Garvey's finances were so intertwined that Candace Garvey had lost her privacy rights. (*Babcock v. Superior Court* (1994) 29 Cal.App.4th 721, 726.) At this point, defendant's counsel asserted that disclosure of the requested documents would affect unidentified "additional parties." When the superior court pressed counsel, counsel stated there was one document that could not be disclosed.

The superior court appointed a discovery referee, retired Judge Raymond Cardenas, after which the court granted plaintiff's motion to compel production. The court ordered Candace Garvey to appear for deposition and to produce the documents requested.

On October 6, 2000, Candace Garvey's business manager produced seven boxes of Candace Garvey's and Garvey Management Group's financial records pursuant to the superior court's order of October 5, 2000. Candace Garvey appeared for her deposition on October 10 and 11, at which time she produced 14 additional boxes of financial records.

The discovery plaintiff conducted and declarations filed in this proceeding revealed that defendant and Candace Garvey separated on November 25, 1995. They reconciled in early 1998, and in March 1998, began living together again in Candace Garvey's Encino home. In 1997, while they were separated, the Garveys offered to compromise their income tax liabilities. Their tax attorney advised them that there were limits on how much income defendant could earn and warned that, as a result of community property laws, Candace Garvey's income could be included with defendant's income should they reconcile. The attorney therefore recommended that the Garveys keep their income and assets separate.

Discovery further revealed that as of October 2000, Candace Garvey had assets worth approximately $8 million. While testifying at her deposition, Candace Garvey stated that she acquired the funds used to purchase approximately $2.5 million in stock accounts in her name "after 1997." She refused to disclose the source of the funds or to produce documents concerning the source of those funds, notwithstanding the discovery referee's order that she answer.

On October 25, 2000, the parties stipulated and the court ordered that plaintiff's request for pendente lite attorney's fees and associated costs would be heard on November 6. They further stipulated that plaintiff's request for modification of child support would be heard on several dates in March 2001. Defendant was enjoined from taking any action in the courts of Georgia, the state in which the child resided, to modify child support until the conclusion of the pending California request.

After Candace Garvey refused to answer deposition questions and withheld documents, Judge Cardenas, the discovery referee, recommended in writing that the superior court order her to "answer the questions and produce the documents without further delay," in that "the answers and/or documents are directly relevant to the issue of [defendant's] ability to pay child support." Candace Garvey objected to the recommendations and set a hearing for November 27, 2000, well after the stipulated date of the hearing on plaintiff's request for pendente lite attorney's fees.

The hearing on plaintiff's request for pendente lite attorney's fees and associated costs finally took place on December 12, 2000, concurrently with a hearing on Candace Garvey's request that she not have to produce evidence showing the source of several million dollars in assets that she acquired during her marriage to defendant. Faced with the court's willingness to consider community assets for the purpose of determining whether to award pendente lite fees and costs, defendant's counsel argued that the court should review, in camera, the documents Candace Garvey refused to produce. Counsel argued that review of the documents would establish that certain funds were Candace Garvey's separate property and that Mrs. Garvey could not reveal the third-party source due to a confidentiality agreement.

Inasmuch as the court was sitting as the trier of fact, the court was unwilling to review the documents in camera and reach any conclusions as to discoverability. As the court recognized, if it did that, "in everybody's mind will be the fact that, 'Yes, he received this evidence. To what extent is he relying on it when he makes a determination?' And that's what's bothersome." In short, the court was "uncomfortable with receiving evidence that would not be available to the other side."

The court noted further that if counsel pursued in camera inspection, "all you're going to get is they can't find out the source and title is in Mrs. Garvey's name." That is, as long as Candace Garvey refused to state how she acquired the funds in the stock accounts, "then the presumption" that the funds are community property is "going to stand." The court explained further, "If I look at the document and . . . say, 'Gee, it's got some third party's name that alleges a trust, therefore, [plaintiff's counsel] doesn't get to see it,' I'm not going to make any final determination that it's a valid trust or invalid trust. I just preclude the evidence from coming in."

Defendant's counsel persisted in his desire for an in camera inspection of the documents. The court was willing to have an in camera inspection performed by another judicial officer. Counsel stated he had "no objection to another judicial officer doing it." Judge Aviva K. Bobb subsequently performed an in camera inspection of the documents,

as a result of which she concluded that the documents were confidential, as were the names of third parties identified therein, disclosure of the documents would infringe impermissibly upon those parties' privacy rights and neither Candace Garvey, defendant nor Chapnick had to answer questions concerning the name of the person who provided funds for the stock accounts.

Following the discussion of in camera inspection and how that would be accomplished, the court and the parties reviewed in detail the evidence pertaining to the attorney's fees request. The court thereafter made the order now under appeal.

DISCUSSION

Code of Civil Procedure section 1021, contained in Part 2 of the Code of Civil Procedure, which governs civil actions, provides that "[e]xcept as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys . . . is left to the agreement . . . of the parties . . . ." A family law proceeding in which custody and/or support are at issue is a civil action. (Code Civ. Proc., § 30; *Lester v. Lennane*, *supra*, 84 Cal.App.4th at p. 559.) Plaintiff's entitlement to pendente lite attorney's fees and associated costs consequently is governed entirely by statute. (*In re Marriage of Loh* (2001) 93 Cal.App.4th 325, 337.)

As plaintiff acknowledges, the statute applicable to her fee request is Family Code section 7640, which provides that "[t]he court may order reasonable fees of counsel, experts, and the child's guardian ad litem, and other costs of the action and pretrial proceedings, . . . to be paid by the parties, excluding any governmental entity, in proportions *and at times* determined by the court." (Italics added.) The parties do not dispute that the court had authority to order the payment of pendente lite fees and costs, and the language italicized above is broad enough to confer such authority. The question thus becomes whether the trial court abused its discretion in doing so. (*In re Marriage of*

Cheriton (2001) 92 Cal.App.4th 269, 314; *In re Marriage of Keech* (1999) 75 Cal.App.4th 860, 866.)

Relative Assets

In arguing that plaintiff's assets far outstrip his own, defendant assumes that Candace Garvey's assets all are separate property. As discussed in greater detail, *post*, there is no evidence to that effect, however. All of the evidence to which defendant cites establishes nothing more than that *he* did not transfer funds or assets to Candace Garvey. It does not establish the separate or community character of her funds and assets. As we elaborate more fully, *post*, the presumption that the funds Candace Garvey received "after 1997" and invested in stock accounts now worth approximately $2.5 million are community property (Fam. Code, § 760) stands unrebutted. When defendant's community share of these assets is factored in, it is *his* assets that substantially overshadow those of plaintiff, which amount to less than $400,000, only $80,000 of which could be considered immediately available to her. The trial court did not abuse its discretion in so concluding.

Consideration of Candace Garvey's Assets

In determining whether one party should pay the other party pendente lite attorney's fees and costs under the Family Code, the court must have evidence that the party to be charged with fees and costs "has or is reasonably likely to have the ability to pay." (Fam. Code, § 270.) Once the court determines that the party to be charged has the ability to pay, it must consider the relative circumstances of the parties, i.e., their respective income and assets and needs. (*In re Marriage of Cheriton*, *supra*, 92 Cal.App.4th at p. 314; *In re Marriage of Hatch* (1985) 169 Cal.App.3d 1213, 1219.) A disparity in circumstances justifies a pendente lite award of fees. (*Cheriton*, *supra*, at p. 315.) In ascertaining whether there is a disparity in circumstances sufficient to justify an award to the requesting party, it is appropriate for the court to consider the community

property that one party has available for use. (*Chapman v. Tarentola* (1960) 187 Cal.App.2d 22, 26-27; see also Fam. Code, §§ 271, subd. (a), 2032, subd. (c); *Martins v. Superior Court* (1970) 12 Cal.App.3d 870, 876.) This is precisely what the court did in this case.

The evidence shows that Candace Garvey acquired the funds invested in the stock accounts during the Garveys' marriage and while they were domiciled in California. The stock account funds therefore are presumptively community property. (Fam. Code, § 760.) The presumption is rebuttable, which shifted the burden to the Garveys to prove that the stock account funds were *not* community property. (*In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 290-291.) The only evidence the Garveys offered that might rebut the presumption is a written post-nuptial agreement executed in Utah on February 21, 2000, approximately two weeks before plaintiff sought modification of child support.[1] This agreement would establish the separate property character of assets acquired during the marriage only if it demonstrates that those assets were acquired with separate property funds or it effectively transmutes community property into separate property.

Nothing in the post-nuptial agreement establishes that assets acquired during the Garveys' marriage were acquired with separate property funds. The agreement states that the parties brought separate assets to the marriage, have continued to manage their respective assets and have accumulated property in their own names since marriage. It does not reveal the means by which they accumulated post-nuptial assets, however. It simply *declares* that certain property is defendant's separate property and certain other property is Candace Garvey's separate property. That is ineffective to establish the nature of those assets. With respect to non-title property, such as the stock accounts (see, e.g., *In re Marriage of Jafeman* (1972) 29 Cal.App.3d 244, 260), the presumption that the

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[1] Defendant's declaration, stating that they agreed orally in March 1998 to transmute community property into separate property is ineffective for this purpose. (Fam. Code, § 852, subd. (a).)

assets are community property can be rebutted only by tracing the source of funds used to acquire the assets (*In re Marriage of Buol* (1985) 39 Cal.3d 751, 762). The post-nuptial agreement contains no evidence of the *source* of the funds used to acquire any particular asset.

The agreement also is ineffective to work a transmutation of community property to separate property. As provided in subdivision (a) of Family Code section 852, "[a] transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." As explained in *Estate of MacDonald* (1990) 51 Cal.3d 262, at page 272, "a writing signed by the adversely affected spouse is not an 'express declaration' for purposes of [former Civil Code] section 5110.730(a) [now Family Code section 852, subdivision (a)] unless it contains language which expressly states that the characterization or ownership of the property is being changed." (Italics omitted.)

The post-nuptial agreement contains no language expressly stating that the parties are changing the characterization or ownership of *existing* property, only of property to be acquired in the future. Lacking such language, the agreement is ineffective to transmute the character of property acquired during marriage and before execution of the agreement. The stock accounts are such property.

In the absence of evidence that the stock accounts are separate property, the superior court properly viewed as unrebutted the presumption that they are community property. Taking into account the disparity in circumstances revealed when considering the community property available to defendant, the trial court properly awarded pendente lite attorney's fees. (*In re Marriage of Cheriton*, *supra*, 92 Cal.App.4th at p. 315.)

Decision to Have Another Judicial Officer Review Allegedly Confidential Documents

Defendant agreed to have another judicial officer review the documents to determine whether the documents sought were confidential, as were the names of third

parties identified in the documents, whose rights disclosure thereof would infringe upon impermissibly, and whether defendant, Candace Garvey or Chapnick had to answer questions about the name or said person. Having agreed to this procedure, he is estopped from claiming error on appeal. (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 213.)

Plaintiff's Discovery Strategy

Defendant argues that it is plaintiff's discovery strategy that has generated excessive attorney's fees in this proceeding. As he sees it, plaintiff improperly expended great sums on seeking discovery of assets held in Candace Garvey's name. Plaintiff limited discovery to assets acquired during the Garveys' marriage. As explained *ante*, it was entirely proper for her to seek information about such marital assets, which are presumptively community property funds available to defendant. It was *defendant's* strategy in resisting discovery to the nth degree and in attempting to have the matter removed to a Georgia court that caused attorney's fees to mount. He cannot now complain that, having run up the bill, he will have to pay more.

The order is affirmed.

NOT TO BE PUBLISHED

SPENCER, P.J

We concur:

ORTEGA, J.

MALLANO, J.