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Spousal Support

Court Rules that Provision in Stipulated Judgment Awarding Wife Percentage of Husband's "Annual Bonus" Applied Only to Performance-Based Discretionary Payments

*By Carol Rothstein, Esq.**

In *In re Marriage of Minkin* (No. G052947; Ct. App., 4th Dist., Div. 3. 4/24/17, ord. pub. 5/19/17) — Cal. App. 5th —, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 455, the Fourth District Court of Appeal considered what the parties intended by the term "annual bonus" in 2004, when they stipulated that the husband, Robert, would pay the wife, Patricia, 41 percent of his "annual bonus" as additional spousal support. After Robert changed jobs and his compensation package changed from a salary and potential annual bonus to a more complex arrangement, the parties disagreed as to which components of Robert's compensation constituted annual bonuses under the stipulated agreement.

In the opinion by Justice Aronson (O'Leary, P. J., Bedsworth, J., concurring), the Fourth District concluded that the words "annual bonus" were ambiguous. After considering the circumstances under which the parties entered into the agreement, the appeals court agreed with the trial court's interpretation that an "annual bonus" was a discretionary payment based on performance, as argued by Robert, and not all payments in addition to base salary, as argued by Patricia.

Facts and Procedure. Patricia and Robert married in 1978 and separated in 2002. At the time of separation, Robert was an executive at St. Joseph Hospital earning $300,000 in annual salary, with a potential performance-based bonus of up to 20 percent of his

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offers." Affirming the $30,000 attorney fee award that Patricia felt was grossly insufficient, it said that the trial court concluded that her "purported shortage of funds did not justify awarding her more in fees than was reasonable under the stipulated judgment." Apparently, the panel did not think that pursuing her position was "reasonable."

Commentary

Stacy D. Phillips & Kevin Martin

This commentary focuses on the primary issue discussed in *In re Marriage of Minkin*—the importance of clear and precise drafting of stipulated judgments.

Negotiating and drafting a stipulated judgment frequently follows a long, expensive and emotionally draining process where both parties (and sometimes counsel) are left wanting to settle the case quickly to end the difficulties associated with a contentious divorce. *Minkin* demonstrates the dangers, which may not be immediately apparent at the time of execution, that may befall clients who rush into a stipulated judgment without giving the stipulated judgment the time and attention it requires. As practitioners, we know that a stipulated judgment must be a living document that the parties can rely on as their lives change post-divorce. In the case of *Minkin*, the parties' stipulated judgment was found to be "ambiguous" and eventually led to unhappy clients and additional litigation between the parties.

The ambiguity in the *Minkin* stipulated judgment centered on the words "annual bonus," which, in ordinary conversation, would be unlikely to send anyone running to the dictionary. However, stipulated judgments are contracts and must be a clear and explicit writing of the parties' agreement. After reviewing the parties' stipulated judgment, the Court of Appeal was uncertain about what the parties intended by the term "annual bonus." Husband argued that "annual bonus" referred to a discretionary payment to him, above his salary, that was based upon performance. Wife argued that "annual bonus" referred to any payment above Husband's base salary. The Court of Appeal concluded the agreement was susceptible to both definitions—a conclusion that required it to examine the circumstances under which Husband and Wife negotiated their agreement years earlier.

The Court of Appeal eventually agreed with Husband's interpretation of "annual bonus." However, had the underlying circumstances been slightly different, the Court of Appeal might have adopted Wife's definition of "annual bonus." The lesson learned from *Minkin* has nothing to do with the definition of "annual bonus" and everything to do with best practices when drafting a stipulated judgment. *Minkin* reminds us of two very important considerations that must be front of mind when drafting a stipulated judgment: (1) the judgment must be able to withstand the passage time and account for changes in the parties' lives, which, in the case of *Minkin*, meant changes to compensation structure; and (2) the language of the judgment must be clear and precise—if a word is subject to multiple meanings, define the term in your document and avoid a potential fight down the road. Everyone wins when a stipulated judgment is clear, comprehensive and can serve the parties as they proceed forward with their new lives.

POINT OF VIEW

Sandra L. Mayberry, Esq.*

Dealing with Depression and Anxiety in Our Clients and Ourselves

Chris Cornell's recent suicide in a Detroit hotel, after a very successful concert and at a time when he appeared to be full of life and enthusiasm about the

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(Pub. 110)

Procedural Posture. The April 2007 child support order required father to pay child support of $1,000 per month, which included his share of childcare costs. The order included a retroactivity provision, which stated that Mother would notify Father if there were no longer childcare costs and that any modification motion would be retroactive to the date the child was no longer enrolled in childcare. In May 2011, Father moved to modify child support and determine arrearages. He claimed that the children had not been enrolled in childcare since January 2007. Prior to trial, Father propounded discovery on Mother, including requests for admissions. Mother failed to timely respond to the request for admissions and the court deemed the admissions admitted. The trial court awarded Father a $441 per month childcare credit for the period of January 1, 2007 to May 31, 2011; set child support at $490 per month, without any childcare add-on, for the period of June 1, 2011 to December 31, 2012; and at $699 per month, without any childcare add-on, for the period of January 1, 2013 to November 31, 2013, and sanctioned the mother $1,250 for discovery violations.

Overview. The trial court was empowered under Family Code section 3653, to retroactively modify its April 2007 support order to the date Father filed a motion to modify (May 10, 2011), but no earlier, even though the April 2007 order contained a retroactivity condition. Thus, it was error to award childcare credits beginning before the motion to modify was filed, with the effect of retroactively reducing the arrearages owed under the April 2007 support order for several years preceding the filing of the modification motion. Mother was not estopped from raising the retroactivity issue, even though she did not initially object to the retroactivity condition or otherwise appeal the April 2007 order, because of the important public policy of protecting minor children to ensure that their needs are met when their parents separate. It was proper to deem that, by failing to respond to requests for admissions, Mother, who was representing herself, admitted that she had incurred no childcare costs for almost seven years.

Outcome. The Court of Appeal affirmed in part and reversed in part the order of the trial court.

References: California Family Law Practice and Procedure, 2nd ed., §§ 42.03 (retroactive modification of child support orders), 110.14[4][c] (failure to respond to request for admissions).

COMMUNITY PROPERTY

Retirement and Pension Benefits

Wife Was Entitled to Gains on Her Share of Husband's Retirement Benefits from Date of Stipulated Judgment

In re Marriage of Janes
(No. E065668; Ct. App., 4th Dist., Div. 2. 5/23/17) — Cal. App. 5th —, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 462
By Miller, J. (McKinster, Acting P. J., Slough, J., concurring)

The Fourth District Court of Appeal held that a wife who was awarded $113,392 from the husband's retirement account by the parties' marital settlement agreement, which was attached to the parties' 2010 judgment of dissolution, was entitled to receive that amount plus resulting gains, calculated from the date of the dissolution judgment. The appeals court rejected the husband's argument that awarding the wife the gains was an impermissible modification of the judgment, which was silent as to gains and losses. Although the wife's money remained in the husband's retirement account until 2014, the money became her separate property when the agreement was executed.

Facts and Procedure. Wife and Husband separated in February 2009. Pursuant to their settlement agreement, which was attached to the 2010 judgment of dissolution, Husband agreed to transfer $113,392 from his 401k retirement account to Wife. The agreement reserved jurisdiction to the superior court to supervise payments and the division of assets pursuant to the agreement.

In February 2014, Wife received a letter from Fidelity Investments ("Fidelity") informing her that Fidelity had been directed by the administrator of the 401k plan, pursuant to a QDRO, to segregate $113,392 from Husband's account, "with no earnings

calculated through the date of segregation." Fidelity informed Wife that it had started an account for her in the amount of $113,392. Wife's attorney wrote a letter to the plan administrator stating that there was no QDRO and demanding that the Fidelity transaction be unwound. The administrator complied and Wife's money remained in Husband's account.

In December 2014, Wife sought the court's approval of a proposed QDRO directing Fidelity to segregate $113,392 from Husband's account, plus gains and losses from the date of separation. Husband opposed Wife's request, arguing that the dissolution judgment awarded Wife a lump sum amount of $113,392, without gains or losses.

At the hearing, Husband argued that Wife had been awarded a lump sum from the 401(k) account, rather than a percentage, and that she was therefore not entitled to gains earned on the account. Husband argued that awarding gains amounted to a modification of the dissolution judgment, for which the court lacked jurisdiction. Wife argued that had the money been segregated in 2010, when the judgment was entered, she would have earned the gains on the $113,392 in her separate account, and that there was no authority supporting Husband's argument that she was not entitled to any gains while the money remained commingled. The family court ruled that awarding the gains to Wife would not be a modification of the judgment, explaining that Wife's $113,392 was her separate property and she was therefore entitled to any gains on it, just as Husband was entitled to the gains on his share of the 401k. The court ordered the husband to execute the QDRO. Husband appealed.

Wife Entitled to Gains on $113,392 from Date Agreement Was Executed. The appeals court explained that community property becomes separate property upon execution of a marital settlement agreement, and that profits acquired on separate property are separate property [Fam. Code § 770(a)(3)]. It was therefore unnecessary for the judgment to mention gains or losses. In this case, the agreement was executed on April 19, 2010, when the final judgment was filed. As of that date, the $113,392 became Wife's separate property and any gains or losses on that money belonged to her. Accordingly, when the family court stated that the gains on Wife's separate property belonged to her, it was not modifying the judgment.

***Marriage of Thorne and Raccina* Distinguished.** The appeals court rejected Husband's claim that *In re Marriage of Thorne and Raccina* (2012) 203 Cal. App. 4th 492 was controlling precedent in this case. In *Thorne,* the parties' marital settlement agreement gave the wife 16 percent of the husband's military pension. More than 10 years later, after learning that courts use a time rule to divide pensions, the wife sought to have the judgment of dissolution set aside, asserting that she was entitled to one-half of the pension. The trial court modified the judgment to comply with the time rule and the appellate court reversed on the grounds that the dissolution judgment had become final and the trial court lacked jurisdiction to modify it.

Thorne is distinguishable from the present case, the appeals court wrote, because the wife in *Thorne* was asking the court to change the division of the pension. In the present case, Wife did not ask the court to change the division of the asset, and the trial court did not change anything about the judgment when it stated that Wife was entitled to the gains on her separate property.

Wife Would Be Entitled to Gains Even if Amount Was Intended as Equalization Payment. The appeals court rejected Husband's argument that he and Wife had bargained for the certain sum of $113,392, that the amount was intended as an equalization payment, and that he would have been required to pay Wife $113,392 even if the account had suffered losses after April 19. The court first noted that there was nothing in the agreement that indicated that the $113,392 was intended as an equalization payment, and stated that it would be odd to tie the fixed equalization amount to a 401(k) account, which has an inherent possibility of loss. However, said the court, even if the amount was intended as an equalization payment, it would have become Wife's separate property on April 19, because there was nothing in the agreement indicating that the payment was to be delayed. The fact that the money remained in the 401(k) account did not entitle Husband to the gains earned on Wife's separate property.

Court Erred in Ordering that Wife Would Receive Gains from Date of Separation. The appeals court agreed with Husband that the court erred in ordering that Wife was to receive gains

from the date of separation, rather than the date of the judgment of dissolution, because property is to be valued as close as possible to the time of trial [Fam. Code § 2552(a)]. If Wife wanted to use the date of separation as an alternative date of valuation, the appeals court wrote, she was required to give the Husband notice that she was seeking the alternative date, including the legal authority supporting her request and the good cause for using the alternative date. However, in this case there was no indication that Wife gave Husband notice that she was seeking an alternative date and there was nothing in Wife's trial brief concerning good cause for an alternative date. The appeals court rejected Wife's contention that Husband forfeited his contention concerning the alternative valuation date because Husband did not object to the alternative valuation date that Wife included in the proposed QDRO. Because Wife failed to properly raise the issue by providing the required notice, Husband could not have forfeited the issue.

Commentary

Stacy D. Phillips & Erica Swensson

Occam's Razor is the problem-solving principle that the simplest answer, with the fewest assumptions, is often the best one. The appellate court in *Janes* seems to have taken this lesson straight from the 14th century. It took the parties' competing, belabored arguments—Husband's assertion that Wife's retirement allocation in the marital settlement agreement was an equalization payment; Wife's position that her gains should be calculated from the date of separation, rather than the date of the agreement; and Husband's claim that allocating Wife appreciation would amount to a modification of the judgment—and distilled them into a simple, elegant solution. At the time the parties entered into the agreement, Wife's $113,392 share of the retirement account became her separate property. Profits gained from separate property are separate property. From the time at which they entered the agreement, all gains belonged to Wife as her separate property. There was no modification, no alternate date of valuation, and no equalization payment.

Janes also presents another page in the annals of "Time is Not Your Friend"—a lesson in making sure the parties actually carry out the terms of their judgments in a timely fashion.

Many of us were drawn to the law because of our curiosity, our appetite for new and changing problems, and the thrill of the pursuit—like sharks that need to keep swimming in order to breathe. It makes us passionate advocates and ferocious problem solvers, but there is a dark side to that coin. We can have a tendency to grow bored easily and move too quickly to "the next," without tying up all of the loose ends. In this case, once the judgment was finalized and entered, neither the parties nor their counsel followed up on the housekeeping required to effectuate the terms of the judgment. Asset division is tedious. Although asset division is not the attorney's responsibility in many cases, it is very helpful to give clients a checklist of what they need to do to effectuate the terms of their deal and, if appropriate, ask if the client needs your help. As a result of the parties not executing the asset division provisions of their agreement, four years passed between entry of the judgment and the litigation regarding division of a community account. How much time and money was spent on the meet and confer between Wife's attorney and Fidelity, Wife's attorney and Husband's attorney, filing for relief, the initial hearing, the follow up briefing and subsequent hearing, and finally the appeal? It is easy to imagine it ate up any of the appreciation on the amount awarded to Wife in the initial agreement. Could this have been avoided with a closing letter urging the parties to promptly execute the terms of the marital settlement agreement? Possibly. It is also possible that the parties simply did not follow up. These are expensive lessons that can be avoided with timely follow-through.

Finally, the *Janes* opinion provides a concise summary of the law and procedural requirements for a party asserting an alternate date of valuation during trial—a handy cite to keep for your trial brief on alternate date of valuation.

Commentary

Vanessa Kirker Wright

This case reminds us of two things: (1) entry of judgment is only about half-way to the end of the case and (2) sloppiness in drafting will come back and haunt you. All in all, this relatively innocuous case is full of good advice.

I didn't find the main holding—that Misti was entitled to the gains on her portion of the 401(k)—particularly shocking, but I did find it interesting that the court made note that while the judgment was entered in Riverside county, the terms of the judgment reserved jurisdiction to Orange county. It might be my imagination, but I got the idea that the court was making a comment on the thoroughness of the parties and their counsel. There was no other reason for the court to comment on this misstatement in the opinion. It is never a good feeling when the court calls you out, in a published opinion, for having overlooked something relatively obvious in your judgment paperwork. The court's observations regarding how long it took the parties to divide the 401(k) and the lack of a motion for "alternate valuation date" are other places where the dry recitation of facts indicates the court's low regard for the parties' attention to detail. I think the point is this: please review your paperwork carefully; these are orders of the court and should not be entered into lightly or without due consideration.

What did puzzle me about this case was why Misti thought she was entitled to gains from the "date of separation" rather than from the date of the settlement agreement. I went back and read her Respondent's Brief, which is available on-line. I found her argument to be odd. She suggested that her separate property interest began accruing gains or losses from the date the community ended — or date of separation. But the terms of the judgment did not say anything about when the 401(k) was valued. The appellate court observed that if there is no other specific date agreed to, the date of valuation is near or at the date of trial or settlement, which is, of course, the law [Fam. Code § 2552(a)]. In her brief, Misti did not address that obvious flaw in her analysis. In short, if Misti intended her portion of the 401(k) was to be valued at the date of separation, she should have said so in the judgment, and certainly that obvious point should have been addressed on appeal.

I think we all heave a sigh of relief when the "664.6 settlement agreement" is signed after months, or years, of sometimes complex negotiation. But this case reminds us to educate our clients that "it ain't over 'til it's over", and that means that the assets are actually divided into each party's name, the debts are actually paid or assigned, title is changed, QDROs are in place and funds are segregated.

Commentary

Marshall S. Zolla

We would like to think that when an MSA is signed and judgment entered, our job is finished and we can move on to the next case. Not so fast. There may be a QDRO to draft, enter and serve. There probably will be transfers to be made to implement the judgment. Remember that the spousal fiduciary duty in Family Code section 721 continues until the asset or liability has actually been distributed [Family Code § 2102 (b)].

In the *Janes* case, the dispute centered on which party had the right to gains and losses on the fixed retirement sum specified in the judgment, and on what date did such accounting commence: the date of separation (2009), the date the MSA was executed and judgment entered (2010), the date of the QDRO (2014), or the date the sum was transferred into an account in Wife's name (2014)? Following entry of judgment, the wife's $113,392 remained in the husband's unsegregated retirement account. Several years later, when Wife requested a transfer of the funds "plus gains and losses (realized and unrealized) income and expenses (accruals)," this dispute erupted. Husband contended that Wife should get only the fixed sum of $113,392 set forth in the judgment and that he had the right to any and all gains on said sum. The trial court disagreed and ordered that Wife was to receive gains from the date of separation. The Court of Appeal agreed that Wife was entitled to the gains, but from the date closest to trial in April, 2010; the trial court order was affirmed with directions.

What duties does counsel have post-judgment to see that transfers required by the MSA and judgment are actually made? These may include not only QDRO's, but real property transfers, change of beneficiary forms, estate planning changes, partnership interests—the list goes on. Perhaps we need to take a renewed look at our retainer letters to make certain that responsibility for post-judgment duties is clearly spelled out, rather than ignored. In addition, more care should be given to the drafting of the executory

provisions of transfer of funds in agreements and judgments to avoid the type of problem encountered in this case.

We're in the midst of baseball season. Don't forget the classic expression of the great Yankee catcher and renowned legal philosopher, Yogi Berra, which seems quite apt in this situation: "It's not over 'til it's over" [*see* The Jurisprudence of Yogi Berra, 46 Emory L. J. 697 (1997)].

References: California Family Law Practice and Procedure, 2nd ed., § 21.41 (procedural considerations for division of retirement benefits).

DOMESTIC VIOLENCE

Restraining Orders

Court Properly Denied Restraining Order against Husband Who Injured Wife While Acting in Reasonable Self-Defense

In re Marriage of G.
(No. D070495; Ct. App., 4th Dist., Div. 1. 5/16/17)
11 Cal. App. 5th 773, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 437
By Dato, J. (Haller, Acting P. J., Aaron, J., concurring)

A trial court did not abuse its discretion when it refused a wife's request for a domestic violence restraining order against her husband, when the wife's injuries were suffered in the course of physical altercations that she initiated and the evidence supported the trial court's conclusion that the husband used reasonable force to protect himself and his property from the wife's aggressions.

Facts and Procedure. Valerie filed a petition for dissolution of her marriage to Louis, requesting sole legal and primary physical custody of their child and seeking child support. She also filed an application for a domestic violence restraining order (DVRO) against Louis, asserting that Louis had physically injured her. In his written opposition to Valerie's request for a DVRO, Louis asserted that Valerie was abusive and recounted several incidents in which Valerie initiated aggression against him and his property. Louis also requested joint legal and physical custody of their child.

At the evidentiary hearing on the DVRO application, Valerie introduced photographs showing various bruises and testified that Louis had initiated the physical aggression during each of the incidents that resulted in her injuries. Louis testified that he had never hit Valerie, although she had struck him on several occasions. According to Louis, Valerie's typical tactic when she was upset with him was to take his work laptop or cell phone and hide it from him until he yielded to her demands. At times, Valerie would damage his devices by putting them in water or deleting data. Louis testified that Valerie's photos showed injuries she sustained on one occasion when she attempted to wrest Louis's laptop from him, eventually covering his nose and mouth with her hand. Unwilling to release the laptop for fear that Valerie would damage it and unable to free his airways, Louis nipped Valerie's thumb to force her to remove her hand. In their continued struggle for the laptop, Valerie fell and scraped her knee.

Valerie argued that the court should enter a DVRO because Louis had either intentionally or recklessly inflicted bodily injury on her. Louis contended that he was merely defending himself. The court ruled against Valerie, concluding that Valerie's own testimony showed the physical confrontations and resulting injuries were triggered by her actions in taking Louis's property and physically assaulting him in connection with taking his property. The court rejected Valerie's argument that Louis had used excessive physical force in responding to her actions. Valerie appealed.

Reasonable Self-Defense is a Defense to a Claim of Abuse. A court may issue a DVRO if the applicant shows "a past act or acts of abuse" [Fam. Code § 6300], which may include "intentionally or recklessly caus[ing] or attempt[ing] to cause bodily injury" [Fam. Code § 6203(a)]. Valerie argued that she was entitled to a DVRO as long as the evidence showed that Louis had either intentionally or recklessly injured her and that the court abused its discretion in considering the circumstances that led to the injury.

The appeals court acknowledged that neither Family Code section 6300 nor section 6203 refers to self-defense. However, section 6305, which limits the circumstances in which a court can issue mutual restraining orders, provides that a mutual restraining order cannot be issued unless the court "makes detailed findings of fact indicating that both parties acted as a primary aggressor and that neither party acted primarily in self-defense." [Fam. Code § 6305(a)(2)]. This provision, wrote the court, "reflects the Legislature's understanding that reasonable self-defense is a defense to a claim of abuse" and "is consistent with a long-standing principle of California law that a party who inflicts injury while acting reasonably in self-defense is not culpable." Under California law, a person may use reasonable force to resist a battery, even if such force harms the initial aggressor. In addition, a property owner may use reasonable force to protect property from damage or to retake property from a person who has obtained possession of it by force.

In this case, the trial court concluded that in each instance where Louis applied force that resulted in a bodily injury to Valerie, he was acting in response to her attempts to take his property by physical force and he did not employ excessive force. The trial court's factual findings were fully supported by the evidence, the appeals court stated, and the determination of what degree of force was justified and reasonable under the circumstances was one for determination by the trier of fact.

Commentary

Deborah H. Wald

The National Coalition Against Domestic Violence (NCADV) estimates that 1 in 3 women and 1 in 4 men have been subjected to some form of physical violence by an intimate partner. The California Partnership to End Domestic Violence reports that approximately 40% of California women experience physical intimate partner violence in their lifetimes. Of these, approximately 75% experience the violence while they have children under the age of 18 years at home. These statistics make graphically clear that intimate partner violence (IPV) is a pervasive problem which must be taken seriously by the courts.

In 1993, the California State Legislature responded to the staggering statistics about domestic violence by passing the Domestic Violence Prevention Act (DVPA) [Fam. Code § 6200 et seq,]. The DVPA, as well as other related statutes, provides significant protections to people whose spouses or intimate partners have been found to have committed acts of domestic violence. For example, a person against whom a domestic violence restraining order (DVRO) has been issued may be ordered to vacate the family home, regardless of ownership [Fam. Code § 6321] and there is a rebuttable presumption against granting physical or legal custody to a person against whom a DVRO has been issued [Fam. Code § 3044]. These statutes provide critically important protections to victims of intimate partner violence and their children, but may be inappropriately used by parties seeking to obtain an advantage in their dissolutions or custody disputes, rather than seeking needed protection from intimate partner violence. The courts must take reasonable steps to insure that the protections of the DVPA are not abused.

In *In re Marriage of G.*, the courts did just that. They balanced the important protections provided by the DVPA against the right to reasonable self-defense from a threat of injury to one's person or property. The trial court found, in this case, that the husband had a right to defend himself from his wife's repeated assaults on his person and his belongings, and that he used a reasonable amount of force that was appropriate to the circumstances. In affirming the trial court's ruling, the Court of Appeal decision clarifies, in unequivocal terms, that the right to reasonable self-defense can be asserted in defense against a request for a domestic violence restraining order. This should not be controversial and, in fact, is likely to help victims of intimate partner violence who fight back against their abusers from having restraining orders issued against them based on their efforts at self-defense.

A DVRO is, fundamentally, a form of injunction — it uses past abusive conduct to determine whether a protective order is needed to prevent further abusive conduct in the future. If an assault is committed for the primary purpose of self-defense, no injunctive relief is necessary or appropriate, since the "victim" of the assault presumably can avoid a recurrence by refraining from engaging in the conduct that caused the need for self-defense in the first place.

Commentary

Vanessa Kirker Wright

When I read this case my first reaction was to heave a sigh of relief. Finally, there is a current appellate opinion that recognizes the sometimes unpleasant facts of a difficult relationship. Finally, a trial court listened to the evidence related to a deteriorating relationship and recognized that people sometimes behave poorly, but their poor behavior doesn't always mean that the draconian results of a DVRO should be levied on one spouse or the other. Here is the case that illustrates my growing discomfort with the aggressive and single-minded application of the idea that where there is screaming and pushing, there is abuse and one spouse is to blame. The remedy offered in *Marriage of G.* does not move the pendulum far enough: one still has to prove that the use of force is (1) reasonable and (2) intended to protect oneself or one's property.

I do not believe I am the only practitioner in the country who has watched the explosion of DVROs with some dismay. I know I am not the only practitioner in the country who has watched warring spouses, and their counsel, use DVROs as a litigation tactic. Unfortunately, the judicial resources and time it takes to ferret out the tactical DVROs makes it an impossible task. In this case, Mr. G was subjected to supervised visits with his only child for more than three months before the trial court finally denied the "permanent" DVRO. Three months is a very long time in the life of a young child — and even longer in the life of a non-offending parent.

As one of my favorite lines in an opinion states: "Sometimes breaking up is hard to do" [Schnabel v. Superior Court (1993) 21 Cal. App. 4th 548]. And when people break up, they are mean to each other and lose control. While it is true that we need to protect people from violence, and that we need to learn to recognize "coercive control" by one spouse over the other, we also need to temper our response to poor behavior with some understanding about the passion and wounds that are raised when people separate.

We ask too much of people in one of the most stressful situations they will ever find themselves in. On the one hand, we do not permit courts to order a spouse to leave the marital residence without a show of violence or abuse. On the other hand, if there is violence or abuse as a result of the close proximity of the parties, we punish parents by imposing presumptions against spousal support and joint custody orders.

This case is a step in the right direction toward a more reality-based evaluation of the need for protection and the punishments that flow from the imposition of restraining orders.

References: California Family Law Practice and Procedure, 2nd ed., §§ 96.03[1] (definition of abuse), 96.05[4] (mutual restraining orders).

JUVENILE COURTS

Nonminor Dependents

Briefly Noted

In re Jesse S.
(No. G054169; Ct. App., 4th Dist., Div. 3. 6/7/17) — Cal. App. 5th —, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 526
By Bedsworth, Acting P. J. (Fybel, Ikola, JJ., concurring)

The appeals court reluctantly affirmed a juvenile court's decision denying a 19-year-old's request to return to juvenile court jurisdiction and the foster care system under Welfare & Institutions Code section 388.1(a)(4), when the appellant did not meet the statutory criteria to return to the court's jurisdiction. Although the appellant's adoptive parents had stopped supporting him, they continued to receive payments on his behalf from the Adoption Assistance Program (AAP).

Procedural Posture. About four months before his 20th birthday in 2016, appellant filed a request to return to juvenile court jurisdiction and the foster care system, pursuant to section 388.1(a)(4). His reason was that the couple who adopted him the day before his 18th birthday was no longer supporting him, even though they were receiving payments on his behalf from the AAP. The trial court denied the request.

Overview. Section 388.1(a)(4) provides that a nonminor who is under age 21 and was previously adjudged a dependent of the court may petition the court for a hearing to determine whether to reassume dependency jurisdiction over the nonminor, provided he or she received adoption assistance payments after turning 18 and his or her adoptive parents no longer provide ongoing support and no longer receive benefits on his or her behalf. Since there was no question appellant's adoptive parents were still collecting AAP payments on his behalf, appellant was not eligible for reentry into the juvenile dependency and foster care system pursuant to section 388.1(a)(4). While the literal application of the statute may yield an anomalous and unintended result in cases like appellant's, those results are not so anomalous that the court could accept appellant's invitation to invoke the common law absurdity rule to delete what the Legislature plainly included when it drafted § 388.1

Outcome. The Court of Appeal affirmed the order, emphasizing that it was unable to provide relief, even though it was clearly warranted.

References: SEISER & KUMLI ON CALIFORNIA JUVENILE COURTS PRACTICE AND PROCEDURE, Ch. 2 (dependency) (Matthew Bender 2016). This summary was derived from the California Official Reports Summary [see 2017 Cal. App. LEXIS 526].

Briefly Noted

In re David B.
(No. A146632; Ct. App., 1st Dist., Div. 4. 6/7/17) — Cal. App. 5th —, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 420
By Streeter, J. (Reardon, Acting P. J., Rivera, J., concurring)

The appeals court held that Welfare & Institutions Code section 303(a), which allows a juvenile court to retain jurisdiction over a dependent nonminor beyond the age of 18, is derivative of jurisdiction assumed by the court before the dependent reaches age 18. Accordingly, when the juvenile court dismissed a dependency petition filed just before the child turned 18, and the dismissal was appealed after the child's 18th birthday, no relief was available and the appeal was moot.

Procedural Posture. The Contra Costa County Children and Family Services Bureau ("Bureau") filed a dependency petition for David B., alleging abandonment [Welf. & Inst. Code, § 300(g)]. At the time the petition was filed, David B. was one month shy of his 18th birthday. The juvenile court dismissed the petition, finding that the evidence did not establish abandonment. David B. appealed.

Overview. Once the juvenile court obtains jurisdiction over a child in dependency proceedings, it may retain jurisdiction beyond age 18, potentially until the nonminor dependent reaches age 21 [Welf. & Inst. Code § 303(a)]. However, a court's retained dependency jurisdiction over nonminors is derivative of jurisdiction assumed earlier, prior to age 18. In this case, although the petition was filed when David B. was 17, the court dismissed the petition and never assumed jurisdiction over him. David B. was already 18 at the time of the appeal. Even if the appeals court found that the trial court erred in dismissing the petition, no relief was available because David B. was 18 and the court could not initiate dependency jurisdiction over him. Moreover, dependent child status could not be determined as of the original hearing date to restore or preserve that status [Code Civ. Proc. §§ 908, 923], and the nunc pro tunc doctrine was inapplicable. The appeals court advised those representing minors in dependency proceedings brought on the eve of majority that a negative decision might better be addressed by bringing a writ petition for peremptory relief rather than an appeal.

Outcome. The appeals court dismissed the appeal as moot, because effective relief could not be granted.

References: SEISER & KUMLI ON CALIFORNIA JUVENILE COURTS PRACTICE AND PROCEDURE, Ch. 2 (dependency) (Matthew Bender 2016).

Reasonable Services

Briefly Noted

In re A.G.
(No. D071620; Ct. App., 4th Dist., Div. 1. 6/16/17) — Cal. App. 5th —, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 558
By O'Rourke, J. (Nares, Acting P. J., Dato, J., concurring)

A juvenile court erred in finding that reasonable services had been provided to a father living in Mexico, when there was no evidence that services had been provided. The fact that the father had been deported to Mexico after he was arrested for assault did not make the agency's failure to provide services reasonable.

Procedural Posture. At the 12-month review hearing in a dependency proceeding involving three children, the juvenile court found by clear and convincing evidence that reasonable services were offered or provided to the parents. The juvenile court returned the children to the mother's care under a plan of family maintenance services and ordered the county health and human services agency to continue to provide visitation and discretionary services to the father, who had been deported to Mexico. The father appealed.

Overview. The children's father, A.J., was arrested and deported to Mexico in 2011 after he assaulted the children's mother, who obtained an order preventing him from having contact with her and the children. In 2015, a dependency petition was sustained, the children were removed from their mother's custody, and the agency was ordered to offer or provide reunification services to the father. Although the father initially withdrew his initial request for reunification services because he wanted his children to complete their education in the United States, he renewed his request one week later, after speaking to an attorney. At the 12-month review hearing, the court found that the father was unable to benefit from reunification services offered in California because he was deported as a result of his own actions, and that he had declined services offered by Mexican officials.

On appeal, the appeals court stated that the juvenile court could not rely on the father's uninformed statement about not wishing to receive reunification services to curtail his right to such services. Moreover, the juvenile court's finding that the county agency could not provide services to the father because he was responsible for his own deportation was legally indefensible. The juvenile court's finding the county agency could not provide services to the father because he was in Mexico was not supported by substantial evidence. The county agency represented that it was looking for service providers and could provide discretionary services to the father in Mexico. The record did not contain any evidence to show that during the review period, the county agency assisted the father in contacting the Mexican social services agency for service referrals or identified any available services that would substantially comply with case plan requirements. There was no evidence that services were unavailable, and any barriers to obtaining services did not relieve the agency of its duty to provide services. Because the record showed that the father was not offered, or provided with, the court-ordered services in his case plan during the review period, there was not substantial evidence to support the reasonable services finding. The court concluded that a harmless error analysis did not apply. The remedy for the failure to provide court-ordered reunification services to a parent is to provide an additional period of reunification services to that parent and to make a finding on the record that reasonable services were not offered or provided to that parent.

Outcome. The Court of Appeal reversed the finding that the father was offered or provided reasonable services but affirmed the findings and orders in all other respects.

References: Seiser & Kumli on California Juvenile Courts Practice and Procedure, Ch. 2 (dependency) (Matthew Bender 2016). This summary was derived from the California Official Reports Summary [see 2017 Cal. App. LEXIS 558].

Termination of Parental Rights

Briefly Noted

In re A.K.
(No. C081545; Ct. App., 3d Dist. 5/9/17, ord. pub. 6/5/17)
— Cal. App. 5th —, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 514
By Butz, J. (Raye, P. J., Hoch, J., concurring)

A father whose parental rights had been terminated lacked standing to assert on appeal that the trial court erred in not assessing the child's paternal grandmother for placement.

Procedural Posture. The juvenile court issued orders in a dependency proceeding terminating parental rights and freeing the minor for adoption [Welf. & Inst.

Code § 366.26]. The father appealed, asserting that the juvenile court erred by failing to consider the child's grandmother for relative placement.

Overview. The Court of Appeal held that the father lacked standing to raise a relative placement issue [Welf. & Inst. Code § 361.3] on appeal because his reunification services had been terminated prior to the hearing, and thus he was not aggrieved by any failure of the juvenile court to consider relative placement at the hearing. Because the father did not raise the issue in the juvenile court and, thereafter, on appeal from the disposition order or other appealable orders [Welf. & Inst. Code § 395], the father forfeited his contentions regarding the relative placement preference. The juvenile court had no duty to hold a relative placement hearing sua sponte because the minor's foster parents were interested in adoption, and thus there was no need for an independent decision on a change in placement.

Outcome. The Court of Appeal affirmed the juvenile court's orders.

References: SEISER & KUMLI ON CALIFORNIA JUVENILE COURTS PRACTICE AND PROCEDURE, Ch. 2 (dependency) (Matthew Bender 2016). This summary was derived from the California Official Reports Summary [see 2017 Cal. App. LEXIS 514].

SPOUSAL SUPPORT

Evaluations

Court May Not Order Spouse to Undergo Vocational Examination Absent Pending Support-Related Motion

In re Marriage of Stupp & Schilders
(No. A144762; Ct. App., 1st Dist., Div. 2. 5/18/17) — Cal. App. 5th —, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 196
By Miller, J. (Kline, P. J., Stewart, J., concurring)

A trial court abused its discretion when it ordered a former wife to obtain a postjudgment vocational examination under Family Code section 4331, when there was no support-related motion pending.

Facts and Procedure. The stipulated judgment of dissolution was entered in March 2014. Wife unsuccessfully appealed support orders incorporated in the stipulated judgment, including provisions imputing income to her. While her appeal of the support orders was pending, Husband asked the family court to order Wife to undergo an immediate vocational evaluation pursuant to Family Code section 4331. The trial court ordered Wife to obtain a vocational evaluation and Wife appealed.

Statutory Basis for Vocational Examination. Family Code section 4331(a) authorizes the court to order a party to submit to a vocational examination to assess the party's ability to obtain employment that would allow him or her to be self-supporting at the marital standard of living. An order for a vocational examination may only be made on motion, for good cause [Fam. Code § 4331(b)].

Vocational Examination Must Be Relevant to an Issue of Spousal Support. The appeals court reasoned that the propriety of the trial court's order turned on the meaning of "good cause," as used in section 4331. The appeals court noted that the term "good cause" is not defined for the purpose of section 4331. However, the "focus" of the vocational examination is to assess a party's ability to obtain employment that would allow the party to maintain himself or herself at the marital standard of living [Fam. Code § 4331(a)]. Moreover, section 4331 is in a chapter of the Family Code entitled "Spousal Support upon Dissolution or Legal Separation." The appeals court reasoned that this suggests that good cause for a vocational examination exists only if the examination is relevant to an issue of spousal support.

No Good Cause to Order Vocational Examination in This Case. Because there was no pending motion for support, there was no good cause to order a vocational examination, the court wrote. Husband requested the order because Wife "appealed the support orders, including the imputation [to her] of income" and argued that the vocational expert's report would give an opinion as to Wife's ability to earn. The appeals court stated that while this kind of report may be important when there's a controversy before the family court regarding support, there was no such controversy when the order was made. The

mere fact that support orders are being appealed does not justify ordering a vocational examination, given that support orders may be affirmed on appeal, as they were in this case.

The appeals court also found instructive a group of statutes permitting limited postjudgment discovery before a proceeding to modify or terminate a support order [see Fam. Code §§ 3660-3668]. The type of discovery that may be used in the absence of a motion for modification or termination of a support order is limited to a request for a current income and expense declaration [Fam. Code § 3664] and income tax returns [Fam. Code § 3665]. Any other method of discovery, including a request for a vocational evaluation, "may only be used if a motion for modification or termination of the support order is pending" [Fam. Code § 3662].

Commentary

Dawn Gray

It is always true that there is much more going on in a case than what you read in an appellate opinion, and that has to be the situation here. But if anyone wondered whether a stand-alone motion for a vocational evaluation is supportable even if there is no accompanying request to modify support, we now have the answer. Without some pending motion, there will be no "good cause" to order the examination. This does make sense; it could be an invasion of privacy, or simply harassment, to request an evaluation of a party without also pursuing some change in the support order that could be supported by the evaluation. After all, a vocational evaluation is simply evidence supporting a position regarding an appropriate support amount or a modification.

Commentary

Marshall S. Zolla

There seem to be an increasing number of postjudgment disputes reaching the Court of Appeal. Here, approximately a year after entry of a stipulated judgment, while an appeal was pending, husband sought a number of orders, including an order for his ex-wife to undergo an examination by a vocational training counselor pursuant to Family Code section 4331, which the trial court granted. In reversing, the Court of Appeal determined that the trial court erred in ordering a vocational exam, holding that no good cause existed [*see* Fam. Code § 4331(b)] because there was no support-related controversy before the family court at the time the order was made.

Vocational exams are often sought for the legitimate purpose of establishing that an unemployed or underemployed spouse seeking support is capable of work and to establish earning capacity. Such a motion is also used on occasion as a tactic to intimidate the other spouse. The text in section 4331 provides that the "focus" of the examination is "an assessment of the party's ability to obtain employment that would allow the party to maintain herself or himself at the marital standard of living." The Court of Appeal opined that there can exist no good cause for a vocational examination under section 4331 if the examination is not relevant to a determination of support. Thus, in this case, where there was no support-related motion pending, there existed no good cause to order a postjudgment vocational examination.

In considering the risk and benefit of seeking a vocational examination, where circumstances permit, care should be given to specifying the scope of the exam, admissibility of the report, permission or not to contact collaterals, protection of any applicable privileges, and, of course, the qualifications and experience of the evaluator. Vocational examinations can be an important piece of evidence, where appropriate and where properly drafted.

References: California Family Law Practice and Procedure, 2nd ed., § 51.41 (examination by vocational training counselor).

TAXATION

Earned Income Tax Credit

Earned Income Tax Credit Denied on Income of Incarcerated Felon

Skaggs (Kevin Dewitt) v. Commissioner
(No. 15944-16, U.S. Tax Ct., 4/26/17)
148 T.C. No. 15
By Buch, Judge

Income earned by a convicted felon employed in a state hospital during the period of his sentence was held to be excluded for the purpose of obtaining an earned income tax credit (EITC). Despite differences in condition and status in the hospital, the taxpayer was still an inmate in a penal institution and thus subject to the exclusion.

Facts and Procedure. Kevin was convicted of various felony offenses in 2008 and was sentenced to prison with an earliest possible release date in 2029. From mid-2012 to mid-2016, he lived at a Kansas state hospital which was used as a security hospital for the treatment of mentally ill inmates. In 2015, he was employed part-time by the hospital as a janitor.

Kevin reported his earnings on a 2015 federal income tax return in order to claim a refundable EITC. The Internal Revenue Service denied the credit on the grounds that Kevin's income was earned while an inmate in a penal institution and was therefore excluded as a basis for obtaining the credit.

When Kevin brought the issue to the Tax Court, the IRS sought dismissal of the case on summary judgment.

Hospital Income Was Properly Excludable. The EITC is a refundable credit available to low-income taxpayers. Because the amount of the credit can exceed the tax, the EITC can constitute a pure social benefit transfer [IRC §32]. A filer must, however, have some taxable income in order to qualify for the credit, and such income cannot include amounts "earned while an inmate in a penal institution" [IRC §32(c)(2)(B)(iv)].

Kevin argued that his status at the hospital was not that of a conventional prison inmate and that the hospital was not a penal institution. The Court rejected these arguments, holding that Kevin was an "inmate" under any conventional meaning of the term. Furthermore, the hospital was an integral part of the state correctional system, particularly for prison inmates transferred there during their terms, and was therefore a penal institution within the meaning of the statute. The fact that Kevin was not employed by the hospital pursuant to a prison work program was deemed immaterial, as the statute applies by its terms to any income earned while an inmate. Thus summary judgment was granted to the IRS and Kevin was denied the credit.

Commentary

Robert Polevoi

The EITC has come to be a cornerstone of whatever remains of a federal "War on Poverty." But the credit has always been associated with a concept of "deserving poor" and, more recently, of "working families," which explains why it excludes people who are serving time and unlikely to be contributing income to any household. Kevin seems like a rather bright character, if only because he managed to frame his pro se arguments in such a form as to require a decision as carefully considered as the Court's was here. Yet only a couple hundred dollars was at stake, beyond an inmate's search for some recognition of his status as a normal employee entitled to wear normal clothes while on the job.

Innocent Spouse Relief

Innocent Spouse Relief Computed According to Statute, Not Divorce Settlement

Asad (Mae Izzedin) v. Commissioner
(No. 32401-15, U.S. Tax Ct., 5/15/17)
T.C. Memo 2017-80
By Morrison, Judge

Ex-spouses who had agreed in their divorce settlement to divide their joint tax liabilities equally were nonetheless required to divide them by percentages determined pursuant to statutory innocent spouse relief.

Facts and Procedure. Sam and Mae separately owned rental properties during their marriage, but their income and deductions from these properties were merged on joint returns filed for 2008 and 2009. When they subsequently divorced, they formally agreed to divide any joint tax liabilities with respect to these properties equally.

The Internal Revenue Service asserted joint tax liabilities for both years, and the matter was brought to the Tax Court. Before trial, the IRS determined that under the innocent spouse provisions of Internal Revenue Code section 6105, it would be appropriate to allocate the liabilities for the two years between the ex-spouses on the basis of percentages determined by their respective fractions of the total losses claimed for their respective properties. The ex-spouses, however, expressed their willingness to accept the 50-50 split of tax liabilities that they had agreed to between themselves.

Spouses' Agreement to Divide Tax Liabilities Equally Not Binding on IRS. Both spouses are generally held jointly and severally liable for taxes attributable to any year for which a joint return was filed. However, under certain circumstances, a spouse may be relieved of liabilities attributable to the other spouse under the "innocent spouse" provisions of Internal Revenue Code Section 6015. In the case of divorced taxpayers, relief may be applied in a manner that allocates liabilities based on the result they would have obtained had they filed separate returns [IRC § 6015(c), (d)].

The Court held that no agreement between divorcing spouses to divide their joint tax liabilities can be binding on the IRS, as the IRS is not a party to the agreement. The agreement to divide joint liabilities equally can only have effect under state law, if one spouse chooses to seek contribution from the other after making a payment to the IRS in excess of the privately agreed amount. The IRS is only limited in its power to seek recovery of joint liabilities from both or either spouse by the application of innocent spouse relief pursuant to statute. As the IRS in this case had conceded the application of innocent spouse relief to both parties, and because the two ex-spouses agreed to accept the IRS computation, the Court applied the percentage divisions of the joint liabilities for the two years at issue without further analysis.

Commentary

Robert Polevoi

This case is notable in two respects. First, it is unusual to find a situation in which both spouses have innocent spouse claims against each other, as opposed to one spouse simply intervening to oppose an innocent spouse claim made by the other spouse. This was the rare instance in which spouses anticipated the need to allocate future tax liabilities that were attributable to both of them.

Of more general significance is the emphasis the court placed on its rationale for rejecting the division of liabilities proposed in the settlement. The standard rationale is simply that state property rights do not inherently determine federal tax liabilities, such that one divorcing spouse cannot simply dispose of a joint tax liability on the other spouse. Here, the court stressed the inherent unfairness to the IRS of being compelled to honor the consequences of an agreement to which it was not a party. This rationale may become more commonly articulated simply because it may be more comprehensible to divorcing spouses (and their attorneys) surprised to discover that the terms of a marital settlement with respect to federal tax liabilities has been completely disregarded.

References: California Family Law Practice and Procedure, 2nd ed., § 160.60[6] (innocent spouse relief).

CUMULATIVE SUBJECT INDEX

The following is an index of the subject matter covered in the California Family Law Monthly for the current volume (January 2017 forward). This table directs the subscriber to the page on which each subject is discussed.

CUMULATIVE TABLE OF CASES

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