

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re Marriage of JERALD R. and
LAUREL J. OLF.

B175339

(Los Angeles County
Super. Ct. No. BD264969)

JERALD R. OLF,

Appellant,

v.

LAUREL J. OLF,

Respondent.

APPEAL from a judgment of the Superior Court of Los Angeles County.
Wendy L. Kohn and John Ouderkirk, Judges. Reversed and remanded.

Jerald R. Olf, in pro. per., for Appellant.

No appearance for Respondent.

The trial court ordered a husband to pay support to his former wife, a disabled homemaker, at the end of a 35-year marriage. One month after the court filed its judgment ordering the payment of spousal support, the husband filed a petition for a modification, seeking a reduction in his support obligation. The court did not rule on the husband's petition until two years had passed. And when it did finally rule, it failed to exercise its discretion along legal lines by considering the husband's then-existing financial circumstances. We reverse and remand for further proceedings.

FACTS

Appellant Jerald Olf and respondent Laurel Olf were married in 1962 and separated in 1997. Respondent, who was 58 years old at the time of separation, is a homemaker who raised the couple's children and did not work outside the house. Appellant, who was 63 years old at the time of separation, is a lawyer and certified public accountant.

On March 7, 2002, the trial court entered judgment on reserved issues relating to marital support and property. The court observed that the parties enjoyed an upper middle class standard of living during the marriage. The court found that respondent, who is under continuing treatment for breast cancer, was the victim of domestic violence, which included beatings and appellant's attempt to strangle respondent in the laundry room of the family home in 1995 or 1996. Respondent suffers from emotional problems as a result of appellant's violent conduct, and she has little or no capacity to support herself. The court concluded that vocational training "is not a realistic possibility given the condition of her physical and emotional health."

With respect to support, the court found that appellant "was, and is, hiding funds" and that appellant's testimony was "[m]arked by selective failure of recollection." The court noted "'indicia of fraud' in Mr. Olf's method of conducting his personal and business financial affairs" and that appellant engaged in a scheme to hide 40 percent of his income from respondent and her representatives.

The court determined that appellant has an income of at least \$15,658 per month available for support. Appellant was ordered to pay monthly spousal support of \$6,500,

which the court deemed to be “well below” the amount respondent needed to maintain the marital lifestyle and pay for her medical expenses. The court found it “extremely unlikely” that respondent could ever become self-supporting due to her physical and emotional problems, which were perpetuated to some degree by appellant’s physical and mental abuse of respondent during the marriage.

One month after the trial court rendered its judgment, appellant filed a petition for a modification requesting a reduction in his support obligation on the grounds that he had no ability to pay the court-ordered amount. Appellant submitted an income and expense declaring claiming a net monthly income of \$8,889 and a net disposable income of \$3,305. Appellant showed total monthly expenses of \$11,183 and claimed that he owed his new wife \$140,000.

The hearing on appellant’s motion began on September 24, 2002. It continued on January 28, 2003, June 11, 2003, November 19, 2003, and finally concluded on February 23, 2004. During that period, the parties submitted significant evidence and argument relating to appellant’s financial circumstances.

THE TRIAL COURT’S RULING

The court entered its ruling on March 26, 2004. The court found that appellant had not shown a material change in circumstances between March 7, 2002 (the date the court entered its original judgment) and April 19, 2002 (the date that appellant filed his petition for a modification). The court denied the petition for a modification. This appeal was filed on May 14, 2004.

DISCUSSION

1. Appeal And Review

The trial court may modify a support order “at any time as the court determines to be necessary.” (Fam. Code, § 3651, subd. (a).) Appeal may be taken from an order denying a modification of spousal support. (Fam Code, § 3554; *Gammell v. Gammell* (1979) 90 Cal.App.3d 90, 91-92 & fn. 1.) The trial court exercises broad discretion with respect to modifications. (*In re Marriage of Biderman* (1992) 5 Cal.App.4th 409, 412; *In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 480.)

A spousal support modification may be granted only if the party seeking the modification shows a material change of circumstances since the most recent order. (*In re Marriage of Tydlaska* (2003) 114 Cal.App.4th 572, 575.) The moving party bears the burden of showing a change in circumstances. (*Ibid.*) A material change is required because “[o]therwise, dissolution cases would have no finality and unhappy former spouses could bring repeated actions for modification with no burden of showing a justification to change the order. Litigants “are entitled to attempt, with some degree of certainty, to reorder their finances and life style [*sic*] in reliance upon the finality of the decree.” [Citation.] Absent a change in circumstances, a motion for modification is nothing more than an impermissible collateral attack on a prior final order.” (*In re Marriage of Biderman, supra*, 5 Cal.App.4th at pp. 412-413; *In re Marriage of Smith, supra*, 225 Cal.App.3d at p. 480.)

2. Consideration Of The Evidence

Appellant argues that the trial court improperly failed to consider all of the evidence that was presented regarding the change in his financial circumstances. This evidence was presented over the course of nearly two years. At the end of the whole process, the trial court simply noted that there was no change in circumstances in the one month period between filing of the judgment and the filing of appellant’s petition for a modification.

The trial court’s frustration with appellant’s tactics is understandable. It was insulting for appellant to file a petition for a modification one month after the trial court invested much time and hard work fashioning a dissolution judgment. The trial court reasonably could have denied appellant’s motion immediately after it was filed: in one month, appellant’s financial circumstances were not likely to have changed significantly and the petition could legitimately have been deemed an unwarranted collateral attack on the judgment. At that point, appellant was improperly asking for a reevaluation of the circumstances existing when the judgment was entered instead of challenging the fairness of the judgment by direct appeal or a motion for new trial. (See *In re Marriage of Mulhern* (1973) 29 Cal.App.3d 988, 992.)

Unfortunately, the trial court did not promptly dismiss appellant's petition. Instead, the court collected evidence and heard argument on the petition for the next two years. By waiting two years before ruling on appellant's petition for a modification, the trial court became obliged to consider that circumstances may indeed have changed. For example, the court should have considered appellant's retirement, now that he is over 70 years old. The court could also consider whether appellant's motive in retiring is to avoid his support obligations. (*In re Marriage of Sinks* (1988) 204 Cal.App.3d 586, 594.) And a health condition that *might* endanger the life of the supporting spouse, but has not caused his income to drop, provides no basis for reducing support. (*Engelberg v. Engelberg* (1968) 257 Cal.App.2d 821, 823-824.)

In light of the two-year gap between the judgment and the ruling on the petition for modification, the trial court needed to address the merits of the petition. The court's ruling on the request for modification "must be based on current facts and circumstances." (*In re Marriage of Tydlaska, supra*, 114 Cal.App.4th at p. 575.) The court's determination of spousal support, where the supporting spouse has a fluctuating income, should take into account actual income as well as earning capacity at the time of the trial or hearing. (*In re Marriage of Rosen* (2002) 105 Cal.App.4th 808, 824-825.)

By failing to consider appellant's circumstances as they stood in March 2004, the court did not exercise its discretion along legal lines and its order must be reversed. (See *In re Marriage of Biderman, supra*, 5 Cal.App.4th at p. 412.) We do not address--nor do we express any opinion on--the merits of appellant's petition for a modification of his support obligation because the trial court has yet to fully consider the evidence and make a ruling based on evidence of appellant's current financial circumstances.

3. The Court's Ruling On Four Life Insurance Policies

On January 6, 2004, after a hearing to address reserved matters, the trial court awarded respondent four life insurance policies and relieved appellant of the obligation to maintain the policies. Appellant now appears to be challenging the court's ruling on the insurance policies and the lack of an equalizing payment. However, no appeal was taken from the order of January 6, 2004. We have no jurisdiction to consider rulings that were

not timely appealed. We only have jurisdiction to consider the order of March 26, 2004, which denied appellant's petition to reduce his spousal support obligation and denied appellant's motion to quash a wage and earnings assignment order.

DISPOSITION

The judgment (order denying appellant's petition for a modification of spousal support) is reversed. The case is remanded for further proceedings consistent with this opinion. Appellant shall bear the costs on appeal. (Cal. Rules of Court, rule 27(a)(4).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.