CALIFORNIA Family Law Monthly

In re Marriage of Berman

The train wreck of husband's case was foreseeable before it even left the station. You've got to be kidding that husband took this case to trial, lost at trial, then pursued the case on appeal. He did. He lost. Big surprise.

Husband sought to terminate his spousal support obligation to his first wife because of substantially reduced income after his retirement date. Why? Husband signed a Transmutation Agreement transferring ownership of his private investigation and security firm to W-2 for no consideration, purportedly because of his retirement at age 65. The trial court found that husband transferred the business in bad faith in order to avoid his support obligations, and ruled that income from the business could continue to be imputed to him for purposes of spousal support. Husband had originally been ordered to pay $9,500 per month in spousal support in 2009, reduced to $4,000 per month by stipulation in 2013; the trial court found his retirement to be a change of circumstances, and reduced the support obligation "slightly" by $500 per month at the 2015 hearing, despite husband's request to terminate support.

In an opinion by Justice Flier, the Court of Appeal affirmed the trial court's ruling, determining that the trial court's finding that husband had transferred his business to his current wife in bad faith with the goal of avoiding his spousal support obligations was supported by substantial evidence, and that it was undisputed that there was no consideration for the transfer of this apparently valuable asset. Husband presented no evidence to explain the lack of consideration for the transfer, which presents the core teaching point and take-away from this case.

The only evidence presented by husband was from his own declarations and papers in which he insisted that he did not transfer the business to avoid his support obligations. The trial court did not believe him, and that credibility determination was binding on the Court of Appeal. The burden was on husband, as the party seeking modification, to prove a material change of circumstances. No business records or other evidence were offered to establish how much of the business income was attributable to husband's labor, as opposed to other sources, and what potential or lack thereof the business had to generate revenue without his involvement. Husband argued that once he made a *prima facie* showing of a material change in circumstances, it was wife's burden, not his, to demonstrate the businesses likely future income. That argument was of no help to husband, because he did not make a *prima facie* showing as to the business income. As discussed, the trial court did not believe there had actually been a bona fide transfer, merely a shifting of the legal ownership of an income-producing asset.

The Court of Appeal opinion is replete with references to the fact that husband presented no evidence to explain the lack of consideration for the transfer of the business to his new wife,

no evidence to sustain his burden as the party seeking modification to prove a material change of circumstances, and no business records or other evidence were offered with respect to the source of the business's post-transfer income; in addition, the Court of Appeal held that in the absence of credible evidence as to how the firm created revenue and what part husband's participation played in those earnings, the trial court did not abuse its discretion in looking to the business's past earnings as a guide to future earnings. Husband presented his case solely through his own declarations, but without any substantiating evidence to support his positions. That is never a wise trial preparation methodology, and, as happened here, foreshadowed a bad ending to an expensive and ill-conceived journey.

Another take-away from this case is to be mindful that the transactions in which we are called upon to render advice benefit from [require] a modicum of fairness, not an attempt at gaining unfair advantage from unchecked zealous advocacy. The certificate on our wall from the California Supreme Court validates our position as "Attorney and Counselor at Law." Wise counsel should accompany good technical advice [see, Lawyers as Counselors, Third Edition, David A. Binder, et al., 2012]. What thought went into the Transmutation Agreement in the Berman case, not to mention the attempt to terminate Kevin Berman's support obligation? Family Code section 1615 cautions that fairness, full disclosure and voluntary execution are the legal standard for Prenuptial Agreements. Why would counsel submit, as so often happens, an egregiously unfair Prenuptial Agreement on behalf of a wealthy intended spouse, when acrimonious negotiations, let alone emotional strain, are certain to occur. Where's the sense of fairness and balance which should temper zealous advocacy? There are lessons to be learned from the Berman scenario. May we please pay attention.

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