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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of CHARLES H. and  
LINDA F. BRANDES.

CHARLES H. BRANDES,

Appellant,

v.

LINDA F. BRANDES,

Respondent.

D050276

(Super. Ct. No. D485527)

APPEAL from an order of the Superior Court of San Diego County, Jeffrey S. Bostwick, Judge. Affirmed.

Charles H. Brandes (Charles)<sup>1</sup> appeals from the court's pendente lite award of attorney fees and costs to Linda F. Brandes (Linda) under Family Code<sup>2</sup> sections 2030

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<sup>1</sup> We use first names for clarity and convenience only and intend no disrespect.

<sup>2</sup> All further statutory references are to the Family Code.

and 2032. Charles asserts that because Linda has substantial assets the court erred in awarding her attorney fees as she could not show any "need" that he pay her fees.

We conclude the court did not abuse its discretion in finding Charles should pay pendente lite attorney fees as his own income and assets far surpass Linda's, and the concept of need in the Family Code includes equalizing the litigation resources of the parties, i.e., obtaining a parity between spouses in their ability to obtain effective legal representation.

## FACTUAL AND PROCEDURAL BACKGROUND

### *A. The Order To Show Cause re Attorney Fees*

In August 2006, at Linda's request, the court issued an order to show cause (OSC) as to why Charles should not pay her attorney fees and litigation costs. Linda requested that Charles be required to pay her slightly over \$1 million for attorney fees Linda had already incurred, and an additional \$2 million for future anticipated fees.

In support of the OSC Linda filed an income and expense declaration, which she updated when she filed her reply papers. This showed her monthly income was \$350,000, consisting of \$200,000 in spousal support and \$150,000 in interest and dividends imputed to her by the court's prior ruling establishing spousal support. In addition, Linda had approximately \$1.97 million in liquid assets, \$70 million in additional assets, and monthly expenses of approximately \$650,000. In her declaration, Linda stated she was unable to pay for the attorney fees incurred in the marital dissolution action without having to liquidate assets she had received from the parties' division of property.

The OSC was also supported with evidence concerning the complexity of the issues already litigated and the issues anticipated to be litigated, the skill and experience of counsel, the fees already incurred, and a budget for the fees anticipated to be incurred.

In response to the OSC, Charles did not dispute his ability to pay reasonable fees. Rather, he argued Linda had no need for a fee award and that any disparity in income or assets was an insufficient ground to justify a fee award.

Charles did not submit an income and expense declaration. He also did not disclose the amount of fees he had incurred or paid. Accordingly, Linda lodged with the court his March 2005 income and expense declaration, his 2005 federal tax return, his January 2005 schedule of assets and liabilities and his August 2006 schedule of assets and liabilities. This evidence showed that in March 2005 his monthly income was \$10 million, and in 2006 his monthly income was \$16.67 million. Charles had assets of over \$290 million, debt of \$216,000, and monthly expenses of \$2.1 million.

#### *B. Court's Ruling*

The court held two hearings on Linda's request for fees.

In the first hearing, the court considered "the complexity of the issues involved in the litigation, the wealth and available resources of the parties and the litigation costs already incurred and expected[] to be incurred through trial." The court found the case to be highly complex, especially as to the valuation of the marital interest in Charles's company, Brandes Investment Partners, which company had a value ranging from \$1.4 billion to \$1.92 billion. The court expressly considered Linda's "need in the context of the relative wealth and complexity of the case." The court indicated its belief that Linda

should "be responsible for some of her fees." The court noted that the difference in the parties' monthly income was at least \$16 million. The court found Charles had the ability to pay the requested fees and noted the value of his business was over a billion dollars. The court also considered the fact the parties were married for 18 years. The court took note of prior rulings that affected its decision, noted the expertise of counsel, and considered the billings of Linda's attorneys and experts.

With regard to the amount of the fees it was awarding, the court acknowledged that *In re Marriage of Keech* (1999) 75 Cal.App.4th 860, 870 required that fees be awarded in an amount that was just and "reasonable." In this regard, the court stated "the fees have to be reasonable as to the extent of the services allowed." The court also found that Linda's original submission was insufficient to show what her reasonable estimated prospective fees were and made her resubmit her evidence on this issue, stating: "What I'm going to do is require [Linda to] provide this court with a budget for the amount of attorney's fees and costs as reasonably estimated for the next phase of the case . . . . I'm reserving on the issue of attorney's fees . . . . [¶] Here is what I have in mind with a budget. I want an estimate broken down into categories of what is needed for what type of work that will be relevant to be accomplished in the next stage of the case. Then I can more readily evaluate the reasonableness of the fees requested to the estimated services that have to be rendered as to that stage, make a pendente lite award considering all these other factors . . . . That's how I want to approach the attorney fees."

Linda complied with the court's request, and, after she submitted the revised budget, the court held a second hearing.

The court indicated at the second hearing it had considered Linda's ability to pay and that she had "around [\$]350,000 a month of cash flow." The court compared that to Charles's income of "around [\$]10 to [\$]16 million a month." The court stated that while it did not believe that Charles "should be required to pay every nickel of her fees," by the same token it could not "ignore the severe disparity of income."

The court concluded that because Linda should not be required to "burn through a significant portion of her liquid estate to fund litigation where the opposing party outstrips her income by 10 times," the court ordered Charles to pay Linda approximately one-half of the fees she requested, \$250,000 for past fees and costs, and \$750,000 for future fees and costs.

The court reserved jurisdiction over the characterization and allocation of the fees. This timely appeal followed.

## DISCUSSION

### A. *Standard of Review*

"[A] motion for attorney fees and costs in a dissolution proceeding is left to the sound discretion of the trial court" and will not be disturbed on appeal "[i]n the absence of a clear showing of abuse. . . ." (*In re Marriage of Sullivan* (1984) 37 Cal.3d 762, 768-769.) Such an abuse will be established, " 'only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made.' " (*Ibid.*)

## B. *Analysis*

In a divorce proceeding, the trial court may order payment of such fees and costs as between the parties, based on their relative circumstances, to ensure a parity of legal representation in the action. (§§ 2030, 2032.) The decision as to whether one party should be ordered to pay the other's attorney fees and costs, and the amount to be paid, is to be based on a consideration of the parties' respective incomes and needs and any factors affecting their respective abilities to pay. (§ 2030; see also § 2032 [court may make an award of attorney fees and costs where the award, and its amount, are just and reasonable under the relative circumstances of the respective parties].)

"In determining what is just and reasonable *under the relative circumstances*, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, *the circumstances of the respective parties* described in Section 4320. *The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances.*" (§ 2032, subd. (b), italics added.)

In accordance with the foregoing, the primary factor in determining whether to award fees, and the amount of any such award, is the relative circumstances of the parties. (*In re Marriage of O'Connor* (1997) 59 Cal.App.4th 877, 882-883.) Thus, "[a] *disparity* in the parties' respective circumstances *may itself* demonstrate relative "need" even though the applicant spouse admittedly has the funds to pay his or her fees." (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1167, quoting *Hogoboom & King*, Cal.

Practice Guide: Family Law (The Rutter Group 1996) ¶ 14:159, p. 14-35, second italics added; *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 315.)

For example, in *In re Marriage of O'Connor, supra*, 59 Cal.App.4th 877, the husband had total assets of \$2 million, \$500,000 of which was liquid. He had incurred \$1.6 million in attorney fees and costs, of which he had paid \$1 million (\$650,000 from his own funds, \$350,000 from an interim award against the wife). The wife had liquid assets of at least \$40 million and had incurred \$2 million in attorney fees and costs. The trial court ordered the wife to pay an additional \$450,000 of the husband's attorney fees under section 2032. (*In re Marriage of O'Connor, supra*, at pp. 880, 884.) The wife appealed, arguing (as does Charles here) that, " 'since [husband] has the ability to pay his own fees, . . . it is improper for her to effectively be financing [husband] . . . . [¶] [T]he trial court incorrectly applied the applicable law and ignored the requirement that there be a finding of "need" prior to making any attorney fee award. . . . [Husband] does not have a "need" for a pendente lite fee award against [wife.]' " (*Id.* at p. 881.)

The Court of Appeal rejected her argument, holding the trial court did not abuse its discretion in making the award. The court first reviewed the legislative history of the predecessor to section 2032, Civil Code section 4370.5, which, before 1990, did not contain the language in subdivision (b) stating that a spouse's ability to pay their own attorney fees did not preclude a finding of need. The 1990 amendments to former Civil Code section 4370.5 were a reaction to cases that held if a spouse had assets with which to pay attorney fees, there could be no showing of need, even if the other spouse had far greater wealth. This resulted sometimes in harsh and unjust results. For example, in *In*

*re Marriage of Joseph* (1990) 217 Cal.App.3d 1277, 1287, a less affluent wife argued to the Court of Appeal that unless her husband were ordered to pay her attorney fees, her liquid assets would be reduced to almost nothing. The Court of Appeal, however, noted that "[n]umerous cases have reiterated the principle that need is a prerequisite to any fee award." (*Ibid.*) The court concluded that, although it seemed unfair to require the wife to exhaust her liquid assets in the face of husband's vast wealth, the fact that she was able to pay her attorney fees from her own resources supported the trial court's finding that she had not shown the requisite "need" to qualify for an award. (*Id.* at pp. 1287-1288; see also *In re Marriage of Aninger* (1990) 220 Cal.App.3d 230, 244-245, [trial court abused its discretion in ordering husband to pay wife's attorney fees and costs when her own liquid assets were adequate].)

As the *O'Connor* court noted, the Legislature responded with a bill that was intended to "'clarif[y] the definition of 'need' for purposes of making an award of attorney fees and costs.' [Citation.]" (*In re Marriage of O'Connor, supra*, 59 Cal.App.4th at p. 882.) The Legislature amended former section 4370.5 to include reference to the "relative circumstances of the respective parties," and, importantly, added the language, now in section 2032, subdivision (b), "'The fact that the party requesting an award of attorneys' fees and costs has the resources from which he or she could pay his or her own attorneys' fees and costs is not itself a bar to an order that the other party pay part, or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation



equitably between the parties under their relative circumstances.'" (*In re Marriage of O'Connor, supra*, 59 Cal.App.4th at p. 883.)

Based upon the language of section 2032, subdivision (b), and the history of the 1990 amendments to its predecessor, the Court of Appeal in *O'Connor* concluded the wife's contention that her husband should pay his own fees from available assets was "nothing more than a refusal to acknowledge the unequivocal meaning of the language of the 1990 amendment, which permits an award to a spouse even if that spouse has sufficient resources to pay attorney's fees and costs from his or her own pocket." (*In re Marriage of O'Connor, supra*, 59 Cal.App.4th at p. 883.)

Here, the court acted within its discretion in awarding attorney fees to Linda. The court found that because of the substantial difference in income between the parties, the complexity of the case, and the amount spent in this case, among other factors, Linda demonstrated a "need" for a pendente lite fee award.

Further, she need not, as Charles argues, have insufficient "financial resources to present her case adequately." Rather, as stated, *ante*, a disparity in the parties' respective financial circumstances *itself* may demonstrate need, even where the applicant *does* have the funds from which to pay her own fees. (*In re Marriage of Drake, supra*, 53 Cal.App.4th at p. 1167; *In re Marriage of O'Connor, supra*, 59 Cal.App.4th at p. 884.)

As the trial court found, it would be improper to force Linda to "burn through a significant portion of her liquid estate to fund litigation where the opposing party outstrips her income by 10 times." (See Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2008) ¶ 14:168, p. 14-50.3 [consideration of the parties'

respective financial circumstances "may warrant a § 2030 award to a party who otherwise would have to 'impair the capital' of his or her separate estate—where the other party has far *greater liquid assets* and would *not* have to dig into his or her unliquid estate"]; *In re Marriage of O'Connor, supra*, 59 Cal.App.4th at p. 884.)

Charles also asserts the court erred in failing to consider the mandatory factors courts must consider in awarding spousal support under section 4320, which is specifically referenced in section 2032, subdivision (b). However, section 2032, subdivision (b) only states that in determining the relative need of the parties, the court should take into consideration, "to the extent relevant, the circumstances of the respective parties described in Section 4320." We have interpreted this statement not to mean that court must consider *every* factor enumerated in section 4320 that has to be considered in awarding spousal support, but only those relevant to a determination of need, such as "assets, debts and earning ability of both parties, ability to pay, duration of the marriage, and the age and health of the parties." (*In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 630.) The record demonstrates that the court considered all of these factors in ruling on the OSC.

In arguing that the court abused its discretion in awarding fees to Linda, Charles also relies exclusively on her income and assets. However, in determining whether an award of fees is appropriate in a given case, court must take into consideration "the circumstances of the respective parties" (§ 2032, subd. (b); *In re Marriage of O'Connor, supra*, 59 Cal.App.4th at p. 884.) Lacking from Charles's argument is any consideration of *his* monthly income and the huge disparity between that income and Linda's.

Further, Charles's position would render meaningless the Legislature's 1990 amendment that added the statement in section 2032, subdivision (b) "The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested." We will not read the language of a statute in such a manner. (*Woods v. Young* (1991) 53 Cal.3d 315, 323.) Charles's position in this matter is "nothing more than a refusal to acknowledge the unequivocal meaning of [section 2032, subdivision (b)], which permits an award to a spouse even if that spouse has sufficient resources to pay attorney's fees and costs from his or her own pocket." (*In re Marriage of O'Connor, supra*, 59 Cal.App.4th at p. 883.)

Charles argues that disparity in incomes, standing alone, without a showing of need, is insufficient for an award of pendente lite attorney fees. This contention is unavailing.

First, "[a] disparity in the parties' respective circumstances may itself demonstrate relative "need" . . . ." (*In re Marriage of Drake, supra*, 53 Cal.App.4th at p. 1167, quoting Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 1996) ¶.14:159, p. 14-35, italics omitted.) Second, it is clear from the record the court *did* consider Linda's "need in the context of the relative wealth and complexity of the case."

Charles also argues the court did not make appropriate findings under sections 2030 and 2032 or explain the basis for its decision. As detailed, *ante*, the record shows otherwise. The court explained in detail at *two* hearings on this matter that it considered the relative wealth of the parties, their ability to pay, the complexities of the case, the

expertise of counsel, the just and reasonable amount to be awarded, and in the end, only awarded Linda half of the fees she requested. Charles, on the other hand, relies exclusively on the clerk's minute order, which only states the amount of the award. He argues the court's statements at the hearing on this matter do not constitute the requisite findings and contends "only a statement of decision can serve that function." However, a statement of decision is "neither required nor available upon decision of a motion." (*Lavine v. Hospital of the Good Samaritan* (1985) 169 Cal.App.3d 1019, 1026.) The court thus properly set forth its finding on the record at the hearing on this matter.

Charles also asserts the court made no finding the amount of the fees was a " 'just and reasonable' amount." However, as detailed, *ante*, this assertion is simply incorrect. The record shows the court acknowledged the fact that under *In re Marriage of Keech* (*supra*, 75 Cal.App.4th at page 870), "the fees have to be reasonable as to the extent of the services allowed." The court made Linda rework her estimates as to what her prospective fees would be. The court thereafter awarded her only one-half of the fees she requested. Upon this record we cannot say that award was not "just and reasonable."

Because "[w]e may overturn the trial court's award only if "'no judge could reasonably'" have made it" (*In re Marriage of O'Connor, supra*, 59 Cal.App.4th at p. 884), and we have no basis upon which to say on this record the trial court's

determination was unreasonable (*In re Marriage of Drake, supra*, 53 Cal.App.4th at pp. 1166-1168), we affirm the court's order.<sup>3</sup>

DISPOSITION

The order is affirmed. Linda shall receive her costs on appeal.

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NARES, J.

WE CONCUR:

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McCONNELL, P. J.

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McDONALD, J.

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<sup>3</sup> We also note that the award of fees to Linda is not final and is "without prejudice to reallocation, recharacterization, perhaps, reimbursement, depending upon the outcome of the trial." (*In re Marriage of O'Connor, supra*, 59 Cal.App.4th at p. 881.)