

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 09/03/10 TIME: 9:00 A.M. DEPT: K CASE NO: FL062515

PRESIDING: HON. FAYE D'OPAL

REPORTER:

CLERK: GINA COMPTON

PETITIONER: BEVERLY

and

RESPONDENT: TOMMY

NATURE OF PROCEEDINGS: NOTICE OF MOTION – ATTY FEES AND COSTS;
OTHER: ENFORCEMENT OF JUDGMENT [RESP] TOMMY
2) MOTION – OTHER: TO ISSUE WRIT OF EXECUTION [PETR] BEVERLY

RULING

On July 7, 2010, Respondent (Tom) file a motion for orders mandating that Petitioner (Beverly) sell to Respondent (Tommy) her interest in the Tomahawk property (for \$398,000) and the 1313 Fourth Street property (for \$367,861.81) and provide an appropriate allocation/credit of payments currently owed per the final judgment resulting in a single payment of \$568,695.64 to Beverly, and requesting that Beverly pay \$1,787.50 for Tommy's legal fees/costs. In support of his motion is Tommy's declaration setting forth details of the rents and expenses related to the Fourth Street property. Tommy's attorney's declaration outlines communications with Beverly's attorney that the Final Statement of Decision already set the values for the two properties.

Tommy then filed a supplemental declaration, supplemental declaration of counsel and Points and Authorities in support of his motion. In his supplemental declaration, Tommy states that after he filed his motion he contacted Ron Riskin of Pacific Commonwealth Corp. ("PCC") which hold the escrow funds referred to as the "Clocktower funds" in an effort to have PCC release the funds to him pursuant to the Final Statement of Decision, which they declined to do without an appropriate letter from an attorney or direction from the court. Tommy requests that the court's order on his motion include a provision directing PCC to release the Clocktower funds to Tommy, noting that he intends to use those funds to accomplish the buyout of the Tomahawk and Fourth Street properties as set forth in his motion to enforce judgment.

In his supplemental declaration, Tommy's counsel again asserts that the "Final Statement of Decision" is a final judgment and that the appeal period has expired, and thus the Clocktower funds should be released to him as part of the court's order on his motion to enforce the judgment so he can use them to buy out Beverly's interest in Tomahawk and Fourth Street.

FL062515

Beverly's attorney disagrees that a Final Judgment was entered in this case. She contends that the "Final Statement Decision" is not appealable as it is not a judgment, either under the Family Code or the California Code of Civil Procedure including Section 904.1(a)(1). Additionally, she contends that that the Rules of Court mandate the use of the Judicial Council form for the family law Judgment (FL-180). She posits that a file-stamped copy of Judgment and Notice of Entry would trigger the running of the 60-day period within which to file a notice of appeal, acknowledging that the Notice of Entry of Judgment was filed, but in this case no Judgment was entered.

Also set for hearing on September 3 is Beverly's motion to issue writ of execution pursuant to the order shortening time of August 27.

Appearances are required.

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 09/03/10 TIME: 9:00 A.M. DEPT: K CASE NO: FL090553

PRESIDING: HON. FAYE D'OPAL

REPORTER:

CLERK: GINA COMPTON

PETITIONER: AMY

and

RESPONDENT: JOHN

NATURE OF PROCEEDINGS: NOTICE OF MOTION – ATTORNEY FEES AND COSTS
[PETR] AMY

RULING

Continued from August 20, 2010 is the issue of attorney fees of \$7,037.50 and costs of \$333.71 requested by Petitioner (Amy) and opposed by Respondent (John). In review of the case file and the respective pleadings of the parties, the court finds and orders as follows:

Per her declarations, Amy works for the Benvenuto Salon in San Anselmo as a receptionist, working approximately 21 hours per week at \$15 per hour (\$1,365 per month; no tip information provided) since March 2009. Amy, age 42 years, holds a college degree, receives \$5,400 per month in support (marriage of 16 years and 10 months, with three children ages 7, 12, and 15), and has no assets of any kind. She pays \$3,300 per month for rent and states other monthly expenses of \$5,000, which include a monthly payment of \$285 servicing a debt load totaling \$18,724. Her attorney confirms that she has paid \$2,500 to her former counsel and that she owes her current counsel \$7,371.21.

Per his declarations, John is self employed as a contractor (construction) and sole owner of his business, commencing in 1983, works approximately 35 hours per week, and earns approximately \$2,000 per month. John, age 48 years, holds a college degree and is a licensed contractor. He pays \$350 monthly for health insurance, has about \$500 in liquid assets and \$15,000 of equity in personal property. He pays \$800 for rent plus has monthly expenses of \$2,300, a total of \$3,100 in personal expenses. Additionally, he pays \$5,400 per month in support to Amy.

John's update of information states he is obligated to pay all tax liability associated with the foreclosures, and carries \$1.5 million of debts that were not discharged in bankruptcy as his

FL090553

obligation. John states that Amy's rent is now \$2,900, her car costs \$250 less now, and she is currently earning \$2,300 a month in her work.

Family Code Section 2030(a) provides that in a dissolution proceeding,

“...the court shall ensure that each party has access to legal representation to preserve each party's rights by ordering, if necessary based on the income and needs assessment, one party to pay to the other party or to the other party's attorney whatever amount is reasonably necessary for attorney's fees and costs...”

Family Code Section 2030(b) provides that the court shall make a determination based on the respective incomes and needs of the parties, and any factors affecting the parties' respective abilities to pay. Family Code Section 2032 requires the court to make awards of attorney's fees and costs under Section 2030 that are “just and reasonable under the relative circumstances of the respective parties.” The fundamental public policy of parity between the parties in their respective abilities to obtain legal representation must be sustained by the court. (See *In re Marriage of Green* (1989) 213 Cal.App.3rd 14, 26; *Alan S. v Superior Court* (2009) 171 Cal.App.4th 238, 251-252.) The court must consider how best to apportion the overall cost of the litigation equitably between the parties under their relative circumstances. (*In Re Marriage of Dietz* (2009) 176 Cal.App.4th 387.) Of note, Family Code Section 2032(c) provides that payment of attorney fees and costs may be taken from “any type of property.”

Neither party has a cash flow that permits payment of the other's attorney fees. Neither party has any assets available to pay the other's attorney's fees. Each party respectively carries a substantial debt load in relation to respective earnings and assets. However, in balancing the relative circumstances of the parties and determining how much John should pay toward Amy's attorney fees, the court orders that John pay \$2,000 toward her fees and costs, said payment to be made over a period of four months commencing October 15, 2010, in the amount of \$500 a month, payable the 15th of each month, and on each month thereafter until paid in full.

Amy's counsel to prepare the formal order.

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 09/03/10 TIME: 9:00 A.M. DEPT: K CASE NO: FL095231

PRESIDING: HON. FAYE D'OPAL

REPORTER:

CLERK: GINA COMPTON

PETITIONER: KAREN

and

RESPONDENT: RANDOLPH

NATURE OF PROCEEDINGS: MOTION – SPOUSAL SUPPORT; ATTORNEY FEES AND COSTS [PETR] KAREN

RULING

This was a marriage of 9 years and 11 months, with separation on August 4, 2009.

Petitioner (Karen) filed a motion on April 27, 2010 requesting guideline spousal support, reasonable attorney fees and actual costs. Karen also requests that Respondent (Randolph), who lives in the community property residence, be given temporary exclusive use, possession and control of the Novato residence and to pay all carrying costs thereon. She requests a court order holding her harmless for any debts that Randolph incurs during his possession of the premises. She requests that the court reserve jurisdiction over all matters including reimbursements/credits related to the residence until time of settlement or trial. Karen's requests are supported by her Income and Expense Declaration, and her 2008 Schedule C for her "Chef" business was provided in support of her motion. She also provided an August 30, 2009 paystub of Randolph's with total earnings as of that date of \$734,026. Karen filed the required support calculations.

Randolph filed a responsive declaration on August 23, 2010, seeking orders that Karen pay one-half of the Chase equity line account, one-half the 401k loan obligation and one-half of the monthly mortgage payment is excess of the fair market rental value of the residence. He also filed his pay stubs and lodged tax returns and W-2 forms under seal.

A copy of the Settlement Agreement attached to the Petition and to Randolph's responsive declaration is also considered in relation to this motion.

ISSUE RELATED TO THE AMENDED PETITION

In review of the court file, the court notes that the initial Petition was filed on October 14, 2009, Summons was issued, service was completed on October 20, 2009 (NAR), and a Response was filed on November 12, 2009.

An amended Petition was filed on April 30, 2010 and a Summons on the amended Petition was issued on that date. No proof of service of the amended documents has been filed.

Once the Response is filed, the court has discretion to allow either party to amend a pleading pursuant to California Code of Civil Procedure Section 473(a)(1), that is, the court may allow an amendment without notice to the other party “in furtherance of justice” to add or strike the name of a party or to correct a mistake in the name of a party, or mistake in some other respect. Given the nature of the changes in the initial Petition and the amended Petition, the court does not find grounds for the amendment of the Petition without notice to the other party.

An amended Petition may be filed in this case “upon notice” and “upon any terms as may be just” (CCP §473(a)(1)) but it must be filed either based on written agreement of the parties or based on court order after notice to the other party, e.g., a noticed motion (see Hogoboom & King, *California Practice Guide – Family Law* at 4:189).

The court strikes the amended Petition and the Summons on amended Petition.

SPOUSAL SUPPORT AND ATTORNEY FEES

Randolph states that these issues were previously settled between the parties and no orders should be made.

Karen does not refer to the Settlement Agreement in her moving papers, although it is attached to her Petition, as noted hereinbelow. Karen did not file a reply declaration.

A Settlement Agreement (SA) dated and signed by both parties on September 8, 2009 is attached to the Petition filed by Karen on October 14, 2009. Under Paragraph 7 of the Petition, Karen checked box “j”, and in her handwriting states “that court order the attached executed settlement agreement as the order of the court.” The SA states that issues of personal property (with detailed lists attached), retirement plans, 401k plans, real property, and spousal support, savings account, executive savings and bonuses, equalizing payment, assets and debts are resolved by the SA, that the parties acknowledge full disclosure of all these matters has been made, including any and all facts material to a party’s willingness to enter into the Agreement, statement of agreement that each party analyzed the SA prior to consent to the SA. Paragraph I “Integration Clause” of the SA specifies that the SA “shall only be altered or amended by further written agreement.”

FL095231

The SA, paragraph D, states, *inter alia*, each party independently waived his and her right to receive spousal support. Paragraph D specifies the payment of \$50,000 to Karen from Gilbert in lieu of regular spousal support payments.

Since the SA, Randolph states the parties have carried out a number of the terms and conditions in the SA, including that Randolph, who took on the mortgage to prevent default on the loan, has paid the mortgage, equity line and monthly payment on the 401k loan (total monthly payments of \$8163); Karen has received liquid assets of \$90,000 under the terms of the agreement.

No evidence has been provided to the court sufficient for the court to find and order that the Settlement Agreement is void and of no effect. No signed and dated agreement by the parties has been presented in compliance with Paragraph I of the SA. In regard to the terms and conditions of the SA and the clause for enforcement of the SA, the court, in the absence of compliance with Paragraph I of the SA, finds no grounds for the court to make a unilateral modification of the SA as to the specific requests made by Karen, that is, spousal support and issues related to the carrying costs of the house.

Accordingly, the court declines to modify the terms and conditions of the Settlement Agreement. The court denies the request that Karen sets forth in her motion for guideline spousal support, attorney fees and costs, and for orders regarding the residence.

Randolph's attorney to prepare the formal order.