Filed 3/13/13

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of VERONICA and CURTIS PRIEM.	
VERONICA PRIEM, Appellant, v. CURTIS PRIEM, Respondent.	A130791 (Alameda County Super. Ct. No. HF10494404)

In this dissolution proceeding, appellant Veronica Priem appeals from the trial court's orders denying her request for temporary spousal support and denying a portion of her request for professional fees. The court found she was statutorily ineligible to receive spousal support based on her history of domestic violence towards her husband, respondent Curtis Priem. She claims the court erroneously considered her prior plea of nolo contendere to a misdemeanor charge of domestic violence in arriving at its decision. She also claims the court failed to properly consider her fee request. We affirm both orders.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The parties were married in July 1999. The marriage produced two sons, one born in May 2000 and the second born in May 2007.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts III and IV of the Discussion. The parties have requested this case identify the parties other than by their proper names. The case has proceeded to date with the names of the parties. The record and exhibits filed with this court do not have the identity of the parties modified. We decline the request to do so at this stage of the case.

On January 19, 2010, appellant filed a petition for dissolution.

On February 22, 2010, the trial court ordered respondent to pay appellant $10,000 per month in unallocated temporary support. He was also ordered to pay her $20,000 for attorney and other professional fees. The parties were referred to child custody mediation.

On March 9, 2010, respondent filed a responsive declaration to an order to show cause, alleging a 10-year history of appellant's erratic and abusive behavior, including the commission of several acts of domestic violence.

On March 23, 2010, the trial court awarded respondent temporary sole physical and legal custody of the children. The court adopted, with modifications, the family court mediator's recommendations as to the parties' visitation schedule. The children were to spend the first half of each week with appellant, and the second half with respondent. Both parties were ordered to complete an anger management program.

On May 26, 2010, respondent filed another responsive declaration in which he agreed to pay guideline child support to appellant, but requested relief from paying temporary spousal support citing to her May 2008 misdemeanor conviction for battery committed against a spouse (Pen. Code, § 243, subd. (e)(1)).[1] He also further detailed the history of domestic abuse, alleging it had generated 19 written police reports, five arrests, three criminal convictions, three criminal protective orders, one civil temporary restraining order, and three probationary periods. She also was presently on probation as a result of the May 2008 conviction, and there was a criminal protective order currently in effect that was set to expire in May 2011.

On November 2, 2010, the parties testified at a hearing regarding temporary support and attorney fees.

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[1] Penal Code section 243, subdivision (e)(1), provides, in part: "When a battery is committed against a spouse . . . the battery is punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in a county jail for a period of not more than one year, or by both that fine and imprisonment. If probation is granted, or the execution or imposition of the sentence is suspended, it shall be a condition thereof that the defendant participate in, for no less than one year, and successfully complete, a batterer's treatment program . . . or if none is available, another appropriate counseling program designated by the court."

On November 10, 2010, the trial court filed its order after hearing. The court ordered respondent to pay appellant $14,602 per month in child support. The court noted appellant's 2008 conviction for domestic violence created a rebuttable presumption under Family Code section 4325[2] that an award of spousal support would be inappropriate. The court found she had "presented little in the way of mitigation" towards rebutting the presumption. Accordingly, her request for temporary spousal support was denied. The court also ordered respondent to pay an additional $20,000 towards appellant's attorney fees. This appeal followed.

DISCUSSION

I. Temporary Spousal Support Awards in Cases Involving Domestic Violence

"Pending a marriage dissolution . . . the court . . . may order either spouse to pay 'any amount that is necessary' for the other spouse's support, consistent with the requirements of sections 4320, subdivisions (i) and (m), and 4325. (§ 3600.)" (*In re Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1326 [16 Cal.Rptr.3d 489], fn. omitted.) Section 4320, subdivision (i), requires the trial court to consider "[d]ocumented evidence of any history of domestic violence" when ordering spousal support. Section 4320, subdivision (m), provides, "The criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with Section 4324.5 or 4325." Together, these provisions represent "a legislative determination that victims of domestic violence not be required to finance their own abuse." (*In re Marriage of Cauley* (2006) 138 Cal.App.4th 1100, 1107 [41 Cal.Rptr.3d 902].)

Section 4325 creates a rebuttable presumption that spousal support requests are not to be granted to spouses who have been convicted of domestic violence during the five years preceding the filing of a petition for dissolution. The statute provides: "(a) In any proceeding for dissolution of marriage where there is a criminal conviction for an act of domestic violence perpetrated by one spouse against the other spouse entered by the

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[2] All further unspecified statutory references are to the Family Code.

court within five years prior to the filing of the dissolution proceeding, or at any time thereafter, there shall be a rebuttable presumption affecting the burden of proof that any award of temporary or permanent spousal support to the abusive spouse otherwise awardable pursuant to the standards of this part should not be made. [¶] (b) The court may consider documented evidence of a convicted spouse's history as a victim of domestic violence, as defined in Section 6211,[3] perpetrated by the other spouse, or any other factors the court deems just and equitable, as conditions for rebutting this presumption. [¶] (c) The rebuttable presumption created in this section may be rebutted by a preponderance of the evidence."

II. Penal Code Section 1016

Appellant first claims Penal Code section 1016 precludes the use of a misdemeanor conviction based on a plea of nolo contendere as the predicate offense under Family Code section 4325. Under this Penal Code provision, a plea of nolo contendere to a misdemeanor "may not be used against the defendant as *an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based*." (Pen. Code, § 1016, subd. (3), italics added.)

Appellant did not raise Penal Code section 1016 below. "As a general rule, failure to raise a point in the trial court constitutes of waiver and appellant is estopped to raise that objection on appeal. An exception to the general rule may be presented, however, where the theory presented for the first time on appeal involves only a legal question determinable from facts which not only are uncontroverted in the record, but which could not be altered by the presentation of additional evidence. [Citation.] And whether the general rule shall be applied is largely a question of the appellate court's discretion." (*Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167 [143 Cal.Rptr. 633].) Because the application of Penal Code section 1016 concerns a matter of statutory interpretation, we will exercise our discretion to consider the merits of her argument.

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[3] Section 6211, subdivision (a) provides, in part: " 'Domestic violence' is abuse perpetrated against . . . [¶] [a] spouse or former spouse."

As noted above, the trial court relied on appellant's May 2008 conviction of misdemeanor domestic violence under Penal Code section 243, subdivision (e)(1),[4] in finding that the rebuttable presumption of Family Code section 4325 applied. Observing respondent had offered proof of a pattern of abusive behavior going back to 2001, the court concluded this evidence, if believed, showed an "extreme and ongoing" history of domestic violence that had continued despite two criminal convictions and several restraining orders that were imposed against appellant during this time period. The court concluded she had failed to rebut the statutory presumption that spouses with domestic violence convictions should not be awarded support. Because the May 2008 conviction arose out of a plea of nolo contendere to a misdemeanor the question is whether the instant proceeding qualifies as a "civil suit based upon or growing out of the act upon which the criminal prosecution is based" under Penal Code section 1016, subdivision (3), which would effectively revoke the Family Code section 4325 presumption here. We conclude it does not.

In general, pleas of nolo contendere are not deemed conclusive in subsequent civil proceedings as admissions of wrongdoing: "We note that even in those civil actions in which a nolo contendere plea is admissible, the party is traditionally permitted to contest the truth of the matters admitted by the plea, to present all facts surrounding the nature of the charge and the plea, and to explain why the plea was entered. [Citations.] This is because '[t]here are many potential reasons for entry of a nolo plea . . . which should negate its consideration as an actual determination of the degree of culpability in subsequent civil proceedings [citation]. A nolo contendere plea in this state necessarily implies a bargain and is seen as an agreement between the prosecution and the defendant, for the limited purpose of the particular case, and no other purpose [citation]. Consequently, . . . the court in any subsequent civil proceeding must independently examine the facts in order to determine whether the defendant actually committed the

[4] Penal Code section 243, subdivision (e)(1) states in part: "[w]hen a battery is committed against a spouse . . . the battery is punishable by a fine . . . or by imprisonment in a county jail for a period of not more than one year, or by both that fine and imprisonment."

offense alleged for purposes of the particular civil proceeding [citation].' [Citation.]" (*County of Los Angeles v. Civil Service Com.* (1995) 39 Cal.App.4th 620, 629 [46 Cal.Rptr.2d 256], fn. 8.)[5]

For purposes of restricting the admissibility of misdemeanor nolo contendere pleas under Penal Code section 1016, subdivision (3), appellate courts have held that a "civil suit" may include a subsequent administrative proceeding. (See *Gebremicael v. California Com. on Teacher Credentialing* (2004) 118 Cal.App.4th 1477, 1488 [13 Cal.Rptr.3d 777].) For example, in *Cartwright v. Board of Chiropractic Examiners* (1976) 16 Cal.3d 762 [129 Cal.Rptr. 462, 548 P.2d 1134] (*Cartwright*), a licensing board revoked a chiropractor's license after the chiropractor pled nolo contendere to a moral turpitude offense. Our Supreme Court held that a misdemeanor conviction by plea of nolo contendere may not be used in an administrative proceeding to impose discipline, absent legislative authorization.[6] (*Id.* at pp. 773–774; see also *Cahoon v. Governing Bd. of Ventura Unified School Dist.* (2009) 171 Cal.App.4th 381 [89 Cal.Rptr.3d 783] (*Cahoon*) [school custodian terminated after pleading nolo contendere to misdemeanor forging of a prescription for a controlled substance].) The court has also noted that the legislative history of Penal Code section 1016 suggests the limitation on the use of nolo contendere pleas as evidence in a subsequent civil suit was intended to apply to matters involving traffic offenses, corporate fraud, and crime victims' damages suits. (See *People v. Yartz* (2005) 37 Cal.4th 529, 539–540 [36 Cal.Rptr.3d 328, 123 P.3d 604] (*Yartz*).)

On the other hand, the Supreme Court has determined that certain noncriminal judicial proceedings do *not* qualify as "civil suits" under this provision. (See *Yartz, supra,* 37 Cal.4th 529, 532 [SVPA civil commitment proceeding].) In *Yartz,* the court

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[5] We note here appellant does not claim she did not commit the offense that formed the basis of her May 2008 conviction.

[6] Since the *Cartright* decision, a number of licensing statutes have been amended to specify a nolo contendere plea, or conviction based thereon, as a ground for discipline. (See *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 320 [267 Cal.Rptr. 293, 787 P.2d 591]; *Cahoon, supra,* 171 Cal.App.4th 381, 384–385.)

distinguished civil suits and actions from civil special proceedings: “Since 1872, judicial remedies have been divided into two classes: actions and special proceedings. [Citation.] An ‘action’ is defined as ‘an ordinary proceeding in a court of justice *by which one party prosecutes another* for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.’ [Citations.] A ‘special proceeding’ is ‘[e]very other remedy’ that is not an ‘action.’ [Citations.] With respect to civil actions, ‘an “action” means the same thing as a “suit.” [Citation.]’ [Citations.] Indeed, the Legislature used the terms ‘civil action’ and ‘civil suit’ interchangeably in this context.” (*Id.* at p. 536, italics added.)

The instant case is not analogous to an administrative hearing, nor to a collateral civil action brought against a criminal defendant. Specifically, spousal support hearings are not civil proceedings “based upon or growing out of” a criminal act. Appellant has not provided us with authority applying Penal Code section 1016, subdivision (3), to any proceeding brought under the Family Code, nor has our own research disclosed any relevant judicial decisions. Indeed, our research has not uncovered a case applying this section in any context other than administrative proceedings pertaining to licensing or employment, and civil lawsuits for damages arising out of the wrongful conduct that formed the basis of the charge to which the defendant pled. We note the domestic violence spousal support limitation is not intended to punish the perpetrator (see, e.g., *Yartz, supra,* 37 Cal.4th 529, 535 [“The SVPA is not punitive in purpose or effect.”]). Rather, it is intended to ensure that a victim of abuse will not be compelled to reward the perpetrator for his or her behavior, or to underwrite any further abuse.

We also observe that a spouse who has pled nolo contendere to misdemeanor domestic violence is nonetheless afforded the opportunity to rebut, by preponderance of the evidence, the presumption created by section 4325. Thus, the plea itself does not automatically result in the denial of support to an offending spouse. Instead, he or she merely has to rebut the negative presumption created by the conviction. Accordingly, we conclude a plea of nolo contendere to a charge of misdemeanor domestic violence, made

within five years prior to the filing of the dissolution proceeding, may be used as the basis for presumptively denying temporary spousal support under section 4325.[7]

III. Failure to Award Reduced Spousal Support

Appellant next claims the trial court misunderstood the nature of its discretion with respect to the lack of severity associated with her misconduct. Specifically, she claims the trial court did not appreciate that it had the authority to order a reduced sum of support under section 4325, subdivision (b), if it concluded she had at least partially rebutted the negative presumption created by her conviction. She asserts the court should have weighed the nature of the harm she inflicted, and argues that the denial of all temporary spousal support was a "draconian punitive action" under the circumstances of the case. We find no abuse of discretion.

At the hearing on temporary support, appellant admitted to having had anger management problems in the past, and to having been physically violent towards respondent since as far back as 2001. However, she asserted the abuse was mutual.[8] She claimed appellant triggered her violent reactions by provoking her verbally. She testified she had been seeing a therapist since 2001 to help with her problems in controlling her anger. In the 2008 incident, she pushed respondent and jabbed him in the chest with her fingers only. In June 2009 she began seeing a psychiatrist who is prescribing psychotropic medications for her. She had also completed two behavioral programs, including an anger management program in 2010.

In contrast, respondent presented evidence of an unrelenting pattern of domestic abuse on the part of appellant. Over the 10-year period, he had sustained bruises, scratches, bleeding, and hyper-extended fingers. Only one-half to one-third of these

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[7] Respondent asks us to take judicial notice of the legislative histories of Penal Code section 1016, and Family Code sections 3044 [use of domestic violence presumption in child custody determinations], and 4325, along with two declarations prepared by Carolina C. Rose. The request, filed June 4, 2012, is granted as to exhibit No. 2 (legislative history of Pen. Code, § 1016) and exhibit No. 4 (legislative history of Fam. Code, § 3044) only. The legislative history of section 4325 is contained in the record that was filed with the appeal.

[8] Respondent testified that on one occasion both he and appellant were arrested for spousal abuse, but the charges against him were dropped.

incidents were reported to the police. Sometimes he would have to restrain her outbursts by sitting on her and holding her arms above her head until she calmed down. He testified that the May 2008 conviction resulted from an incident in which he had restrained her after she became physical with him during an argument over her parenting skills. She subsequently placed the children in a minivan and drove the car off the back side of a very steep hill. Though she was the one who called the sheriff's department to the home, the officers arrested her. In August 2009, he called the sheriff's department when she angrily shoved a box into his side, near to the site where he had recently had surgery. Since May 2010, she had been verbally abusive towards him in her many voicemails and texts. There was also a recent incident after a co-parenting counseling session in which she followed him to his vehicle while continuously yelling at him.[9] We conclude substantial evidence supports the trial court's finding that appellant failed to rebut the section 4325 presumption.[10]

The fact that respondent has been spared serious physical injury does not lessen the detrimental impact of the abuse, nor does it in any way excuse appellant's conduct. The abuse that did occur was enough to justify more than one criminal conviction and to place her in violation of court-issued restraining orders. Given the long-standing history of abuse and her apparent inability to control her behavior, we also conclude the trial court did not abuse its discretion in failing to award her reduced spousal support.

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[9] Respondent also testified that appellant screamed at him during a co-parenting session and would not stop even when the counselor told her that if she continued to scream she would have to discontinue the session. The counselor ended the session prematurely and subsequently resigned from the case.

[10] Appellant requests we take judicial notice of the trial court's August 2012 order finding that she had successfully rebutted the presumption against joint custody under section 3044 [rebuttable presumption against joint custody based upon domestic violence evidence], and granting her joint legal and physical custody of the parties' two children. She asserts the custody decision illustrates the "arbitrary nature of the temporary support decision." The request, filed October 9, 2012, is denied. Our decision here is based on the record that was before trial court at the time it entered the appealed-from order. We also observe that while two different judicial officers may arrive at different conclusions regarding similar issues arising out of identical facts, this does not necessarily render either decision "arbitrary." The two statutes arise in different contexts, which also may help explain why different results were obtained.

Appellant claims the trial court erred when it "disregarded" her efforts to reform her conduct through therapy. She did present evidence that she had been in therapy for many years for help "in dealing with unresolved childhood issues that lay at the root of her inability to control her anger." However, the court aptly noted her abuse of respondent continued unabated over the years in spite of her ongoing therapy. Thus, there was no basis for the court to conclude that her participation in therapy had ameliorated her abusive behavior.

Finally, while it is true that appellant's standard of living would be improved with an award of spousal support, we disagree that the absence of such support here "exaggerated the enormous disparity between the children's two custodial households" such that the children would be adversely impacted by a "drastic reduction in their living conditions" when residing with their mother. As noted above, appellant was awarded $14,602 per month in child support and the parties share custodial time equally. Additionally, the trial court's order notes that respondent had stipulated to reinstate a $15,000 per quarter payment to her from the parties' charitable remainder trust. Respondent's uncontroverted testimony indicated that the total amount she would receive per month (in excess of $19,000) was nearly equal to the cash flow the family lived off during the marriage. Her protest that her children are now being forced to share her "financial prison cell" is not compelling under all the circumstances of this case.

IV. Partial Fee Award

Appellant claims the trial court abused its discretion by awarding only part of the fees she requested at the hearing. Her counsel asked for $20,000 for legal and consulting fees, plus a further $15,000 for obtaining a financial consultant to assess respondent's characterization of the parties' assets as his separate property. Respondent's counsel noted that it is his burden to trace his separate property. The court awarded $20,000 in attorney fees only.

An award of attorney fees is subject to reversal only when there has been an abuse of discretion by the trial court. (*In re Marriage of Cueva* (1978) 86 Cal.App.3d 290, 296 [149 Cal.Rptr. 918].) We note that in her written reply to respondent's responsive

declaration, appellant requested $20,000 towards her attorney fees only. This request was augmented during the November 2, 2010 hearing with a new oral request for an additional $15,000 to be used for "obtaining an appropriate consultant in regards to the division of the assets." The request was briefly stated, and there is little within the rather lengthy record supplied by the parties to show that she provided the court with sufficient argument for, or documentation of, her need for the additional fees. It is also likely that the trial court believed it sufficient for the moment to place the burden on respondent to trace the assets that he claimed were his separate property. Accordingly, we are unable to conclude the court abused its discretion in failing to include the request for an additional $15,000 in its fee award.[11]

DISPOSITION

The orders are affirmed.

[11] Respondent submitted an appendix on June 5, 2012, in conjunction with his appellate brief consisting of two orders regarding attorney fees that were entered by the trial court in July 2011 and December 2011, respectively. The two awards total $95,000 in fees to appellant. On October 9, 2012, appellant filed a motion to strike the appendix, and references thereto, on the grounds that they were not part of the record at the time the appealed-from order was entered. We grant the motion to strike as the contested orders are not relevant in light of our decision here.

Dondero, J.

We concur:

Margulies, Acting P. J.

Banke, J.

Trial Court:	Alameda County Superior Court
Trial Judge:	Hon. Thomas J. Nixon
Attorney for Appellant	Law Office of Ann F. VanDePol and Ann F. VanDePol
Attorney for Respondent	Hersh FamilyLaw Practice, P.C. and Jill Hersh David Youngsmith Meredithe Kreis