

In re Marriage of Ackerman (46 Cal.App.4th 191, 52 Cal.Rptr.3d 744)

H and W married August 1991 and separated September 2001.

H is an MD and board certified plastic & reconstruction surgeon since 1987 operating own practice he established in 1987. W employed in home throughout marriage. W graduated law school in 1995 but failed bar exam in 1998.

Two minor children of this marriage, ages three and one. Older child diagnosed with autism.

At trial parties stipulated their “monthly controllable cash flow” at DOS was \$61,000. Parties’ joint 2001 tax return showed net (after tax) income of approximately \$36,000.

H ordered to pay SS beginning January 2004 at \$7,500 with periodic reductions and termination of payments August 2006 and termination of jurisdiction in August 2009. Order based on 3 assumptions: 1) W would review for and take bar exam in July 2004; 2) if W passed she would obtain employment as attorney by September 2005 (when last support step down took effect); 3) whether or not W passed she was able to work by September 2004 as a paralegal and earn at least \$3,000 per month. If none of assumptions materialized, W could move for modification of order.

Child support ordered beginning January 2004 with one step down in September 2004. W’s earning capacity considered.

W’s Appeal and Result

W appealed judgment. Among W’s contentions: 1) income from earnings and property were incorrectly calculated and should not have been imputed; 2) support step down improperly based on W’s future earning capacity; 3) all of H’s income should have been considered in setting support.

1) Imputation of income

- W argued there was no substantial evidence she would receive income from her share of property and argued court must look to actual, not theoretical, return on property. Appellate Court found that

- W challenged imputation of earning capacity to her for spousal support by claiming it was not in best interests of kids but cited Cheriton which related to child support. “Unlike a child support order...a spousal support award does not require the court to consider the children’s best interests”. Moreover, the trial court here expressly found imputation was in the kid’s best interests

2) Step down in support and termination

- W contended there was no factual basis for step down, however, her own testimony and that of vocational expert supported trial court decision.
- W argued trial court should not have presumed her law degree resulted in enhanced earning capacity; appellate court found no such presumption was made by trial court
- Actual income/earnings not required; imputation appropriate where there is ability, willingness and opportunity to work

3) Failure to consider all of H’s income

- Parties were ordered by trial court to meet and confer prior to income/controllable cash flow stipulation so presumably, all the income was considered.

No error found on appeal; trial court findings and order upheld.