

FILED

2013 DEC 30 AM 8:17

SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

MARIA CECILIA TIU MALABANAN,
Plaintiff-Appellee,

v.

BEN B. MALABANAN, JR.,
Defendant-Appellant.

OPINION

Cite as: 2013 Guam 30

Supreme Court Case No. CVA12-034
Superior Court Case No. DM0709-11

Appeal from the Superior Court of Guam
Argued and submitted on July 17, 2013
Hagåtña, Guam

Appearing for Defendant-Appellant:

Catherine Bejerana Camacho, *Esq.*
Law Office of Catherine Bejerana Camacho
267 S. Marine Corps Dr., Ste. 302
Tamuning, GU 96913

Appearing for Plaintiff-Appellee:

Jeffrey A. Cook, *Esq.*
Law Offices of Cunliffe & Cook, APC
210 Archbishop F.C. Flores St., Ste. 200
Hagåtña, GU 96910

BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

CARBULLIDO, C.J.:

[1] Defendant-Appellant Ben B. Malabanan, Jr. appeals from the trial court's decision and order increasing the amount of temporary spousal support payments he must make to Plaintiff-Appellee Maria Cecilia Tiu Malabanan pending their divorce. Ben argues that the trial court abused its discretion when it modified the temporary spousal support amount to which the parties stipulated, because Maria failed to demonstrate a material change of circumstances and because the court did not assess pertinent factors such as Maria's employability, Ben's child support payments, and Maria's expenses when it augmented the amount. In opposition, Maria argues that the trial court did not abuse its discretion because there was evidence before the court of a material change of circumstances – namely, that she was unemployable due to her severe depression – and because the trial court considered the pertinent factors that Ben alleges were not assessed. By reply, Ben submits that Maria bears the burden to prove a material change of circumstances as the moving party requesting modification, and that she failed to mention her medical condition in her moving papers. Moreover, Ben submits that Maria's medical condition had been present for years and that her income did not change as a result of her medical condition.

[2] We hold that the trial court abused its discretion because it did not articulate whether a material change of circumstances exists justifying the modification, and reverse its decision.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] Maria filed a complaint for divorce. She then filed an *ex parte* motion and signed order to show cause as part of her set of requests for child support, spousal support, and attorney's fees.

[4] In her supporting declaration, Maria admitted that Ben had physical custody of their minor child, MSTM, and that MSTM should continue living with Ben. She explained that Ben demanded she vacate the family home, that she moved her belongings into storage while she sought a new home, and that after her father passed away she spent part of her time in the Philippines to look after her father's estate. In declaring that she has "grown accustom [sic] to living at a very high standard of living while married to [Ben]," and that she "enjoyed an extravagant lifestyle," Maria cited a reported annual income of approximately \$350,000.00 that was mainly derived from Ben's dental practice. Record on Appeal ("RA"), tab 5 at 2 (Decl. Pl., Oct. 10, 2011). She also listed anecdotally the extent of the extravagant lifestyle that she enjoyed during their marriage.

[5] Maria admitted to receiving a proposal from Ben "as to what he thought was fair" in the event of a divorce. *Id.* at 3, 6 (Ex. B). She disagreed with the proposal, highlighting that although Ben was prepared to pay \$4,000.00 per month, he refused to pay any future credit card debts. She then requested \$4,000.00 per month as "spousal support to me and to pay all credit card debts," as well as "monthly reasonable attorney's fees for having to prosecute this matter." *Id.* at 3-4. Finally, she declared that although she is well educated with several degrees and licenses, she "would not be able to make the kind of money that could provide [her] the lifestyle" that she had grown accustomed to. *Id.* at 4. As Ben points out, nowhere in her declaration did

Maria mention her medical problems or her resulting inability to seek employment. *See id.* at 1-4; Appellant's Br. at 2, 18 (Mar. 22, 2013).

[6] Ben filed an opposition challenging Maria's request for temporary spousal support and attorney's fees, because the amount she requested exceeded the amount required to "reasonably [sic] support" her while the divorce is pending, and because she "has the means to fully support the lavish lifestyle that she may have grown accustomed to." RA, tab 18 at 2, 4 (Def.'s Opp'n Pl.'s Req. Temp. Child Supp., Spousal Supp. & Att'y's Fees, Nov. 16, 2011). Moreover, Ben, and not Maria, supports MSTM and was therefore "left with paying a majority of the community debts." *Id.* at 4. Ben argued that the court should not award the full amount of temporary spousal support Maria requested and should balance other factors, including an imputation of her salary based on her education and experience, her "decision to discontinue employment," Ben's custody over MSTM, and the body of Guam case law reflecting that "the courts have been quite conservative in granting spousal support and attorneys' fees to spouses during the pendency of the divorce action." *Id.* at 6-7.

[7] Ben also filed a supporting declaration, asserting that he provides for all of MSTM's necessities and takes her on vacations. He listed his other monthly expenses, including car payments and insurance for Maria's vehicle, and between \$1,000.00 and \$1,500.00 per month for Maria's credit card bills. Ben argued that under the circumstances, his payment of the credit card bills was not warranted.

[8] Before a hearing on Maria's *ex parte* motion, Ben and Maria reached a settlement through their respective counsel on the issue of temporary spousal support and attorney's fees. According to Ben's account, at the hearing "the attorneys for both parties represented to the trial court that a settlement had been reached, wherein Ben would pay Maria spousal support in the

amount of \$4,000.00 during the pendency of the divorce.” Appellant’s Br. at 3. According to Maria’s account, “the entire record demonstrates there was not a clear and unambiguous resolution of the spousal support issue as it pertained to certain debts” and that “Maria’s agreement to temporary spousal support of \$4,000.00 was partially based on the case moving forward and community debt and community property issues being promptly resolved.” Appellee’s Br. at 2-3 (Apr. 22, 2013). The record indicates that the parties agreed to the \$4,000.00 amount for the “temporary support issue,” but were still negotiating the issues of credit card and other community debts. Transcripts (“Tr.”) at 1-5 (Hr’g Order Show Cause Re: Temp. Child Supp., Spousal Supp. & Att’y’s Fees, Nov. 17, 2011) (“Hr’g Order Show Cause”).

[9] Ben then filed a verified answer to Maria’s complaint for divorce and counterclaimed for divorce, requesting child support payments from Maria. Maria answered Ben’s counterclaim, and denied “that [Ben] should have sole custody and that she should be ordered to pay child support at this time.” RA, tab 22 at 2 (Pl.’s Answer Def.’s Countercl. Divorce, Jan. 9, 2012). Later, at a scheduling conference, the parties appeared to represent to the court that Ben would continue making the \$4,000.00 monthly payment while the divorce was pending.

[10] Maria subsequently filed a motion for the payment of community debts, storage fees, and child custody issues. In her motion for additional temporary spousal support, Maria asked for monthly storage expenses for her personal belongings, allegedly because when Ben ordered Maria out of the family home he agreed to pay for her to store her belongings until she found a new place to live. Maria also requested \$521.20 per month as part of community debt for a Kia

automobile. This car is in Maria's name only, which Maria claims is solely due to Ben's bad credit.¹

[11] Ben argued that he and Maria had already agreed to \$4,000.00 per month. Additionally, Ben submitted that the Kia vehicle and storage fees already existed during the November hearing, and that Maria "cannot now seek a modification of an agreement, because the obligations she seeks payment on existed at the time she accepted the offer." RA, tab 29 at 4 (Def.'s Opp'n Pl.'s Req. Payment of Community Debts, Storage Fees & Child Custody Issues, May 31, 2012). After individually challenging each of Maria's specific requests for additional support, Ben stated that Maria's entire request "goes beyond the amount required to reasonably [sic] support [Maria] during the pendency of the case." *Id.* at 5.

[12] Maria filed a reply, alleging that she never agreed that the \$4,000.00 payments would include her car and storage debts, and that Ben improperly cut off her health insurance coverage. Ben filed a corresponding motion to strike. During a hearing on June 22, 2012, the court asked the parties to address one of the crucial, "philosophical" issues underlying this appeal: "whether a spouse seeking temporary support is entitled to an amount necessary to pay for expenses that existed at the time of separation or whether [the] requesting spouse is entitled to an amount more akin to the lifestyle to which he or she is accustomed during . . . the marriage." Tr. at 15 (Hr'g Mot. to Modify, June 22, 2012).

[13] Ben filed his opposition to Maria's first reply with a supplemental declaration. He again stated that Maria is a professional and educated individual and that he had custody over MSTM. He also attached Maria's responses to his interrogatories, which reflected her pre- and post-

¹ Maria explained that "[d]uring the marriage [Ben] used my name and credit to purchase a 2011 Kia Sportage automobile. He submitted documents to the bank that I did not approve, claiming that I had a certain income from his clinic which was not true." RA, tab 26 at 2 (Decl. Maria Cecilia Tiu Malabanan, May 1, 2012).

separation household expenses in Guam and the Philippines, respectively. With respect to Maria's requests for additional support payments, Ben emphasized that the additional \$321.00 per month requested for storage fees was unnecessary because Maria "is now residing on Guam and apparently renting a place." *See* RA, tab 38 at 9 (Def.'s Opp'n Pl.'s Mot. & Reply, June 29, 2012). He also argued that Maria exercised exclusive control over the Kia, that because she moved back to Guam, her alleged \$750.00 monthly transportation expense in the Philippines should have been lowered by at least \$300.00, and that therefore her assertion that she is currently unable to pay for the \$521.00 payments on the vehicle does not add up.

[14] Ben also disputed Maria's alleged costs for medical care, claiming that he removed Maria from his Guam health care plan because she was receiving care in the Philippines. He argued that according to her own calculations, Maria's allocation of \$700.00 per month for care in the Philippines would more than cover the same expenses in Guam, thus reducing her overall expenses. Lastly, Ben cited case law supporting his argument that his custody over MSTM justified a reduction of the temporary spousal support award.

[15] Maria filed a second reply and supporting declaration. She stated that Ben "should have to continue to provide [her] sufficient funds for her to live in the same living conditions and standards that the parties lived in prior to their separation, subject to his ability to pay and assets available." RA, tab 41 at 3 (Pl.'s Reply Def.'s Opp'n Pl.'s Mot. Re: Temp. Spousal Supp., July 3, 2012). In response to Ben's accusation that she can work but chooses not to do so, Maria declared that she stayed in the Philippines because of her emotional state, and that her depression has been exacerbated by the divorce and by her lack of health insurance.

[16] The court conducted a hearing on Maria's request to augment the amount of temporary spousal support. At the hearing, Maria's counsel argued that Maria has a need for temporary

spousal support, that Ben has the ability to pay, and that her requests are reasonable in light of the purpose of temporary spousal support, which is to “put her back at the same lifestyle that she had when she separated.” Tr. at 12 (Cont’d Hr’g Mot. to Modify, July 6, 2012).

[17] By contrast, Ben’s counsel argued that the issue of temporary support had already been resolved when the parties presented their agreement to the court, because the car payment, credit card payments, and storage fees existed at the time. He stated that “it’s clear from the communications from the transcripts of the hearing that the \$4,000.00 was to cover all of [Maria]’s expenses at least during the pendency of the divorce.” *Id.* at 18. According to Ben’s counsel, the court should impute certain income to Maria based on the savings she realized after returning to Guam, and reduce Ben’s imputed income for his care of MSTM. Moreover, Ben’s counsel guessed that Maria is deliberately not taking her medication, given that she had enough money to pay for her medication from October to June despite Ben’s cancellation of her medical insurance coverage.

[18] The trial court later issued the decision and order that forms the basis of this appeal. The court focused on Ben’s ability to pay, Maria’s inability to work, and the parties’ relative expenses before and after separation. In conducting its legal analysis, the court noted that the relevant statute, 19 GCA § 8402, is based on California Civil Code section 137, and that therefore California cases interpreting the statutes are persuasive. *See* RA, tab 50 at 3 (Dec. & Order, Sept. 17, 2012) (quoting *Cruz v. Cruz*, 2005 Guam 3 ¶ 9). The court was persuaded by one court’s interpretation of Civil Code section 137 in *Whelan v. Whelan*, which held:

The purpose of allowances to a wife for alimony pendente lite, counsel fees and court costs are to enable her to live in her accustomed manner pending the disposition of the action and to provide her with necessary funds for attorney’s fees and costs to properly present her case. She is not required to first impair the capital of her separate estate.

197 P.2d 361, 362-63 (Cal. Dist. Ct. App. 1948) (citation omitted).

[19] Ultimately, the court ordered Ben to pay \$4,821.00 per month to include the car loan and storage expenses. It found that the previous award of temporary spousal award in the amount of \$4,000.00 per month was insufficient to preserve Maria’s separate property pending divorce, and noted that because Ben’s income exceeded his expenses, he could afford to pay the increase. Ben filed a timely notice of appeal.²

II. JURISDICTION

[20] This court has jurisdiction over this appeal pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 113-52 (2013)) and 7 GCA §§ 3107 and 3108(a) (2005).

III. STANDARD OF REVIEW

[21] A trial court’s award of temporary spousal support is reviewed for an abuse of discretion. *See Sweeley v. Sweeley*, 170 P.2d 469, 472 (Cal. 1946) (“[T]he trial court has a substantial range of discretion in determining whether support and suit money pendente lite are necessary and that the amount found necessary will not be disturbed on appeal unless an abuse of discretion clearly appears.”). We previously defined abuse of discretion as “a trial court decision exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found.” *Cruz*, 2005 Guam 3 ¶ 8 (citations and internal quotation marks omitted).

[22] Under the abuse of discretion standard, “a reviewing court does not substitute its judgment for that of the trial court.” *People v. Tuncap*, 1998 Guam 13 ¶ 12. Instead, the reviewing court “must simply determine whether substantial evidence supports the trial court’s decision.” *Rodriguez v. Rodriguez*, 2003 Guam 8 ¶ 9. “The responsibility of the reviewing court

² In reviewing this Verified Petition after motions from both parties, we issued an order explaining that the trial court’s decision and order was final and immediately appealable, as opposed to interlocutory, and we therefore established the date of the order as the official date of the filing of the notice of appeal, “triggering all applicable GRAP deadlines.” *Malabanan v. Malabanan*, CVA12-034 (Order at 1-6, Dec. 13, 2012).

is merely to ascertain whether there was sufficient evidence before the trial court to sustain the judgment and order. The power to weigh the evidence rests with the trial court.” *Id.*

[23] The appellant carries the burden to establish an abuse of discretion. *In re Marriage of Rothrock*, 70 Cal. Rptr. 3d 881, 887 (Ct. App. 2008).

IV. ANALYSIS

A. Whether the Trial Court Had the Power to Modify its Temporary Spousal Support Order.

[24] At oral argument, neither party contended that the trial court lacked the power to modify its original order for temporary spousal support if a change in circumstances is established. Instead, their disagreement stems from the court’s exercise of that power. Because the parties do not dispute the power of the trial court to modify its order for temporary spousal support, we need not address the issue at this time.

B. Whether the Trial Court Abused its Discretion by Increasing the Amount of Temporary Spousal Support Without Proof of Change of Circumstances Warranting the Increase.

[25] The crux of this case is whether the trial court abused its discretion when it increased the amount of temporary spousal support by \$821.00 per month to cover storage fees and car payments, expenses that already existed when the court originally accepted the parties’ stipulation of \$4,000.00 per month.

[26] The Guam statute governing temporary spousal support states, in pertinent part:

When an action for dissolution of marriage is pending, the court may, in its discretion, require the husband or wife, as the case may be, to pay as alimony any money necessary to enable the wife, or husband, to support herself and her children, or to support himself and his children, or prosecute or defend the action. . . . During the pendency of any such action the court may, in its discretion, require the husband or wife, as the case may be, to pay as alimony any money necessary for the prosecution of the action and for support and maintenance, and execution may issue therefor in the discretion of the court.

19 GCA § 8402 (2005).

[27] Because the language of 19 GCA § 8402 was derived from California Civil Code section 137, California cases interpreting section 137 constitute persuasive authority for us to consider. *Cruz*, 2005 Guam 3 ¶ 9; *see also id.* ¶ 9 n.2 (noting section 137 was repealed, and because Guam did not adopt the new codified language, “we should only rely on cases interpreting former section 137 . . .”).

[28] The trial court was persuaded by *Whelan v. Whelan*, which held that the purpose of temporary spousal support is to “enable [the wife] to live in her accustomed manner” while the divorce action is pending without requiring the wife to impair her capital, which in turn could impair her ability to litigate the divorce. 197 P.2d at 362-63. Bearing this purpose in mind, when circumstances change in a manner that prevents the awardee from living in her accustomed manner and increases her need for temporary support, courts should consider whether to modify the original support award to maintain the awardee’s status quo before the court issues a final decree of divorce. *See Perry v. Perry*, 114 S.W.3d 465, 469 (Tenn. 2003) (“[A] substantial and material change in circumstances must be shown in order to extend, or otherwise modify, the trial court’s temporary, open-ended alimony award.”); *Harrell v. Harrell*, 123 S.E.2d 220, 222 (N.C. 1961) (“[I]t must be borne in mind that the [temporary] allowance, as stated above, is subject to modification from time to time . . . [and] it may not be amiss to grant allowance pendente lite.”); *Stern v. Stern*, 483 N.Y.S.2d 113, 631-32 (N.Y. App. Div. 1984) (modifying temporary alimony upon a showing of need by the recipient spouse and of the respective financial circumstances of both spouses).

[29] In its decision and order, the trial court did not specify which circumstances changed from the time of its initial order—when it accepted the parties’ stipulation—until the time of Maria’s request for modification and the court’s subsequent augmentation of the award, an

increase of \$821.00 per month that was effective on the date of Maria's motion. *See* RA, tab 50 at 4 (Dec. & Order) (“[Ben] is hereby ORDERED to pay \$4,821[.00] per month to [Maria] *pendente lite* pursuant to 19 GCA § 8402. SO ORDERED this 14th day of September, 2012, *nunc pro tunc* to May 1, 2012”). While the trial court acknowledged that at the time of her motion Maria had more expenses than income, and that Ben could afford to pay extra support money, the court made no mention of how Maria's need represented a marked change from the time of the original order. *Id.* at 2-4. In fact, the word “change” does not appear in the court's decision and order. *See id.* at 1-4. It appears the court did not fully embrace the notion that its decision and order would modify a preexisting order, and instead focused only on Maria's present need and Ben's continuing ability to pay, as though creating a new award.

[30] In order for the trial court to modify a preexisting order of temporary spousal support, it must determine whether there is a material change in circumstances warranting modification, and the moving party must prove that there exists a nexus between the change of circumstances and the change in need. Maintaining a litany of expenses is not sufficient to justify an increase of spousal support. Otherwise, an awardee of temporary spousal support would seek modification of an earlier order after any iota of change, however slight, regardless of whether that change was material or affected the awardee's ability to “live in her accustomed manner pending the disposition of the action” and “properly present her case.” *Whelan*, 197 P.2d at 362.

[31] The trial court seemed to justify its increase of the award on the basis of expenses that existed at the time of the original award, namely, the Kia car payments and Maria's storage fees. RA, tab 50 at 4 (Dec. & Order). These expenses did not result from, and were not otherwise tied to, any change of circumstances. Instead, they seemed to reflect the status quo since the parties

separated. It is unclear whether the trial court took into account changes in the parties' circumstances since the time of the original order, such as Maria's newfound unemployment.

[32] Again, in deciding whether to modify an award of temporary spousal support, the trial court must articulate, at a minimum, whether a substantial change of circumstances exists justifying the modification. Therefore, the trial court abused its discretion when it augmented the award without conducting a comparative analysis between the original order and the modification.

[33] As we explained in *Sinlao v. Sinlao*, which concerned property division but nonetheless informs our position, we do not imply that the trial court must utilize a precise mathematical formula to reach its decision when a party seeks modification of a temporary spousal support award *pendente lite*. 2005 Guam 24 ¶ 24 (“[R]ather than adopting a hard and fast rule such as mathematical equality, we believe that trial courts must have reasonable discretion in determining how the equal division of property should be accomplished, on a case-by-case basis.”).

[34] However, the trial court must clearly delineate where a change exists between the two relevant time periods—the time of the initial award and the time of modification—such that a material change of circumstances is both verified and shown to be properly connected to an increased need. The court's failure to do so here amounted to an abuse of discretion requiring reversal.

V. CONCLUSION

[35] The parties do not challenge the trial court's power to modify temporary spousal support orders made via oral motion and after acceptance of a stipulation entered into by the parties. Therefore, for now we will not delve further into this issue.

[36] The trial court abused its discretion because it failed to explain whether there was a material change in circumstances from the time of the court's original order awarding temporary spousal support until the time the court issued its decision and order modifying the award, and because it failed to specify how a material change of circumstances, if any, justified an increase in the award in relation to Maria's current needs as compared with her previous needs. The trial court must determine whether a material change of circumstances exists and, if so, whether that material change of circumstances warrants an increase in the amount of temporary spousal support. This amount must reflect Maria's current needs as they differ from her needs at the time of the original award.

[37] For the foregoing reasons, we **REVERSE** and **REMAND** this case for proceedings not inconsistent with this opinion.

By ^{Signed} : **Robert J. Torres**

ROBERT J. TORRES
Associate Justice

Original Signed : **Katherine A. Maraman**
By

KATHERINE A. MARAMAN
Associate Justice

Original Signed : **F. Philip Carbullido**
By

F. PHILIP CARBULLIDO
Chief Justice

I do hereby certify that the foregoing is a full true and correct copy of the original on file in the office of the clerk of the Supreme Court of Guam

DEC 30 2013

By: IMELDA K. DUENAS
Assistant Clerk of Court
Supreme Court of Guam