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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JEREMY NEWBERRY,
Petitioner and Respondent,
v.
MINDY AMERINE,
Respondent and Appellant.

A137926

(Contra Costa County
Super. Ct. No. D0804035)

I. INTRODUCTION

Appellant, the former wife of respondent, appeals on five separate grounds from a post-judgment order entered by the trial court regarding child support payments she sought from respondent via an order to show cause. We find only one flaw in the trial court's order regarding the child support payments payable by respondent to appellant, and hence affirm the order in all respects save that one. Regarding that ground, we remand the matter to the trial court for recalculation of the proper child support payments.

II. FACTUAL AND PROCEDURAL BACKGROUND

The parties were married in June 2004, had two children during their brief marriage, but then separated in August 2007, and agreed to a stipulated judgment of dissolution that was entered on July 18, 2011.

A year later, i.e., on July 19, 2012, appellant filed an order to show cause regarding the issues of attorney fees and child support payments. On December 10, 2012, an evidentiary hearing was held on those issues; the trial court entered its order

regarding both issues on December 18, 2012. Appellant, the former wife, objects to the trial court's findings in that order regarding the correct amount of child support payments, and filed a timely notice of appeal from it. Roughly simultaneously, however, appellant also apparently filed a motion to set aside the judgment of dissolution entered in 2011. However, although apparently a partial hearing has been held on that motion, as of the present time, no order has yet been entered relative to it, and apparently will not be until at least November 2013.

III. DISCUSSION

Appellant seeks to vacate that portion of the trial court's December 18, 2012, order regarding the proper amount of child support payments respondent should be providing. Her argument is based on five separate and distinct alleged flaws in the trial court's order. We agree regarding the first of appellant's contentions, but not the others; we shall deal with the issues raised in the order they have been briefed by the parties.

A.

First of all, appellant contends that the trial court erred in calculating the child support payments based not on respondent's "gross income" as required by Family Code sections 4058 and 4059¹ but, instead, on his net income, i.e., his income after the deduction of federal taxes.

The record makes clear that such did, indeed, happen. Per the record supplied us—and which respondent does not contend is in any way incorrect—respondent, a former professional football player, received a monthly pension in the gross amount of \$5,170, from which was deducted federal tax payments of \$1,034, resulting in a net payment amount of \$4,136 monthly. The trial court used the latter figure in determining respondent's current monthly income of \$8,190, a figure it then used in computing the monthly child support payments due from respondent to appellant, i.e., \$1,844 per month.

However, contrary to the calculations used by the trial court, section 4059 makes clear that "gross income" is the amount of income a person receives *before* the

¹ All further statutory references are to the Family Code.

deductions for “state and federal income tax liability resulting from the parties’ taxable income.” (§ 4059, subd. (a.)) That figure was, clearly, \$5,170, and not \$4,136. As appellant argues in her briefs to us, the trial court thus erred in one of its computations relevant to the child support payments due to appellant, and that if it had used the correct figure for respondent’s monthly pension income, her monthly child support payments would have been higher.

Respondent’s only answer to this argument is to note that (1) “this is an appeal from a temporary child custody support order pending the outcome of a motion to set aside judgment” and (2) “in looking at the trial court’s order as a whole that [it] did not err in using \$4,136.00. Again, the trial court issued its ruling intending that child support be temporary due to the pending motion and knowing that the temporary child support may be modified soon.” However, nowhere in his brief to us does respondent contend that the \$4,136 figure the trial court used as his monthly “retirement/pension” income was indeed such, i.e., as opposed to the \$5,170 monthly income figures reflected on the bank records before the court showing the amounts of his monthly pension payments. Thus, since the amount used by the trial court in computing the payments due to appellant “did not comply with the statutory requirements for child support orders, it was erroneous as a matter of law.” (*Boutte v. Nears* (1996) 50 Cal.App.4th 162, 166; see also *M.S. v. O.S.* (2009) 176 Cal.App.4th 548, 553-554; *In re Marriage of Schlaflly* (2007) 149 Cal.App.4th 747, 753.)

B.

Second, appellant contends that the trial court “committed prejudicial error in treating husband’s income as taxable instead of non-taxable.” She argues that respondent apparently paid no income taxes in 2011 but, instead, received a tax refund of \$5,456, and that such was due to the fact that “his return showed he had a \$232,703.00 net operating loss carry over to future years. Accordingly, due to the large net operating loss carry over, the evidence was that Husband would not have paid any income tax in calendar years 2012 and probably 2013.” Appellant thus argues that the trial court erred in treating respondent’s income as taxable, instead of non-taxable. If that income were

treated as non-taxable, she continues, respondent's monthly gross income would have been higher, and thus appellant would have been awarded a higher child support payment, i.e., \$2,150 instead of \$1,844. (Ibid.)

There are at least two problems with this second argument of appellant. First of all, appellant's 2011 tax returns were not admitted into evidence—or apparently even offered into evidence.² The only factual basis appellant offers in support of her argument are two pages of the reporter's transcript which records some questions and answers (most of the latter rather vague) between appellant's counsel and respondent about his 2011 taxable income—or lack thereof. Nowhere on these pages is anything said, or even hinted at, regarding respondent's 2012 or 2013 income, or even the actual amount of his “net operating loss carry over” which appellant alleges, in both of her briefs,³ to be \$232,703.

Second, appellant provides no legal authority in support of her argument that a “net operating loss carry over” incurred by respondent would have necessarily made his 2011 or 2012 (or any other year's) income non-taxable. In his brief to us, respondent asserts that his counsel “could find no case law regarding this very issue.” Appellant's reply brief offers no such authority, either.

For both of these reasons, we reject appellant's second claim of error by the trial court.

C.

Appellant's third claim of error is that the “trial court erred in making Wife's filing status head of household on the DissoMaster [it] used to determine the amount of child support. Had Wife's filing status been shown as ‘single,’ which is her true filing status, the amount of child support would have been \$2,114 [¶] The difference

² Contrary to appellant's counsel's representation to us that “Husband's income tax returns . . . were in evidence”

³ In her briefs to this court, appellant's counsel often repeats, indeed often word-for-word, her several arguments regarding the alleged errors committed by the trial court. We find this to be not only surprising, but clearly inappropriate.

between the two child support awards results in a miscarriage of justice requiring modification of the child support award of \$1,844.00.”

We reject this claim of error for the simple reason that there is no evidence in the record to support appellant’s claim that “Husband claimed his two minor children . . . as dependents on his income tax return. Accordingly, Wife was unable to claim them as dependents in order to file as head of household.” As already noted, no tax returns by either party were received in evidence, so there is no evidence before us as to whether, as claimed by appellant, respondent filed as “head of household” because the couples’ two minor children were living with him. Additionally, appellant effectively concedes that she “had not filed an income tax return since 2007.”

Because, again, of the absence of supporting evidence, we reject appellant’s claim that the trial court erred in treating her tax status as “head of household” rather than as “single.”

D.

Next, appellant claims that the trial court erred in its finding regarding respondent’s current monthly income from his limousine and wedding and events business. Appellant notes, correctly, that respondent husband testified that “his average monthly income from his limousine business was \$700.” This was the figure the trial court used in computing appellant’s total monthly income for his “Limo/Wedding Event Business.” But, appellant complains, per the record, that amount only included respondent’s limousine rental business and not his rental of his property, Newberry Estate Vineyards, a “wedding and events venue” owned by respondent and rented out for weddings and similar events. The amounts charged by respondent for such events ranged, per his testimony “between like \$2,500 to \$3,900.”

Appellant notes that, in 2012, appellant booked two events into that property, but in his testimony respondent could not recall the amount he received for those two events. Respondent husband also testified that, as of the date of the hearing (December 2012), he had close to 30 events scheduled for 2013 and 2014. Later, he testified that he thought he and his now-wife had written contracts for those events, contracts which she had “put

away somewhere,” but for which they had already received “25 percent up front from the people who hire” him. From this testimony, appellant contends the trial court “committed prejudicial error in not including any of husband’s income from his wedding event business in the child support calculation.”

We do not agree; appellant’s calculations as to the alleged additional income received by respondent husband from the rental of his estate property for weddings was far from precise. For example, he testified that he did not have “the foggiest” idea as to how much money he and his current wife had “received to date from the 30 potential customers.” Further, he made clear that they were “in the infancy stage of this business” and thus “I don’t know what the exact expenses [for the weddings, etc.] are going to be for the event because we haven’t done enough of them.” Thus, appellant is simply speculating when she argues that the trial court should have included additional monies from such events in computing respondent’s monthly income. Clearly, a trial court’s order regarding child support payments is reviewed for abuse of discretion. (See *In re Marriage of Zimmerman* (2010) 183 Cal.App.4th 900, 906; *M.S. v. O.S.*, *supra*, 176 Cal.App.4th at p. 553; *In re Marriage of Schlafly*, *supra*, 149 Cal.App.4th at p. 753; *In re Marriage of Leonard* (2004) 119 Cal.App.4th 546, 555.) In view of the highly speculative circumstances surrounding the net income likely to be received by respondent from the rental of his Newberry Estate Vineyards property for weddings and the like, the trial court clearly did not abuse its discretion in not including any such figure in respondent’s estimated net income.

E.

Finally, appellant argues that the trial court erred in not making the “temporary child support award retroactive” to the date appellant filed her order to show cause for modification, i.e., July 19, 2012.

Under section 3653: “An order modifying . . . a support order may be made retroactive to the date of the filing of the notice of motion or order to show cause to

modify or terminate, or to any subsequent date, except as provided in subdivision (b) or by federal law.” (§ 3653, subd. (a).)⁴

Here, the trial court specifically considered whether or not to grant retroactive child support payments and determined, because of the pending motion to set aside the dissolution, not to do so. It stated: “The court orders no retroactive amounts at this time although, as noted above, a permanent order modifying child support may include a retroactive amount.”

Especially in view of the fact that the entire dissolution judgment—of course including child support payments—is under review by the trial court, our review of such an order is for abuse of discretion. (See cases cited *ante*.) We find no abuse of discretion by the trial court on the retroactivity issue, especially because of the ongoing litigation regarding the judgment of dissolution.

IV. DISPOSITION

The trial court’s order of December 18, 2012, is affirmed in all respects except regarding the computation of the monthly payments due to appellant as discussed in part A. above. Regarding that one determination, the trial court’s order is vacated and the matter remanded to it for recalculation of the child support payments required to be

⁴ Subdivision (b) of section 3653 pertains to an order entered due to the unemployment of one of the parties, which does not appear to have been the case here.

made to appellant as set forth in part A. above; any increase in such payments shall be retroactive to December 18, 2012. The parties are to bear their own costs on appeal.

Haerle, J.

We concur:

Kline, P.J.

Brick, J.*

* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.