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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

In re the Marriage of CHRISTOPHER
HADSELL and CATHERINE HADSELL.

CHRISTOPHER HADSELL,

Appellant,

v.

CATHERINE HADSELL,

Respondent.

A139942

(Contra Costa County
Super. Ct. No. MSD1100775)

Appellant Christopher Hadsell (“appellant”) appeals from the trial court’s judgment in this marriage dissolution action. We direct the trial court to correct the judgment in one respect and otherwise affirm.

BACKGROUND

Appellant filed a petition for dissolution of marriage in February 2011 (“Petition”). According to the Petition, appellant and respondent Catherine Hadsell (“respondent”) married in September 1997 and separated in December 2010, and they have three children. In late 1999 and early 2000, appellant and respondent quit their jobs and elected to live on their substantial investments.

On May 11, 2011, respondent filed a motion seeking, among other things, child and spousal support based on the imputation of income to appellant. The trial court entered a temporary order directing appellant to pay support.

On December 6, 2011, the trial court conducted a hearing on respondent's request for support based on the imputation of income to appellant. At the conclusion of the hearing, the trial court stated, "I am going to make no change to the existing support order based on today's trial, but I am going to . . . direct both parties to get vocational evaluations, each to pay for his or her own. Now, if you don't do that, I am not going to hold you in contempt, but I am going to make some assumptions about what that vocational evaluation would have shown if it were made. And I propose to simply continue the existing motion over to a time when those evaluations have been done because I do think that it is fair to talk about whatever it is we're going to be doing, potentially retroactively."

On four dates in October and December 2012, the trial court held further hearings on, among other things, respondent's request for support. In a May 2013 Statement of Decision ("Decision"), the court found "child support calculations should be based on imputation of earned income to [appellant] at \$200,000 per year commencing May 11, 2011; and imputation of income to [respondent] of \$50,000 per year commencing July 1, 2012. In addition, any actual income that [appellant] has received for managing Hadsell Partners LLP should be counted as his income, and any unearned income that either party has received (from Hadsell Partners LLP or otherwise) should be counted. If either or both parties had acted diligently to secure employment, they would be receiving these items on top of their incomes from that employment. Obviously, however, the imputed earned income stated above should *not* be cumulated with any actual earned income that either party may have received" The court adopted Dissomaster calculations prepared by respondent's counsel, and directed the parties to ascertain the net arrears owed by appellant. The court also ordered appellant to pay spousal support retroactive to May 11, 2011, based on those same Dissomaster calculations, and ordered appellant to pay \$2,500 per month in spousal support prospectively.

Among other things, the Decision also awarded certain items of jewelry to respondent as her separate property. The court awarded respondent \$75,000 in attorney's fees under Family Code section 271.¹

This appeal followed.

DISCUSSION

I. *The Trial Court Did Not Err in Imputing Income to Appellant*

“Child support orders are governed by the statewide uniform guideline found in [] sections 4050-4076. Although the court normally uses the noncustodial parent's actual income to determine the monthly amount of child support, [] section 4058, subdivision (b) permits the court, in its discretion, to substitute actual income with earning capacity if consistent with the child's best interests. While there is no statutory definition of earning capacity, its meaning has been well established with a three-prong test that was first articulated in *In re Marriage of Regnery* (1989) 214 Cal.App.3d 1367 ‘Earning capacity is composed of (1) the ability to work, . . . ; (2) the willingness to work . . . ; and (3) an opportunity to work which means an employer who is willing to hire. [Citations.]’ [Citations.] This rule has been modified to include only the first and third prongs; thus, the definition of earning capacity is satisfied when the payer has both the ability and opportunity to work. [Citation.] In that instance the court may use earning capacity rather than actual income to determine child support payments.” (*State of Oregon v. Vargas* (1999) 70 Cal.App.4th 1123, 1125–1126, fn. omitted (*Vargas*); see also *In re Marriage of LaBass & Munsee* (1997) 56 Cal.App.4th 1331, 1336–1338 (*LaBass*).)² We review the trial court's decision for an abuse of discretion. (*Vargas*, at p. 1126.)

Appellant first contends the trial court erred in imputing income to him because at the close of the December 6, 2011 hearing, the court found respondent had not presented enough evidence for the court to determine what income could be imputed to appellant.

¹ All further undesignated section references are to the Family Code.

² Section 4058, subdivision (b) provides, “The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children.”

Appellant argues the court's determination was a "judgment" that precluded the court from imputing income to him in May 2013, absent a new motion. However, as explained in our factual summary, the trial court expressly declined to make a final determination at the December 6, 2011 hearing, instead directing the parties to return to the court after obtaining vocational evaluations. Accordingly, appellant is mistaken in asserting the December 6 ruling was a final determination on respondent's May 2011 support motion. To the extent appellant suggests the trial court lacked authority to postpone its ruling, the contention has been forfeited because it is not supported by reasoned argument with citations to authority. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785 (*Badie*).

Appellant next argues the trial court abused its discretion in imputing income to him because the expert testimony presented by respondent did not support the court's finding. Respondent presented testimony from a Bay Area executive search professional, Clifford Scheffel. Mr. Scheffel reviewed appellant's background working in venture capital, and testified appellant was qualified to be hired as a chief financial officer (CFO). On appeal, appellant does not deny he has the ability to work as a CFO, but he disputes he has the opportunity to do so. He emphasizes Mr. Scheffel testified he was not aware of any open "CFO positions with venture capital firms" within the last 30 days. However, a reasonable inference is that Mr. Scheffel's testimony was only with reference to positions being filled by his firm, which only represents 10 to 20 percent of the marketplace. Although he testified he was "not aware of" such a position "open today," he also testified, "[f]rom information in news sources, I've certainly seen people who have accepted positions within that marketplace. We have ones where offers are on the table that could happen tomorrow[, it is a] very dynamic environment. So 30 days is a very specific period of time."

In any event, appellant has not shown the trial court imputed income to him based on a finding he could land an executive position in a venture capital firm. Mr. Scheffel testified the venture capital sector is a "very small community." He opined appellant is qualified for executive positions in that sector and testified the compensation range is

\$300,000 to \$800,000. But the trial court imputed income to appellant of \$200,000, which is closer to (but still below) the \$250,000 to \$350,000 compensation range Mr. Scheffel identified for CFO or COO (chief operating officer) positions in a “pre-public technology company.” He testified the market for those types of positions was “the best we’ve ever seen in my 29 years” and appellant was qualified for 11 (almost half) of the searches for such positions his office completed in the previous 18 months. He further testified there were such positions currently available and estimated there were 100-200 such positions open in the previous 18-month period. Mr. Scheffel also testified appellant could work as a “consulting CFO” and earn \$200,000 per year by billing 1,000 hours. Based on the foregoing, we reject appellant’s contention there was no evidence he has the opportunity to work.

Appellant also argues the imputation of income was based on an unreasonable work regimen, because Mr. Scheffel testified the CFO and COO jobs are “usually a very committed environment” requiring around 60 work hours per week. Appellant cites *In re Marriage of Simpson* (1992) 4 Cal.4th 225, 234–235, which concluded, “earning capacity generally should not be based upon an extraordinary work regimen, but instead upon an objectively reasonable work regimen as it would exist at the time the determination of support is made.” However, Mr. Scheffel’s testimony was with reference to jobs earning an annual salary between \$225,000 and \$375,000 per year, which was greater than the \$200,000 per year imputed by the trial court. Moreover, Mr. Scheffel testified appellant could earn \$200,000 per year by billing 1,000 hours as a consultant, which is only 20 hours per week over 50 weeks. Appellant has not shown the amount of income imputed to him would require that he undertake an unreasonable work regime within the meaning of *Simpson*.

Finally, appellant contends the trial court erred in directing in its judgment that, for purposes of the Dissomaster support calculation, the \$200,000 in imputed income be added to \$55,000 a year appellant had been receiving as managing director of Hadsell Partners, LLC, a partnership with capital under management. In support of this approach, the court’s judgment reasoned, “Managing Hadsell Partners LL[C] does not require

substantial effort and is not a substitute for and will not interfere with full time employment.” Appellant argues the court was obligated under section 4058, subdivision (b) to use *either* appellant’s actual income *or* appellant’s earning capacity. He does not, however, cite any evidence managing Hadsell Partners, LLC interferes with full time employment, or any legal authority the court could not include the income from the company as part of his earning capacity where full time employment would not interfere with that income stream.³ The court did not abuse its discretion.⁴

II. *Appellant’s Other Contentions*

A. *Retroactive Child Support*

Appellant contends the trial court abused its discretion in ordering appellant to make a retroactive child support payment because the children had no unmet needs.

³ On February 23, 2015, appellant requested that this court take judicial notice of an Internal Revenue Service (IRS) publication that, he asserts, demonstrates the IRS considers the money he receives from Hadsell Partners, LLC to be earned income. We deny the request because the characterization of the income is immaterial to this court’s analysis. (*Kilker v. Stillman* (2015) 233 Cal.App.4th 320, 328 [denying request for judicial notice of document “immaterial to the issues addressed in this opinion”].) We reject appellant’s claim not because the \$55,000 is not earned income, but because he failed to show the trial court abused its discretion in concluding full time employment would not interfere with the Hadsell Partners, LLC income stream. We also deny the request for judicial notice because appellant fails to cite to any portion of the record showing this argument based on the IRS publication was presented to the trial court (*In re S.C.* (2006) 138 Cal.App.4th 396, 406–407), he failed to raise the argument in a timely fashion in his briefing on appeal (*Loranger v. Jones* (2010) 184 Cal.App.4th 847, 858, fn. 9), and he fails to explain why the IRS characterization of the income controls the determination of earning capacity under California family law (*Badie, supra*, 67 Cal.App.4th at pp. 784–785).

⁴ Appellant argues in passing that respondent’s counsel made other errors in the Dissomaster calculation: By failing to deduct the Hadsell Partners, LLC business expenses; using the wrong custody split during some of the relevant time period; and using the wrong retroactivity date. We do not consider those claims of error because appellant fails to cite to any portion of the record showing such objections were presented to the trial court. (*In re S.C., supra*, 138 Cal.App.4th at pp. 406–407.) For the first time in his reply brief, appellant argues there is insufficient evidence imputing income to him was in the best interest of the children. We do not consider this untimely contention. (*Loranger v. Jones, supra*, 184 Cal.App.4th at p. 858, fn. 9.)

Appellant relies on *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 300, which held the trial court abused its discretion in *failing* to make a child support order fully retroactive to the filing date of the motion for support. *Cheriton* concluded the trial court had erred by focusing “on the parents’ expenses, rather than on the children’s needs.” (*Ibid.*) Contrary to appellant’s argument, nothing in *Cheriton* suggests a trial court must find a child had unmet needs before making a retroactive support order. As *Cheriton* itself points out, “[b]y statute, parents are required to provide child support according to their ‘ability,’ their ‘circumstances and station in life,’ and their ‘standard of living.’” (§ 4053, subds. (d), (a), (f).)” (*Cheriton*, at p. 290.) Appellant has not shown the trial court’s retroactive support order was contrary to that statutory directive.

B. *Allocation of Retirement Accounts*

In its Decision, the trial court explained that the parties entered into a Family Trust Agreement (FTA) during the marriage that, among other things, identified certain specific assets as community property. Respondent argued below that one retirement account not mentioned in the FTA remained her separate property. The trial court concluded more broadly that the FTA “was legally inadequate to work a transmutation as to the accounts that were identified.” In its judgment, the court identified the “community share” of appellant’s and respondent’s retirement accounts. Because the community share in respondent’s plan was less than the community share in appellant’s plan, the court awarded respondent’s plan to her as her separate property and directed that funds be transferred from appellant’s plan to respondent’s plan “to equalize the community property in the retirement accounts.”

On appeal, appellant presents a disjointed argument that the trial court’s treatment of the retirement accounts somehow constituted a failure to apply the same principles of law in characterizing his assets as it did in characterizing respondent’s assets, resulting in respondent’s unjust enrichment. Appellant does not appear to argue the trial court treated his retirement accounts differently than it did respondent’s retirement accounts. Instead, he appears to suggest that, if the retirement accounts are treated as separate property, then other assets identified as community property in the FTA should also be treated as

separate property. However, the trial court stated it was “undisputed” the retirement assets at issue “would have been at least partly separate property, but for the FTA.” In contrast, appellant declined at trial to pursue any claim that assets identified as community property in the FTA were his separate property.

As explained in appellant’s post-trial brief, “[Appellant] began pursuit of his separate property in which he traced his separate property interests to Benchmark Capital Management, LLC (which is estimated to have provided easily 90% of all of the [family] wealth) until his investigation confronted him with: i) the discovery of those exact same contract terms and Nevada statutes in the [FTA] facing his separate property claims that [r]espondent faces with her 401(k) separate property claim, ii) an estimate by his counsel that pursuing his separate property interests would incur an estimated \$200,000 in fees, and iii) the court’s comments at trial that if he were to prevail in his separate property interests, he would in turn possibly be liable for higher future support payments. In light of these facts and circumstances, [appellant] used discretion and did not pursue his legal rights to his separate property interests and communicated to [r]espondent his willingness instead to consider such assets community property.”

Thus, appellant was aware of respondent’s separate property claim relating to the FTA, but nonetheless declined to present evidence in pursuit of a claim that other assets listed in the FTA were his separate property. Appellant acknowledges in his opening brief on appeal he “used discretion in not pressing” his separate property claim at trial, but presents no argument or authority why the trial court was obligated to consider such a claim when presented for the first time in appellant’s objections to the proposed judgment. The trial court did not abuse its discretion in allocating the assets in the FTA.⁵

⁵ Because it is not undisputed the other assets in the FTA would be appellant’s separate property but for the FTA, appellant’s contentions the trial court’s award was error under the doctrines of promissory estoppel and unjust enrichment are without merit, even assuming such contentions were presented to the trial court in a timely manner.

C. *Allocation of Jewelry*

At trial, the parties disputed whether certain items of valuable women's jewelry were respondent's separate property or community property. Respondent contended the pieces of jewelry were gifts from appellant, and appellant contended the jewelry was acquired as a community property investment. The trial court found in favor of respondent, reasoning: "[Respondent] credibly identifies specific 'giftable' occasions corresponding to each item. [Appellant] contends that, while these items were nice to have and wear, they were acquired as investments, and hence community property. The latter contention is not credible. [Appellant] is a person who prides himself greatly on his financial acumen. Had it been true that these were contemplated as investments when acquired, we would have heard at some length about his detailed study of the economics of jewelry investments. We heard no such thing. . . . I find that all items of [respondent's] jewelry were gifts, and are now her separate property."

Normally, section 852, subdivision (a) requires a writing for a transmutation of property to be valid. However, that requirement "does not apply to a gift between the spouses of clothing, wearing apparel, jewelry, or other tangible articles of a personal nature that is used solely or principally by the spouse to whom the gift is made and that is not substantial in value taking into account the circumstances of the marriage." (§ 852, subd. (c).) On appeal, appellant contends the value of the jewelry, which he asserts was purchased for approximately \$100,000, was substantial because they were retired and living off their savings. In light of the family's extensive financial assets, the trial court did not err in concluding the exception applies.

Appellant also argues the section 852, subdivision (c) exception does not apply because "the jewelry was purchased by the Family Trust" and, therefore, "this gifting would necessarily be between the Family Trust and [respondent]," rather than between appellant and respondent as spouses. Appellant's assertion the jewelry was purchased by the trust is unexplained and unsupported by a citation to evidence in the record, and any legal argument following from that factual assertion is left undeveloped and unsupported by any references to authority. (*Badie, supra*, 67 Cal.App.4th at pp. 784–785.) Finally,

appellant argues the trial court should have accepted his evidence the jewelry was purchased as an investment, but the record supports the trial court's finding to the contrary.

D. *Reimbursement for Tuition Payments*

In its decision, the trial court directed that respondent pay appellant the amount of \$9,700, representing one half of a \$19,400 tuition payment appellant made from his separate property; the debt was a community liability, so appellant was entitled to partial reimbursement from respondent. The parties agree the equalizing payment in the judgment fails to reflect that award, because the equalizing payment effectively only includes \$4,850 for the tuition reimbursement. We will direct the trial court to correct the judgment.

E. *The Sanctions Award*

The trial court awarded respondent \$75,000 in attorney fees from appellant as a sanction pursuant to section 271.⁶ We review the trial court's order for an abuse of discretion. (*In re Marriage of Greenberg* (2011) 194 Cal.App.4th 1095, 1100.)

An attachment to the trial court's judgment explains the basis for the sanctions award, identifying twelve categories of "culpable and obstructive conduct" by appellant, including: "[a]most obsessive insistence, with no claim of procedural right, on being designated the 'petitioner' in this action"; "[h]ighly inappropriate statements to the

⁶ Section 271, subdivision (a) provides: "Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award."

children about [respondent] and the divorce”; “[v]iolations of the ATROs”;⁷ “[t]ransparent attempts to game *Epstein*⁸ issues with respect to the Blackhawk residence”; “[a]ttempts to game issues of employability and employment”; “[p]etty gamemanship and mind games concerning child-care add-ons”; “[e]arly assertion, apparently without any basis, of separate-property ownership of the Blackhawk residence and various investments”; “[d]iscovery gamesmanship”; “[l]ess than forthright testimony at times, in both depositions and trial”; “[p]etty attempts to provoke [respondent] in e-mail traffic”; “[s]elling community household goods at consignment, with no notice to [respondent] and no opportunity for her to reclaim any items”; and “[a] proposal (in his Proposed Statement of Decision) that the Court should order [respondent’s] attorney’s [sic] to refund part of the attorney fees they have been paid, a matter that is not legally cognizable.”

On appeal, appellant disputes the bases for aspects of some of those findings. For example, he argues it *was* proper to designate him as petitioner and he *did* provide respondent notice he was taking items to be sold on consignment. Regarding other findings, he makes blanket assertions that the trial court’s findings are incorrect. For example, he asserts he made no inappropriate statements to the children and he “provided forthright testimony at all times.” Appellant’s arguments do not approach the showing necessary to demonstrate an abuse of discretion, especially when many of the bases relate to the trial court’s observations as the judicial officer overseeing the litigation. Moreover, as described in respondent’s counsel’s declaration below and respondent’s brief on appeal, the trial court’s findings were supported by extensive evidence in the record. Appellant effectively forfeited his claim by failing to respond in his reply brief to the evidence cited in respondent’s brief, other than to dispute respondent’s characterization of the presiding judge as “highly experienced.” (*Burchett v. City of Newport Beach* (1995) 33 Cal.App.4th 1472, 1481 [an appellant’s failure to respond in

⁷ ATRO stands for “automatic temporary restraining order.” (*In re Marriage of Burwell* (2013) 221 Cal.App.4th 1, 8; see also § 2040.)

⁸ *In re Marriage of Epstein* (1979) 24 Cal.3d 76.

his or her reply brief to arguments made by the respondent makes it unnecessary for the reviewing court to address the issue].) The trial court did not abuse its discretion in awarding sanctions under section 271.

DISPOSITION

The trial court is directed to correct the equalizing payment in the judgment to reflect an award to appellant from respondent in the amount of \$9,700, representing one half of a \$19,400 tuition payment. The judgment is otherwise affirmed. Respondent is awarded her costs on appeal.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

