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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of DONNA and
NICHOLAS BROWN.

DONNA BROWN,

Appellant,

v.

NICHOLAS BROWN,

Respondent.

A140331

(San Mateo County
Super. Ct. No. FAM079140)

After respondent Nicholas Brown took a lower-paying job, appellant Donna Brown stipulated to his payment of considerably reduced child support.¹ Several months after executing the stipulation, Donna sought an order modifying it, arguing Nicholas's child support payments should be increased through the imputation of income. The family court declined to impute income and largely continued the terms of the stipulation. One year later Donna moved to set the order aside, arguing bonuses received by Nicholas should be included in his base compensation for calculating child support and reiterating her request for imputed income. Again the family court declined. We affirm.

I. BACKGROUND

The marriage of Donna and Nicholas was dissolved in December 2004. Pursuant to the judgment of dissolution and a later stipulation, Nicholas had paid monthly child

¹ The parties are identified by their first names for clarity. No disrespect is intended.

support ranging from \$6,000 to as much as \$10,000, but at some point in 2010 the family court reduced Nicholas's child support obligation to \$2,102 per month. In a stipulation executed by the parties in January 2011 (stipulation), Nicholas agreed to make monthly child support payments of \$3,700 through December 2012, with increased support if his income was more than \$642,000 in a year.

In October 2012, an evidentiary hearing was held on Donna's request to modify the child support stipulation.² Nicholas testified he was promoted from associate to partner in a large national law firm in January 2008, but at the beginning of 2010, apparently as a result of the economic downturn, he was encouraged by the firm to look for employment elsewhere. Up until receiving this advice, Nicholas had not contemplated leaving the firm.

Acting on the firm's encouragement, Nicholas resigned and joined another national firm in the middle of 2010. He had received nearly \$1 million in annual compensation from his former law firm in 2008 and 2009, but his guaranteed income at the new firm was \$275,000 annually, with the potential to receive additional payments if he was successful in developing business. Nicholas had high hopes when he joined the new firm, but business was initially slow. In 2011, he received a bonus of \$20,000, for total compensation of \$295,000. At the time of the hearing in 2012, he had received a \$45,000 bonus in the middle of the year and hoped for a larger bonus at year-end. Nicholas denied receiving any deferred compensation.

Nicholas believed the deal he struck with his new law firm was the most favorable available to him at the time. As he told the court, ". . . I am doing my best to earn what I

² The documents filed in connection with this motion, if any, are not part of the limited appellate record, which consists primarily of two hearing transcripts and a few stipulations and orders. Donna makes a wide variety of factual assertions in her opening brief, particularly about the parties' past dealings, which are not supported by evidence in the record. We disregard these assertions. (*People v. Guzman* (1995) 40 Cal.App.4th 691, 697.) It is the responsibility of the appellant to provide an appellate record adequate to adjudicate the claims made on appeal. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 149 (conc. opn. of Werdegar, J.).)

can, and I have not at any point acted in a way that was [not] intended to maximize my income. . . . [¶] The transition I made from one firm to the other was I believe . . . in the long term best interests of everyone.”

Donna testified that she was working as a “temp,” making \$2,000 per month “at most.” Because Nicholas did not wholly fulfill his parenting obligations, she was forced to care for their child 70 percent of the time, rather than the 60 percent ordered by the court. The substantial reduction in child support since Nicholas’s change in employment had worked a severe hardship on her, causing her to cancel her health insurance, lose an apartment, drive a friend’s car, and borrow to make ends meet.

In a statement of decision, the family court found Nicholas’s testimony about his resignation “credible” and concluded that “had he not done so, he would certainly have been laid off.” As a result, the court declined to impute additional income based on his prior earnings. The court also found no evidence Nicholas was receiving significant income other than his salary and bonuses from the new law firm. Using the uniform guidelines, the court found Nicholas would be required to earn approximately \$640,000 annually to require a child support payment in excess of the \$3,700 monthly payments specified in the stipulation.³ Accordingly, the court declined to modify the base payments specified in the stipulation, although it imposed additional payments if Nicholas’s income exceeded \$640,000. In addition, the court ruled that, under the stipulation, child support would be governed by the uniform guidelines after 2012, resulting in a support payment based on Nicholas’s \$275,000 salary, plus a percentage of any bonus. These findings were reflected in an order entered October 24, 2012. The order was not appealed, although Donna did file an unsuccessful petition for writ of

³ The amount of child support normally payable by a divorced spouse is determined by an algebraic formula established in Family Code section 4055. “The formula support amount is ‘presumptively correct’ in all cases [citations], but ‘may be rebutted by admissible evidence showing that application of the formula would be unjust or inappropriate in the particular case, consistent with the principles set forth in Section 4053’ ” (*In re Marriage of Cryer* (2011) 198 Cal.App.4th 1039, 1047–1048.)

mandate challenging the order. (*Brown v. Superior Court* (Dec. 19, 2012, A137305) [nonpub. opn.])

On September 17, 2013, a hearing was held on Donna’s motion to set aside the October 2012 order on the ground Nicholas failed to disclose to the court “that his bonus compensation is reoccurring like clock work every July and every December.”⁴ Donna argued the bonuses should be included in his base compensation for support calculations, rather than subject to a separate percentage surcharge. In the course of the hearing, Donna also raised several of the arguments made during the earlier hearing. The family court denied the motion, finding no misrepresentation by Nicholas to justify revising the earlier order. Because Nicholas’s salary had increased since the time of the earlier hearing, the court raised his monthly child support payment to \$2,190, consistent with the guidelines.⁵ With respect to Donna’s claim Nicholas had deferred income from December into the following January, the court noted, “If he’s supposed to be paid \$50,000 in December and he gets it in January, he still has to pay you the bonus within ten days of his receipt of the funds. He’s not making anything by deferring income.” The court found no evidence of an intentional manipulation of Nicholas’s income. A minute order was entered the day of the hearing reflecting these rulings.

II. DISCUSSION

Donna argues the family court abused its discretion in refusing to modify the 2012 order by including Nicholas’s semiannual bonuses in his base compensation for purposes of calculating child support and imputing income to Nicholas. She also contends the court erred in declining to award sanctions against Nicholas.⁶

⁴ The documents submitted in connection with this motion, with the exception of one declaration by Donna, are not in the appellate record.

⁵ Nicholas told the court he had already been voluntarily paying Donna child support at the higher rate and did not object to the increase.

⁶ At times, Donna appears to be challenging aspects of the 2012 order. Any appellate challenge to that order was forfeited when Donna failed to appeal it. (See *In re Marriage of Zimmerman* (2010) 183 Cal.App.4th 900, 906 [modification of child support is an appealable order]; *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990)

Initially, we note we are hampered in reviewing the family court’s order by the lack of an adequate appellate record. “It is well settled . . . that a party challenging a judgment has the burden of showing reversible error by an adequate record.” (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) Donna initially provided no appellate record other than the hearing transcripts, which cannot be reviewed in the absence of the background documents. While Nicholas submitted a handful of these documents in an appendix, they were far from a complete record. Finally, with her reply brief Donna submitted an “Appellant’s Appendix to Reply Brief,” consisting of a request for judicial notice, without any indication the request was actually granted, and a small number of other documents. While we have done our best to review the family’s court’s order on the basis of this limited record, it is only barely adequate to permit review.

We review the family court’s 2013 order for abuse of discretion. (*In re Marriage of Cryer, supra*, 198 Cal.App.4th at p. 1046.) Relying on *M.S. v. O.S.* (2009) 176 Cal.App.4th 548 (*M.S.*), Donna argues the family court should have included Nicholas’s predictable bonuses in his base income. The father in *M.S.* was unemployed, but he received substantial compensation from his Indian tribe in the form of both regular disbursements and semiannual bonuses. (*Id.* at pp. 551–552.) In calculating child support, the family court had annualized the amount of the most recent bonuses and included them in his base income. (*Id.* at p. 552.) The father challenged the inclusion of the bonuses. As the court summarized the applicable law, a “ ‘court cannot deduct predictable . . . bonuses in determining [a parent’s] prospective earnings merely because they occur sporadically. The mechanism for calculating [a parent’s] net disposable income is a monthly average. [Citation.] The question is whether the bonuses . . . are likely to reoccur. Absent a determination that “the monthly net disposable income figure does not accurately reflect [the parent’s] . . . prospective earnings,” it [would be] error for

220 Cal.App.3d 35, 46 [if a timely appeal is not taken from an appealable order, the appellate court has no jurisdiction to review it].) We also decline to consider the various arguments raised by Donna for the first time in her reply brief. (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.)

the court to exclude . . . bonuses in its calculation. [¶] The court can disregard past bonus . . . payments from the calculation only if it determines that [the parent] is unlikely to receive them in the future.’ ” (*Id.* at p. 554, fn. omitted.) Given the regularity of the father’s bonuses, the court affirmed their inclusion in calculating the monthly child support payments. (*Id.* at pp. 556–557.)

While recognizing some similarity between *M.S.* and this situation, we find no abuse of discretion in the family court’s decision not to include Nicholas’s semiannual bonuses in calculating his monthly child support payments. It is important to recognize that, while the court did not include the bonuses in the monthly figure, neither did it exclude the bonuses from the child support calculations altogether. Nicholas is required to pay to Donna a percentage of any bonus earned, when it is earned. The court’s decision not to attempt to estimate the size of the bonuses and include them in the monthly award was reasonable because, while the bonuses were awarded at predictable times, it was not possible to estimate their size with any confidence. There was only limited evidence in the record about past bonuses, since Nicholas had received only a small number at the time of the hearing, and the amount of the bonuses depended in part on Nicholas’s performance in obtaining business for the firm, a difficult matter to predict. In these circumstances, the court’s decision to require payment of a percentage of the actual bonuses when earned represented a fair and appropriate exercise of discretion. Just such an allocation is authorized by Family Code section 4064, which states: “The court may adjust the child support order as appropriate to accommodate seasonal or fluctuating income of either parent.” (See *In re Marriage of Mosley* (2008) 165 Cal.App.4th 1375, 1386–1387 [finding an abuse of discretion when the family court refused to treat bonus income separately in circumstances similar to those here].)

We also find no abuse of discretion in the family court’s refusal to impute income to Nicholas. From the evidence provided at the earlier hearing, it appears that Nicholas unwillingly left his position at his original law firm and accepted the best alternative position he could find. As he told the court in 2012, he was doing his best to maximize his income. Donna presented no evidence of other, better-paying positions he could have

obtained, merely arguing he was able to make more money in prior years. In the face of Nicholas's current efforts, which the family court found to be in good faith, the fact he was able to earn more in the past does not demonstrate he could be earning more today. Accordingly, there was no evidentiary basis to conclude Nicholas's earning capacity is greater than his present earnings, thereby justifying imputed income. (See *In re Marriage of Lim & Carrasco* (2013) 214 Cal.App.4th 768, 775.)

Further, in challenging the 2012 order in 2013, Donna provided no evidence of materially changed circumstances bearing on the issue of imputation, as necessary to justify the modification of a child support order. (See *In re Marriage of Freitas* (2012) 209 Cal.App.4th 1059, 1068 [“ ‘ “As a general rule, courts will not revise a child support order unless there has been a ‘*material change of circumstances.*’ ” ’ ”].) She merely reiterated her earlier arguments, essentially contending the court erred in 2012. In the absence of evidence of changed circumstances, the family court did not abuse its discretion in declining to revise the earlier order.

At oral argument on this matter, Donna contended the family court abused its discretion in not calculating child support for 2013 according to the terms of the stipulation because Nicholas deferred a \$50,000 bonus from 2012 to 2013 in order to avoid exceeding the \$642,000 income level that would have permitted Donna to seek additional child support. By its terms, the stipulation was effective only through December 31, 2012. Even if, as Donna contends, Nicholas deferred income in order to avoid the stipulation threshold, that would merely have permitted Donna to seek further child support for the year 2012; it would not have authorized the family court to extend the stipulation beyond its date of expiration. Further, the family court rejected the factual premise for Donna's argument, finding no evidence that Nicholas intentionally manipulated his income. We similarly find no evidence in the record before us demonstrating such manipulation. While a pay statement issued to Nicholas in 2013 reflects a line item for “Prior Yr Bonus” of \$50,000, there is nothing in the record to suggest Nicholas could have, but declined to, receive that income in calendar year 2012. In the absence of some further explanation of the circumstances of this income beyond

the mere designation of it as, presumably, “prior year bonus,” there is no basis for concluding Nicholas voluntarily deferred the income. Finally, the 2012 statement of Nicholas’s income issued by his employer reflects gross income of \$586,849. Even if he had received an additional \$50,000 in 2012, his income for that year would not have exceeded the \$642,000 threshold.⁷ In short, we find no basis for finding an abuse of discretion on this ground.

Donna contends she sought sanctions against Nicholas “based upon [his] act of deferring income and his failure to timely report such income, failure to timely produce a valid and signed tax return as required by the October 24, 2012 Order.” The decision to award sanctions rests within the discretion of the family court. (*Shelton v. Rancho Mortgage & Investment Corp.* (2002) 94 Cal.App.4th 1337, 1345–1346.) Because the appellate record does not contain the briefs submitted in connection with Donna’s motion, we cannot determine the specific grounds she asserted for the imposition of sanctions. In a declaration submitted in support of the motion, Donna claimed Nicholas rarely made timely support payments, canceled two support checks, and lied to the court about the timing of his bonuses. The transcript of the 2012 hearing does not support Donna’s claim of false representations about the bonuses, and Nicholas submitted evidence demonstrating the two checks were cancelled because they had been altered to increase their face amount. Given the evidentiary conflict, we have no basis for finding an abuse of discretion in the trial court’s failure to impose sanctions.

⁷ Donna’s contrary contention appears to be based on an arithmetical error. The 2013 income statement from Nicholas’s employer, submitted in Donna’s appendix, contains a table of numbers that, when totaled, equal the gross income figure of \$586,849.16. A handwritten notation on the statement, presumably in Donna’s handwriting, erroneously sums the numbers to equal \$601,849. The error appears to have occurred because a \$15,000 deduction from gross income was disregarded, rather than deducted from the total.

III. DISPOSITION

The order of the family court is affirmed.

Margulies, Acting P.J.

We concur:

Banke, J.

Becton, J.*

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