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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

KIERAN A. COX,

Defendant and Appellant,

v.

JEANNA STOVALL,

Plaintiff and Respondent.

A140942

(Alameda County
Super. Ct. No. AF12639961)

Kieran A. Cox appeals an order awarding Jeanna Stovall child support in the amount of \$2,321 per month. He contends the court abused its discretion in calculating his monthly income. Although Cox's lack of credibility undoubtedly made calculation of his income and expenses extremely difficult, we nonetheless agree that the court abused its discretion in setting the amount of child support. Accordingly, we must remand for recalculation.

Factual and Procedural History

In July 2012, Stovall filed a petition to establish that Cox was the father of her son. In January 2013, the court found that Cox is the child's father and ordered supervised visitation.

Following a contested hearing, the court ordered Cox to pay \$1,577 per month in child support and an additional \$744 per month for child care. The child support order is based on the court's finding that Cox's monthly income is \$14,887 and Stovall's monthly income is \$8,410.

Cox filed a timely notice of appeal.

Discussion

Cox contends the trial court erred in calculating his monthly income. In finding that Cox's total monthly income is \$14,887, the court calculated that Cox has \$9,175 in self-employment income and \$5,712 in other taxable income from his real estate investments. The court explained its calculations as follows: "I note looking at the 2012 tax returns from the IRS, the IRS considers respondent with the various deductions and allowances he has taken to have an income of \$110,100 a year subject to Social Security tax. [¶] The court is going to use that \$110,100 income [or \$9,175 a month] as the self-employment income level for respondent." To that amount, the court added \$5,712 in income generated from Cox's rental properties. The court calculated the rental income by imputing \$950 per month income to Cox based on the rental value of the apartment in which he lives rent-free and adding that to his actual rental income from other occupied units in the same building which he owns, and then subtracting \$25,000 for annual expenses.

Cox's Self-employment Income

Cox contends the court erred in calculating his self-employment income. Initially, he argues that the court should have used an average of his actual net taxable income as reported on his 2010-2012 tax filings (\$18,807). The trial court, however, found that Cox's tax returns, as well as his testimony and income and expense declarations, were completely untrustworthy. The court stated: "I have spent a great deal of time considering and reviewing the financial records and in doing so in connection with the testimony that has been offered at trial. [¶] I must say that I have had a tremendous amount of difficulty discerning the true income numbers in this case [¶] The numbers in the income tax statements do not reconcile with the numbers included in respondent's income and expense declarations. [¶] In terms of witness credibility, I found respondent to not be credible. His responses, regardless of who asked the question, were disingenuous and were vague and appeared to intentionally obfuscate and confuse the issues. [¶] . . . [¶] When asked about the discrepancies in the data included in the deferral tax filings as compared to the income and expense declarations and attachments, which are

filed under oath, respondent again confused the issues and called his attachments to his own income and expense declarations garbage. [¶] Under the circumstances, I put little to no faith in the assertions in the income and expense Declarations filed by respondent, particularly viewing how much the numbers have shifted between the income and expense declaration filed on December 12, 2012 and the January 4, 2013 declaration, the September 6th 2013 declaration, and then finally the September 26th declaration.

[¶] . . . [¶] Taking into consideration Family Code section 4058 and the associated case law and guidelines, I then spent a great deal of time looking at the federal tax filings. They do not provide the level of clarity that I was looking for, and the court is additionally cautious because as was testified to yesterday, respondent is currently paying back, though he contest[s] the charge, roughly \$11,000 in tax debt associated with a 2009 tax filing. The IRS believed additional moneys were owed.” The court continued, “I don’t trust the testimony of respondent and I don’t trust the numbers that he has provided to the court. And frankly, I don’t trust the numbers he has provided to the IRS.”

Although income tax returns are presumptively correct as to a parent’s income in child support actions (*In re Marriage of Loh* (2001) 93 Cal.App.4th 325, 332), the court’s statements demonstrate that the presumption of correctness of recent tax returns was rebutted in this case (*In re Marriage of Calcaterra and Badakhsh* (2005) 132 Cal.App.4th 28, 34).

Having found that Cox’s net income as reported on his tax returns was not credible, it was within the court’s discretion to reject those numbers and calculate Cox’s income using a different method. (*In re Marriage of Barth* (2012) 210 Cal.App.4th 363, 376–377.) While the Family Code gives the court significant discretion to calculate a parent’s annual income for purposes of making a child support award,¹ “the discretion

¹Under Family Code section 4058, subdivision (a), “The annual gross income of each parent means income from whatever source derived . . . and includes, but is not limited to, the following: [¶] (1) Income such as commissions, salaries, royalties, wages, bonuses, rents, dividends, pensions, interest, trust income, annuities, workers’ compensation benefits, unemployment insurance benefits, disability insurance benefits, social security benefits, and spousal support actually received from a person not a party

must be a reasonable one, ‘ “exercised along legal lines, taking into consideration the circumstances of the parties, their necessities and the financial ability of the [supporting spouse].” ’ ” (*Riddle v. Riddle* (2005) 125 Cal.App.4th 1075, 1081.) “When the trial court’s findings regarding the amount of support are challenged, ‘an appellate court cannot interfere with the trial court order unless, as a matter of law, an abuse of discretion is shown. [Citations.] The power of the appellate court therefore begins and ends with the determination as to whether the trial court had any substantial evidence (whether or not contradicted) to support its conclusions. [Citation.] The appellate court should not substitute its own judgment for that of the trial court; it should determine only if any judge reasonably could have made such an order.’ ” (*In re Marriage of Barth, supra*, at p. 372.) While we appreciate the difficulty the court faced in calculating Cox’s income, the Social Security base wage which the court used as the amount of Cox’s self-employment income bears no rational relationship to Cox’s actual self-employment income.

Self-employed persons are required to pay a social security tax on their net earnings up to an annual base wage. “Social Security’s Old-Age, Survivors, and Disability Insurance (OASDI) program limits the amount of earnings subject to taxation for a given year. . . . This limit changes each year with changes in the national average wage index. We call this annual limit the contribution and benefit base.” (Social Security Web site <<http://www.ssa.gov/oact/cola/cbb.html>> [as of Nov. 24, 2014].) For earnings in 2012, the base wage was \$110,100. (*Ibid.*) Self-employed persons with net earnings of more than \$400, like Cox, are required to file a Schedule SE with their federal income

to the proceeding to establish a child support order under this article. [¶] (2) Income from the proprietorship of a business, such as gross receipts from the business reduced by expenditures required for the operation of the business. [¶] (3) In the discretion of the court, employee benefits or self-employment benefits, taking into consideration the benefit to the employee, any corresponding reduction in living expenses, and other relevant facts.” Section 4058, subdivision (b) authorizes the court to, “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.”

tax return. (Social Security Administration Publication No. 05-10022 (Jan. 2014) <<http://www.ssa.gov/pubs/EN-05-10022.pdf>> [as of Nov. 24, 2014].) Line 10 of Long-Schedule SE asks the taxpayer to apply the social security tax rate to the smaller of the taxpayer's actual net income or the statutory base wage. On his 2012 return, Cox applied the tax rate against net income of \$3,141, as reported on line 6 of the Schedule SE. The \$110,100 base wage that the court used to calculate Cox's child support obligation bears no relationship to the amount of income that Cox reported or that can be derived from any of the evidence that was before the court. Contrary to the trial court's statement, it is not the amount that the Internal Revenue Service considered to be his income. It is merely the cap applied to all taxpayers. Thus, while we do not minimize the difficulty faced by the trial court in determining Cox's income, and do not preclude the court from making reasonable estimates based on the evidence before it, the use of the base wage is not a reasonable proxy for Cox's actual income. Accordingly, the matter must be remanded for recalculation of Cox's self-employment income.

Cox's Rental Property Income

Cox contends the court erred in calculating his income from his rental properties. First, Cox argues, "There is no legal basis in Family Code or case law supporting the imputation of income based on a parent who has a mortgage on the property he lives in and does not have to pay rent." The court did not make an express finding as to the existence of a mortgage on Cox's property or the amount of any monthly payments on the mortgage. Nonetheless, even if there is no mortgage, there is no basis for inclusion of an imputed rental value as income.

It is generally accepted that "the broad definition of income set forth in section 4058 [is] not limitless and [does] not 'reach so far as to include the increase in equity of a parent's residence, forcing the parent to sell or refinance the home in order to make court-ordered support payments.'" (*In re Marriage of Henry* (2005) 126 Cal.App.4th 111, 119 [finding no authority for the proposition that "the increase in the equity value of a parent's residence constitutes income or earning capacity for purposes of calculating child support under section 4058"]; *In re Marriage of Williams* (2007) 150 Cal.App.4th 1221, 1241–

1242.) While housing benefits that are related to employment may be considered as income under section 4058, subdivision (a)(3) (see *In re Marriage of Schlafly* (2007) 149 Cal.App.4th 747, 758–759), Cox’s housing is not provided as a benefit of his self-employment. There is no authority or rationale for imputing as income the rental value of his apartment.²

Cox also argues that the court erred “in limiting the sum total of allowable Schedule E deductible income property expenses to \$25,000.” The court explained its rationale as follows: “[B]ecause I recognize that there are certain expenses that Mr. Cox regularly incurs in connection with those properties, I have tried to ascertain the appropriate amount of losses or deductions associated with those properties. [¶] Because of the shifting numbers and the credibility issues that I’ve already discussed, I have been unable to track a clear number that is supported by receipts or any other form of credible information. However, what I decided to do was follow the motto of the IRS and allow a maximum loss of \$25,000 annually.”

Cox argues, “It defies all logic and reason to presume, that income property, or any business for that matter, realizes income without any expenditures. The mortgages alone (which are absolutely necessary to the operation and possession of the income property) almost entirely wipe out all monthly rental income as shown on the September 26, 2013 income and expense statement.” As noted above, however, the court did not find any of Cox’s evidence credible and it is Cox’s burden to establish, with credible evidence, his investment expenses. The court did not, as Cox argues, presume there are no expenses. Given Cox’s failure to submit complete and credible documentation, the court’s decision to estimate his expenses as \$25,000 a year is not unreasonable. (*In re Marriage of Calcaterra and Badakhsh, supra*, 132 Cal.App.4th at p. 36 [where court finds father’s evidence not credible, it is not an abuse of discretion to “credit father’s

²The court retains discretion, however, to consider Cox’s reduced living expenses resulting from mortgage-free housing a “special circumstance” under section 4057 subdivision (b)(5), allowing an upward adjustment of the guideline child support amount. (*In re Marriage of Schlafly, supra*, 149 Cal.App.4th at pp. 758–759.)

indication of gross income and disregard his indication of expenses necessary to service the properties”].) Moreover, on appeal Cox has failed to demonstrate that \$25,000 is an unreasonable estimate.

Disposition

The child support order is reversed and remanded. The parties shall bear their respective costs on appeal.

Pollak, J.

We concur:

McGuinness, P.J.

Jenkins, J.