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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of BROOKE MORRIS-
HOPKINS and JONATHAN R.
HOPKINS.

BROOKE A. MORRIS-HOPKINS,

Respondent,

v.

JONATHAN R. HOPKINS,

Appellant;

SAN DIEGO COUNTY DEPARTMENT
OF CHILD SUPPORT SERVICES,

Intervener and Respondent.

D058960

(Super. Ct. No. DN138584)

APPEAL from orders of the Superior Court of San Diego County, Randall W.

Magnuson and William Y. Wood, Commissioners. Affirmed.

Appellant Jonathan R. Hopkins (Father) appeals from postjudgment orders modifying his child support obligation in the dissolution action between Father and his

former wife, respondent Brooke A. Morris-Hopkins (Mother). Representing himself on appeal, Father contends the family court abused its discretion in granting the motion by intervener and respondent San Diego County Department of Child Support Services (the County), to modify and increase his support obligation. (Fam. Code,¹ §§ 4053 et seq., 17400.)

Father does not challenge the underlying finding that he is able to work and pay support, but he argues the court originally, and on reconsideration, incorrectly imputed to him an excessive monthly income based on a wage of \$21 per hour, in light of his showing he had not earned wages at that level since 2005, and because of other factors, such as his current health problems and student loan obligations.²

Our review of the entire record persuades us that the family court had an adequate basis in the evidence to exercise its discretion in the manner it did on the child support issue, to impute income to Father. (§ 4058.) We affirm the November 4, 2010 order declining to reconsider the February 25, 2010 order.

¹ All further statutory references are to the Family Code unless noted. As a respondent served with the notice of appeal, the County substituted in the California Attorney General's Office for purposes of the appeal. No briefs from either respondent have been filed.

² Father filed his notice of appeal on December 30, 2010. We construe the appeal as timely as to both the original postjudgment order and the denial of the motion to reconsider it, as both covered the same issues. (*In re Marriage of Zimmerman* (2010) 183 Cal.App.4th 900, 906; *In re Marriage of de Guigne* (2002) 97 Cal.App.4th 1353, 1359.)

BACKGROUND

We set forth only those facts that are relevant to the issues on appeal. The record shows that the parties' dissolution judgment and marital settlement agreement were filed on May 16, 2006, after a two-year marriage, while both parties were in their mid-20's. The original custody arrangement was 80 percent for Mother and 20 percent for Father. The child support provision of the marital settlement agreement states, "Father shall pay to Mother \$150 per month for child support, for [J.] Hopkins, Date of Birth 5/21/05, due on the first of each month commencing on February 1, 2006. The parties understand that this is not a guideline child support number and agree to the above number. The parties are fully informed of their rights concerning child support"

By December 2007, Father's timeshare for J. was set at 45 percent, with 55 percent for Mother. On January 2, 2008, the court modified the existing child support order to reduce it to \$50 per month effective November 1, 2007.

A. County's Motion to Modify Support Amount

On July 8, 2009 the County filed a motion to modify Father's support obligation, to increase it to \$243 per month, and a hearing was set for August 11, 2009. The parties were participating in mediation proceedings about timeshare issues. Each party filed updated income and expense declarations. The hearing was continued several times, until the modification ruling was issued February 25, 2010.

Father has a bachelor's degree in biology and was attending nursing school, first full time and later part time, and he was receiving student loans that he was using for

living expenses, and which he would have to repay. Father previously worked as an orthopedics technician, but his certification expired. He could not pursue his previous occupations (massage therapy and casino dealing), in part because of an old (high school) ankle injury, which created physical work limitations on his standing and walking time. However, he anticipated being able to get a desk job in nursing to accommodate his work limitations. He was unlikely to obtain further casino employment in any case, because he had been fired from one such position.

As of July 2009, Father reported his wages were around \$225 per month and he was receiving approximately \$800 in student loan money per month. Father questioned why Mother was not working more hours as a dance teacher. Mother was making around \$1,400-\$1,600 per month for several classes and her preparation and travel time. Mother objected that Father had trained for various careers but was still studying, and claimed he was evading payment of child support.

At the August hearing, the court requested that Father obtain a doctor's note and an explanation of how he could go to school full time but not work full time. At the December 31, 2009 hearing, the court discussed with Father his claimed work limitations and ordered him to make specified job hunt contacts. Father was pursuing certification as a substitute teacher. The court allowed Mother to file papers further explaining her work situation.

At the February 25, 2010 hearing, Father explained that he was now a part-time student and was expecting to graduate from nursing school in April 2011. He was currently working 15 hours per week at a job paying \$10 per hour. He supplied a

declaration and doctor's note prescribing "no walking/standing without a break every thirty minutes."

The court inquired of counsel for the County about any guideline calculations, and received four sample calculations at different levels of income for Father. These calculations resulted in guideline support amounts of up to \$396 per month. The court asked Father to explain his position about his restricted earning potential, heard the arguments, and then said, "I've heard enough." The court determined that the \$396 per month guideline amount of support should be ordered, effective retroactively to August 2009, the month after the County's motion had been filed. (§ 3653, subd. (a) [generally, an order modifying or terminating 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. . . ."].)

B. Father's Reconsideration Motion; Appeal

In March 2010, Father filed a motion for reconsideration, arguing that when ordering the child support modification, the court failed to adequately account for Father's level of disability and overall earnings history. Father was planning on working more part-time hours in the near future. Although he had started several side businesses, they were not successful in the current state of the economy. His wages were then around \$120 per month and he was receiving approximately \$700/month in student loans. At the August 12, 2010 reconsideration hearing, the court rejected his arguments about his earning capacity being overstated.

Further hearings were held on Father's additional arguments that Mother does not work a full 40-hour week, and she apparently made more than her reported income of

\$1,600 per month, or in any case, the court should not have ruled that Father's increased support amount would be ordered retroactive to August 2009. On November 4, 2010, the court denied Father's reconsideration requests in full. He appeals.

II

APPLICABLE STANDARDS

A. Rules of Review

" 'A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.' " (*In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1093.) As the appellant, Father has the burden of showing that a prejudicial abuse of discretion occurred. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1291.) If an appellant does not provide an adequate record to support a contention of insufficiency of the evidence to support a finding, that contention may be deemed waived. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132; *Goldring v. Goldring* (1949) 94 Cal.App.2d 643, 645.)

Child support awards are reviewed for abuse of discretion. (*In re Marriage of de Guigne, supra*, 97 Cal.App.4th 1353, 1366.) The appellate court reviews the record to determine if the court's factual determinations are supported by substantial evidence: "Our review is limited to determining whether the court's factual determinations are supported by substantial evidence and whether the court acted reasonably in exercising its discretion. [Citation.] We do not substitute our judgment for that of the trial court, but confine ourselves to determining whether any judge could have reasonably made the challenged order." (*Id.* at p. 1360.)

B. Standards for Setting Child Support Obligations

The trial court must exercise "an informed and considered discretion" with respect to child support obligations, and must not "ignore or contravene the purposes of the law regarding . . . child support. [Citations.]" (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 282-283; *County of Stanislaus v. Gibbs* (1997) 59 Cal.App.4th 1417, 1425; § 4053 [each parent should support child to extent of ability].)

"The guideline amount of child support, calculated by applying a mathematical formula to the relative incomes of the parents, is presumptively correct. (See §§ 4055, 4057, subd. (a).) That presumption 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' (§ 4057, subd. (b).)" (*In re Marriage of de Guigne, supra*, 97 Cal.App.4th 1353, 1359.)

On appeal of a child support award, the family court's interpretation of statutory definitions of income will be reviewed de novo. (*In re Marriage of Pearlstein* (2006) 137 Cal.App.4th 1361, 1371-1372.) Section 4058, subdivision (a) outlines the components of a parent's "annual gross income" for support purposes, as meaning "income from whatever source derived," except as otherwise specified in the section. (See *In re Marriage of Rocha* (1998) 68 Cal.App.4th 514, 516-517.)

"Where a factual basis exists for imputing income based on earning capacity . . . there is legal authority to do so. By express statutory provision, trial courts have discretion to impute income to a parent based on earning capacity. (§4058, subd. (b).) Case law also recognizes that discretion." (*In re Marriage of Cheriton, supra*, 92

Cal.App.4th 269, 301.) Such attribution of income is allowed where necessary to protect the child's best interests. (§4058, subd. (b); *In re Marriage of de Guigne, supra*, 97 Cal.App.4th 1353, 1363.)

" 'For purposes of determining support, "earning capacity" represents the income the spouse is reasonably capable of earning based upon the spouse's age, health, education, marketable skills, employment history, and the availability of employment opportunities.' [Citation.]" (*In re Marriage of Cheriton, supra*, 92 Cal.App.4th 269, 301.) Moreover, "section 4058 expressly authorizes the court to attribute income even if there is no evidence that a supporting parent has taken steps to reduce his or her income." (*In re Marriage of de Guigne, supra*, 97 Cal.App.4th 1353, 1363.) No particular form of findings for such attribution of income is required by sections 4056 or 4058. (*In re Marriage of Schlafly* (2007) 149 Cal.App.4th 747, 756-757.)

III

ANALYSIS

Father contends the family court abused its discretion in granting the County's motion to modify and increase his support obligation, from \$50 per month to \$396 per month, and in declining to reconsider that order. Although he claims to be attacking an order that unjustifiably exceeded the guidelines amount, his actual contention seems to be that the court used outdated and unsupported information about his earnings potential in making a guidelines calculation, e.g., the \$21 per hour casino job from 2005 that did not last long, and from which he was fired. (§§ 4053, 4058.)

To examine the orders for any record support, we first take note that this finding about his earnings potential was only part of the overall guidelines calculation under section 4055. It was not disputed that Father has a bachelor's degree and has held a number of jobs at various times, and has attended different types of schools as an adult, although none of them for long. He contends that he sufficiently rebutted the County's motion to modify the support order by showing his 2010 student status and his receipt of student loans (owing \$700-800 per month), and also by demonstrating his ongoing physical limitations on standing and walking on the job. He claimed he was simply not able to earn more than \$10-11 per hour since 2005, even though he never voluntarily quit or reduced his income.

Under section 4057, the court had the discretion to evaluate whether all of the relevant circumstances justified keeping only a minimal level of support in place for Father. (See *In re Marriage of de Guigne, supra*, 97 Cal.App.4th 1353, 1361.) The court had to adhere to the principles set forth in section 4053 that each parent should support the child according to his or her ability, and imputation of income is permitted where necessary to promote the child's best interests. (§4058, subd. (b); *In re Marriage of de Guigne, supra*, at pp. 1359, 1363.) We next examine the evidence in support of the family court's factual determinations about earning capacity.

Father can make no adequate showing that the family court erroneously treated his student loan monthly proceeds as income, nor that it somehow utilized his student status incorrectly. Case law supports Father's contention that student loan proceeds that must be repaid should not be treated as income. (*In re Marriage of Rocha, supra*, 68

Cal.App.4th 514, 516-517 [student loans, which are later subject to repayment, do not fall within the meaning of "income" for purposes of determining support, pursuant to section 4058, subd. (a)].) However, there were several alternative factors supporting the \$21 per hour determination.

The County and Mother brought forward evidence about Father's earning capacity, in terms of his " 'age, health, education, marketable skills, employment history, and the availability of employment opportunities.' " (*In re Marriage of Cheriton, supra*, 92 Cal.App.4th 269, 301.) Father attempted to rebut this showing by arguing he was unduly hampered by physical work restrictions, the state of the economy, and his school schedule. Father has lodged with this record certain exhibits that were before the family court, mainly medical reports about treatment of his ankle injury and records about Mother's work schedule. At the December 31, 2009 hearing, in light of Father's arguments, the court continued to require him to make job contacts, since he had not shown any total disability.

We cannot say the family court abused its discretion in evaluating Father's earning capacity to be an hourly amount greater than his current earnings level. The court did not disregard Father's arguments about his various difficulties, but took them and all the other relevant factors into consideration in making the underlying findings about income levels, in support of this guideline calculation. (See *In re Marriage of de Guigne, supra*, 97 Cal.App.4th 1353, 1362-1364; § 4057, subd. (b).) The court was well aware that Father was in nursing school, part time, and that Father was optimistic he would eventually be

able to obtain a desk job as a nurse, and the court did not preclude Father from pursuing this plan.

To the extent that Father was relying on his claimed disability, the court could reasonably have discounted his explanations and excuses that he was not able to earn more than he had recently. Father did not document how or why the earning capacity assigned to him was unreasonable, in light of his demonstrated level of work restriction due to the ankle injury and treatment. Nor did he show why Mother's contribution should be found to be relatively inadequate.

We do not retry this case. On appeal, Father has failed to support his claims that the court abused its discretion or misapplied the statutory scheme through the manner in which it evaluated his earning capacity with regard to providing child support, even in light of Father's evidence about his level of disability and his salary history. (*Maria P. v. Riles, supra*, 43 Cal.3d 1281, 1295-1296.) The family court had a sufficient factual basis in the evidence about Father's relative youth, partial level of work disability, fairly high level of education and work experience to make the earning potential determination that it did. (§4058, subd. (b); *In re Marriage of Cheriton, supra*, 92 Cal.App.4th 269, 301.) There was no abuse of discretion in the application of the policies relating to child support obligations. (§§ 4053, 4058, subd. (b).)

DISPOSITION

The orders are affirmed. Each party to bear its own costs.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

HALLER, J.