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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of VERONICA C. and
JIM E. RODRIGUEZ.

VERONICA C. RODRIGUEZ,

Respondent,

v.

JIM E. RODRIGUEZ,

Appellant.

D060846

(Super. Ct. No. DS31313)

APPEAL from an order of the Superior Court of San Diego County, Kelly C. Doblado, Judge. Affirmed.

Jim E. Rodriguez (Husband) appeals an order denying his order to show cause (OSC) that requested modification or termination of his obligation to pay spousal support to Veronica Rodriguez, his former wife (Wife). On appeal, he appears to argue the trial court erred by: (1) enforcing the parties' previous stipulation, incorporated in the

judgment of dissolution, that spousal support is nonmodifiable (except for either party's death or Wife's remarriage); and (2) not issuing a statement of decision.

FACTUAL AND PROCEDURAL BACKGROUND

In 1992, Husband and Wife married. In February 2006, they separated. At that time, they had two minor children.

On December 27, 2006, the trial court entered a judgment of dissolution of their marriage (Judgment) that incorporated the parties' written stipulation for judgment. Their stipulation provided that:

"[Husband] agrees to pay [Wife] spousal support in the amount of \$1,194.00 per month payable in advance, one half on or before the first day of each month and one half on or before the 15th day of each month, commencing November 1, 2006, and continuing until either party's death or [Wife's] remarriage. *This spousal support provision is nonmodifiable without exception ([i.e.,] [t]his spousal support may not be modified under any circumstances as to either amount or duration.)*" (Italics added.)

On May 23, 2011, Husband filed an OSC requesting his obligation to pay spousal support pursuant to the Judgment be modified or terminated based on changed circumstances (i.e., Husband's job change and decreased income and Wife's cohabitation). Wife opposed the OSC, arguing the Judgment incorporated the parties' stipulation, which provided spousal support was nonmodifiable under any circumstances.

On September 2, 2011, the trial court issued an order denying Husband's OSC based on the provision that spousal support was nonmodifiable. Husband timely filed a notice of appeal.

DISCUSSION

I

Presumption of Correctness and Appellant's Burden on Appeal

A trial court's judgment or order is presumed to be correct. In *Denham v. Superior Court* (1970) 2 Cal.3d 557, the court stated:

"[I]t is settled that: 'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown [by the appellant]. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' " (*Id.* at p. 564.)

"The burden of affirmatively demonstrating error is on the appellant." (*Fundamental Investment etc. Realty Fund v. Gradow* (1994) 28 Cal.App.4th 966, 971.) "An appellant must provide an argument and legal authority to support his contentions. This burden requires more than a mere assertion that the judgment is wrong. 'Issues do not have a life of their own: If they are not raised or supported by argument or citation to authority, [they are] . . . waived.' [Citation.] It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

"Where a point is merely asserted by [appellant] without any [substantive] argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion." (*People v. Ham* (1970) 7 Cal.App.3d 768, 783, disapproved on

another ground in *People v. Compton* (1971) 6 Cal.3d 55, 60, fn. 3.) "Issues do not have a life of their own: if they are not raised or supported by [substantive] argument or citation to authority, we consider the issues waived." (*Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99; see also *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700 ["[w]hen an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary"]; *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3 [contention was deemed waived because "[a]ppellant did not formulate a coherent legal argument nor did she cite any supporting authority"]; *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1301, fn. 2 ["[t]he dearth of true legal analysis in her appellate briefs amounts to a waiver of the [contention] and we treat it as such"]; *Bayside Auto & Truck Sales, Inc. v. Department of Transportation* (1993) 21 Cal.App.4th 561, 571.) Appellants acting in propria persona are held to the same standards as those represented by counsel. (See, e.g., *City of Los Angeles v. Glair* (2007) 153 Cal.App.4th 813, 819.)

II

Waiver of Appellate Contentions

Based on our review of Husband's brief, we conclude he has waived his appellate contentions by not presenting any coherent or comprehensible, substantive legal arguments supported by citations to the record and legal authorities. He has not presented any coherent, substantive arguments or analyses showing the trial court erred by denying his OSC requesting modification or termination of his spousal support

obligation or by not issuing a statement of decision. To the extent Husband makes other contentions on appeal, his briefing is so incoherent and incomprehensible that we cannot discern their substance. We need not discuss the merits of each contention and conclude Husband has waived his appellate contentions. (*Benach v. County of Los Angeles*, *supra*, 149 Cal.App.4th at p. 852; *People v. Ham*, *supra*, 7 Cal.App.3d at p. 783; *Jones v. Superior Court*, *supra*, 26 Cal.App.4th at p. 99; *Landry v. Berryessa Union School Dist.*, *supra*, 39 Cal.App.4th at pp. 699-700; *Ochoa v. Pacific Gas & Electric Co.*, *supra*, 61 Cal.App.4th at p. 1488, fn. 3; *Colores v. Board of Trustees*, *supra*, 105 Cal.App.4th at p. 1301, fn. 2; *Bayside Auto & Truck Sales, Inc. v. Department of Transportation*, *supra*, 21 Cal.App.4th at p. 571; *Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1119-1120; cf. *In re Marriage of Green* (1989) 213 Cal.App.3d 14, 29 ["[f]rom the point of view of grammar and syntax as well as logic, [appellant's] briefs are almost impenetrable".])

In any event, assuming arguendo Husband has not waived his appellate contentions, we conclude his appellate arguments are incoherent, incomprehensible, vague and/or conclusory and therefore he has *not* carried his burden on appeal to present persuasive substantive argument and analysis showing the trial court prejudicially erred.¹

¹ We further note Husband's opening brief contains a two-page statement of facts supported by only one citation to the record on appeal, violating California Rules of Court, rule 8.204(a)(2)(C). (All rule references are to the Cal. Rules of Court.) Statements of fact not part of, or supported by citations to, the record on appeal are improper and cannot be considered on appeal. (Rule 8.204(a)(2)(C); *Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632; *Kendall v. Barker* (1988) 197 Cal.App.3d 619, 625.) We disregard any statements of fact set forth in Husband's brief that are outside of the record on appeal. (*Pulver*, at p. 632; *Kendall*, at p. 625; *Gotschall v. Daley* (2002) 96 Cal.App.4th 479, 481, fn. 1.) Furthermore, to the extent his assertions

(*Denham v. Superior Court, supra*, 2 Cal.3d at p. 564; *Fundamental Investment etc. Realty Fund v. Gradow, supra*, 28 Cal.App.4th at p. 971; *Paterno v. State of California* (1999) 74 Cal App.4th 68, 105 [conclusory claims did not persuade appellate court]; *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368 ["[o]ne cannot simply say the court erred, and leave it up to the appellate court to figure out why".])

III

In Any Event, No Error Is Shown

Assuming arguendo that Husband has not waived his appellate contentions, we nevertheless would conclude he has not shown the trial court erred, as he contends.

of fact and procedure ostensibly refer to matters within the record on appeal, his brief does *not* contain adequate citations to the appellate record in violation of rule 8.204(a)(1)(C). Like in *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, at page 1246, Husband's brief is, in large part, "devoid of citations to the [record on appeal] and [is] thus in dramatic noncompliance with appellate procedures." "It is the duty of a party to support the arguments in its briefs by appropriate reference to the record, which includes providing exact page citations." (*Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205.) "If a party fails to support an argument with the necessary citations to the record, that portion of the brief may be stricken and the argument deemed to have been waived." (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856; see also *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.) To the extent Husband's contentions do not contain adequate supporting citations to the record on appeal, we consider those contentions to have been waived. (*Nwosu*, at p. 1247; *City of Lincoln*, at p. 1239; *Duarte*, at p. 856; *Guthrey*, at p. 1115.) Finally, we again note the fact Husband filed this appeal in propria persona does not exempt him from compliance with established appellate rules. (*Nwosu*, at pp. 1246-1247 [in propria persona litigants must follow the same procedural rules as attorneys]; *City of Los Angeles v. Glair, supra*, 153 Cal.App.4th at p. 819 [same].)

A

Contrary to Husband's assertion, the trial court did not err in abiding by the parties' written stipulation, as incorporated in the Judgment, that spousal support was not modifiable. As quoted above, that stipulation provided Husband was to pay \$1,194 per month in spousal support and further provided: "*This spousal support provision is nonmodifiable without exception ([i.e.,] [t]his spousal support may not be modified under any circumstances as to either amount or duration.)*" (Italics added.) Family Code section 3591² provides:

"(a) Except as provided in subdivisions (b) and (c), the provisions of an agreement for the support of either party are subject to subsequent modification or termination by court order. [¶] . . . [¶]

"(c) *An agreement for spousal support may not be modified or revoked to the extent that a written agreement, or, if there is no written agreement, an oral agreement entered into in open court between the parties, specifically provides that the spousal support is not subject to modification or termination.*" (Italics added.)

If spouses agree on the amount and duration of spousal support to be paid by one spouse to the other and further agree the spousal support shall not be modified or terminated except on one spouse's death or the supported spouse's remarriage, then that spousal support order is not subject to subsequent modification or termination by the court. (§ 3591, subd. (c); cf. *In re Marriage of Bennett* (1983) 144 Cal.App.3d 1022, 1024-1026 ["obligation of the Husband to pay the sum of \$500 per month, as alimony, . . . shall be non-modifiable"].) Furthermore, a supported spouse's cohabitation with

² All statutory references are to the Family Code unless otherwise specified.

another person does not constitute remarriage or otherwise provide grounds for modifying or terminating spousal support in contravention of an express agreement that spousal support is not modifiable. (See, e.g., *In re Marriage of Harris* (1976) 65 Cal.App.3d 143, 146-147, 150-152.) Husband does not cite, and we are unaware of, any case or other authority concluding an agreement providing that spousal support shall not be modified is, in effect, unenforceable and spousal support may nevertheless be modified or terminated if there is a subsequent change in circumstances (e.g., the supporting spouse suffers a decrease in income or the supported spouse cohabitates with another person). In this case, Husband and Wife expressly agreed the amount and duration of Husband's spousal support obligation were *not* modifiable "under any circumstances" (other than either party's death or Wife's remarriage). We conclude the trial court correctly denied Husband's OSC requesting that his spousal support obligation be modified or terminated. (§ 3591, subd. (c); *Bennett*, at pp. 1025-1026.)

B

Husband also does not show the trial court erred by not issuing a statement of decision at or after the hearing on his OSC. Section 3654 provides: "At the request of either party, an order modifying, terminating, or setting aside a support order shall include a statement of decision." Assuming *arguendo* section 3654 applies to orders *denying* a request to modify or terminate spousal support, Husband does not show he made an adequate request for a statement of decision. Because Husband did not include a reporter's transcript of the September 2, 2011, hearing in the record on appeal, there is nothing in the record showing he requested, either orally or in writing, a statement of

decision at that hearing. Likewise, there is nothing in the record showing the trial court did not issue a statement of decision orally on the record in the presence of the parties. (Cf. Code Civ. Proc., § 632 ["When the trial is concluded within one calendar day . . . , the statement of decision may be made orally on the record in the presence of the parties"].)

Furthermore, Husband's OSC, filed on May 23, 2011, did not sufficiently request a statement of decision. His eight-page attachment of facts in support of his OSC included the statement, "For the record I am asking for a Statement of Decision for any hearing provided regarding this decision." Husband does not cite any case or rule showing that statement constituted a sufficient request for a statement of decision under section 3654. (Cf. Code Civ. Proc., § 632.) In any event, assuming arguendo it was a sufficient request and the trial court did not make the statement of decision orally on the record (*ibid.*), Husband could not sit idly by at the hearing three months later when the trial court heard his OSC and rendered its ruling, without renewing his request for a statement of decision or pointing out the court's error in not issuing one. (Cf. *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1138.) It is unfair for a party to lull the trial court and opposing party into believing no statement of decision had been requested and "thereafter to take advantage of an error on appeal although it could have been corrected at trial." (*Ibid.*) "It is clearly unproductive to deprive a trial court of the opportunity to correct such a purported defect by allowing a litigant to raise the claimed error for the first time on appeal." (*Ibid.*) In the circumstances of this case, because Husband apparently remained silent when the trial court failed to issue a statement of decision and now challenges that

omission on appeal, we conclude he has waived on appeal the issue of his section 3654 right to a statement of decision. (*In re Marriage of Cauley* (2006) 138 Cal.App.4th 1100, 1109; *In re Marriage of Sellers* (2003) 110 Cal.App.4th 1007, 1011, citing *In re Marriage of Arceneaux*, at p. 1138.)

DISPOSITION

The order is affirmed.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.