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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

RANDALL JUSTIN MARTIN,

Appellant,

v.

LISABETH RAE MASSEY,

Respondent.

STANISLAUS COUNTY DEPARTMENT  
OF CHILD SUPPORT SERVICES,

Intervener and Respondent.

F061699

(Super. Ct. No. 434675)

**OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Richard Allen, Commissioner.

Nancy J. Shailor for Appellant.

No appearance for Respondent Lisabeth Rae Massey.

Kamala D. Harris, Attorney General, Julie Weng-Gutierrez, Assistant Attorney General, Ismael A. Castro and Marina L. Soto, Deputy Attorneys General, for Intervener and Respondent Stanislaus County Department of Child Support Services.

The superior court ordered appellant Randall Justin Martin (Martin) to pay \$251 per month in child support. Martin has appealed from that order. He contends that the court erred in failing to make various findings required when a court orders child support in an amount which differs from the presumptively correct, so-called “guideline” amount described in Family Code section 4055.<sup>1</sup> He also contends that the court erred in “imputing” an income of \$1,387 per month to him, i.e. in determining that he could earn that much, even if he in fact earned nothing. As we shall explain, we find Martin’s contentions without merit because nothing in the record on appeal indicates that the court deviated from the “guideline” amount or that the \$1,387 income amount used in the calculation of Martin’s child support obligation was anything other than his actual monthly taxable gross income. We affirm the order.

### **FACTUAL AND PROCEDURAL BACKGROUND**

The parties entered into an uncontested judgment filed on February 1, 2010, establishing Martin as the biological father and respondent, Lisabeth Rae Massey (Massey), as the biological mother of the minor child, Arion Nichelle Martin, born July 15, 2006. Through court mediation, several orders were made regarding custody and visitation of the child. Summarily, from August 19, 2009, to July 22, 2010, the parents shared the child every seven days with alternating holiday time and seven days of uninterrupted time each. On July 22, 2010, Martin got alternate weekends from Friday at 5:00 p.m. to Sunday at 7:00 p.m. and every Wednesday from noon to 7:00 p.m. and alternating holiday time. On August 3, 2010, in its findings and order after hearing, after a long cause hearing, the court kept the July 22, 2010, order in place, but designated Massey as primary caretaker, added two seven-day periods of uninterrupted time for each parent and included October 31 into the alternating holiday time.

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<sup>1</sup> All further statutory references are to the Family Code unless specified otherwise.

In the judgment entered on February 1, 2010, child support was ordered reserved by stipulation. There was no previous order for child support payable by either party.

Stanislaus County Department of Child Support Services brought a motion to modify child support, heard on November 30, 2010. Martin and Massey each filed income and expense declarations prior to the hearing. Martin's income and expense declaration stated he received no income, while Massey's stated she received \$1,248 in monthly unemployment compensation. Both parties appeared at the hearing, but were not represented by counsel. There is no reporter's transcript or official electronic recording of the hearing. On November 30, 2010, the court issued its findings and order after hearing for child support.

### **DISCUSSION**

“Statutory guidelines regulate the determination of child support in California. (See Fam. Code, §§ 4050-4203.) The guidelines set forth several important principles relating to child support determinations, including that (1) the interests of the child are the state's top priority, (2) a parent's principal obligation is to support his or her children ‘according to the parent's circumstances and station in life,’ (3) ‘[b]oth parents are mutually responsible for the support of their children,’ (4) ‘each parent should pay for the support of the children according to his or her ability,’ (5) children should share in both parents' standard of living, and (6) in cases ‘in which both parents have high levels of responsibility for the children,’ child support orders ‘should reflect the increased costs of raising the children in two homes and should minimize significant disparities in the children's living standards in the two homes.’ (§ 4053, subs. (a), (b), (d)-(g).) The guideline amount of child support, which is calculated by applying a mathematical formula to the relative incomes of the parents, is presumptively correct. (See §§ 4055, 4057, subd. (a); *In re Marriage of de Guigne* (2002) 97 Cal.App.4th 1353, 1359 (*de Guigne*).)” (*In re Marriage of Schlafly* (2007) 149 Cal.App.4th 747, 753, fn. omitted (*Schlafly*).)

Subdivision (a) of section 4055 describes the mathematical formula utilized to calculate the “guideline” child support amount. “The amount of child support established by the formula provided in subdivision (a) of Section 4055 is presumed to be the correct amount of child support to be ordered.” (§ 4057, subd. (a).) “The presumption of

subdivision (a) is a rebuttable presumption affecting the burden of proof and 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).) Subdivision (a) of section 4056 states:

“To comply with federal law, the court shall state, in writing or on the record, the following information whenever the court is ordering an amount for support that differs from the statewide uniform guideline formula amount under this article:

“(1) The amount of support that would have been ordered under the guideline formula.

“(2) The reasons the amount of support ordered differs from the guideline formula amount.

“(3) The reasons the amount of support ordered is consistent with the best interests of the children.”

As subdivision (a)(2) of section 4056 expressly requires, a trial court has a “sua sponte obligation ... to state on the record reasons whenever the actual support order differs from the guideline amount.” (*In re Marriage of Hall* (2000) 81 Cal.App.4th 313, 316.) “The information required by section 4056, subdivision (a) must be supplied sua sponte as part of the order or judgment.” (*Ibid.*; *Rojas v. Mitchell* (1996) 50 Cal.App.4th 1445, 1452.) When a trial court fails to give reasons for issuing a child support order which differs from the guideline amount, the court errs, and “the error cannot be considered harmless since the missing reasons cannot be implied in the court’s express findings and we cannot conclude that the missing information would necessarily have been adverse to appellant.” (*Rojas v. Mitchell, supra*, at p. 1451.) When the trial court complies with section 4056, subdivision (a) and states its reasons for issuing a support order in an amount which deviates from the guideline amount, the court’s decision is reviewed for abuse of discretion. (*In re Marriage of Katzberg* (2001) 88 Cal.App.4th 974, 980; *County of Stanislaus v. Gibbs* (1997) 59 Cal.App.4th 1417, 1419-1420.)

The calculation of a section 4055 “guideline” child support amount requires a determination of the “total net monthly disposable income of both parties.” (§ 4055, subd. (b)(1)(E).) A determination of the “total net monthly disposable income of both parties” (*ibid.*) of course requires a determination of the “net disposable income of each parent.” (§ 4059; see also § 4055, subd. (b)(2).) The calculation of the “net disposable income of each parent” (§ 4059) of course begins with that parent’s “gross income,” from which is subtracted various expenses, and sometimes also a “deduction for hardship, as defined by sections 4070 to 4073, inclusive, and applicable published appellate court decisions.” (§ 4059, subd. (g).) Under section 4058, subdivision (b), however, “[t]he 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.” (§ 4058, subd. (b).) “A trial court’s decision to impute income to a parent for child support purposes based upon the parent’s earning capacity is reviewed under the abuse of discretion standard.” (*In re Marriage of Destein* (2001) 91 Cal.App.4th 1385, 1393.) “We determine ‘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 own judgment for that of the trial court, but determine only if any judge reasonably could have made such an order.” (*Schlaflly, supra*, 149 Cal.App.4th at p. 753.)

Martin’s contention that the trial court erred in issuing a support order that differs from the guideline amount without providing the “information” required by section 4056, subdivision (a), including the “reasons the amount of support ordered differs from the guideline formula amount,” fails because Martin makes no showing that the \$251 per month support order differs from the guideline amount. Attached to the court’s order is the Dissomaster printout used by the court in making the calculation. Nothing in it reflects any deviation from the section 4055 guideline formula.

Appellant’s contention that the court did deviate from the guideline amount appears to be based upon his assumption that the court “imputed” to him an income of

\$1,387 per month when in fact, according to appellant, he had no income. This argument fails for two reasons. First, “[t]he court’s decision to substitute earning capacity for actual income is not ... a deviation that requires compliance with section 4056.” (*Schlafly, supra*, 149 Cal.App.4th at p. 756.) This is because “[t]he imputation of income relates to an input in the guideline calculation, and is not a deviation from the final guideline amount.” (*Id.* at p. 757.) Second, the record on appeal shows that the court did not impute any income to Martin. The court’s Dissomaster printout expressly states that the \$1,387 income figure is “Based on earned income: \$1387.00 MONTHLY.” The printout also expressly states that appellant’s “Imputed Income” was “NONE.”

Perhaps Martin assumes that because he submitted an income and expense declaration stating that his income was zero, and there is no reporter’s transcript revealing what evidence was presented at the trial of the issue, we must rely on the evidence we have and conclude that his income was zero. If so, appellant is mistaken. “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. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, original italics; in accord, see also *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140.) Martin’s income and expense declaration was dated September 7, 2010. The contested hearing was held on November 30, 2010. We must assume that either appellant became gainfully employed after September 7, or that the court heard evidence contradicting Martin’s declaration and credited that other evidence.<sup>2</sup>

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<sup>2</sup> At oral argument, Martin’s counsel asked this court to take judicial notice of Martin’s application to this court for a waiver of this court’s fees and costs. In his application, which this court granted, Martin asserted that he receives food stamps. The application was dated January 20, 2011, and was filed in this court on January 26, 2011. Martin’s counsel argued that Martin could not receive food stamps if he had a [fn. cont.]

**DISPOSITION**

The family court's child support order is affirmed.

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Franson, J.

WE CONCUR:

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Wiseman, Acting P.J.

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Cornell, J.

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job, and asked us to view this application as evidence that Martin did not have any income at the time of the superior court's November 30, 2010, hearing. This argument misperceives the function of an appellate court. An appeal is not a new trial at which a litigant may present new evidence (or judicially noticed facts) not presented to or judicially noticed by the trial court which made the decision.

“Reviewing courts generally do not take judicial notice of evidence not presented to the trial court’ absent exceptional circumstances. [Citation.] ‘It is an elementary rule of appellate procedure that, when reviewing the correctness of a trial court’s judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered. [Citation.] This rule preserves an orderly system of [litigation] by preventing litigants from circumventing the normal sequence of litigation.’ [Citation.] No exceptional circumstances appear that would justify deviating from this general rule in the present case ....” (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 379, fn. 2; see also *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3; and *People v. Preslie* (1977) 70 Cal.App.3d 486, 493.)

Appellant’s request that we take judicial notice of his application to this court for a waiver of court fees and costs is denied.