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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ANTONIO MEDINA-PUERTA,

Plaintiff and Appellant,

v.

MARY T. GOON,

Defendant and Respondent.

G045387

(Super. Ct. No. 02P000616)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Paula J. Coleman, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Antonio Medina-Puerta, in pro. per., for Appellant.

Parsons & Pietro and Shannon M. Pietro for Respondent.

Six years after the trial court established Antonio Medina-Puerta's (Antonio) paternity and ordered Mary T. Goon. (Mary)¹ to pay him \$23 per month in child support, he sought an upward modification of the support order, claiming the expiration of his unemployment benefits as changed circumstances. Instead, he obtained an order that required him to pay monthly child support to Mary.

The civil discovery process and a court hearing revealed the following pertinent facts about Antonio's financial status: In the previous four years, Antonio (1) received over \$700,000, tax free, as the result of a consent decree in a civil forfeiture action against the United States; (2) turned down a \$95,000 a year engineering position because it conflicted with his current visitation schedule; and, (3) routinely hid money and paid normal living expenses by manipulating his children's trust accounts and opening bank accounts under various aliases. Following a modification hearing, the trial court imputed income of \$95,000 per year to Antonio and order him to pay Mary \$706 per month in child support.² He appeals from this order on a number of marginally frivolous grounds. Consequently, we affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Antonio's opening brief is replete with facts unsupported by record references or admissible evidence. The appellate record discloses he and Mary were married and divorced before the birth of their twin boys in November 2000. Antonio filed a paternity action in 2002. He was awarded joint legal and physical custody of the twins. In 2004, Mary was ordered to pay \$23 per month child support to Antonio because she was employed and Antonio was not.

¹ We refer to the parties by their first names for clarity, not out of any disrespect.

² At oral argument, Antonio claimed the trial court ordered Mary to pay him \$706 per month following the January 19, 2011 modification hearing. Although there was a clerical error made in the court's minute order from that date, this error was corrected on June 15. Furthermore, the error related to the court's calculation of support under the uniform guideline, not the ultimate amount ordered, an amount *below* what the uniform guideline called for.

Mary has worked as a technical writer for Cisco Systems since August 2000. After the initial support order, Antonio underwent a vocational assessment to determine his earning capacity. As a college graduate with both undergraduate and advanced degrees in engineering from the Massachusetts Institute of Technology (MIT), the assessment appraised Antonio's earning ability at approximately \$80,000 per year.

In 2008, Mary obtained court permission to relocate from Orange County to Milpitas, California. Antonio continued to reside in the family home in Fountain Valley, the ownership of which was in dispute at the time of the court's hearing. Mary and Antonio continued to share joint legal custody of their children, but Mary became the primary custodial parent.

In March 2010, the Orange County Department of Child Support Services filed a request for modification of the child support order at Antonio's behest. He alleged changed circumstances after exhausting his unemployment benefits. The county's attorney filed and served a notice to appear and produce financial documents on both parties.

On June 21, Antonio filed an income and expense declaration. He listed his last period of employment as September 1 through October 31, 2007 and his last employer as the University of Madrid in Spain. During this employment, he claimed to have worked 40 hours per week and earned \$1,640 per month. In 2010, Antonio claimed receipt of \$1,266 per month income from unemployment benefits, \$95 in total assets, \$2,480 per month in expenses, and \$5,770 in credit card debt. He also claimed to spend a monthly total of \$965 in travel expenses to visit the children and to provide for "other needs."

On June 24, the court ordered both parties to produce copies of their tax returns for the previous three years, copies of all bank statements, the names of all banks where deposits are made, a list of past employers, and copies of unemployment benefit statements. In July, Mary issued deposition subpoenas to obtain bank records from

Pacific Premier Bank for accounts in Antonio's name and other names he had used in the past. She claimed Antonio was not complying with the court's discovery order.

In August, Antonio filed a notice of motion and motion to "quash deposition subpoena for production of business documents" and for sanctions. He claimed Mary's subpoenas violated his right to privacy and were "vague, ambiguous, oppressive, burdensome, overly broad, and not calculated to lead to the discovery of admissible evidence" Mary opposed the motion, arguing Antonio refused to comply with the court's discovery order, claiming he "chooses not to work based upon substantial sums held by him on account" in the banks served with the subpoenas.

In October, Mary submitted a 2010 income and expense declaration showing an average gross monthly income of \$8,284, plus \$1,386 per month from a one-time bonus. She submitted paystubs from August, September and October of 2010 as supporting documentation and claimed \$7,842 in monthly expenses, which included a mortgage payment, healthcare premiums, and child care costs. She challenged Antonio's modification request on the grounds he "is a highly educated engineer" who turned down a 2009 employment opportunity that would have resulted in \$95,000 in gross income per year. She also provided documentation establishing his 2006 receipt of over \$700,000 from a consent decree in a civil forfeiture action against the United States and alleged that while he refused to work in the United States, he had maintained a long-standing employment relationship with the University of Madrid that was facilitated by his frequent lengthy trips to Spain. She claimed he used as many as five aliases and the children's trust accounts to hide income and property.

On October 12, Antonio filed an income and expense declaration listing income of \$554 per month from unemployment compensation and assets of \$35 in cash or bank accounts. He claimed expenses of \$2,430 per month, plus \$9,801 in credit card debt and \$11,920 in past due rent payable to Mary for a total of \$21,721 in other

expenses. On the same day, Antonio filed another motion to quash Mary's subpoenas and for sanctions.

On October 28, the parties appeared before Commissioner Richard G. Vogl. According to the court's minute orders, Antonio "orally objected" to Commissioner Vogl hearing his motion to quash, although we cannot determine from the record whether this oral motion came before or after the court issued a tentative order denying his motion. The court trailed the case from the morning calendar to the afternoon of the same day. However, sometime before 1:30 p.m., the court clerk received a telephone call from Antonio "stating he is in the hospital and cannot return to Court at 1:30 p.m." The court filed a written order denying Antonio's motion to quash that day, but also trailed the case to November 1 with an order for Antonio to present a doctor's note to prove his hospitalization.

On November 1, Commissioner Paula Coleman presided over the case. Antonio submitted a doctor's note as ordered. The court heard argument on Antonio's motion to quash and denied it. Commissioner Coleman explicitly stated, "petitioner's Motion to Quash was denied "pursuant to Commissioner Vogl's order," and "the only matter now pending is the Motion Re Modification." She scheduled the modification hearing for January 19, 2011.

Antonio filed something he called a motion to "SET ASIDE VOID ORDERS" three days later. However, this motion was taken off calendar after James L. Waltz later affirmed the denial of Antonio's motion to quash the subpoena. On January 14, 2011, Antonio filed a second income and expense declaration. Now he claimed income of only \$150 per month in unemployment compensation and \$27 in assets.

Antonio raised no objection to Commissioner Coleman presiding over the January 19, 2011 modification hearing. Mary testified in harmony with her income and expense declaration and the documents she filed in support of her declaration. Referring to her pay stubs, she established a total of \$91,310 in earned wages for the year 2010.

She has a mortgage and pays taxes associated with her Milpitas home, health care to cover herself and the children, and their day care expenses. She also claimed additional child care costs related to the twins' respective learning disabilities and the payment of all other routine living expenses. She denied having ever received money from Antonio to offset these costs.

During Antonio's testimony, he acknowledged earning a bachelor's, master's and doctorate in "engineering mostly," but claimed he had not been able to find gainful employment since 2007. He denied any physical disability and claimed to look for a job every day using several online search engines and by responding to advertisements and contacting headhunters. Although he limited his initial job search to his chosen field, he claimed that more recently he had been "looking for anything that could pay anything." At the same time, he acknowledged making no effort to remain current in his field and taking month-long visits with his children to Spain at his family's expense. He also admitted to using several names, including one for his passport and at least two others on various bank accounts. Although Antonio listed the University of Madrid as his last employer, he testified the source of his unemployment benefits was a brief stint with a company called Cole Instruments.

During a pointed cross-examination by Mary's attorney, Antonio conceded he had recently interviewed for a full-time position that would have paid over \$95,000 a year in wages and benefits. However, he testified the job was unacceptable because "[t]hey would not allow me to travel every other week to San Jose and be absent from work for that length of time." In fact, he admitted making frequent and extended trips to San Jose to visit the children.

Counsel also established Antonio's selective cooperation with the court's discovery order and Mary's subpoenas, and eventually Antonio admitted having previously undisclosed bank accounts. In 2009, one such account had an ending balance of \$41,469, approximately \$39,000 of which was from a legal settlement involving his

former employer, Cole Instruments.³ Counsel produced bank records for the children's trust accounts, which forced Antonio to address some interesting account activity. For instance, he refused to account for a \$25,421.37 deposit in one account, or acknowledge a \$41,400 internet transfer from his personal account. He had no explanation for the transactions even though the only other signatories on the accounts were his then ten year old twins. Nor could he explain a transfer of \$72,000 from one trust account into his personal checking account, an amount which was then deposited into another trust account at a different bank. Although Antonio claimed to have opened all the accounts so his sons would have enough money "to go to college when they grow up," he also said the money did not necessarily come from him and he did not always know the source of these funds. But whether he deposited the money or not, Antonio swore it was for the sole benefit of his children and he was merely the "conduit" for these funds. However, he did confess to using "small amounts" from the children's trust accounts to pay bills and make credit card payments. And, in the end, he begrudgingly confessed to receiving over \$700,000 from a civil forfeiture claim in 2006 and approximately \$300,000 from his family the following year.

After Antonio briefly cross-examined Mary and counsel made their arguments, the court ruled as follows: "Mary's income based upon her year-to-date, as well as the bonus portioned over 12 months, is the attributable income to the Mary. Taking into account her filing status, as well as her expenses regarding mortgage, interest, property taxes, health insurance, the child care expense, as well as the other associated school-related expenses. [¶] As to Antonio, the issue is totally what his income is. The court has huge concerns about his credibility. Perhaps once upon a time in 2004, a prior bench officer found his ability [to earn] was minimal. However, he had

³ The trial exhibits, including the various bank documents referred to during questioning were not transmitted to this court. Antonio objected to the documents at trial on grounds such as hearsay, irrelevant, "illegally obtained," lack foundation, and lack authenticity, none of which objections were meritorious or sustained.

an expert indicate that he would be employable if he did certain things, none of which he appears to have done. [¶] I believe, based on the testimony I heard, as well as taking judicial notice of certain portions of the transcript that has been lodged with the court on July 15, 2009, in front of Judge Monarch, that he has not made any efforts to work because it would interfere with his visitation schedule. [¶] In that hearing, he claimed that he got an oral offer for the company in the area that was going to pay \$95,000 a year, but they want[ed] [him] to be full-time. They would not allow [him] to travel every other week to San Jose and be absent of work for that length of time. I believe that was a huge motivation in not pursuing that job opportunity. [¶] I also find that Antonio holds a bachelor's, a master's, and a Ph.D. in engineering. But what is more troubling to the court is that I believe there has been a huge amount of secreting money, as evidenced by the litigation, over these subpoenas and the efforts by the petitioner to not have those be discovered. There is a huge source of money coming in and out of these banks over the last year or two which is totally unexplained. I think basically there is a shell game going on with money from bank account to bank account. [¶] I find that he is able to work. He testified that he would be willing to work. And I believe that he had at least one opportunity to work, and I don't find any evidence of any testimony that shows me that he is really really trying hard to get a job. [¶] Based upon the education and the prior job opportunity and his testimony as to why that was not an option for him, which the court does not find of substantial justification for not taking that job, the court is going to find he had the ability, the opportunity, and was willing to work, but declined that employment, and impute the income of \$95,000. I feel substantial evidence supports my decision, which is going to result now in the fact that Antonio is going to have to pay child support, a basic child support amount of \$197 per month, with child support add on's of 509. I did that after support, relative to the incomes, so he is not actually paying one-half of all the child care. I apportioned more to mom because of her higher earning ability. The total child support amount is going to be \$706 per month. [¶] Sir, I believe

that you have money available to you by evidence of these bank accounts, whether coming from the family. It appears as though a lot of giving is going on. There is no evidence that you have any loans that are going to be required to be repaid. [¶] And therefore that is going to be the order of the court. There is a question as to when to make this effective. Technically, the court has jurisdiction back to April 1st, as Antonio filed this motion in March of 2010, however, I have discretion when to make that order effective. [¶] So I'm going to make that order effective, basically as there has been a huge change in circumstances, as of February 1st, 2011. That is going to be the order of the court."

DISCUSSION

Trial Court's Jurisdiction

As noted Antonio "orally objected" to Commissioner Richard G. Vogl proceeding on October 28, 2010, but he failed to appear in court for the afternoon calendar. On November 1, Commissioner Paula Coleman "submitted and filed" and denied Antonio's objection to Commissioner Vogl, also clarifying "that Antonio's Motion to Quash was denied" The denial of his motion to quash was confirmed by Judge Waltz at the end of November 2010.

Approximately one month after the January 19, 2011 modification hearing and several months after Commissioner Vogl's order, Commissioner Coleman's order and the order of Judge Waltz, Antonio filed a motion entitled "MOTION TO SET ASIDE VOID ORDER OF JANUARY 19, 2011." According to the attached memorandum of points and authorities and declaration, Antonio was now objecting to the proceedings before Commissioner Vogel due to "an appearance of prejudice, bias and impartiality." He did not offer any facts in support of this assertion, but he did cite Code

of Civil Procedure sections 170.1, subdivision (a)(6)(A)(iii), 641, subdivisions (f) and (g), and 642 as authority for his motion.⁴

In a June 15 minute order, Commissioner Coleman denied his set aside motion. According to the minute order, “[Antonio] objected to Commissioner Coleman hearing the matter due to lack of jurisdiction stating a CCP [section] 170.1 challenge had been made. The court overruled the objection restating that the challenge previously made was untimely. [¶] The petitioner then objected, generally, to having the matter heard by a Commissioner. The court advised that the objection was untimely citing *County of Orange v. Smith* (2002) 96 Cal.App.4th 955 as the Court heard the matter on January 19, 2011 and no objection was stated. [¶] The petitioner then advised the court that at 8:55 a.m. he had filed an Appeal and objected to the matter going forward. When the court inquired as to whether the appeal was to the January 19, 2011, Order, requiring the [Antonio] to pay child support, [Antonio] stated it was as to everything being heard by the court including this Motion to Set Aside, which had not been ruled on yet. [¶] . . . [¶] After further hearing, [Antonio’s] Motion to Set Aside Order was denied.”

On appeal, as he did with his earlier motion in the trial court, Antonio does not provide any facts in support of his assertion that Commissioner Vogl’s tentative ruling gave “an appearance of prejudgment, bias and impartiality.” He again relies on sections 170.1, subdivision (a)(6)(A)(iii), 641, subdivisions (f) and (g), and 642, and he

⁴ Code of Civil Procedure section 170.1 provides, in pertinent part, “(a) A judge shall be disqualified if any one or more of the following are true: [¶] . . . [¶] (6)(A) For any reason: [¶] . . . [¶] (iii) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.” (All further statutory references are to the Code of Civil Procedure unless otherwise stated.)

Section 641, subdivisions (f) and (g) state: “A party may object to the appointment of any person as referee, on one or more of the following grounds: [¶] . . . [¶] (f) Having formed or expressed an unqualified opinion or belief as to the merits of the action. [¶] (g) The existence of a state of mind in the potential referee evincing enmity against or bias toward either party.

Section 642 asserts, “Objections, if any, to a reference or to the referee or referees appointed by the court shall be made in writing, and must be heard and disposed of by the court, not by the referee.”

adds sections 170.3, subdivision (c)(4), 473, subdivision (d), and 663⁵ to his list of legal authority, but as Mary notes, deciphering the legal basis for Antonio’s claim is nearly impossible. Even so, his motivation for this appeal is crystal clear.

Antonio postulates a tenuous line of reasoning in his ongoing effort to wiggle out of a legitimate obligation. An unfavorable tentative ruling alone will rarely, if ever, prove sufficient grounds for judicial disqualification under Code of Civil Procedure section 170.1. The section sets forth specific grounds for such challenges, including personal knowledge of disputed facts, a personal relationship with one of the litigants that would likely to lead to such knowledge, prior representation of a litigant or personal involvement in the same proceeding or one involving the same issues, or some identifiable financial state in the outcome. Antonio neither asserts any of these grounds as a basis for his claim, nor makes an effort to ascertain or prove facts that would support them. We therefore deem his claim of judicial bias as either waived or abandoned. (*H.N. & Francis C. Berger Foundation v. City of Escondido* (2005) 127 Cal.App.4th 1, 15.)

Furthermore, section 170.3, subdivision (d) limits a party’s remedy in this court to review by writ of mandate with the pointed statement “[t]he determination of the question of the disqualification of a judge is *not* an appealable order.” (*Italics added.*) Generally, a petition must be served and filed within 10 days of receiving written notice of entry of the court’s order. (*Ibid.*) The time to complain about proceeding before a

⁵ Section 170.3, subdivision (c)(4) declares, “A judge who fails to file a consent or answer within the time allowed shall be deemed to have consented to his or her disqualification and the clerk shall notify the presiding judge or person authorized to appoint a replacement of the recusal as provided in subdivision (a).”

Section 473, subdivision (d) affirms, “The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order.”

Section 663, affirms, “A judgment or decree, when based upon a decision by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment: [¶] 1. Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts; and in such case when the judgment is set aside, the statement of decision shall be amended and corrected. [¶] 2. A judgment or decree not consistent with or not supported by the special verdict.”

commissioner has long since passed and Antonio's claim unwittingly comes close to constituting a frivolous argument. We conclude the court had both subject matter and personal jurisdiction to render a judgment here.

Imputed Income

Antonio contends the trial court erroneously arrived at its child support calculation by imputing \$95,000 income to him. We disagree.

The trial court has broad discretion when modifying child support and imputing income. (*Mendoza v. Ramos* (2010) 182 Cal.App.4th 680, 684; *In re Marriage of Kepley* (1987) 193 Cal.App.3d 946, 951.) On appeal, this court reviews "the record to determine if the court's order is supported by substantial evidence and if a reasonable court could have made the order. If so, we will affirm. [Citation.]" (*Mendoza v. Ramos, supra*, 182 Cal.App.4th at p. 684.) We do not disregard the trial court's determination of witness credibility. Rather, this court reviews a judgment to determine only if any judge reasonably could have made the order. (*In re Marriage of Destein* (2001) 91 Cal.App.4th 1385, 1393.)

Family Code section 4058 defines "annual gross income" as "income from whatever source derived," except in circumstances not applicable here, including "[i]ncome 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 to the proceeding to establish a child support order under this article." (Fam. Code, § 4058, subd. (a)(3).) And in some cases, "[t]he court may . . . consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children." (Fam. Code, § 4058, subd. (b).)

We need not restate the record to establish substantial evidence of Antonio's earning capacity, or explain why imputation of income is necessary in this

case. While there is no requirement a parent act in bad faith before earning capacity may be imputed (*In re Marriage of Padilla* (1995) 38 Cal.App.4th 1212, 1217), bad faith has arguably been demonstrated here. The trial court believed Mary's testimony and disbelieved Antonio's explanations and excuses. Simply stated, he has failed to show the court abused its discretion to impose a support obligation.

Antonio also argues the court failed to make the necessary findings to justify a deviation from the statewide uniform child support guideline. What we note first is the court's *downward* departure from the guideline amounts. Under the guideline, Antonio should be paying \$789 a month, but the court reduced his portion of childcare expenses to arrive at the \$706 figure. Secondly, the record demonstrates the court correctly made all findings necessary to justify the imposition of a support obligation and its downward departure. In short, we find no error with respect to the court's deviation from state guidelines.

In addition, Antonio asserts the court's order is based on "incompetent and prejudicial" evidence in violation of his right to due process of law. Of principal interest are the bank statements, the production of which Antonio fought tooth and nail. There is no other way to say this – a parent's financial information is both relevant and necessary to a proper determination of child support. Family Code section 4058 requires the court to determine the annual gross income of each parent. Bank records help establish this amount, especially when one party is not forthcoming with financial information, and our review of the record reveals no basis to exclude this information on any of the grounds asserted by Antonio, i.e., lack of foundation, hearsay, illegally obtained information, or relevance.

Finally, Antonio complains the court prevented him from conducting a "meaningful" cross-examination of Mary and improperly excluded evidence she had "secret assets and interest income." With respect to the first assertion, we note the court found no need to have any further inquiry into Mary's finances, probably because as

Mary's counsel argued, her income had been verified through tax records and pay stubs. Furthermore, the court permitted Antonio to engage in a limited cross-examination of Mary. This endeavor revealed nothing new. Antonio claimed Mary hid a certain amount of unearned interest in one account, but as the trial court attempted to explain, any interest earned from moneys deposited in a bank account is reported on the individual's tax return and is not considered a "hidden asset." Antonio also complained about an escrow account Mary opened for the purpose of purchasing a home, but that account was closed after the purchase. In sum, the court permitted Antonio some latitude to cross-examine Mary and in no way precluded him from having a fair hearing.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.