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

J.A.,

Plaintiff and Appellant,

v.

A.D.,

Defendant and Respondent;

MONTEREY COUNTY DEPARTMENT
OF CHILD SUPPORT SERVICES,

Intervener and Respondent.

H036594

(Monterey County
Super. Ct. No. PT2073)

Appellant J.A., father of a minor child born to mother A.D. appeals from a final order entered by the trial court establishing parentage and setting child support. On appeal appellant contends that the trial court erred in its child support calculation because it failed to impute minimum wage earnings to A.D., who is currently receiving public assistance through the California Work Opportunity and Responsibility to Kids Program (CalWORKs). The trial court was correct in refusing to impute minimum wage based on public assistance. We will therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

J.A. and A.D. are parents of a child born in March 2007. On December 4, 2009, the Monterey County Department of Child Support Services (Department) filed an action on behalf of A.D. against appellant to establish parentage and to seek child support. The matter came on for hearing on August 24, 2010. At the hearing, the parties agreed that appellant had a 48 percent time-share with the child. A.D. testified that she had been working as a cashier, but began receiving public assistance through the CalWORKs program beginning on March 1, 2010. As part of that program, she was a full-time student. Appellant agreed that his income was \$2,731 per month, and admitted that he was the child's father. During the hearing, appellant requested that the trial court impute minimum wage income to A.D. in calculating child support. Although the Department presented evidence establishing that minimum wage jobs were available in Monterey County, the trial court ruled that as long as mother was on CalWORKs, no income could be imputed, and her income would be reflected as zero in the calculations. The trial court found that paternity had been established and ordered appellant to pay child support of \$414 per month beginning March 1, 2010. The formal order attaching the guideline child support calculations was filed on September 8, 2010. On January 25, 2011, appellant filed a timely notice of appeal from this order.

STANDARD OF REVIEW

Setting the amount of child support “ ‘rests in the sound discretion of the trial court the exercise of which this court will not disturb unless as a matter of law an abuse of discretion is shown.’ ” (*In re Marriage of Ilas* (1993) 12 Cal.App.4th 1630, 1634.) On appeal we will affirm if the record reveals that substantial evidence supports the court's order. (*In re Marriage of Berger* (2009) 170 Cal.App.4th 1070, 1079.)

ARGUMENT

The Court's Refusal to Attribute Income to A.D. Was Proper

Parents have the obligation to support their minor children. This obligation continues irrespective of income fluctuations. (*Mendoza v. Ramos* (2010) 182 Cal.App.4th 680, 684-685 (*Mendoza*)). As a result, courts may consider a parent's earning capacity in addition to actual income in setting child support amounts to achieve a result which is in the best interests of the children. (Fam.Code, § 4058, subd. (b).)¹ "Earning capacity is composed of (1) the ability to work, including such factors as age, occupation, skills, education, health, background, work experience and qualifications; (2) the willingness to work exemplified through good faith efforts, due diligence and meaningful attempts to secure employment; and (3) an opportunity to work which means an employer willing to hire. [Citations.] [¶] . . . When the ability to work or the opportunity to work is lacking, earning capacity is absent and application of the standard is inappropriate. When the payor is *unwilling* to pay and the other two factors are present, the court may apply the earnings capacity standard to deter the shirking of one's family responsibilities." (*In re Marriage of Regnery* (1989) 214 Cal.App.3d 1367, 1372-1373.)

On appeal, appellant contends that the trial court improperly calculated his child support obligation because the court failed to consider A.D.'s earning capacity. He argues that the trial court should have imputed a minimum wage income to A.D, even though she is currently unemployed because A.D had both the ability and opportunity to work. The Department disagrees. The Department argues that receiving public assistance through CalWORKs is sufficient evidence that A.D. is currently unable to work.

¹ Family Code section 4058, subdivision (b) states: "The 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." All further statutory references are to the Family Code.

Further, the Department argues that it would be against public policy to impute earnings to a parent receiving need based public assistance when calculating child support.

It was undisputed that minimum wage jobs were available at McDonalds, and that A.D. had worked as a cashier in the past. Appellant contends that this was sufficient evidence of both ability and opportunity to work requiring the court to impute minimum wage earning capacity to A.D. Appellant is mistaken. Even though A.D. had experience working and jobs were available, she was unable to work because she qualified for and received public assistance, and was participating in the CalWORKs program. In *Mendoza*, a case appellant relies on, father had been ordered to pay child support. He sought to reduce his child support obligation because the mother was pursuing an education rather than working. The court rejected the father's argument, holding that he had not demonstrated mother's ability to earn the income he sought to impute. The court reasoned that "The party seeking to have income imputed bears the burden of demonstrating opportunity to earn that income: the burden 'cannot be met by evidence establishing merely that a spouse continues to possess the skills and qualifications that had made it possible to earn certain salary in the past—even where it was undisputed that the spouse had voluntarily left that prior position.' [Citation.] It is not sufficient to demonstrate only what the party had been making before the loss of income; the moving party must also adduce evidence of vocational abilities and employment opportunities. [Citation.]" (*Mendoza, supra*, 182 Cal.App.4th at pp. 685-686.) The Court held that, "The evidence . . . in this case, far from demonstrating that [mother] could find employment, shows only that she was unable to do so and was forced to seek public assistance. [Citation.]" (*Ibid.*) As in *Mendoza*, appellant could not carry his burden of showing that A.D. could find minimum wage employment because her participation in the CalWORKS program established that she was unable to do so. (*Id.* at p. 686.)

Imputation of Income to a Parent on CalWORKs Would be Contrary to Public Policy.

Additionally, the trial court did not err when it refused to impute minimum wage to A.D. because to do so would violate public policy. “The CalWORKs program, often described as ‘welfare-to-work,’ provides benefits to families with minor children where the parents are unable to provide their support. To maintain the benefits, the recipient must participate in designated activities, a process which begins with an unsuccessful job search or a determination that a search would not be successful. After assessment of the participant, a specific program and menu of services is designed; failure to participate can result in the loss of plan benefits. Broadly stated, the goal of the program is to achieve the ability of the parent to provide support.” (*Mendoza, supra*, 182 Cal.App.4th at p. 686.) “Since CalWORKs requires, whenever possible, that the parent seek or prepare for employment, an unemployed parent who is in compliance with his or her CalWORKs plan is, in effect, in the process of seeking employment.” (*Barron v. Superior Court* (2009) 173 Cal.App.4th 293, 300.) Imputing minimum wage to a parent in the CalWORKs program would be an abuse of discretion because it would interfere with, or jeopardize the completion of the program. (*Ibid.*) Failure to complete the program would jeopardize the important public policy underlying the program: to help parents acquire the skills necessary to find and retain long term employment that is necessary to support their children. As in *Mendoza*, the requested reduction in appellant’s obligation to pay child support based on imputed income would undermine A.D.’s ability to complete her program, or, at the very least, would require her to work in violation of the provisions that allowed her to receive the assistance necessary to support the children. (*Mendoza, supra*, 182 Cal.App.4th at p. 686.) The trial court did not abuse its discretion in refusing the requested order.

The Trial Court did not Deviate from Guideline Child Support

Appellant also asserts that the trial court deviated from guideline child support without making the required findings under section 4056, and that the Department is improperly enforcing spousal support. His arguments are without merit.

When a trial court calculates child support, it must use an approved formula based on income and percentage of time shared with the children. This calculation results in guideline support payments. (§ 4055, subd. (b).) If the court correctly arrives at the guideline calculation, but then, in the exercise of its discretion decides to deviate from the guideline support, it must make certain findings on the record. (§ 4056.) In this case, the trial court used an approved computer program to calculate guideline support. (§ 3830.) Based on the figures introduced into evidence, as calculated by the program, the guideline support came to \$414 per month. The trial court ordered appellant to pay guideline child support without any deviation. Just because appellant disagrees with the figures the court used for A.D.'s income does not mean that the trial court deviated from the guideline support. Therefore, the court was not required to make any specific findings under section 4056.

Finally, the appellant seems to argue that the department was without authority to seek and the trial court was without authority to grant spousal support. Whether or not such authority existed, the trial court issued no spousal support order. Appellant misconstrues the attachments to the trial court's order. The computer generated document, with the guideline child support payment calculation that is incorporated and made part of the child support order, includes a spousal support calculation as a matter of convenience for the court. However, in its petition, the Department sought only to enforce appellant's child support obligation, and the trial court only ordered child support. Therefore, appellant's concerns regarding a spousal support award are misplaced. There is no such order in the record on appeal.

DISPOSITION

The judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.