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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

COUNTY OF SAN BERNARDINO CHILD SUPPORT DIVISION,

Plaintiff and Respondent,

v.

ELENA GROSS,

Defendant and Appellant.

E054457

(Super.Ct.No. CSSS1001023)

OPINION

APPEAL from the Superior Court of San Bernardino County. John A. Crawley, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Elena Gross, in pro. per., for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie Weng-Gutierrez, Linda M. Gonzalez, Sharon Quinn, and Marina L. Soto, Deputy Attorneys General, for Plaintiff and Respondent.

I

PROCEDURAL INTRODUCTION

On February 24, 2010, the County of San Bernardino filed this action against defendant and appellant Elena Gross to require her to pay child support for her two minor children. Numerous proceedings and appeals occurred over the next two years.

On January 6, 2012, this court considered the various notices of appeal and civil case information statements on file. We ordered this appeal to proceed only as to the notice of appeal filed April 22, 2011. That notice of appeal only concerns the trial court's order entered on March 24, 2011. As discussed below, we subsequently modified this order by an order filed on August 31, 2012.

On July 25, 2012, plaintiff and respondent San Bernardino County Department of Child Support Services (the Department) filed a motion to dismiss this appeal because appellant was a vexatious litigant who failed to ask the permission of this court before proceeding with the appeal.[1]

The Department asked this court to take judicial notice of this court's unpublished opinion filed on December 20, 2011. (See *In re Marriage of Timothy and Elena Gross* (Dec. 20, 2011, E051037) [nonpub. opn.].)[2] In that opinion, we held that (1) the trial

[1] The motion was filed by the California Attorney General representing the public interest pursuant to Family Code sections 17406 and 17407. The motion lists the San Bernardino County Department of Child Support Services as the moving party.

[2] The Department's request to take judicial notice of the unpublished opinion is granted. (Calif. Rules of Court, rule 81115(b)(1).)

court did not abuse its discretion in declaring Elena[3] a vexatious litigant; (2) the vexatious litigant order was within the trial court's jurisdiction; (3) the trial court did not abuse its discretion in issuing a restraining order, although we ordered some modification of the order, and (4) the trial court did not abuse its discretion in denying Elena's motion for pendent lite attorney fees and costs. Elena filed opposition to the request for dismissal.

The Department also argued that the March 24, 2011, order denying Elena's motion to vacate was not appealable and that an April 22, 2011, notice of appeal was directed only at that order.

On August 31, 2012, this court denied the motion to dismiss. On the vexatious litigant issue, we noted a conflict between *Mahdavi v. Superior Court* (2008) 166 Cal.App.4th 32 and *In re R.H.* (2009) 170 Cal.App.4th 678. *Mahdavi* held that a court may not require a defendant in the underlying action to obtain leave of the presiding justice in order to file an appeal. (*Mahdavi*, at pp. 40-42.) *In re R.H.* disagreed with this holding. (*R.H.*, at pp. 694-696.)

Although we followed *Mahdavi*, we said: "Should respondent wish to address this issue in its respondent's brief, this court may decide to publish an opinion which determines that issue." The Department has elected to brief the issue in its respondent's brief.

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[3] Since the parties in the underlying action share a last name, we refer to them by their first names for the sake of clarity and not out of disrespect.

We then considered the Department's argument that the March 24, 2011, order was not appealable. After reconsideration, we took judicial notice of an order after hearing filed in the Riverside County Superior Court on December 7, 2010, and concluded that judgment was actually entered on July 28, 2011. A notice of appeal was filed on August 22, 2011.

On March 7, 2012, we erroneously filed a partial remittitur as to the August 22, 2011, notice of appeal. Since the remittitur cannot be recalled, we deemed the notice of appeal filed April 22, 2011, to have been filed from the judgment entered on July 28, 2011. (Calif. Rules of Court, rule 8.104(d).)

Our August 31, 2012, order defines the scope of our task: to review claimed error in the July 28, 2011, judgment, i.e., error allegedly occurring at the hearing of December 2, 2010, and the resulting order of December 7, 2010.

II

THE DECEMBER 2, 2010, HEARING

The July 28, 2011, judgment required Elena to pay child support for two children totaling $420 per month, beginning July 1, 2010. It also ordered that any arrears created by the judgment should be paid at the rate of $25 per month commencing January 1, 2011. Attached was a computer printout "showing the parents' incomes and percentage of time each parent spends with the children. The printout, which shows the calculation of child support payable, will become the court's findings."

At the hearing of December 2, 2010, Elena made two arguments. First, she argued that the timeshare calculation used in the printout was in error. She argued that the

existing custody order was uncertain on timesharing and that she was actually seeing the children two to five hours more than the timeshare agreement. The court replied: "That's not a significant enough distinction that I'm going to use it to affect the time share. [¶] . . . [¶] It's 20 percent." Accordingly, a 20 percent timeshare was used in the computer calculation.

Second, Elena agreed that the printout calculation of child support was based on her income of $1,128 per month, but she argued that her income was attributable to sponsorship income.

The sponsorship income derives from agreements that Timothy and his parents made when Elena entered the United States. At that time, they agreed to pay her monthly support equal to at least 125 percent of the amount of the federal poverty level so she would not be a burden on the state welfare system. By subtracting $420 a month in child support from the sponsorship income, she argued that she would fall below the 125 percent level. In effect, Elena was arguing that the sponsorship income should not count for purposes of calculating her child support obligation.

The court rejected the argument and adopted the order of December 7, 2010, as stated above.

III

ISSUES ON APPEAL

Elena first argues that the trial court erred in including her sponsorship contract support income when calculating child support.

Second, she argues that the trial court erred in computing the timeshare component of the child custody order as described above. She contends that the trial court improperly referred to recommendations in a memorandum prepared by a mediator dated December 1, 2009.

Third, Elena argues that the trial court lacked jurisdiction because she was pursuing an appeal on temporary child support in this court, and we had issued a remittitur in that case. (Case No. E051037; Riverside Super. Ct. case No. IND098669.)

As noted above, we have also retained discretion to consider the vexatious litigant issue described above.

IV

SPONSORSHIP CONTRACT PAYMENTS

The Department helpfully summarizes the nature of sponsorship payments: "The federal Immigration and Nationality Act forbids admission to the United States of any alien who 'is likely at any time to become a public charge.' (8 U.S.C. § 1182 (a)(4)(A).) An exception is allowed for a 'family-sponsored' alien who has obtained an affidavit of support. (8 U.S.C. § 1182(a)(4)(C)(ii).) [¶] This exception is implemented by requiring a person petitioning for the alien's admission into the United States (the 'sponsor') to execute an affidavit pursuant to 8 U.S.C. section 1183a, in which the sponsor agrees 'to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable.' (8 U.S.C. §§ 1182(a)(4)(C)(ii); 1183a(a)(1)(A).) The affidavit, currently

identified as Federal Form I-864, is enforceable as a contract against the sponsor by the sponsored alien . . . ."

Elena submitted two forms I-864. One was signed by Timothy's parents and one was signed by Timothy. She also provided a copy of a ruling by the Riverside County Superior Court confirming that, despite the divorce proceedings, the contract was enforceable; it therefore ordered the payment of $1,128.12 per month to Elena as support. (Riverside County Super. Ct. No. INC10002737.)

In accordance with the ruling, Timothy's parents have been paying Elena $1,128.12 per month. Elena listed these payments as income in her income and expense declaration dated October 27, 2010. There is no dispute concerning the nature of the payments or the fact that they have been made. The only issue is whether they constitute income for child support purposes.

The Department relies on Family Code section 4058.[4] That section defines income broadly: "The annual gross income of each parent means income from whatever source derived, except as specified in subdivision (c) and includes, but is not limited to, the following: (1) Income such as salaries, royalties, wages, bonuses, rents, dividends, pensions, interest, trust income, annuities, workers' compensation benefits, unemployment 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*." (Italics added.)

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[4] Unless otherwise indicated, all further statutory references are to the Family Code.

The Department cites *In re Marriage of Alter* (2009) 171 Cal.App.4th 718, 732: "[T]he list of income sources in section 4058, subdivision (a), is expressly described as a nonexclusive list. The listed items 'are *by way of illustration* only. Income from other sources . . . should properly be factored into the "annual gross income" computation.' [Citation.] In contrast, section 4058, subdivision (c), contains a specific list of exclusions. Thus, for purposes of the computing child support under the statutory guidelines, 'income' should be broadly defined while the exclusions are specific and must be narrowly construed. [Citation.]"

Elena relies on *In re Marriage of Corman* (1997) 59 Cal.App.4th 1492. In that case, the court considered "whether spousal support received from a party to the child support proceeding constitutes gross income under section 4058, subdivision (a). We look to the words of the statute in context to ascertain the intent of the Legislature. On the one hand, the definition of gross income in section 4058, subdivision (a) is very expansive. It expressly includes all income except for income specified in section 4058, subdivision (c). Spousal support is not expressly excluded from gross income pursuant to subdivision (c). On the other hand, section 4058, subdivision (a) also sets forth a nonexclusive list of qualifying income. That list explicitly includes "spousal support actually received from a person *not a party* to the proceeding to establish a child support order." [Citation.] Thus, the statute expressly includes nonparty spousal support as income." (*Id*. at p. 1499.) The court therefore held that "the specific inclusion of nonparty spousal support as gross income impliedly excludes party spousal support, despite the expansive initial definition of gross income." (*Ibid*.)

In re Marriage of Corman does not support Elena's argument that the sponsored contract payments are not income. As the superior court held, nonparty spousal support is income under section 4058, subdivision (a)(1). Since Timothy's parents are not parties to the proceeding to establish child support, payments from them clearly fall within this definition. We therefore agree with the Department and the trial court that the sponsorship contract payments in this case are income to Elena for child support purposes. We express no opinion on whether the payments from the parents are nonparty spousal support or not.

Elena's secondary argument is that she is entitled to receive sponsor contract payments equal to 125 percent of the federal poverty line. Since the ordered child support payments would divert income from her, she argues that her support would fall below that amount. She therefore contends that the payments from Timothy's parents should be increased to keep her at or above the 125 percent level. In effect, she wants the parents to pay the $240 per month to their son through her.

Elena cites several cases in which a sponsorship agreement was upheld. In *Iannuzzelli v. Lovett* (2008) 981 So.2d 557, a Florida appellate court upheld the sponsorship agreement liability but declined to award attorney fees.[5] (*Iannuzzelli*, at p. 559.) The appellate court rejected the assertion that it was required to order payment of attorney fees under the federal statute. (8 U.S.C. § 1183(a).) (*Iannuzzelli*, at p. 560.) It held that the sponsored person would have to claim and prove her income fell short of the

[5] Since the husband was the sponsor in *Iannuzzelli*, under California law the payments would be excluded from income. (§ 4058, subd. (c)(3).)

125 percent poverty level and would not be entitled to an award of attorney fees until she obtained a judgment for a specific amount. (*Id*. at pp. 560-561.) As the court noted, such an action would be treated as a typical breach of contract action, and it would be subject to typical contract defenses, such as failure to mitigate damages. (*Id*. at p. 561.)

The other cited cases are to the same effect. In *Cheshire v. Cheshire,* 2006 U.S. Dist. LEXIS 26602 (M.D. Fla. May 4, 2006), the court upheld the liability but offset the obligation by the amount of income and benefits the sponsored person had earned after the divorce. (*Id*. at p. 17.)

In *Stump v. Stump* 2005 U.S. Dist. LEXIS 26022 (N.D. Ind., Oct. 25, 2005), *Shumye v. Felleke,* (N.D. Cal. 2008) 555 F.Supp.2d 1020, and *Younis v Farooqi* (D. Md. 2009) 597 F.Supp.2d 552, the courts all upheld liability under the I-864 affidavit and considered the amount of damages to be awarded.

Elena especially focuses on *Younis*. In that case, the parties agreed that alimony should reduce the defendant's obligations under the affidavit. (*Younis v Farooqi*, *supra*, 597 F.Supp.2d at p. 555.) The defendant further argued that his child support payments should also reduce the obligation. The court held that they do not. (*Ibid*.) If the case had arisen under California law, section 4058, subdivision (c) would require a finding that the payments by the former husband should not be considered income to the former spouse. Accordingly, the cited cases from other jurisdictions do not support Elena's position here.

In any event, the question of liability and damages under the I-864 affidavit were not properly before the court at the December 2, 2010, hearing. If Elena wishes to further litigate the question of Timothy's parent's liability under the I-864 affidavit, she should

pursue the matter in the appropriate forum and prove specific damages for breach of the sponsorship contract.

V

COMPUTATION OF THE TIMESHARE COMPONENT OF THE CHILD CUSTODY ORDER[6]

As described above, the trial court heard argument at the December 2, 2010, hearing on the timeshare component of the child custody order. Elena argued that she had visitation two to five hours more than accounted for under a prior visitation agreement. The trial court impliedly found that the agreement was sufficiently vague as to the visitation schedule to prevent an exact calculation being made, but it considered Elena's argument to be de minimis, i.e., it would not affect the 20 percent timeshare used previously.

We cannot conclude that the trial court abused its discretion in this regard. When using the computerized formula for determining child support, the trial court must exercise its discretion in determining the proper factors to use in the formula. "[T]he court, in child support cases, is not just supposed to punch numbers into a computer and award the parties the computer's result without considering circumstances in a particular case which would make that order unjust or inequitable. [Citation.] Otherwise, there would be no need for a judge; all you would need would be a computer." (*In re Marriage of Fini* (1994) 26 Cal.App.4th 1033, 1043.) Thus, although the guideline

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[6] The Department did not address this issue in its respondent's brief.

amount is presumptively correct, the judge has some discretion in defining and applying the specified factors. (§§ 4053, subd. (k), 4057.)

Under section 4055, the H% is "the approximate percentages of time that the high earner has or will have primary physical responsibility for the children compared to the other parent." (§4055(b)(1)(D); *In re Marriage of DaSilva* (2004) 119 Cal.App.4th 1030, 1032-1033; *In re Marriage of Katzberg* (2001) 88 Cal.App.4th 974, 981.) The amount of child support as found by use of the guideline formula is rebuttably presumed to be the correct amount of temporary child support to be ordered. (§§ 4057, 4053, subd. (k).) As noted above, the trial court heard argument on these factors, and Elena has not sustained her burden of rebutting the presumption and showing any error in this regard.

Elena also argues that the trial court improperly based its timeshare determination on the report of a mediator. She argues that this was improper because it violated the basic principle of mediation confidentiality. Elena cites Evidence Code section 1121, which states: "Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with [Evidence Code] Section 1118." (See also Fam. Code, § 3177; Evid. Code, §§ 1040, 1119.) However, the mediator may make certain recommendations to the court under Family code section 3183.

The argument is based on an order pursuant to referral to mediation filed in the Riverside County Superior Court on December 1, 2009. It prescribed a visitation schedule. The trial court found that the schedule was too uncertain to establish which parent had primary physical responsibility for the children. (See *In re Marriage of DaSilva*, *supra*, 119 Cal.App.4th at pp. 1032-1034.) At that early stage, there was no actual timesharing experience to serve as the basis for a recommendation as to the amount of time that each parent had primary physical responsibility for the children. (§ 4055, subd. (b)(1)(D).)

Nevertheless, Elena argues reference to the mediator's recommendations was improper. On March 15, 2011, she filed a memorandum of points and authorities that objected to the custody order of December 1, 2009, "as the basis for calculating timeshare on 3/15/11." She argued that "it would be an abuse of discretion to adopt the recommendation by a mediator as the basis of the 'time share' on which child support is based." However, as noted above, the mediator could not and did not recommend a guideline timeshare basis in the December 1, 2009, report. The motion was heard and denied on March 24, 2011.

As discussed above, this decision is not before us now. The December 2, 2010, hearing is the subject of this appeal. At that hearing, Elena did not mention her contention regarding the mediator's recommendation. Accordingly, we cannot consider it as part of this appeal because it was not raised at the December 2, 2010, hearing.

VI

JURISDICTIONAL ISSUE[7]

Elena attempted to raise a jurisdictional issue at the December 2, 2010, hearing by mentioning that the prior order was made in Riverside County Superior Court. The trial court responded that it did not matter where it was made so long as it stated the timeshare percentage.

Elena raises a different jurisdictional issue here. She contends that the December 2, 2010, child support order was in excess of the trial court's jurisdiction because an earlier appeal placed jurisdiction in this court. She refers to an earlier appeal in this case under case No. E051037 and cites *People v. Alanis* (2008) 158 Cal.App.4th 1467.

Again, we decline to address the issue because it was not raised at the hearing of December 2, 2010. We note, however, that we issued a remittitur in case No. E051037 on August 10, 2010. "When the remittitur issues, the jurisdiction of the appellate court ceases, and that of the trial court attaches." (9 Witkin, California Procedure (5th ed. 2008) Appeal, § 844, p. 906.)

VII

THE VEXATIOUS LITIGANT ISSUE

As described above, this court's August 31, 2012, order denied the Department's motion to dismiss but stated: "Should respondent wish to address this issue in its

[7] The Department did not address this issue in its brief.

respondent's brief, this court may decide to publish an opinion which determines that issue." The Department has elected to brief the issue in its respondent's brief.

On further consideration, we decline to address the vexatious litigant issue in this case, primarily because Elena failed to file a reply brief responding to the Department's argument.

Normally, we would give the litigant, and in some cases his or her court-appointed attorney, "notice of as well as the opportunity to brief, produce evidence, and be heard in oral argument on the question of vexatious litigant status. [Citations.]" (*In re R.H.*, *supra*, 170 Cal.App.4th at p. 687.) Since Elena has not had that opportunity in this case, we decline to address the issue.

VIII

DISPOSITION

The judgment is affirmed. The Department shall recover its costs on appeal.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

MILLER
J.