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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of DONNA RAY
IVERSON and DONALD IVERSON.

DONNA RAY IVERSON,

Appellant,

v.

DONALD IVERSON,

Respondent.

A129075

(Humboldt County
Super. Ct. No. FL980540)

INTRODUCTION

Donna Ray Iverson appeals in propria person from an order of the Humboldt County Superior Court reducing the child support paid by her former husband, Donald Iverson, for the support of their two children. She contends the court abused its discretion and failed to follow the statewide uniform “guideline” found in Family Code section 4055, when it used a 50 percent shared custody arrangement for purposes of calculating child support, despite undisputed evidence that since January 2010, the couple’s daughter had been living with Donna 100 percent of the time and had not visited

with Donald.¹ She further argues the court committed reversible error in failing to state the amount of support that would have been ordered under the guideline formula and in failing to properly explain its reasons for deviating from guideline support as required by section 4056, subdivision (a). Finally, she contends the court abused its discretion in allowing Donald to modify the child support amount when he refused to provide his income tax returns. We shall affirm the order.

FACTS

Donald, a neurologist, and Donna, a registered nurse, share custody of their two children, a teenage son and daughter, pursuant to court orders reflecting a 50-50 timeshare. On September 2, 2009, Donald filed a motion to modify child support. In that motion, he alleged that the parties' incomes had changed since support was last calculated. The matter was set for hearing on January 25, 2010, but Donald failed to appear, having mistakenly calendared the hearing for the following day. The matter proceeded without testimony from Donald. Donna testified that although both parties had agreed in documents filed with the court that visitation with the children was shared equally, the actual schedule represented that the children spent approximately 70 percent of the time with her and 30 percent with Donald. Based on that testimony, the court set Donald's child support amount at \$2,058 effective October 1, 2009.

On that same date, Donald moved to modify child support, explaining his failure to appear. He disputed Donna's statement of the actual timeshare, stating the visit share was 50 percent, that the parties' incomes had changed, and questioning Donna's stated income. At a May 4, 2010 hearing on the motion, Donna appeared in propria persona, Donald and the Humboldt County Child Support Services were each represented by counsel. Donald, supported by documentary evidence in the form of a pay stub showing his earnings from January through March 31, 2010, testified that his income had changed

¹ All statutory references are to the Family Code, unless otherwise indicated. As customary in family law cases, we refer to the parties by their first names for purposes of clarity and not out of disrespect. (*Edwards v. Edwards* (2008) 162 Cal.App.4th 136, 138, fn. 1 (*Edwards*).)

from the year 2009 to the year 2010. Because Donald had filed for an extension in the preparation of his income taxes and did not have them available for review, the court set the matter for review in mid-November 2010.

The parties also testified as to their income and the timeshare with the children. Donna testified that she had both children approximately 65 percent of the time until late January. Her declaration, filed November 19, 2009, stated the children were with her 50 percent of the time and also that the parties “have followed the shared custody ordered by the courts [and] agreed upon flexibility due to schedules.” Donna also testified that since the end of January, she had the parties’ son 65 percent of the time and their daughter 100 percent of the time.

Donald testified that after the January 25, 2010 hearing, Donna became less flexible and there was a “[sea] change” in their custody arrangement with Donna taking their son on days when Donald was entitled to custody, but not allowing Donald to have make-up days. Their daughter decided to live with Donna. Still, Donald maintained their son continued to spend about 50 percent of the time with him. Before February 2010, their daughter had been at his home for a prolonged periods of time—three or four weeks on one occasion and a couple of two-week periods. At the time of the May 4 hearing, their daughter was still residing with her mother. Donald testified that their daughter was taking antidepressant medication. He also related an incident that had occurred a week before the hearing, in which he received a text from his daughter saying she and her mother had a fight and that she was “stuck at home.” Donald called her. “[S]he was sobbing and said she just felt horrible, and she didn’t know what was wrong. I talked to her for a while. And she said that she had run out of her antidepressant medication about five days before and that her mom didn’t have the money to buy the medication. So I went and got the prescription and brought it to her.” Donald also related that while their daughter was still going to high school, “[h]er attendance is marginal.” He had asked his daughter to resume the visitation schedule and she had said she would. She had told him this a few times, most recently about a week before the hearing. She asked him to “be patient.”

Near the conclusion of the hearing, the court stated: “I think that I created this problem at the last hearing because I didn’t have the information that I now have. The information that’s relevant to me now—I think what I do have is since the end of January, beginning of February, we have the 50/50 split with [the son]. But then with [the daughter], Dr. Iverson has no time at all, for whatever reason. And since my job here is to set guideline support based on . . . the current situation, now that I have that information, which I did not have last time, it seems to me that this is the information that I will end up using making the decision.”

On May 28, 2010, the court filed its ruling modifying child support. In its ruling, the court found that the parties shared physical custody during the period of October 2009 through December 2009, and that they “did not demand from each other a strict adherence to the shared custody plan, but accommodated the needs of the children.” It found that “historically there has been an agreement between the parties that the current visitation order is a shared custody order with both parties having equal time with the children. Since about the time of the last hearing, the testimony revealed that the minor son of the parties has been spending an equal amount of time with both parents. The minor daughter has not. The testimony revealed that the daughter is experiencing some medical issues and has not visited her father since February. It is clear to the Court that both parents are deeply involved in the lives of their children and are committed to their success. It is also clear to the Court that historically, the parents have cooperated in what the Court finds is an open arrangement with respect to visitation of the children—working around and accommodating the schedule of the children. To his credit, in the face of the current order for shared custody, [Donald] has responded to his daughter’s medical needs and not demanded compliance with the shared custody order. The testimony made it clear that he has supported her in her choices while making it clear that he wants to see her when she is ready. [¶] The Court is not going to award or penalize either party in terms of increased (or decreased) child support for their efforts in supporting their daughter. In determining the appropriate child support, the Court will use the fifty-percent shared custody order that is already in place.”

The court found there were two distinct time periods at issue: October 2009 through December 2009, and January 2010 to the May 4, 2010 date of the hearing. The different time period exist because Donald's income changed from the year 2009 to the year 2010. The court made findings as to each party's income during the two periods.

For the period of October 2009 through December 2009, the court found that the parties shared actual physical custody of both children 50-50 and that 50 percent shared custody was the appropriate percentage for purposes of calculating child support during that time. The court also identified the income numbers it was inserting in the "Guideline Calculator," explaining how it arrived at those numbers. Utilizing the statutory guideline calculations, the court arrived at a child support amount from Donald of \$977 for the period of October 2009 through December 2009. (The court appended the "Guideline Calculation Results Summary" for this period to its ruling as Attachment A.)

For the period of January 2010 to May 2010, the court similarly identified the income numbers it was using in its guideline calculation. For the reasons explained in its ruling, quoted above, the court continued to use the 50 percent shared custody input, despite its recognition that the parties' daughter had not visited with Donald since the preceding February. For the period of January 2010 forward, the court arrived at a child support amount of \$844 under the guidelines. (The court attached the "Guideline Calculation Results Summary" for this period to its ruling as Attachment B.) The court set the matter for review on November 18, 2010, at which time it could review Donald's 2009 income tax filings.

The order after hearing was filed on June 25, 2010, and this timely appeal by Donna followed.

DISCUSSION

I. Timeshare Calculation

Donna contends the court abused its discretion and failed to follow the statewide uniform "guideline" (§ 4055), when it used a 50 percent shared custody arrangement for both children for purposes of calculating child support, despite undisputed evidence that the parties' daughter had been living with Donna 100 percent of the time and had not

visited with Donald since January 2010. In related arguments, she contends the court failed to comply with provisions of section 4056, subdivision (a), requiring that any deviation from the guidelines be accompanied by an explanation and a statement of what the guideline support amount would be.

A. Standard of Appellate Review

We will uphold the trial court's determination to grant or deny a modification of a child support order, unless an abuse of discretion is demonstrated. (E.g., *Edwards v. Edwards, supra*, 162 Cal.App.4th 136, 141.) “ ‘Reversal will be ordered only if prejudicial error is found after examining the record of the proceedings below. [Citation.] However, questions relating to the interpretation of statutes are matters of law for the reviewing court. [Citation.]’ [Citation.]” (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1150-1151 (*Drake*); accord *Edwards*, at p. 141.)

B. Statutory Overview

The Court of Appeal in *In re Marriage of Cryer* (2011) 198 Cal.App.4th 1039 (*Cryer*), recently summarized the relevant law relating to child support calculations: “The amount of child support normally payable is calculated based on a complicated algebraic formula found at Family Code section 4055.^[2] Although this formula is referred to as the statewide uniform ‘guideline’ (§ 4055), ‘guideline’ is a misleading term. (*In re Marriage of Hubner* (2001) 94 Cal.App.4th 175, 183) The formula support amount is ‘presumptively correct’ in all cases (see §§ 4053, subd. (k), 4057, subd. (a)), but ‘may be rebutted by admissible evidence showing that application of the

² Section 4055, subdivision(a) provides: “(a) The statewide uniform guideline for determining child support orders is as follows: $CS = K [HN - (H\%)(TN)]$.” The components of the formula are described in subdivision (b)(1) as follows: “(A) CS = child support amount. [¶] (B) K = amount of both parents’ income to be allocated for child support as set forth in paragraph (3). [¶] (C) HN = high earner’s net monthly disposable income. [¶] (D) H% = *approximate percentage of time that the high earner has or will have primary physical responsibility for the children compared to the other parent*. In cases in which parents have different time-sharing arrangements for different children, H% equals the average of the approximate percentages of time the high earner parent spends with each child.” (Italics added; see *Edwards, supra*, 162 Cal.App.4th 136, pp. 141-142, and fn. 6.)

formula would be unjust or inappropriate in the particular case, consistent with the principles set forth in Section 4053’ (§ 4057, subd. (b).)” (*Cryer*, at pp. 1047-1048, fn. omitted; see Hogoboom and King, Cal. Practice Guide: Family Law (The Rutter Group 2011) ¶¶ 6:130 to 6:133, pp. 6-57 to 6-58 (Hogoboom and King, Family Law.)

Although the guideline is “presumptively correct” in all cases, there is still room for judicial discretion exercised within the statutory framework. “The statewide uniform guideline displaces a good body of earlier case law dealing with ‘discretionary’ child support; ‘a trial court *no longer has the broad discretion* in ordering child support which it had prior to the enactment of the new statutory scheme effective July 1, 1992.’ [Citations.]” (Hogoboom and King, Family Law, *supra*, ¶ 6:151, p. 6-62.) “Nonetheless, legislative history indicates it was never the intent to eliminate family law judges’ traditional discretionary authority to adjust child support orders in individual cases where fairness so requires. [Citations.] [¶] By the same token, any exercise of judicial discretion may occur only *within the parameters set by the child support statutes*: ‘[I]n child support proceedings, *to the extent permitted by the child support statutes*, [the court] must be permitted to exercise the broadest possible discretion in order to achieve equity and fairness in these most sensitive and emotional cases.’ [Citations.]” (*Id.* at pp. 6-62 to 6-62.1.)

“Section 4053 sets forth a number of principles, foremost among them being the protection of the child's best interest: ‘The guideline seeks to place the interests of children as the state’s top priority.’ (§ 4053, subd. (e).) . . . [D]eparture from the standard child support formula may be appropriate when application of the formula ‘would be unjust or inappropriate due to special circumstances in the particular case’ (§ 4057, subd. (b)(5)), so long as the variance is consistent with section 4053.” (*Cryer*, *supra*, 198 Cal.App.4th at p. 1048; see Hogoboom and King, Family Law, *supra*, ¶¶ 6:130 to 6:133, pp. 6-57 to 6-58.)

Section 4057 provides: “(a) 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*. [¶] (b) *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, because one or more of the following factors is found to be applicable by a preponderance of the evidence, and the court states in writing or on the record the information required in subdivision (a) of Section 4056: [¶] . . . [¶] (5) Application of the formula would be unjust or inappropriate due to special circumstances in the particular case. These special circumstances include, but are not limited to, the following: [¶] (A) Cases in which the parents have different time-sharing arrangements for different children. [¶] (B) Cases in which both parents have substantially equal time-sharing of the children and one parent has a much lower or higher percentage of income used for housing than the other parent. [¶] (C) Cases in which the children have special medical or other needs that could require child support that would be greater than the formula amount.” (Italics added.)

“The ‘special circumstances’ exception of section 4057, subdivision (b)(5) gives the trial court ‘considerable discretion to approach unique cases on an ad hoc basis.’ (*County of Lake v. Antoni* (1993) 18 Cal.App.4th 1102, 1106 . . . ; see also *In re Marriage of Fini* (1994) 26 Cal.App.4th 1033, 1043 . . . [‘the 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’].) The trial court has ‘broad discretion’ to determine when special circumstances apply. (*In re Marriage of de Guigne* (2002) 97 Cal.App.4th 1353, 1361)” (*Cryer, supra*, 198 Cal.App.4th at p. 1049.)

C. Timeshare Calculation

The trial court here did *not* expressly rely upon the “special circumstances” exception of section 4057, subdivision (b)(5) in making its support order. Rather, it exercised discretion in determining the timeshare component (H%) at 50 percent and using that timeshare in the guideline calculation. Because the court did not deviate from the presumptively correct formula support, it was not required to state either the amount

of support that would have been ordered under the guideline formula or the reasons the amount of support ordered differs from the guideline formula amount, as required by section 4056. (We note that the court *did* explain its reasons for using the 50 percent timeshare.)

The question, then, is whether the court abused its discretion in using a 50 percent timeshare in the guideline calculation where it was undisputed that the parties' daughter had resided with Donna and not visited with her father in the four months before the May hearing.

“[C]ertain components of the statutory scheme are based on the exercise of judicial discretion. For example, courts have discretion in determining the percentage of ‘primary physical responsibility’ (time-sharing) to be imputed to each parent (*In re Marriage of Katzenberg* (2001) 88 [Cal.App.]4th 974, 977” (Hogoboom and King, Family Law, *supra*, ¶ 6:151.1, p. 6-63.)

The timeshare component of the guideline calculation is not determined by the amount of time a parent has physical custody, but by calculating the approximate percentage of time that a parent has or will have primary physical “responsibility” for a child. (*DaSilva v. DaSilva* (2004) 119 Cal.App.4th 1030, 1033 (*DaSilva*); *In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1160 (*Drake*); Hogoboom and King, Family Law, *supra*, ¶ 6:168, p. 6-67.) Use of the terminology “physical responsibility,” rather than “physical custody” in section 4055, subdivision (b)(1)(D) is “purposeful: i.e., to clarify that [section] 4050 et seq. is not intended to alter current child custody law in any manner (no struggle for ‘custody’ is necessary to apply the statutory formula). [Citations.]” (Hogoboom and King, Family Law, *supra*, ¶ 6:168, p. 6-67; citing, among others, *Edwards*, *supra*, 162 Cal.App.4th at p. 144; *DaSilva*, *supra*, at p. 1033; *In re Marriage of Katzberg*, *supra*, 88 Cal.App.4th 974, 981; see also *Drake*, *supra*, at p. 1160.) As *DaSilva*, recognized, on any given day, responsibilities for the child are shared by both parents to some degree. (*DaSilva*, at p. 1035.) “[M]any families have complex arrangements (and various backup plans) for dealing with transportation issues, school hours, and related extracurricular activities that can change on a daily basis. In

recognition of this reality, courts are asked to ‘approximate’ hours of responsibility and have the discretion to apportion time for school hours depending on the particular parent’s overall level of involvement in the school day routine.” (*Ibid.*)

Although the question here is a close one, we cannot say the court abused its discretion in the circumstances. As the court explained, the parties had a shared custody agreement and historically had operated with flexibility in not demanding a strict adherence to the shared custody plan, but accommodating the needs and schedules of the children. The court found this to be an “open arrangement with respect to visitation of the children.” Evidence showed that their daughter had been at Donald’s home for prolonged periods of time—three or four weeks on one occasion and a couple of two-week periods in the months before she decided to live solely with Donna. Donald agreed with this arrangement in order to support his daughter in her struggle with depression and he continued to encourage her to resume visiting him. Further, when his daughter was in trouble, having run out of medication, she called him. He immediately responded, obtaining the medication she needed and encouraging her to visit with him. Finally, within a week before the hearing, the daughter stated her intent to resume visiting with her father. This statement of her intent is significant, as the H% component of the guideline states that it is equivalent to the “approximate percentage of time that the high earner has *or will have* primary physical responsibility for the children compared to the other parent.” (§ 4055, subd. (b)(1)(D), italics added.) Hence there was evidence that the balance of visitation between parents would shortly be restored.

In these circumstances, the court could believe that the daughter’s residence with Donna was similar to the prolonged period of time she had spent with Donald, was temporary, and that her extended stay with Donna during the four month period did not undermine the actual 50 percent flexible timeshare under which the parties had operated successfully since initiating shared custody. Therefore, we conclude the court did not abuse its discretion in determining the timeshare factor to be used in the guideline support calculation was 50 percent.

D. No Violation of Section 4056 Failure to Explain Deviation from Guideline Formula

As we have stated above, the court did not deviate from the presumptively correct statutory guideline formula in setting child support. Therefore, we reject Donna’s claim that the court committed reversible error in failing to comply with the requirements of section 4056 by stating the amount of support that would have been ordered under the guideline formula, the reasons the support ordered differed from the guideline formula amount, and the reasons the amount of support ordered was consistent with the best interests of the children. (§ 4056, subd. (a)(1)-(3).) (The reasons articulated by the court might well have satisfied the statement of reasons required for a deviation due to “special circumstances,” a question we are not required to answer, given our determination that the court acted within its discretion in selecting a 50 percent timeshare component.)

II.

Modification in the Absence of Income Tax Returns

In a single paragraph in her opening brief, Donna contends the trial court abused its discretion in modifying Donald’s child support obligation in the absence of his income tax returns. Donna cites no case or statutory authority supporting this claim. Consequently, she has waived it on appeal. (Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) ¶ 8.17.1, pp. 8-5 to 8-6.) “Appellant’s burden also includes the obligation to present *argument and legal authority on each point* raised. This requires more than simply stating a bare assertion that the judgment, or part of it, is erroneous and leaving it to the appellate court to figure out why; it is not the appellate court’s role to construct theories or arguments that would undermine the judgment and defeat the presumption of correctness. [(]See *Niko v. Foreman* (2006) 144 [Cal.App.]4th 344, 368—‘This court is not inclined to act as counsel . . . for . . . any appellant and furnish a legal argument as to how the trial court’s rulings . . . constituted an abuse of discretion’ (internal quotes omitted)[.]) [¶] When appellant asserts a point but fails to support it with reasoned argument and citations to authority, the court may

treat it as waived and pass it without consideration. [Citations.]” (Eisenberg, et al., *supra*, ¶ 8.17.1, pp. 8-5 to 8-6.)

Were we to address the claim, we would find no indication that the court abused its discretion. The court based its determination on the documentary evidence of Donald’s earnings for the first three months of the year; expressed its concern about the delayed filing of Donald’s 2009 income tax return; and set another hearing to occur shortly after the expected filing of that return.

DISPOSITION

The order of January 25, 2010, modifying child support is affirmed. In the interest of justice, each party shall bear its own costs on appeal.

Kline, P.J.

We concur:

Haerle, J.

Lambden, J.