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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of JEFFREY CHEEK and HAJNALKA T. CHEEK.	
JEFFREY CHEEK, Respondent, v. HAJNALKA T. CHEEK, Appellant, CONTRA COSTA COUNTY DEPARTMENT OF CHILD SUPPORT SERVICES, Intervener and Respondent.	A122838 (Contra Costa County Super. Ct. No. D04-03245)

Hajnalka T. Cheek (mother) appeals from a July 14, 2008 order, which increased the monthly child support that she was to pay to Jeffrey Cheek, the father of her two children. She challenges the order on various grounds, none of which warrants reversal. Accordingly, we affirm.[1]

[1] Respondent Jeffrey Cheek has not filed an opposing brief with this court. Contra Costa County Department of Child Support Services, which agency has intervened in this matter, has filed an opposing brief.

FACTS

A. Background[2]

Mother and father married and have two children. On February 19, 2003, father petitioned for dissolution of marriage in Alameda County. The litigation was transferred to Contra Costa County on June 25, 2004, and the marriage was dissolved on December 29, 2004.

After the matter was transferred to Contra Costa County, the parents were granted joint legal and physical custody of the children. On March 29, 2007, however, father was granted sole legal custody and primary physical custody of the children. Mother was granted supervised visitation. By December 2007, the court lifted the supervision requirement, and mother was granted unsupervised visits of five hours every Saturday. Effective April 5, 2008, mother was granted expanded unsupervised visits every other weekend from Friday at 6:00 p.m. through Sunday at 6:00 p.m.

As to the issue of child support, the record indicates that after a hearing on February 14, 2007, the mother was directed to pay to father monthly child support of $1,363 for both children, retroactive to January 1, 2007.

In March 2007, mother moved to modify child support. After a hearing on May 24, 2007, the court directed mother to pay to father monthly child support of $200 for both children, retroactive to April 1, 2007. The county was directed to recalculate the arrears owed by mother, and the court found that father owed mother $3,020.32, which was to be offset against any arrears owed by mother. Mother was directed to file a current income and expense declaration by July 20, 2007, and she was to inform the District Attorney of any change in her employment status or financial circumstances. The court reserved jurisdiction to modify support retroactive to the time mother secured employment.

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[2] Pursuant to mother's designation, the record consists of (1) a clerk's transcript that contains only mother's notice of appeal and her notice designating the record on appeal, the order under review, and the Register of Actions, detailing previous motions and some court orders; and (2) a reporter's transcript of the hearing held on July 14, 2008. The background facts are taken, in part, from entries in the register of actions.

During the first week of September 2007, both parents filed income and expense declarations before a scheduled review hearing on the issues of child support and arrears. After a hearing on October 5, 2007, the court continued its previous order that mother pay to father monthly child support of $200 for both children. After calculating that mother had accrued arrears of $11,757.17, through August 31, 2007, the court directed mother to pay an additional $100 per month, starting November 1, 2007, to be applied to arrears.

B. Current Litigation

On April 25, 2008, mother filed a motion to modify child support, together with an income and expense declaration; the county filed a response on May 21, 2008. Father did not file a response.

At a hearing held on July 14, 2008, before Court Commissioner Josanna Berkow, both parents appeared in propria persona and were sworn. The court initially commented as it went into "volume seven of the case file," that mother's current motion requested a modification of child support based on changed circumstances in that she was then spending increased time with the children and there was "a change in income."[3] Without objection by mother, the court accepted the county's calculation that the children were spending 14% of their time with mother.

The court also confirmed, without objection by mother, that mother was then employed, earning a gross taxable monthly income of $1,682, and that her required monthly union dues were $97. After noting there had been "multiple hearings and volumes" regarding father's self-employment income, the court took judicial notice of a prior order filed September 12, 2007, in which another court commissioner had found that father's self-employment gross taxable monthly income was $3,200, based on an earlier May 24, 2007 finding of which the court also took judicial notice.

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[3] The record does not indicate whether the change in income referred to mother's situation or father's situation.

When the court asked mother what evidence she had that would dispute the previous court finding of father's income, mother responded by asking the court to enter a default against father because he had not filed his FL 150 (income and expense declaration form) in a timely manner. The court replied, "I do have an Income and Expense Declaration in my file, dated July 13th. It does not appear to have been filed; that's correct. I'll return this to Mr. Cheek, he needs to file it. It looks like it's the original. Serve copies on Ms. Cheek."

The court then asked the county to explain why it had calculated the guideline amount of child support by using $2,821, rather than $3,200, for father's monthly taxable gross income. County counsel explained: "There's an attachment, a 1099 earning statement that [father] attached to his Income and Expense declaration, that shows gross total [income] of [$]14,746.94 through June 7, 2008. It's the most accurate information." In response to the court's query, mother confirmed that she had no evidence to the contrary regarding father's income. The court then agreed with the county, finding that "the 1099" statement was the most accurate information regarding father's income, and that father had a monthly gross taxable income of $2,821. After applying the formula for calculating child support, the court determined that a guideline order would require mother to pay to father monthly child support of $357 for both children.

The court then considered whether the required amount of child support should be modified below the guideline. Without objection by mother, both county counsel and father informed the court that the current monthly child support of $200 was "a below guideline amount." Father explained that the amount had been set below the guideline because mother had earlier indicated she was working only part-time. However, in mother's most recent income and expense declaration, she indicated she was working full-time.

The court found there was no basis for deviating from the guideline amount for child support. Taking into account mother's tax status, mother's net disposable monthly income was $1,326, and if she were required to pay $357, her net monthly disposable income would be less than $1,000 but $100 above the poverty level. After father refused

to accept less than the guideline amount, the court ordered mother to pay current monthly child support of $357.

When mother complained that she would not be able to support herself, the court replied there was no evidence that would allow the court to deviate from the guideline, that after the payment of child support mother was left with a monthly net income that was above the poverty level, and $357 was "not much support for two children. . . ."

The court also adjusted mother's monthly payment towards arrears. Because mother's remaining monthly net disposable income after paying current child support was only $100 above the poverty level, the court modified her arrears payment downward from $100 per month to $25 per month.

Mother asked the court to increase the monthly amount she was required to pay towards arrears so that she would be able to eliminate the arrears. The court denied the request, explaining that current support must be paid first, and that the amount to be paid towards arrears had been reduced because of the increase in current child support but mother was free to pay more money to eliminate the arrears.

The court filed a written order consistent with its rulings at the hearing. Mother's timely appeal ensued.

DISCUSSION

Mother presents several arguments in support of her claim that the order increasing child support was not supported by substantial evidence and constituted an abuse of discretion by the court. We disagree.

The Family Code provides a formula for calculating child support using the net monthly disposable incomes of both parents and the percentage of time each parent either spends with the child or has or will have primary physical responsibility for the child. (Fam. Code, § 4055.[4]) The guideline amount is presumed to be the correct amount of child support to be ordered. (§ 4057, subd. (a).) The presumption may be rebutted by admissible evidence showing that the application of the formula would be unjust or

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[4] All further unspecified statutory references are to the Family Code.

inappropriate. (*Id*. at subd. (b).) The parties may stipulate to a child support amount subject to the approval of the court. (§ 4065, subd. (a).) However, "[i]f the parties to a stipulated agreement stipulate to a child support order below the amount established by the statewide uniform guideline, no change of circumstances need be demonstrated to obtain a modification of the child support order to the applicable guideline level or above." (*Id*. at subd. (d).)

Initially, we reject mother's contention that a default should have been entered against father for his failure to timely file his income and expense declaration. The court commissioner who heard the matter was not required to grant a default based on father's failure to file his income and expense declaration. (§ 4253 ["[W]hen hearing child support matters, a commissioner or referee *may* enter default orders. . . ." (italics added)].)

We also find unavailing mother's argument that there was insufficient evidence to support the recalculation of child support because father never filed his July 13, 2008, income and expense declaration or his latest tax return. The court could rely upon the county's undisputed offer of proof regarding father's current income, even though father's latest income and expense declaration and tax return had not been formally filed or admitted as exhibits at the hearing. "Judges assigned the hearing of domestic relations law and motion calendars in busy metropolitan courts must hear and decide a staggering number of cases while conducting the calendar in such a way that the parties and their counsel have a full and fair hearing. To accomplish this nearly impossible task, trial judges must adopt processes which expedite the hearing of motions and orders to show cause in domestic relations cases, one of the most important and sensitive tasks a judge faces." (*In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1059, fn. 3.) "[A] preferable procedure" involves the court's review of the moving and responding papers before the hearing, and its making inquiries of the parties and counsel as necessary at the hearing, including allowing the parties and counsel to make offers of proof of matters not in the parties' declarations. (*Ibid*.) Thus, in this case, the court acted within its discretion in considering the county's offer of proof, which consisted of counsel's description of

father's 1099 income earning document. County counsel's description of the income document that would be proffered in evidence was sufficiently specific to constitute a valid offer of proof from which the court could determine father's monthly gross taxable income. (Cf. *United Sav. & Loan Assn. v. Reeder Dev. Corp.* (1976) 57 Cal.App.3d 282, 294 [offer of proof insufficient because counsel only described facts she would prove, and not testimony or description of writings she was prepared to introduce as evidence].) The offer of proof was therefore substantial evidence supporting the court's decision that child support should be calculated based on father's monthly gross taxable income as reflected by his gross earnings for the first five months of 2008 rather than based on earlier earnings as reflected in the court's September 2007 order.

In her reply brief, mother argues she was prejudiced by the order because if the court had held father in default for failing to timely file his current financial information, the court would have continued monthly child support at $200. However, mother ignores that the monthly child support payment of $200 was a below guideline amount that father had accepted when she was working part-time. Father was not obliged to continue to accept that amount after mother revealed she was working full-time. (§ 4065, subd. (d).) Additionally, mother did not request that the court either retain child support at $200, or recalculate the guideline child support using father's previous monthly taxable gross income of $3,200, because father failed to timely file his most recent financial information.

Although father was directed to file his income and expense declaration, dated July 13, 2008, the register of action in the clerk's transcript submitted on this appeal does not reflect that father complied with the court's order. However, it would be a waste of judicial resources to reverse and remand the matter for further proceedings on mother's motion in the absence of any showing or argument that the financial information used by the court to recalculate child support in its July 14, 2008, order was incorrect.[5]

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[5] In her reply brief, mother asks us to consider whether she is entitled to recover an overpayment of child support based upon a March 25, 2009 order. However, whether

DISPOSITION

The order filed July 14, 2008 is affirmed.

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Jenkins, J.

We concur:

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McGuiness, P. J.

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Siggins, J.

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mother is entitled to such relief must be presented to the trial court; it is not properly before us on this appeal from the July 14, 2008 order.