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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of ENRIQUE and DARLENE CRUZ.	
ENRIQUE E. CRUZ, Respondent, v. DARLENE E. CRUZ, Appellant.	D037848 (Super. Ct. No. DN80815)

APPEAL from an order of the Superior Court of San Diego County, Harry L. Powazek, Commissioner. Affirmed.

Darlene E. Cruz appeals a postjudgment order granting Enrique E. Cruz's request for reduction of child support.[1] Asserting the court's determination of her earning capacity was devoid of substantial evidentiary support, Darlene contends the court erred

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1 For purposes of clarity, we may refer to the parties by their first names.

in imputing income to her for purposes of calculating Enrique's reduced child support payment. We affirm the order modifying child support.

I

INTRODUCTION

"California has implemented a 'statewide uniform guideline' for determining child support according to a complex algebraic formula based on the parents' incomes and custodial time with the child." (*In re Marriage of Smith* (2001) 90 Cal.App.4th 74, 80.)

By motion for modification of a postjudgment order in dissolution proceedings, Enrique requested increased custodial time with the parties' minor daughter Ashley and, if such request were granted, a corresponding reduction in his child support payment. In litigating Enrique's modification motion, the parties disputed the share of custodial time to be granted to Enrique. The parties also disputed the amount of income to be imputed to Darlene.

After hearing, the court imputed income to Darlene in the amount of the existing order without modification. However, the court increased Enrique's custodial time from the existing 25 percent to 41 percent. For purposes of calculating Enrique's child support obligation, the court took into account Enrique's increased share of custodial time and thus reduced the amount of Enrique's monthly child support payment.

Darlene's appeal attacks the order reducing Enrique's child support payment. However, Darlene does not challenge the increase in Enrique's custodial time, the upward modification of a component of the existing order that triggered the downward modification of child support. Instead, Darlene simply challenges the sufficiency of the

evidentiary support for the amount of income imputed to Darlene by the court, the precise amount also imputed in the existing order. Concluding Darlene has not demonstrated reversible judicial error with respect to the order reducing Enrique's child support obligation, we do not disturb such order.

II

FACTUAL AND PROCEDURAL BACKGROUND

We state the facts and reasonable inferences in the light most favorable to Enrique as the party prevailing in the superior court.

In October 1984 the parties married.

In October 1987 the parties' daughter Ashley was born.

In June 1993 the parties separated.

In January 1994 Enrique petitioned to dissolve the parties' marriage. Later that year, the court dissolved the marriage. Darlene was self-employed as the operator of a secretarial services business. Under successive court orders, Enrique began paying Darlene monthly child support.

In March 1996, in a postjudgment proceeding, Darlene claimed $375.58 monthly income. However, in calculating Enrique's child support payment, the court attributed $1,660 gross monthly income to Darlene.

On January 1, 2000, Darlene closed her secretarial services business and began working for Newport Strategic Search, Inc. as a part-time recruiter.

On January 11, 2000, in a postjudgment proceeding, although Darlene claimed only $683.20 monthly income, the court attributed $1,666 gross monthly income to her. The court ordered Enrique to pay Darlene $1,088 monthly child support.

III

CHALLENGED SUPERIOR COURT PROCEEDINGS

In June 2000 Enrique filed the motion at issue on this appeal. Specifically, by order to show cause, Enrique requested upward modification of his custodial time share from his existing 25 percent to 50 percent. Enrique also asked the court to reduce his monthly child support payment if his request for increased custodial time were granted.[2]

In August 2000 Darlene filed a responsive declaration asserting Enrique's custodial time share should be maintained at 25 percent. Darlene also asserted she was working parttime with $1,000 gross monthly income and $793.52 net disposable income. Further, Darlene filed an income/expense declaration asserting that during the past 12 months, she had received $1,853.61 income from her personal business (closed in January 2000) plus $6,110 gross salary/wages from her employment at Newport Strategic Search, Inc..

In November 2000 Darlene filed a supplemental declaration asserting that Enrique's custodial time share should be maintained at 25 percent and that child support should be increased commensurate with Enrique's "substantial increased income."

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[2] Enrique also sought to modify the existing order with respect to other matters not at issue on this appeal.

On January 16, 2001, Darlene filed a second supplemental declaration, again asserting that Enrique's custodial time share should be maintained at 25 percent and that child support should be increased commensurate with Enrique's "substantial increased income." Darlene also asserted the family court services mediator's recommendation of a 41 percent custodial time share for Enrique was "unrealistic," "unachievable," and not in Ashley's emotional best interest.

On January 17, 2001, Enrique filed a declaration about Darlene's earning capacity and requested that the court attribute to Darlene a monthly income of at least $2,200. Enrique asserted Darlene was experienced in the secretarial-administrative field and he believed Darlene continued to suppress her income deliberately to achieve a higher support award. Enrique also asserted his custodial time share should be 41 percent.[3]

On January 18, 2001, Darlene filed a third supplemental declaration, again asserting that Enrique's custodial time share should be maintained at 25 percent and that child support should be increased commensurate with Enrique's "substantial increased income." Darlene also asserted her only income was from her present part-time job where she received $1,000 gross monthly income; in January 2000 she had closed her secretarial services business because she lost her largest clients and was no longer

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[3] Attached to Enrique's declaration were copies of employment listings in fields where Darlene was assertedly qualified. At the ensuing hearing on Enrique's modification motion, Darlene objected that those employment listings were baseless, without foundation and devoid of any evidentiary value. Although overruling Darlene's objection, the court stated the attachments were "fairly useless to me." Our conclusion that the appealed order must be affirmed does not depend on the admissibility of those attachments.

making a profit; her part-time position with her present employer provided her with a steady income and the ability to be with her children before and after school; and, as a result of accepting her current employment, her net disposable income was larger than it was when she had been self-employed. Darlene's income/expense declaration claimed a $767.34 net monthly disposable income and a $733.71 current net disposable income.

On January 22, 2001, Enrique's modification motion came on for hearing. The parties disputed the share of custodial time to be granted to Enrique, with Enrique's counsel arguing the court should adopt the recommendation by the family counseling services of a 41 percent custodial time share for Enrique, while Darlene's counsel argued Enrique's share should be set at 33 percent. The parties also disputed the amount of income to be imputed to Darlene. Enrique argued the court should attribute a monthly income to Darlene in the amount of her earning capacity, asserted by Enrique to be at least $2,200 monthly. However, asserting Darlene presently had a job but was not employable fulltime because she was a mother with a small child in addition to Ashley, Darlene's counsel argued Enrique's proffered figure of $2,200 for Darlene's income was "unrealistic." Further, arguing the existing order's finding of $1,666 income was currently unsupported by competent evidence, Darlene's counsel asserted Darlene's actual income and the number to be used for all calculations was a "$1,000-and-change figure and 363."

After hearing, the court accepted the parties' stipulation that Enrique's gross monthly income was $7,380 and also found Enrique's net monthly income was $5,583. Further, noting there had "been a consistent finding of an ability" with respect to

Darlene's income, the court found Darlene had $1,666 gross monthly income and $1,615 net monthly income. In doing so, the court rejected as without "basis" the finding sought by Enrique that Darlene's monthly income was at least $2,200. Finally, the court used a 41 percent custodial time share for Enrique to calculate Enrique's child support obligation. Thus, applying that 41 percent figure, the court reduced retroactive to July 1, 2000, the amount of Enrique's monthly child support payment from the existing $1,088 to $887.

In March 2001 the court entered findings and an order based upon the January 2001 hearing. Darlene appeals.

IV

DISCUSSION

Asserting a lack of substantial evidentiary support for the court's determination she had $1,666 current monthly earning capacity, Darlene contends the court erred in using such earning capacity to impute income to her for purposes of calculating Enrique's child support payment. (Fam. Code,[4] § 4058, subd. (b).)[5] However, the precise issue on appeal is the propriety of the ultimate order reducing Enrique's child support payment. As we shall explain, on this record Darlene has not established reversible judicial error with respect to such order.

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4 All further statutory references are to the Family Code unless otherwise specified.

5 Section 4058, subdivision (b) provides: "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."

Under California's statewide uniform guideline, child support is determined according to an algebraic formula based upon the parents' income and custodial time with the child. (*In re Marriage of Smith, supra*, 90 Cal.App.4th at p. 80.) Further, as the party moving to reduce child support, Enrique had the burden to prove a material change of circumstances warranting such downward modification. (*In re Marriage of Stephenson* (1995) 39 Cal.App.4th 71, 83, fn. 7.) As discussed, Enrique's modification motion requested increased custodial time with Ashley and, if such request were granted, a corresponding reduction in his child support payment. The record indicates Enrique met his burden to prove changed circumstances warranting an increase in his custodial time. Accordingly, in a ruling not challenged by Darlene, the court entered an order increasing Enrique's custodial time share from the existing 25 percent to 41 percent. However, the record also indicates that Enrique did not meet his burden to show changed circumstances with respect to Darlene's income. Although Enrique asked the court to make use of Darlene's earning capacity to find she had a gross monthly income of at least $2,200, the court effectively affirmed its existing order by attributing to Darlene a gross monthly income of $1,666. Similarly, in rejecting Darlene's request to find her income had decreased since the existing order was issued, the court effectively concluded Darlene did not meet her burden to show changed circumstances warranting a decrease in the income attributed to her. Thus, since neither party showed changed circumstances warranting modification of the existing order's finding involving the issue of Darlene's income, such issue was not a determinative factor in the court's ultimate order modifying downward Enrique's child support obligation. Instead, the reduction in Enrique's child support

payment was based solely upon the court's increasing Enrique's custodial time share. (*In re Marriage of Smith*, *supra*, 90 Cal.App.4th at p. 80.)

Moreover, in any event, the record supports the court's attribution of $1,666 gross monthly income to Darlene. Before using a parent's earning capacity to determine child support payments, the court must decide whether the parent has the current ability and opportunity to work. (*In re Marriage of Smith*, *supra*, 90 Cal.App.4th at p. 82, citing *State of Oregon v. Vargas* (1999) 70 Cal.App.4th 1123, 1127; accord, *In re Marriage of LaBass & Munsee* (1997) 56 Cal.App.4th 1331, 1337-1338; *In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 995.) The ability to work includes """such factors as age, occupation, skills, education, health, background, work experience and qualifications."""" (*In re Marriage of LaBass & Munsee*, at pp. 1337-1338.) In cases where parties are self-employable, an "appropriate definition of 'opportunity to work' is the substantial likelihood that a party could, with reasonable effort, apply his or her education, skills and training to produce income." (*In re Marriage of Cohn* (1998) 65 Cal.App.4th 923, 930.)

Ample evidence indicated Darlene currently had the ability to work and it was substantially likely that, with reasonable effort, Darlene could have applied her education, skills and experience to generate at least $1,666 monthly income. (*In re Marriage of Cohn*, *supra*, 65 Cal.App.4th at p. 930; *In re Marriage of LaBass & Munsee*, *supra*, 56 Cal.App.4th at pp. 1337-1338.) Indeed, in her third supplemental declaration and her accompanying income/expense declaration filed two days before the January 2001 hearing on Enrique's modification motion, Darlene asserted: she was 36 years old; she had completed 14 years of education; she had previously operated her own secretarial

services business; and since November 1999 she had worked as a recruiter for Newport Strategic Search, Inc. in a part-time position and "as a result of accepting this employment my net disposable income is larger than it was when I was self-employed." Finally, as Darlene acknowledges, under section 4058, subdivision (b), the court had discretion to calculate child support based upon Darlene's earning capacity in lieu of her actual income if consistent with Ashley's best interests. In considering Darlene's earning capacity in finding her actual income to be $1,666 and then using such amount to calculate Enrique's child support payment, the court implicitly found its ruling was consistent with Ashley's best interests. Darlene has not made any showing to the contrary.

In sum, Darlene has not established any abuse of discretion or other prejudicial judicial error with respect to the order reducing Enrique's child support payment. (*State of Oregon v. Vargas*, *supra*, 70 Cal.App.4th at p. 1126; *In re Marriage of Hinman*, *supra*, 55 Cal.App.4th at p. 994; *In re Marriage of Carlsen* (1996) 50 Cal.App.4th 212, 215; *In re Marriage of Paulin* (1996) 46 Cal.App.4th 1378, 1384.) Accordingly, we do not disturb such order.

V

DISPOSITION

The order is affirmed.

KREMER, P. J.

WE CONCUR:

BENKE, J.

HUFFMAN, J.