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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of SHARNA
SHACHAR and JAMES MORRIS.

SHARNA SHACHAR,

Respondent,

v.

JAMES MORRIS,

Appellant.

D042346, D043648

(Super. Ct. No. D461882ABC)

CONSOLIDATED APPEALS from orders of the Superior Court of San Diego County, Jeffrey S. Bostwick, Commissioner, and Michael T. Smyth, Judge. Reversed.

James Morris appeals two postjudgment child support orders in the marital dissolution proceedings between Morris and Sharna Shachar.

Morris contends the first challenged child support order must be reversed because the family law court's erroneous determination that the parties equally shared primary

physical responsibility for their children resulted in a monthly child support payment from Shachar to Morris in an amount less than he was entitled to receive under the guideline child support formula. We reverse the first challenged child support order and direct the superior court to recalculate guideline child support using a proper timeshare factor as set forth in Family Code section 4055.¹

Morris contends the second challenged child support order must be reversed because the family law court's downward modification of Shachar's monthly child support payment to Morris was not supported by competent evidence that Shachar's income had decreased. We reverse the second challenged order.

I

FACTUAL AND PROCEDURAL BACKGROUND

The parties' children were born in May 1991, October 1992 and October 1995.² Primary wage earner Shachar works as a self-employed physician. Morris is unemployed but spends a disputed amount of time caring for the children.

After their September 2000 separation, the parties entered into a written marital termination agreement (Agreement).

In July 2001 the family law court entered judgment dissolving the parties' marriage and incorporating the Agreement. In relevant part, the judgment provided

¹ All further statutory references are to the Family Code unless otherwise specified.

² The parties dispute whether they married in June 1990 (Morris) or in April 1999 (Shachar).

- (1) the parties would share physical custody of the children on alternate weeks and
- (2) Shachar would pay Morris \$1,575 monthly child support.

In October 2001 the family law court modified the parties' child custody schedule to provide that (1) Morris would have custody of the children during "typical" weeks from Sunday at 6:00 p.m. until Thursday afternoon after school;³ (2) Shachar would have custody from Thursday afternoon after school until Sunday at 6:00 p.m.; and (3) Morris would have custody on the third weekend of the month.

In April 2003 and November 2003 the family law court entered modified orders involving the parties' child custody and child support. Morris has appealed those two orders and we have consolidated his appeals.

II

MORRIS'S APPEAL OF THE APRIL 2003 MODIFICATION ORDER

A

The Parties' Competing Orders to Show Cause

In July 2002 Morris filed an order to show cause for (1) an increased amount of child support from Shachar and (2) custody of the children on alternate weekends. Later that month, Shachar apparently sought modification of the child custody order to award her primary custody of the children.

In November 2002 the parties' competing orders to show cause came on for an evidentiary hearing. In compliance with the requirement recognized in *In re Marriage of*

³ Shachar acknowledges the children's school ended on Thursday at 1:00 p.m.

Whealon (1997) 53 Cal.App.4th 132, 144 (*Whealon*), Morris objected to the court's use of a 50/50 child custody timeshare factor in calculating guideline child support because the parties' actual timeshare percentages since October 1991 had been 60 percent (Morris) and 40 percent (Shachar).⁴

On April 17, 2003, based on the November 2002 hearing, the family law court entered an order (April 2003 Modification Order) modifying the existing child sharing order to provide that (1) except for the third week of the month, Shachar would have the children every week from Thursday at 1:00 p.m. until Sunday at 6:00 p.m.; (2) on the third weekend of the month, Shachar would have the children after school on Friday until 12:00 noon on Saturday, except that on a Friday when the children were not in school she would pick them up curbside at Morris's home between 4:00 p.m. and 5:00 p.m.; and (3) Morris would have the children during the remainder of the time except for vacations and holidays, with holidays to be shared equally. The April 2003 Modification Order stated its child sharing schedule resulted in the parties sharing the children in "approximately equal amounts of time," namely, that "each parent [would] have the children approximately 14 days in each 4 week cycle."

⁴ In *Whealon, supra*, 53 Cal.App.4th at page 144, the appellate court observed: "For better or worse, California child support law now resembles determinate sentencing in the criminal law: The actual calculation required of the trial judge has been made so complicated [citation] that, to conserve judicial resources, any errors must be brought to the trial court's attention at the trial level while the error can still be expeditiously corrected."

With respect to child support issues, the April 2003 Modification Order (1) imputed \$2,000 gross monthly income to Morris; (2) determined Shachar's gross monthly self-employment income to be \$15,942; and (3) stated the child custody timeshare was 50/50. Based on those numbers, the April 2003 Modification Order increased Shachar's monthly child support payment to \$2,484.

B

The April 2003 Modification Order Must Be Reversed

Asserting entitlement to more than \$2,484 in monthly guideline child support from Shachar, Morris challenges that portion of the April 2003 Modification Order that stated its child sharing schedule resulted in an "approximately" equal child custody timeshare between the parties. Noting that the April 2003 Modification Order established a child custody schedule resulting in him having actual primary physical responsibility for the children 62 percent of the time, Morris contends the family law court erred by finding the parties shared approximately equal primary physical responsibility for the children. More particularly, Morris contends the family law court did not comply with the mandatory statutory requirement to calculate the actual percentage of time each party had primary physical responsibility for the children. (§§ 4052, 4053, subd. (c), 4055, subd. (a).⁵)

⁵ Section 4052 provides: "The court shall adhere to the statewide uniform guideline and may depart from the guideline only in the special circumstances set forth in this article."

Section 4053 provides: "In implementing the statewide uniform guideline, the courts shall adhere to the following principles: [¶] . . . [¶] (c) The guideline takes into account each parent's actual income and level of responsibility for the children."

Morris concludes the family law court reversibly erred by basing its April 2003 Modification Order's child support award on the arbitrary and erroneous assumption that the parties' timeshare percentages were 50/50.

"The rules regarding how to calculate the 'H%' factor of the uniform guideline formula" (the timeshare factor) "are well established by case law." (*DaSilva v. DaSilva* (2004) 119 Cal.App.4th 1030, 1033 (*DaSilva*)). "The trial court is required to determine the 'approximate' percentage of time [a parent] has or will have 'primary physical responsibility' for [the children]. This calculation "'is based on the parents' respective periods of primary physical '*responsibility*' for the children rather than physical 'custody.'"" (*Ibid.*) "'The relevant phrase is "primary physical responsibility"' and as such timesharing 'properly may be "*imputed*" to a parent (or between parents) when the child is not in either parent's physical custody. . . . [¶] Conversely, however, no timesharing adjustment should be made in the guideline formula where the child is not under either parent's physical supervision.'" (*Ibid.*)

Although "'California child support law has become highly deterministic,'" one "area in which a trial court retains some discretion . . . is in determining the percentage of 'primary physical responsibility,' also known as 'parenting time,' to be imputed to each parent. That percentage is a component of the formula used in the uniform guideline to calculate child support." (*In re Marriage of Katzberg* (2001) 88 Cal.App.4th 974, 977

Section 4055, subdivision (a) sets forth the statewide uniform guideline for determining child support orders.

(*Katzberg*.) However, considering "such determinism, ascertaining the correct 'uniform guideline' becomes extraordinarily important, because the trial court may only depart from that guideline by specifying (either in writing or on the record) three things — the guideline amount, the reason why the amount ordered differs, and the reason the different amount is consistent with the best interests of the child. [Citation.] Obviously that means, at a minimum, a correct calculation of the guideline amount." (*Whealon, supra*, 53 Cal.App.4th at p. 144.)⁶

Where, as here, the family law court's child custody order explicitly establishes the precise time the children are to spend with each parent, the family law court must calculate the accurate timeshare percentage. (*Wilson v. Shea* (2001) 87 Cal.App.4th 887, 892.) Here, the family law court failed to calculate an accurate timeshare percentage. The child custody schedule established in the April 2003 Modification Order provided: (1) during typical weeks Morris would have primary physical responsibility for the children 54 percent of the time; and (2) during the "third weekend" weeks, Morris would have primary physical responsibility 88 percent of the time. As such, Morris would have

⁶ In *Whealon, supra*, 53 Cal.App.4th 132, the family law court ran the computation "with a 20 percent time-share factor, when the correct figure was 28 percent." (*Id.* at p. 144.) When the error was brought to the family law court's attention, the court "was (understandably) reluctant to rerun the computation" and then estimated "what the DissoMaster would have yielded with the correct figure." (*Ibid.*) Although expressing "great sympathy for the trial judge," the appellate court stated the DissoMaster "must be redone" by the family law court, "this time with the accurate time-share figure of 28 percent." (*Id.* at p. 145.) The appellate court observed that consistent with "sections 4055 and 4056, deviations cannot be justified simply by making an estimate. We have not been cited to any authority which allows discrepancies to be swept under the carpet by virtue of . . . some discretionary fudge factor." (*Id.* at pp. 144-145.)

primary responsibility for the children on average 62 percent of the time. However, despite the precise child custody time awarded in the April 2003 Modification Order, the family law court inexplicably found the parties' child custody timeshare to be 50/50 and used that inaccurate timeshare factor in calculating guideline child support payments. Accordingly, the April 2003 Modification Order must be reversed. (*Whealon, supra*, 53 Cal.App.4th at pp. 144-145.) Shachar's contentions to the contrary are without merit.

As discussed, the April 2003 Modification Order awarded Morris custody of the children on Thursdays of typical weeks from 12:00 midnight until 1:00 p.m., thus indicating Morris had 13 hours of primary physical responsibility for the children on Thursdays of typical weeks. Nevertheless, essentially ignoring the April 2003 Modification Order's child custody schedule (particularly with respect to "third weekend" weeks), Shachar contends we should affirm that order's determination of a 50/50 child custody timeshare because a "common sense analysis" of its custody schedule would purportedly demonstrate the parties have equal custody of the children. Specifically, Shachar contends that "[f]rom a practical point of view," Morris drops the children at school at approximately 8:00 a.m. on Thursdays during typical weeks and does not see them again until 6:00 p.m. on Sunday. In essence, Shachar contends: (1) Morris should not be credited with primary physical responsibility for the children during the five hours between 8:00 a.m. and 1:00 p.m. on Thursdays of typical weeks; and (2) Shachar should be credited with primary physical responsibility for those challenged five hours so as to make her total credit on a typical Thursday 16 hours (instead of 11) and Morris's total credit on such Thursdays eight hours (instead of 13). Based on her allocation of those

five challenged hours, Shachar concludes the actual timeshare during three out of four weeks is approximately equal at 49 percent for her and 51 percent for Morris.⁷

However, if "a parent desires credit for time the child is not physically with him or her, then the parent has the burden of producing admissible evidence demonstrating he or she is primarily responsible for that child during those challenged times." (*DaSilva, supra*, 119 Cal.App.4th at p. 1034.) "As noted in one treatise, 'As a practical matter, if the noncustodial parent does not raise the issue and come forth with *competent evidence* on the point, most trial courts will credit the time the child spends in day care or school to the custodial parent.'" (*Id.*, at p. 1034, fn. 3, italics added.) Further, the custody hours of nonprimary parent Shachar are presumed to begin and end when the children are transferred to and from her care. (Super. Ct. San Diego County, Local Rules,⁸ rule 5.66(B)(5).⁹) Review of the record reveals Shachar did not present competent evidence

⁷ In effect, Shachar concedes that under the April 2003 Modification Order, the parties share "approximately equal custody" for *only* three out of four weeks of the month. Nevertheless, Shachar contends the order should be affirmed because she should not be penalized by a determination of unequal timeshare percentages based simply on the fact Morris spends the third weekend of each month with the children. However, reversal of the order would not penalize Shachar but instead would permit recalculation of guideline child support using a proper determination of section 4055's timeshare factor. (*Whealon, supra*, 53 Cal.App.4th at pp. 144-145.)

⁸ All further rule references are to the Superior Court of San Diego County Local Rules unless otherwise specified.

⁹ Rule 5.66(B)(5) provides: "Time sharing percentages will be calculated by assigning each parent the number of hours that the child is scheduled to be with that parent or to be under the care, custody or control of that parent. Unless rebutted by *competent evidence*, it shall be assumed that the hours credited to a parent who is not the primary caretaker shall begin at the time the child is transferred to his or her care and

sufficient to satisfy her burden to demonstrate she was primarily responsible for the parties' children during the challenged five hours. (*DaSilva*, at p. 1034 & fn. 3; rule 5.66(B)(5).)

Factors relevant to whether Shachar was primarily responsible for the parties' children during the challenged five hours include "(1) who pays for transportation or who transports the child; (2) who is designated to respond to medical or other emergencies; (3) who was responsible for paying tuition (if any) or incidental school expenses; and (4) who participates in school activities, fundraisers, or other school-related functions." (*DaSilva*, *supra*, 119 Cal.App.4th at pp. 1034-1035.)

Shachar contends: (1) if one of the parties' children becomes sick or has some other problem at school during the five challenged hours, it would be Shachar's responsibility to care for the child; (2) the children know Thursday is their time with Shachar and know to call her in the event of any mishap at school; (3) she has been called several times from school on Thursday mornings to pick up a sick child; (4) she spends more time with the children than ordered by the court because Morris is frequently hours late in picking up the children; and (5) she takes extra time with the children for numerous Jewish holidays. However, these contentions purporting to demonstrate Shachar has primary physical responsibility for the children during the challenged five

shall not extend beyond the end of his or her custodial or visitation time when the child is returned to the other parent or to the child's school or day care provider. 'Primary caretaker' refers to the parent who has custody of the child the majority of the time." (Italics added.)

hours are devoid of citation to the evidentiary record. (Cal. Rules of Court, rule 14(a)(1)(C).) Moreover, our independent review of the record discloses no evidentiary support for Shachar's contentions. (*DaSilva, supra*, 119 Cal.App.4th at p. 1034 & fn. 3; rule 5.66(B)(5).)

While family law courts have discretion in determining the percentage of primary physical responsibility (time-sharing) to be imputed to each parent (*Katzberg, supra*, 88 Cal.App.4th at p. 977), imputed time-sharing figures cannot be plucked from thin air. There must be admissible evidence of a parent caretaker's responsibility for, and supervision of, the children. (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2004) ¶ 6:169, pp. 6-68 to 6-69.) Here, Shachar presented no competent evidence that she had primary physical responsibility for the children during the challenged five hours on Thursdays of typical weeks. Thus, the family law court erred in exercising its discretion to impute those five hours to Shachar.

We are not unmindful of the daunting volume and complexity of matters facing the family law courts daily. However, because the family law court calculated guideline child support using a factually unsupported timeshare factor, the April 2003 Modification Order must be reversed. (*Whealon, supra*, 53 Cal.App.4th at pp. 144-145.)¹⁰

¹⁰ We reject Shachar's contention that upon concluding the parties' physical custody is not 50/50, we should modify the April 2003 Modification Order so that the hours reflect a 50/50 timeshare, or remand the matter to the family law court to do so. Because Shachar has not appealed the order, she cannot presently seek modification here.

III

MORRIS'S APPEAL OF THE NOVEMBER 2003 MODIFICATION ORDER

A

Shachar's Order to Show Cause for Modification of Child Support

In September 2003 Shachar filed an order to show cause for a downward modification of her monthly child support payment to Morris on the ground her income had purportedly decreased.

In November 2003 Shachar's order to show cause came on for hearing and was granted. On November 25, 2003, the family law court entered an order reducing Shachar's monthly child support to \$1,827 (November 2003 Modification Order).

B

The November 2003 Modification Order Must Be Reversed

By its November 2003 Modification Order, the family law court reduced Shachar's monthly child support payment to \$1,827 based on a purported decrease in her income. Seeking reversal of the order, Morris contends the family law court reversibly erred by determining Shachar's income had materially declined. More specifically, Morris contends that as a matter of law the family law court's finding Shachar's financial condition had worsened was not supported by competent evidence because Shachar's supporting financial disclosure documents did not satisfy the mandatory requirements of

rule 5.48.¹¹ Consistent with his objection at the November 2003 hearing in the family law court, Morris contends the family law court's grant of Shachar's modification motion was impermissibly based solely on a single financial statement that did not comply with rule 5.48's requirement that additional documentation be submitted to verify Shachar's self-employment income.

The family law court may modify a child support order to reflect a material change in circumstances, including a decline in a party's income. (§ 3651, subd. (a).) As the party seeking to reduce child support, Shachar had the burden to prove a material change of circumstances warranted a reduction. (*In re Marriage of Tydlaska* (2003) 114 Cal.App.4th 572, 576 (*Tydlaska*)). Because Shachar failed to present the requisite competent evidence of the purported decline in her income, the family law court should have denied Shachar's motion to reduce child support. (*Ibid.*; rule 5.48.)

As the family law court observed at the November 2003 hearing, self-employment income data are uniquely susceptible to manipulation. Hence, rule 5.48 requires a

¹¹ Rule 5.48 provides that in order to "verify current income parties must serve and file copies" of specified documents "with their income and expense declaration." In particular, rule 5.48 requires a self-employed party, such as Shachar, to serve and file with her income and expense declaration a "schedule reflecting all compensation received by that party year-to-date, the prior calendar year's and the most recent financial statement, profit-and-loss statement or other documents which reflect the prior year, current period and year-to-date income."

"[F]amily law courts have the authority to exercise reasonable control over all proceedings connected with pending litigation, including formulating rules of procedure where justice requires it, in order to insure the orderly administration of justice." (*Lammers v. Superior Court* (2000) 83 Cal.App.4th 1309, 1321 (*Lammers*)). Absent conflict with state law, local rules have the force and effect of law and must be followed. (*Ibid.*)

comparison of financial evidence from three overlapping intervals. Indeed, Shachar acknowledges that rule 5.48 requires financial documentation reflecting her income in (1) the prior year, (2) the previous 12 months, and (3) the current year-to-date.

Despite Shachar's acknowledgement that rule 5.48 requires financial evidence from three overlapping intervals, her income and expense declaration was accompanied only by a single financial statement purportedly showing her profit and loss during the preceding 12 months (Sept. 2002 through Aug. 2003). Thus, although Shachar presented financial records for the previous 12 months in support of her order to show cause for modification of child support, she did not submit the requisite records for the prior year (Jan. 1, 2002 to Dec. 31, 2002) or the current year-to-date (Jan. 1, 2003 to Sept. 22, 2003, the date she filed her order to show cause for modification of child support). By providing financial records for only one of the three overlapping periods set forth in rule 5.48, Shachar did not present the evidence required to verify her current (reduced) income and thus failed to meet her burden to prove a material change of circumstances warranting a reduction in child support. (§ 3651, subd. (a); *Tydlaska, supra*, 114 Cal.App.4th at p. 576.)¹² Shachar's contentions to the contrary are without merit.

Shachar contends the November 2003 Modification Order should be affirmed because it established a reduced child support amount based on current and ample evidence of income as required under rule 5.48. Specifically, asserting she submitted

¹² Indeed, at the November 2003 hearing, the family law court stated: "I don't know about her numbers in this profit and loss statement. It probably needs more scrutiny."

(1) a profit and loss statement for the period of September 2002 through August 2003 and (2) her 2002 income tax return, Shachar contends such documents considered together reflected her prior year income and current year-to-date income. Further, asserting those documents indicated her income was generally stable from month to month without any large windfall payments, Shachar concludes the family law court properly reduced her child support payment based on the \$123,000 average of her 2002 and 2003 income shown on such documents. Additionally, Shachar contends her actual income reported on her 2003 income tax return was also approximately \$123,000.

However, Shachar's contention that her income was generally stable without windfall payments is unsupported by citation to the evidentiary record. (Cal. Rules of Court, rule 14(a)(1)(C).) Further, although Shachar contends she submitted her 2002 income tax return "as evidence" at the November 2003 family law court hearing, Shachar has not presented a record containing that tax return. Moreover, Shachar has not presented a record containing evidence of her current year-to-date income for 2003.

Shachar has attached a copy of her 2003 tax return to her respondent's brief. However, because Shachar's 2003 income tax return was not presented at the November 2003 family law court hearing, it is not part of the appellate record. As such, Shachar's attachment of her 2003 income tax to her respondent's brief did not comply with legal requirements for attachments to appellate briefs. (Cal. Rules of Court, rule 14(d) ["A party filing a brief may attach copies of exhibits or other materials *in the appellate record*"], italics added; Ct. App., Fourth Dist., Div. One, Local Rules of Ct., rule 8,

Attachments to Briefs.¹³) Further, Shachar did not submit the requisite declaration for an attachment. (Ct. App., Fourth Dist., Local Rules, rule 8(e) ["Counsel filing a brief with attachments shall file a declaration specifying whether the material is part of the record and, if not, why each attachment is permissible"].) Instead, in her respondent's brief, Shachar simply asserted: "Shachar has signed this brief under penalty of perjury in order to authenticate her 2003 income tax return so that it maybe [*sic*] relied upon by this court as evidence in this case." Although Shachar has in essence acknowledged her November 2003 income tax return would constitute additional evidence on appeal, she has not complied with the legal requirements for requesting that we take evidence or make findings on appeal. (Cal. Rules of Court, rule 22.)¹⁴ Because Shachar did not

13 "There shall be no attachments to a brief except the following:

"(1) Copies of exhibits or materials which are *already contained in the existing record on appeal* as set out in rule 14(d).

"(2) Expository material which is designed as an aid to understanding the presentation in the brief, such as graphs, charts, or diagrams derived from or illustrating matters in evidence. Expository material should be clearly labeled as such, so that it will not be confused with exhibits in the record.

"(3) An unpublished opinion cited to the court under rule 977(c) of the California Rules of Court."

"(4) Authorities from other jurisdictions which are not available to the court in its library. A list of materials in the court's library can be obtained from the clerk's office." (Ct. App., Fourth Dist., Div. One, Local Rules of Ct., rule 8(d), Attachments to Briefs, italics added.)

14 California Rules of Court, rule 22(b) provides: "A party may move that the reviewing court make findings under Code of Civil Procedure section 909. The motion must include proposed findings."

California Rules of Court, rule 22(c) provides:

"(1) A party may move that the reviewing court take evidence.

"(2) An order granting the motion must:

comply with the legal requirements for attaching her 2003 income tax return to her respondent's brief and did not move that we take her return as additional evidence on appeal, the return is not cognizable on this appeal. Finally, as executed in March 2004, Shachar's 2003 income tax return presumably included income attributable to time periods after the November 2003 family law hearing on Shachar's order to show cause for modification of child support. As such, Shachar's 2003 income tax return did not constitute competent evidence of her then-current year-to-date (Jan. 1, 2003 to Sept. 22, 2003) income.¹⁵

In sum, Shachar did not present competent evidence to meet her burden to show her child support payment should be reduced due to a material decline in her income. (§ 3651, subd. (a); rule 5.48). Despite Morris's objection that Shachar's showing did not comply with the local family court rule (*Lammers, supra*, 83 Cal.App.4th at p. 1321), the family law court found her income had decreased. Thus, by reducing Shachar's child support payment based on an inadequately supported finding that her income had declined, the family law court acted beyond its discretion. Accordingly, because the

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- "(A) state the issues on which evidence will be taken;
 - "(B) specify whether the court, a justice, or a special master or referee will take the evidence; and
 - "(C) give notice of the time and place for taking the evidence.
- "(3) For documentary evidence, a party may offer the original, a certified copy, or a photocopy. The court may admit the document in evidence without a hearing."

¹⁵ We acknowledge Shachar's valiant efforts to demonstrate her current income. However, she was required to comply with various applicable legal requirements but did not succeed in doing so.

family law court should have denied Shachar's order to show cause for modification of child support, the November 2003 Modification Order must be reversed.

IV

DISPOSITION

The order of April 17, 2003, is reversed with directions to the superior court to recalculate guideline child support using a proper determination of the timeshare factor of Family Code section 4055.

The order of November 25, 2003, is reversed.

Appellant is awarded costs on appeal.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.