Filed 2/22/11 Campo CA1/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

JAMIE CAMPO, Plaintiff and Respondent, v. BRIAN CAMPO, Defendant and Appellant.	A128281 (Lake County Super. Ct. No. FL202709)

Brian Campo appeals from an order modifying visitation and child support for his four-year-old daughter, who lives with her mother, Jamie Campo, in Minnesota. He contends the court abused its discretion by failing to reduce his monthly child support payments to account for expenses he incurs transporting his daughter to California for visitation. We affirm.

Factual and Procedural Background

On June 28, 2006, a judgment of dissolution was entered dissolving the parties' marriage. Pursuant to a settlement agreement incorporated into the judgment, the parties were awarded joint legal custody of their daughter and Jamie, who had recently moved from California to Minnesota, was awarded sole physical custody of the daughter. The daughter was to reside with Jamie in Minnesota and Brian was awarded reasonable visitation with his daughter in California. The agreement sets child support at $1,000 a month. In addition to the child support payments, Brian is required to "pay all costs to effect transportation of the minor child to and from his visitation." In the years following

entry of judgment, Brian had month-long visits with his daughter approximately once every three months, or four times a year.

On April 17, 2009, Jamie moved to modify the visitation plan in anticipation of the daughter starting school. At that time, Brian requested that the child support order also be reviewed. Through mediation, the parties agreed to a new visitation schedule which continued to allow for three or four visits a year based on the school schedule. The parties, however, were unable to mediate the issue of child support. Among other things, the parties disagreed as to whether Brian's child support payments should be reduced by approximately $500 a month to cover the cost of transporting his daughter for visitation. Brian's request was based on his estimate that the cost of airfare for each visit was $1,800, which amounts to $525 a month.

At a hearing in November 2009, Jamie's attorney argued that Brian's child support payments should not be reduced because Brian agreed in the original agreement to pay all the transportation expenses and he had not demonstrated any change in circumstances in support of the modification. She emphasized that the number of visits had not changed under the new plan, there was no evidence that the travel expenses had increased and the parties' respective incomes had remained the same since the judgment was entered. Brian's attorney argued that the cost of transporting the daughter to and from California three or four times a year with a chaperone was a significant expense and emphasized that Brian was not represented by counsel at the time the agreement was entered. The court issued a tentative decision setting child support at $1,028 per month. The decision states further, "Because the judgment decrees that the father will bear the cost of transportation expense, no credit is given for his costs in transporting the child." A final order adopting the rulings in the tentative decision was entered on February 23, 2010, and thereafter Brian filed a timely notice of appeal.

Discussion

An order of child support "may be modified or terminated at any time as the court deems to be necessary." (Fam. Code,[1] § 3651, subd. (a).) "Statutory procedures for modification of child support 'require a party to introduce admissible evidence of changed circumstances as a necessary predicate for modification.' [Citations.] The burden of proof to establish that changed circumstances warrant a downward adjustment in child support rests with the supporting spouse. [Citation.] [Citation.] [¶] 'Ordinarily, a *factual* change of circumstances is required [for an order modifying support] (e.g., increase or decrease in either party's income available to pay child support).' [Citation.] 'There are no rigid guidelines for judging whether circumstances have sufficiently changed to warrant a child support modification. So long as the statewide statutory formula support requirements are met (Fam. [Code,] § 4050 et seq.), the determination is made on a case-by-case basis and may properly rest on fluctuations in need or *ability* to pay.' [Citations.] The ultimate determination of whether the individual facts of the case warrant modification of support is within the discretion of the trial court." (*In re Marriage of Leonard* (2004) 119 Cal.App.4th 546, 556.)

Under Family Code section 4057, subdivision (b)(5), guideline child support may be reduced when "[a]pplication of the formula would be unjust or inappropriate due to special circumstances in the particular case." In *Wilson v. Shea* (2001) 87 Cal.App.4th 887, 893, the court held that it is within a court's discretion to reduce guideline support under section 4057, subdivision (b)(5) to create a travel fund for a noncustodial parent when the custodial parent moves away and the reduction is necessary to assure the noncustodial parent's visitation with the child. The court explained, "The Legislature has declared that 'it is the public policy of this state to assure minor children frequent and continuing contact with both parents after the parents have separated. . . .' [Citation.] Further, the California Supreme Court has noted that the law gives 'broad discretion' to trial courts to modify visitation orders to minimize loss of the noncustodial parent's

[1] All statutory references are to the Family Code.

contact with a child in move-away cases, including 'allocating transportation expenses to the custodial parent.' " (*Wilson,* at p. 893; see also *In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 553-554 [travel trust financed with money otherwise due as child and spousal support in international move-away case].)[2]

In this case, Brian argues that the child support order must be reversed because the court failed to recognize its discretion to reduce the amount of Brian's child support obligation to account for expenses he would incur facilitating visitation. He argues that the court's statement in its tentative decision that it was denying his request " 'because the judgment decrees that the father will bear the cost of transportation expense' . . . does not reflect a weighing of options as an exercise of discretion, but rather a belief that the court was bound by its prior judgment and thereby was prohibited from an exercise of its discretion." Other than the arguably ambiguous statement quoted above, nothing in the record remotely suggests that the court was not aware of the scope of its discretion in this matter. To the contrary, at the hearing, Jaime expressly acknowledged that the reduction was within the court's discretion, but argued that the court should deny the request because there had been no significant change in circumstances since the original order was entered. In context, the court's ruling seems to adopt this reasoning.

While the transportation expenses are undoubtedly significant, the record shows that in the three years since the judgment was entered, Brian has been able to afford regular visitation with his daughter. The record shows a significant disparity between Brian's $6,925 monthly income and Jamie's $2,687 monthly income. Absent some

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[2] In light of the court's clear discretion under the above authority to award the relief requested by Brian, we need not decide whether sections 4061 and 4062 provide additional authority for reducing Brian's child support obligations in this case. (See *In re Marriage of Fini* (1994) 26 Cal.App.4th 1033, 1039, fn. 5 [sections 4061 and 4062 authorize a court to reduce the guideline amount of child support by applying a "negative add-on" for travel expenses for visitation incurred by the parent paying child support]; but see *In re Marriage of Gigliotti* (1995) 33 Cal.App.4th 518, 528-529 [disagreeing with *In re Marriage of Fini* and noting that the "language of subdivisions (b)(1) and (b)(2) of section 4061 appears to authorize only additions to the guideline formula amount because of expenses set out in section 4062"].)

evidence of changed circumstances demonstrating that the prior agreement would present a significant barrier to visitation under the new visitation plan, we find no abuse of discretion in the court's ruling.

Disposition

The order modifying visitation and child support is affirmed.

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Pollak, J.

We concur:

_____
McGuiness, P. J.

_____
Jenkins, J.