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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

J.G., Plaintiff and Respondent, v. A.F., Defendant and Appellant.	B229643 (Los Angeles County Super. Ct. No. BF032109)

APPEAL from a judgment of the Superior Court of Los Angeles County. Maren E. Nelson, Judge. Affirmed.

Hersh, Mannis & Bogen, Joseph Mannis and Jeff M. Imerman for Defendant and Appellant.

Buter, Buzard, Fishbein & Royce, Glenn S. Buzard and Ashley M. Silberfeld for Plaintiff and Respondent.

A.J. is the child of A.F. (Father) and J.G. (Mother). Father appeals from a judgment entered on October 27, 2010, after a court trial on issues of child custody, child support, and attorney fees in a child support action brought by Mother. The court determined that an upward deviation from the guideline amount was appropriate due to special circumstances and ordered Father to pay child support for A.J. of $3,600 per month and to pay half of Mother's attorney fees in the amount of $50,000.

Father contends that the trial court's use of an imputed 4 percent rate of return on his trust assets was not supported by substantial evidence because Father's counsel did not stipulate at trial that 4 percent was an appropriate rate of return; the court erred when it deviated from guideline child support based on its finding that application of the guideline formula would be unjust or inappropriate due to special circumstances; the court erred when it refused to consider recurring monetary gifts Mother received from maternal grandmother; the court erred when it found that A.J.'s direct expenses were $3,600 per month; Father should receive credit for child support overpayments if the court's child support order is reversed; and the court abused its discretion in awarding Mother an additional $50,000 in attorney fees under Family Code section 7605.[1] We conclude that Father forfeited some of the issues on appeal by failing to raise them below and that in any event, the court did not err in making the above orders. Accordingly, we affirm the judgment.

BACKGROUND

In 2004, Father and Mother met at an Alcoholics Anonymous meeting in California, when Father was 22 years old and Mother was 30 years old. Mother gave birth to A.J. in 2006. Father resided in Los Angeles from the date of A.J.'s birth to April 2009, when Father moved to Michigan. Father has not held a paying job for years.

Father's family founded a successful company in Detroit, Michigan. Father owns a 10.575 percent interest in a family ranch, in which he has a capital account of approximately $1.55 million. Father is the contingent beneficiary of eight trusts. Father

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

is the beneficiary of three trusts, which for purposes of privacy we refer to as the 1976 Trust, the 1992 Trust, and the 2001 Trust, which altogether had total assets valued in excess of $3.7 million as of December 31, 2009. The 2001 Trust was established in 2001 by Father, as settlor, for his own benefit, as the beneficiary, with paternal grandparents as the trustees. The 2001 Trust receives the income from the 1976 Trust and the 1992 Trust. The 2001 Trust provided that at the five-year anniversary of the 2001 Trust, Father had the right to withdraw all or any part of principal and that when Father reached the age of 25, the trustee would distribute the assets of the trust to Father, and the 2001 Trust would terminate. In 2005, Father assigned to paternal grandparents the right to receive any mandatory distributions from any trust of which he was the beneficiary as well as the ranch and delayed his right to terminate the 2001 Trust until his 30th birthday. In January 2009, three days after the trial court issued a temporary support order, Father extended until his 40th birthday his right to receive mandatory trust distributions and his right to amend or revoke the 2001Trust.

Father's December 5, 2008 income and expense declaration claimed monthly expenses of $6,936, exclusive of tuition and books, while Father lived in Los Angeles. The 2001 Trust paid Father's $3,400 monthly rent and gave him a monthly allowance of $3,000. Father's tuition at Loyola Marymount University was paid by the 2001 Trust. Father also received money from the 2001 Trust to purchase real estate in Los Angeles. Subsequently, in connection with litigation regarding the real estate purchased by Father, paternal grandfather paid approximately $75,000 to the opposing party. In 2007, Father received a $50,000 distribution of principal from the 2001 Trust to start an on-line photography business, which subsequently failed.

Paternal grandmother maintained a joint checking account with Father. She discontinued her practice of making regular monthly deposits into the joint checking account in 2007, when paternal grandparents stepped down as trustees for the 2001 Trust and a professional trustee from JP Morgan Chase Bank became trustee. In April 2009, paternal grandmother paid for Father's vacation with her in Italy. The 2001 Trust paid for all of Father's living expenses after he moved to Michigan in 2009 and paid his costs

to attend a software conference in San Francisco. Father was arrested in May and again in October 2009 for driving under the influence. He was required to reside at a rehabilitation facility for six months, but during a weekend visit to his home, was involved in an automobile accident while driving under the influence. Father was living in a rehabilitation facility in Michigan at the time of trial and planned to live there for the next six months to a year. The trustee of the 2001 Trust stopped giving Father the $3,000 monthly allowance, reducing it to $700 every other week, then reducing it to $100 weekly. At the time of trial, Father had enrolled in an emergency medical technician course in Michigan, paid for by a loan from paternal grandparents.

Meanwhile, on August 2, 2007, Mother filed a petition to establish paternity. Subsequently, Father and Mother stipulated to Father's paternity and to award sole legal and physical custody of A.J. to Mother.

On January 8, 2010, the trial court entered an order pendente lite requiring that, among other things, Father pay above-guideline child support in the amount of $4,000 per month. He was also ordered to pay one-half of A.J.'s health insurance premiums and one-half of any uninsured medical expenses. The court determined that Father had trust assets worth approximately $3.3 million, that Father lived on the income he received as well as distributions of principal from trusts of which he is a beneficiary, and that in 2008, Father received net distributions of principal from the trusts totaling approximately $80,000 or $6,666 per month tax free. The trial court noted that the income generated by Father's trust assets "is probably consistent with prudent management of said trust assets."

Father took out a line of credit guaranteed by paternal grandparents to pay his temporary child support obligation. Although documents shown to Father at trial indicated that Father's line of credit was paid off, Father testified that he did not know how or if the line of credit was paid off. Nor did Father know who paid his legal fees in connection with the drunk driving and child support litigation. Documents showed that the 2001 Trust paid a portion of the balance on the line of credit. Also, paternal

grandparents paid a portion of the legal fees in connection with the child support litigation.

Father's counsel submitted a trial brief calculating interest income on the 2001 Trust, 1992 Trust, and 1976 Trust based on a 3 percent, 4 percent, and 5 percent rate of return. The trial on permanent child support commenced on February 2, 2010. In his opening statement, Father's counsel commented that the trial court consistently imputed income to the trusts at 3.5 percent or 4 percent, "which is probably the right number in this world today," and that it would be reasonable to impute a 3.5 percent rate of return. During closing argument, Father's counsel stated that in 2009 Father had taken approximately $135,000 in distributions from the 2001 Trust and noted that 4 percent of $3.8 million, which is roughly $150,000, was close to the amount of Father's 2009 distribution. Father's counsel agreed with the court that Father could invest his portfolio in a mutual fund to make a 3 or 4 percent tax-free rate of return but opined that no investor would invest the entire portfolio in tax-free municipal bonds. Father's counsel later noted that a 4 percent rate of return on $3.8 million yielded $152,000 per year or $12,666 per month. Finally, Father's counsel argued that the rate of return should not be calculated on a tax-free basis, but on a taxable basis. He stated, "Your Honor, I can't stipulate that you could invest this money, the 3.8 million, and there's no evidence that you could put it into only municipal bonds. I find that concept to be one that I can't agree to, and I do not believe you could earn that kind of money tax-free in any reasonable basis. [¶] I believe an imputation of money should be in a taxable manner, so that you have a mix of corporate bonds, and particularly bank accounts, et cetera."

On May 4, 2010, the trial court issued a tentative decision on issues of child custody and child support. Among other things, the tentative decision stated, "At trial [Father's] counsel acknowledged that the court could impute 4% taxable income on all of the trust assets to arrive at an income figure for [Father]. In the absence of evidence that [Father] is working to support himself and [A.J.] or what his actual income was for 2009, and given his current situation and history, imputation is appropriate. [¶] No information was provided as to the cost to liquidate the trust assets so as to generate 4% income

annually. The court thus assumes this number to be zero. [¶] Pursuant to Evid. Code §§ 452(h), 454, and 455, the court proposes to . . . impute a return of 4%, as stipulated to by [Father's] counsel. If the assets in the trust were invested to return 4% taxable per year they would generate $12,470 per month."

Father filed objections including that the tentative decision "improperly assumes without evidence that the cost of liquidating trust assets so as to generate 4% income annually is zero."

On August 13, 2010, the trial court filed a statement of decision, which stated as follows. Mother's rent for a two-bedroom apartment was $2,055 per month. Prior to trial, Mother had been working 30 hours per week receiving $15.56 per hour at the University of California Irvine on a temporary assignment. Following close of evidence and at closing argument, Mother's counsel reported that Mother had been terminated from her position and that she was seeking new employment. Father's counsel proposed that minimum wage be imputed to Mother. Based on Mother's January 29, 2010 income and expense declaration, $3,619 of the $7,125 monthly expenses claimed by Mother were attributable to A.J.'s direct expenses, including 50 percent of the rent, uninsured health care costs, car expenses, costs for groceries and dining out, utilities, phone, clothes, entertainment, child care expenses, and A.J.'s health insurance costs. Maternal grandmother paid for Mother's $723 monthly health insurance premiums, a $1,100 deposit for A.J.'s preschool, Mother's car insurance, car repairs, and other amounts "'when needed.'" A.J.'s uninsured health care costs of $132.61 were ordered to be reimbursed to Mother by Father.

In 2007, the 2001 Trust distributed $146,761 to Father, but $19,766 was refunded for unused tuition. Father's total taxable income for 2007 was $103,113. Father's December 5, 2007 income and expense declaration showed his monthly expenses, exclusive of tuition and books, were $6,936. In 2008, the 2001 Trust distributed $152,864 (exclusive of $31,000 in tuition) to Father. Father's total taxable income for 2008 was $52,232. Father's income tax return for 2009 had not been prepared as of the date of trial, but his counsel stated that Father received $139,615.25 from the 2001 Trust.

The trial court determined that in 2009, $148,115 was distributed to Father or on his behalf, of which $56,000 was principal paid for various legal expenses. The 2001 Trust distributed $76,342.90 for Father's personal use and $15,772.10 for child support. The court held: "At the present time the trusts appear to be invested primarily for growth, as they generated less than 2% income in 2009. While such an investment strategy might otherwise be appropriate for a person of [Father's] age, the result here is that [Father] has the benefit of an increasing asset base, sufficient income for his own support while in rehabilitation, but insufficient income to support his minor child. At trial [Father's] counsel acknowledged that the court could impute 4% taxable income on all of the trust assets to arrive at an income figure for [Father]. In the absence of evidence that [Father] is working to support himself and [A.J.] or what his actual income was for 2009, and given his current situation and history, imputation is appropriate. [¶] No information was provided as to the cost to liquidate the trust assets so as to generate 4% income annually. The court thus assumes this number to be zero. [Father's] counsel stipulated at trial that 4% was an appropriate rate of return for imputation. If the assets in the trust were invested to return 4% taxable per year they would generate $12,470 per month."

The trial court declined to treat monies received by Mother from maternal grandmother and by Father from paternal grandparents as income, even though Father received funds to pay for his legal fees and line of credit for child support that were "not explained in any fashion." The court declined to lower Father's support obligation on the basis that Mother received funds from maternal grandmother to help support A.J.

The trial court determined that the guideline child support payment would be $2,660 if Mother were earning $1,620 monthly by working 25 hours weekly at $15.56 per hour, and $2,700 monthly if Mother worked at minimum wage for 40 hours weekly. The court determined that although $2,660 or $2,700 monthly support payments allowed Father more than sufficient funds to meet his own expenses, they were insufficient for Mother to pay A.J.'s expenses. Concluding that Mother's earning capacity was insufficient to support A.J. equivalent to the manner in which Father lived in California

and as Father would be expected to live in Michigan were he not in a rehabilitation facility, the court determined that upward deviation from the guideline was appropriate. The court determined that child support of $3,600 monthly would leave Father with $5,566 per month for his own support, taking into account that A.J. was his dependent and that Father pays state income tax at Michigan rates. In making its calculation, the court took into account the difference in housing costs in Michigan and that the equivalent cost to live in Michigan was $5,386.

The trial court ordered Father to pay child support of $3,600 monthly. The court found that Mother's attorney fees of $94,026 was reasonable after subtracting the cost of a second attorney at trial in the amount of $4,900 from the "approximately $98,936" initially submitted by Mother. Father had already paid $35,000 for Mother's attorney fees and the court ordered Father to pay an additional $50,000 for Mother's attorney fees. In a footnote, the court stated, "By way of example only, if [Father] were to finance the fee award on a note with 5% interest over ten years, his monthly payment would be approximately $530 a month, an amount affordable given his net disposable income of not less than $5566 and current expenses of $4728."

Father appeals from the judgment ordering him to pay $3,600 monthly child support and $50,000 attorney fees.

DISCUSSION

A. The trial court did not abuse its discretion in imputing income at a 4 percent rate of return

Father contends that the trial court's use of an imputed 4 percent rate of return on the trust assets is not supported by substantial evidence because Father's counsel did not stipulate at trial that 4 percent was an appropriate rate of return. He contends that the court erred by substituting its own judgment when it imputed a 4 percent rate of return on the trust assets instead of deferring to the trustee's investment strategy which resulted in a 2 percent actual rate of return in 2009. We conclude that Father's failure to object to the court's tentative decision proposing to impute a 4 percent rate of return forfeits that issue

on appeal, and that in any event, the court did not abuse its discretion in imputing a 4 percent rate of return.

Any errors in a child support calculation must be brought to the attention of the trial court at the trial level while the error can be expeditiously corrected, or the issues are forfeited on appeal. (*In re Marriage of Calcaterra & Badakhsh* (2005) 132 Cal.App.4th 28, 37.) Father did not object to the tentative decision or statement of decision regarding the trial court's determination that Father's counsel had acknowledged and stipulated to a 4 percent rate of return or to the court's use of the 4 percent taxable rate of return. Father's only objection with reference to the 4 percent rate of return was that the tentative decision "improperly assumes without evidence that the cost of liquidating trust assets so as to generate 4% income annually is zero." But the court found the cost to be zero given the absence of evidence to the contrary. Father therefore has forfeited the issue that the court erred in imputing a 4 percent rate of return on the trust assets.

Father's argument that the trial court erred by substituting its own judgment by imputing a 4 percent rate of return on the 2001 trust assets instead of deferring to the trustee's investment strategy which resulted in a 2 percent actual rate of return in 2009 was rejected in *In re Marriage of Schlafly* (2007) 149 Cal.App.4th 747 (*Schlafly*). In *Schlafly*, the Court of Appeal stated that "Section 4058, which defines annual gross income for purposes of child support calculations, expressly 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.' (§ 4058, subd. (b).) This earning capacity doctrine 'embraces the ability to earn from capital as well as labor.' [Citations.] 'Just as a parent cannot shirk his parental obligations by reducing his earning capacity through unemployment or underemployment, he cannot shirk the obligation to support his child by *underutilizing* income-producing assets.' [Citation.]" (*Schlafly*, at p. 754.)

The *Schlafly* court rejected the father's argument that the trial court was required to defer to his investment strategy by using his actual rate of return of 1.6 percent on assets of $2.9 million. There, the trial court acted within its discretion in determining that the father's actual 1.6 percent rate of return was an underutilization of assets and that

3 percent was a reasonable rate of return because the father could invest in bonds at a guaranteed 3 percent return. (*Schlafly*, *supra*, 149 Cal.App.4th at pp. 754–755.) Thus, the trial court did not need to defer to the father's decision to prioritize future value over current income for his own benefit and could instead treat the father's assets as earning a conservative rate of return. (*Id*. at p. 755.) And the *Schlafly* father did not contest, but acknowledged the trial court's assumption that 3 percent was a reasonable rate of return on investment for bonds or certificates of deposit. (*Id*. at p. 756.) Therefore, the *Schlafly* court held that "the application of a 3 percent rate of return—an estimate that is supported by common knowledge and common sense—is supported by substantial evidence." (*Ibid*.; *In re Marriage of Destein* (2001) 91 Cal.App.4th 1385, 1396–1398 [trial court did not abuse its discretion in imputing a reasonable 6 percent rate of return on historically non-income-producing real estate assets]; *In re Marriage of Pearlstein* (2006) 137 Cal.App.4th 1361, 1374–1375 [it is within the trial court's discretion to impute a reasonable rate of investment return to value of the father's stock available for sale]; *In re Marriage of Dacumos* (1999) 76 Cal.App.4th 150, 153 [trial court did not abuse its discretion in imputing rental income based on the fair market rental value of properties that the father rented at a loss].)

Under the foregoing authorities, we conclude that the trial court acted within its discretion in imputing a 4 percent rate of return to the trust assets. Nevertheless, Father argues that the trustee, and not he, has control over the trusts' investment strategy and he contends that the court does not have the authority to control the actions of the trustee. But we do not address the right of the court to control the trustee's actions. Rather, we simply conclude that the court did not abuse its discretion in imputing a 4 percent rate of return notwithstanding the trustee's investment strategy, which it determined was focused on growth for Father's benefit but was not a strategy designed to support A.J. Although Father points to the court's statement in its pendente lite order that the trust income generated was probably in accordance with prudent management, we conclude the trial court did not abuse its discretion and did not act inconsistently in determining that a

4 percent rate of return was reasonable to support A.J. rather than a 2 percent rate of return which "might otherwise be appropriate for a person of [Father's] age."

What is more, we conclude that the evidence supports the juvenile court's determination that Father acknowledged and stipulated to a 4 percent rate of return. In his trial brief, Father submitted calculations based on a 3 percent, 4 percent, and 5 percent rate of return. And in his opening statement, Father's counsel commented that the 3.5 percent or 4 percent rate was "probably the right number in this world today," and that 3.5 percent was a reasonable rate of return. Further, in closing argument, Father's counsel stated that 4 percent of $3.8 million, which was approximately $150,000, was close to the amount of Father's 2009 distribution. Father's argument that his counsel did not stipulate to a 4 percent rate of return is not supported by the portion of counsel's closing argument to which he cites. Rather, Father's counsel urged that the rate of return should be calculated on a taxable basis, arguing that a reasonable investor would not invest the entire portfolio in tax-free municipal bonds but would invest in a mix of taxable corporate bonds and bank accounts.

Nor are we persuaded by Father's argument that the court should have based its child support determination on Father's lifestyle during trial. Father's stay in the rehabilitation facility was temporary, and we conclude that the court did not abuse its discretion in determining that A.J.'s support should be based on Father's lifestyle outside of the rehabilitation facility, which we shall discuss.

Accordingly, we conclude the trial court did not abuse its discretion in imputing a 4 percent rate of return on the 2001 Trust assets.

B. The trial court did not abuse its discretion in making an above-guideline support award

Father contends that the trial court abused its discretion in making an above-guideline support award because Father's living expenses were not substantially reduced while he was living in the rehabilitation facility; Father never stopped making child support payments, as did the father in *Brothers v. Kern* (2007) 154 Cal.App.4th 126 (*Brothers*); Father's net disposable income based on a 2 percent or 3 percent rate of

return would be less than his monthly expenses; Mother knew about Father's alcohol problems and therefore his circumstances and slightly reduced expenses at the time of trial were not a surprise to her; and the court based its above-guideline child support order on a lifestyle that Father was not living at the time of trial. We disagree with Father's contentions.

"Statutory guidelines regulate the determination of child support in California. (See §§ 4050-4203; *In re Marriage of Fini* (1994) 26 Cal.App.4th 1033, 1040.) The guideline amount of child support, calculated by applying a mathematical formula to the relative incomes of the parents, is presumptively correct. (See §§ 4055, 4057, subd. (a).) That presumption 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 . . . .' (§ 4057, subd. (b).)" (*In re Marriage of de Guigne* (2002) 97 Cal.App.4th 1353, 1359 (*de Guigne*).) "Section 4053 makes clear that the court's paramount concern in adhering to or departing from the guideline amount must be the interests of the children: '(a) A parent's first and principal obligation is to support his or her minor children according to the parent's circumstances and station in life[;] [¶] (b) Both parents are mutually responsible for the support of their children[;] [¶] . . . [¶] (d) Each parent should pay for the support of the children according to his or her ability[;] [¶] (e) The guideline seeks to place the interests of children as the state's top priority[;] [¶] (f) Children should share in the standard of living of both parents. Child support may therefore appropriately improve the standard of living of the custodial household to improve the lives of the children. . . .'" (*de Guigne*, at pp. 1359–1360.)

The amount of child support established by the formula provided in section 4055, subdivision (a) is a rebuttable presumption. Section 4055, subdivision (b)(5) provides that a deviation from the guideline is permitted if the trial court finds that "'[a]pplication of the formula would be unjust or inappropriate due to the special circumstances of the particular case.'" (*de Guigne, supra*, 97 Cal.App.4th at p. 1360.)

"Our review is limited to determining whether the court's factual determinations are supported by substantial evidence and whether the court acted reasonably in

exercising its discretion. [Citation.] We do not substitute our judgment for that of the trial court, but confine ourselves to determining whether any judge could have reasonably made the challenged order. [Citation.]" (*de Guigne*, *supra*, 97 Cal.App.4th at p. 1360.) "In reviewing a challenge to the sufficiency of the evidence, we are bound by the substantial evidence rule. All factual matters must be viewed in favor of the prevailing party and in support of the judgment. All conflicts in the evidence must be resolved in favor of the judgment." (*Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 58.)

In *de Guigne*, *supra*, 97 Cal.App.4th at pages 1364 through 1366, the trial court did not abuse its discretion in considering as special circumstances the vast imbalance in the type of housing and lifestyle available to the children and the father based on the father's separate property mansion, acreage, and $25 million to $40 million in non-income-producing assets and that he had the ability to continue to support the children at a comfortable level consistent with his station in life. The *de Guigne* court held that a child support order that is greater than the guideline amount need not be earmarked for a specific purpose; the trial court need only articulate "the reasons for a deviation and how the deviation is consistent with the children's best interest." (*Id*. at p. 1364.)

In *Brothers*, *supra*, 154 Cal.App.4th at page 136, the trial court did not abuse its discretion in requiring the incarcerated father to pay more than the guideline amount based on the assets the father had before he stopped making child support payments, stopped working, and liquidated his assets and transferred them to his lawyer. That is, "[t]he point of using imputed income to calculate child support is to determine what the obligor *could* have earned if he or she had taken an opportunity to do so instead of taking a course of action that did not result in income." (*Ibid*.) The trial court also acted within its discretion in finding special circumstances supporting an upward deviation from the guideline support amount because the child would not suffer any detriment from an increase in the amount of the father's resources that went to support payments because there had been no visitation prior to the father's incarceration; the father's standard of living would not be impacted by the increase because he was incarcerated; the guideline

figure was not enough to maintain the child's current standard of living; and the increased amount would not exceed the father's imputed income. (*Id*. at p. 137.)

We conclude that the trial court did not abuse its discretion in making an above-guideline support award. Although Father has not had a paying job in years, he is able to live a very comfortable lifestyle because he is the beneficiary of three trusts with assets in excess of $3.7 million. He is also the contingent beneficiary of eight other trusts and owns more than 10 percent interest in the family ranch. The 2001 Trust and paternal grandparents have paid Father's living expenses, vacations, child support obligations, and attorney fees. The 2001 Trust disbursed funds to Father for his on-line business, a business seminar in San Francisco, the purchase of property, and educational expenses. Paternal grandmother made regular deposits into a joint checking account with Father until she stepped down as trustee of the 2001 Trust in 2007. And Father borrowed money from paternal grandparents for an emergency medical technician course. In 2007, the 2001 Trust distributed $146,761 to Father, but $19,766 was refunded for unused tuition. In 2008, the 2001 Trust distributed $152,864 (exclusive of $31,000 in tuition) to Father. In 2009, Father received $139,615.25 from the 2001 Trust.

Accordingly, the trial court did not abuse its discretion in considering as a special circumstance the imbalance in the lifestyle available to A.J. compared to Father based on the assets available to Father. The court did not abuse its discretion in finding that the guideline figure was not sufficient to meet A.J.'s needs to be supported in a fashion roughly equivalent to Father's lifestyle while out of the rehabilitation facility. This is so because, as in *Brothers*, the court may consider the assets and income Father received before he took a course of action that resulted in reduced income and lifestyle. And as in *Brothers*, the court determined that an above-guideline amount would leave Father with disposable income to meet his own needs. The court determined that child support of $3,600 monthly would leave Father with $5,566 per month for his own support, taking into account that A.J. was his dependent and that Father pays state income tax at Michigan rates. In making its calculation, the court took into account the difference in housing costs in Michigan and that the equivalent cost to live in Michigan was $5,386.

Father's attempts to distinguish *Brothers* fail to advance his contention that the trial court abused its discretion in making an above-guideline support award. Father argues that, unlike the incarcerated father in *Brothers*, his living expenses in rehabilitation have not been substantially reduced and the court's contrary determination is an abuse of discretion. But as stated, the court determined that at the above-guideline amount, Father will be left with $5,566 monthly, which is more than he is currently spending while living in rehabilitation and which will allow him to maintain a lifestyle comparable to that he led in Los Angeles once he leaves the rehabilitation facility. Father's arguments that he never stopped paying child support (unlike the father in *Brothers*) merely requests a reduction in child support, and Mother was aware of his alcoholism and reduced expenses at the time of trial do not convince us that the court abused its discretion in determining that upward deviation from the guideline was appropriate. In light of our conclusion that the court did not abuse its discretion in imputing a 4 percent rate of return, we reject Father's further argument that he does not have the ability to pay the above-guideline amount based on an imputed 2 percent or 3 percent rate of return on trust assets.

We conclude the trial court did not abuse its discretion in making an above-guideline support award.

C. The trial court did not abuse its discretion in refusing to treat money received by Mother from maternal grandmother as income

Father contends that the trial court abused its discretion in refusing to consider recurring monetary gifts Mother receives from maternal grandmother as income. We disagree.

"[W]here a party receives recurring gifts of money, the trial court has discretion to consider that money as income for purposes of the statewide uniform child support guidelines." (*In re Marriage of Alter* (2009) 171 Cal.App.4th 718, 722–723.)

We conclude that the trial court acted within its discretion in refusing to treat money received by Mother from maternal grandmother as income. The court also refused to treat the monies received by Father from paternal grandparents as income,

even though Father received funds to pay for his legal fees and line of credit for child support that were "not explained in any fashion." Thus, the court acted within its discretion in refusing to lower Father's support obligation on the basis that Mother received funds from maternal grandmother to help support A.J.

In light of our conclusion that the trial court did not abuse its discretion in refusing to consider Mother's monetary gifts from maternal grandmother as income and in making an above-guideline support order, we reject Father's request to receive appropriate credit for his overpayment of child support upon recalculation of the guideline support amount.

D. Father forfeited the issue of A.J.'s uninsured medical expenses

Father argues that the child support order requires Father and Mother to split equally A.J.'s uninsured medical expenses, but A.J.'s $3,619 monthly expenses include uninsured medical expenses in the amount of $50 per month. Therefore, he contends, A.J.'s direct expenses are $3,550 monthly.

Father did not object to the tentative decision or statement of decision regarding the inclusion of A.J.'s $50 monthly uninsured medical expenses in A.J.'s $3,619 monthly expense calculation and has therefore forfeited that issue on appeal. (*In re Marriage of Calcaterra & Badakhsh*, *supra*, 132 Cal.App.4th at p. 37.) In any event, we decline to split hairs on the child support order by complying with Father's implied request to reduce the child support from $3,600 to $3,550 monthly. The trial court ordered Father and Mother to share equally any uninsured medical expenses for A.J. Father points to Mother's January 29, 2010 income and expense declaration that shows A.J. incurs uninsured medical expenses of $50 monthly. Although the court determined that A.J.'s monthly expenses were $3,619, it rounded down to order child support of $3,600 monthly, and we decline to modify the court's order.

E. The trial court did not abuse its discretion in awarding attorney fees of $50,000 to Mother

Father urges that the trial court abused its discretion in awarding attorney fees of $50,000 to Mother on the basis that Father could borrow the money. We disagree.

Under the Uniform Parentage Act (§§ 7600–7730), section 7640 gives a court the discretion to "'order reasonable [attorney] fees . . . to be paid by the parties . . . in proportions and at times determined by the court.'" (*Kevin Q. v. Lauren W.* (2011) 195 Cal.App.4th 633, 639, quoting § 7640.) "Section 7605, subdivision (a), in contrast, requires the court to ensure 'each party has access to legal representation . . . by ordering, *if necessary* based on the income and needs assessments, one party . . . to pay to the other party . . . whatever amount is *reasonably necessary* for attorney's fees . . . .' (Italics added.)" (*Kevin Q. v. Lauren W.*, at p. 642.) "Whether one party shall be ordered to pay attorney's fees and costs for another party, and what amount shall be paid, shall be determined based upon (1) the respective incomes and needs of the parties, and (2) any factors affecting the parties' respective abilities to pay. A party who lacks the financial ability to hire an attorney may request, as an in pro per litigant, that the court order the other party, if that other party has the financial ability, to pay a reasonable amount to allow the unrepresented party to retain an attorney in a timely manner before proceedings in the matter go forward." (§ 7605, subd. (b).) "The findings of the court regarding the actual income and needs of the parties are necessarily subject to a substantial evidence standard of review. The determination of the amount which is 'reasonably necessary' to ensure each party has access to legal representation is a decision necessarily committed to the sound judgment of the trial court, and is, accordingly, subject to review under an abuse of discretion standard." (*Kevin Q. v. Lauren W., supra,* 195 Cal.App.4th at p. 642; *id.*, at pp. 646–647 [trial court did not abuse its discretion under sections 7605 and 7640 by considering recurring monetary gifts of support by the mother's parents for purposes of calculating the mother's ability to pay her attorney fees when it denied the mother's motion for an order requiring the father to pay her outstanding attorney fees].)

We conclude that the trial court did not abuse its discretion in ordering Father to pay Mother's attorney fees of $50,000 based on its determination that Mother was unable to pay her attorney fees, while Father had resources and funds available to pay attorney fees because he had received recurring payments by the 2001 Trust and parental grandparents of his litigation costs with respect to the child support action, the real

property action in Los Angeles, his drunk driving proceedings in Michigan, and child support obligations. We are not persuaded by Father's argument that the court's "conclusion" that Father "could afford the $530 monthly payments on a 10 year promissory note at 5% interest, is not supported by substantial evidence." Father has seized on an example posed by the court in a footnote that merely illustrates, "[b]y way of example," Father's ability to finance the fee award given his net disposable income. And Father's argument that he cannot afford to pay Mother's attorney fees is based improperly on his calculation of a 2 percent or 3 percent rate of return on the trust assets. As previously discussed, the court did not err in imputing a 4 percent rate of return on the trust assets.

We conclude that the trial court did not abuse its discretion in ordering Father to pay Mother's attorney fees of $50,000.

DISPOSITION

The judgment is affirmed. J.G. is entitled to costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.