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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of BEVERLY and JEFFREY TURNBAUGH.	
BEVERLY TURNBAUGH, Appellant, v. JEFFREY TURNBAUGH, Respondent.	A149615 & A151080 (San Mateo County Super. Ct. No. FAM078493)

This is a consolidated appeal by Beverly Turnbaugh from postdissolution child support and litigation costs orders in favor of her former spouse Jeffrey Turnbaugh.[1] First, Beverly challenges the trial court's August 12, 2015 order modifying a prior child support order and denying her request for Jeffrey to pay half of their children's private tuition costs. Second, she challenges the court's April 10, 2017 order requiring her to pay most of Jeffrey's litigation costs. We will affirm both orders.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The parties married in August 1998 and separated in December 2003, for a marriage of approximately five years and four months. The marriage produced two sons, one born in February 1999 and the other born in October 2002.

[1] Hereinafter we refer to the parties by their first names for purposes of clarity and not out of disrespect.

I. The Marital Settlement Agreement

On May 7, 2004, a judgment of dissolution was filed. A marital settlement agreement (MSA) was attached and made a part of the judgment. The MSA includes a real property cotenancy agreement. In this agreement, the parties deferred sale of the family home, which they jointly own, agreeing that Beverly would continue to live there until the youngest child reached the age of 19 or both children ceased living in the home. The cotenancy agreement provides that in the event of any "action" to interpret it, the prevailing party will recover his or her reasonable attorney fees. The MSA also provides that it is to be "construed simply and fairly."

In the MSA, Jeffrey agreed to pay support to Beverly, which was initially a combination of spousal and child support, all taxable to her and referred to as "family support." Family support was set at $18,000 per month for three years, dropping in March 2007 to $6,500 per month. Support would continue at $6,500 per month through December 2021, with an inflation adjustment for cost of living.

The MSA gives Beverly complete decisionmaking authority with respect to the schooling of the children: "Mother shall solely make decisions regarding . . . education decisions, including where the children reside and the children's education, including but not limited to where they attend school." It further permits her to draw upon the home's equity to pay for the schooling that she chooses, but all such debt is assigned to her and is to come from her half of the home equity when the house is later sold.

The MSA provides that child support can be modified "when warranted," but if Jeffrey requests modification, any calculation must be based on the parties' "actual income and net worth." The section also memorializes the fact that his payments were "below guideline" levels for child and family support, and acknowledges that Beverly had received less than an equal share of the community assets. Jeffrey also agreed to maintain health insurance and a life insurance policy for the children.

II. Postjudgment Modification Proceedings

A. Beverly's 2009 Motion to Modify Support

On July 22, 2009, Beverly filed a motion to modify child support, requesting an increase from $6,500 to $11,588 per month.

On November 30, 2009, the trial court filed its order setting child support at $3,903 per month, plus 11 percent of any monthly employment-related income received by Jeffrey in excess of $20,000, excluding loan forgiveness bonus payments used to repay two loans he had previously received from his employer.

On April 2, 2010, the trial court vacated the November 30, 2009 order, designating it as a temporary order entered without prejudice to either party's claims.

B. The 2010 Support Order

On November 29, 2010, the trial court filed its order setting child support at $5,410 per month for August 1, 2009 through December 31, 2009. The court set support at $4,040 per month for the year 2010, plus 11.5 percent of any employment bonus or other compensation that increased his yearly income over $276,000, excluding the loan forgiveness bonus payments. The court also required him to liquidate assets to pay off these loans, which would allow him to receive future loan forgiveness bonuses as real, and not " 'phantom,' " income. Year 2011 monthly support was set at $7,938, plus 11 percent of his further employment earnings.

C. Jeffrey's 2012 Motion for Modification

On June 22, 2012, Jeffrey filed a motion for modification of child custody. In it, he requested that monthly support be reduced from $7,938 to $2,168, plus 11 percent of employment compensation in excess of the $230,000 "bonus income" he received each year. In an accompanying declaration, he reported that, as expected, the bonus payments related to one of his forgivable loans had ended; however, he and Beverly were unable to agree on the new base child support amount.

On September 19, 2012, the trial court filed its order denying Jeffrey's request to modify child support on the ground that the effect of the termination of the bonus payment would not be relevant until 2013.

On November 19, 2012, the trial court filed an interim order setting modified child support in the amount of $2,893 per month commencing January 1, 2013. The court reserved jurisdiction to modify child support back to January 1, 2013.

On March 7, 2013, Beverly filed an ex parte application seeking an order to compel Jeffrey to execute documents relating to her refinancing of the family home.[2] In a responsive declaration, Jeffrey stated that "[t]he primary intent of co-owning the home was to allow our sons to attend the Hillsborough public schools. As Petitioner has unilaterally decided that neither boy will attend these schools, there is no reason to continue to co-own the Hillsborough residence."

III. Jeffrey's 2013 Motion for Modification

A. Pretrial Proceedings

On May 5, 2013, Jeffrey filed a new support motion, asking that the interim order be confirmed as a final order. Specifically, he asked the trial court to "[c]onfirm $2,893 per month per order filed on Nov. 19, 2012 and variable payment based on 11% of commissions earned and any RSU distributions."[3]

In her responsive declaration, Beverly requested, among other things, that the trial court order Jeffrey to share equally with her the out-of-pocket expenses required for the boys' private school education at The Nueva School (Nueva), described as "a top school for academically gifted and talented children." She indicated that she had previously advanced the costs for the older boy to attend that school, and with the younger boy now attending the same school "the expense for our sons' education has doubled, and this has

[2] The trial court granted Beverly's application on March 8, 2013.

[3] "RSU" appears to refer to restricted stock unit.

caused significant financial stress for our family. I am outspending what I am taking in." She also claimed Jeffrey was improperly "divert[ing]" his earnings and assets.

On October 10, 2014, Elizabeth Duff, Jeffrey's current wife, filed a motion to quash several subpoenas that Beverly issued concerning Duff's income and assets. In her opposition, Beverly reported that Jeffrey had admitted to gifting $400,000 to his wife and therefore she was entitled to review Duff's banking and brokerage statements to trace other "divert[ed]" assets.

On August 29, 2014, a private judge was appointed by stipulation to conduct the evidentiary hearing on Jeffrey's support motion.

On June 25, 2015, the trial court denied the motion to quash, ordering that the subpoenaed documents be produced to Jeffrey's attorney, who would provide them to the court for an in camera inspection to determine whether there were any unexplained deposits. Subsequently, the court found there were no unexplained deposits.

In her trial brief, Beverly indicated that disputes existed regarding the legal interpretation of what income should be attributable to Jeffrey for purposes of support, and whether he should contribute to add-on costs for the children. She requested that the court "impute a reasonable rate of return" on his "underperforming" investments. She asked the court to impute, as income, commissions he had "unreasonably directed to third parties as 'Bonuses.' " She also asked the court to limit his business expenses for his condominium rental property, and requested that he be ordered to contribute towards the boys' private school education.

In his trial brief, Jeffrey stated that he was opposed to private schooling for the boys and only allowed the children to attend private school on the condition that Beverly paid for it. The evidentiary hearing on child support took place over four days in July, August, and November of 2015, and January of 2016.

B. Testimony

Beverly testified that both boys attended public school in the Hillsborough school system through the fifth grade. One reason for changing from public school was that the boys are quite gifted intellectually. The older child had started fifth grade in September and had completed the full curriculum for fifth grade by October. Thereafter, his teacher had him teach a lot of the math lessons because "his math was so off the charts." As of trial, he was on track to attend Caltech or MIT. He had already completed all the course offerings that would be available at San Mateo High School, one of the high schools that Hillsborough students can attend. The younger child was excelling in music, math, writing, and animation. The older child started at Nueva in fall 2010, and the younger one started in fall 2013. At the time of trial, Beverly was paying $87,000 per year for both boys as tuition. She had not borrowed against the house for educational expenses, asserting Jeffrey had refused to cooperate in the loan process. Up until trial, she had never gone to court to enforce her contractual right to borrow for private school.

Jeffrey testified that borrowing for educational expenses "has never come up." He denied turning down Beverly's request to borrow against the house for private school, stating he had no opposition to her borrowing for tuition. He said he never consented to the children going to private school because he has "always been a strong proponent of good public schools." He believed that the public schools in Hillsborough, including the high schools that the children can attend, "are exceptional" and that spending $86,000 a year "on something that is free is insane." However, if Beverly wanted the children to go to private school, then she should pay for it. He would be willing to allow her to obtain a home equity line of credit under the terms of the MSA to help finance the children's private school education going forward. Jeffrey also testified that his present income was very low, due to the loss of key clients and his assistant/partner's departure.

Jeffrey also testified that the term life policy he previously held had expired in 2013. He had then obtained a whole life policy at a cost of $96,000 per year. He stated

that a five-year term life insurance policy would have cost about $10,000, but he would not have received any money at the end of the term. He considered that option to be a bad investment. It appears the prior policy was actually a 20-year policy that would have expired in 2018. The policy had an annual premium of $600 per year.

C. Decisions

1. Child Support

On March 17, 2016, the trial court issued a proposed statement of decision. As to the private school issue, the court agreed with Beverly that both of the children are "extremely talented and gifted" and were thriving at Nueva. The court also noted Jeffrey's position that the MSA provided that Beverly had the right to borrow against the family residence for certain uses. The court observed he had deferred his right to sell the property and realize his half of the community property proceeds until after the children graduated from high school. The court also noted that the most recent child support order did not include an add-on for private schooling costs. The court credited his testimony that the parties intentionally chose Hillsborough as the place to purchase the residence so that the children could attend the highly regarded public schools there. The court also discredited Beverly's testimony that Jeffrey had refused her requests to borrow against the house. The court found "[t]he request to share educational costs at Nueva as a child support add-on, is, in effect, a request to modify the terms of an MSA which was bargained for and for which consideration has been given. That request is denied."

The court also addressed Beverly's request "that interest on the life insurance policy which [Jeffrey] is mandated to carry [under the MSA] be included in [his] income available for support since presumably [he] has chosen a policy which provides him not only with compliance with the prioer [*sic*] court order but also with investment opportunity." The court denied the request, reasoning that Beverly seemed to be arguing that "because [Jeffrey] made a business decision which allowed him to cover his support obligation as well as invest, he should be charged with the investment portion."

On April 11, 2016, Beverly filed a 25-page objection to the proposed statement of decision.

On May 4, 2016, Jeffrey filed his response to Beverly's objections.

On June 15, 2016, the trial court filed its ruling on Beverly's objections.

On August 12, 2016, the trial court filed its findings and order after hearing. For 2013 through 2015, the court awarded support in the range of $8,392 to $5,828 per month. For 2016, the monthly support award was reduced to $1,331. The support calculations included a 3 percent return on assets as income available for support. The court denied Beverly's request for Jeffrey to pay half of the boys' private school tuition.

On October 7, 2016, Beverly filed a notice of appeal from the August 12, 2016 order.

2. Attorney Fees

On October 21, 2016, Jeffrey filed a request for attorney fees and costs. Among other things, he reported that his employment had been terminated in June 2016. He also claimed Beverly's conduct created unnecessary litigation as he had made settlement proposals that were not significantly different from the orders ultimately issued by the court. He ultimately requested an award of $138,000.

On November 30, 2016, the trial court issued its order finding good cause to excuse Jeffrey's late-filed attorney fee motion.

On January 25, 2017, Beverly filed a request seeking a total of $159,783 in attorney fees, costs, and sanctions under Family Code section 271.[4]

On April 10, 2017, the trial court issued its order on attorney fees. The court found Jeffrey was the prevailing party, granting his request in the amount of $138,000. The court also granted Beverly's request for fees in the amount of $10,627, for fees and

[4] All further statutory references are to the Family Code except as otherwise indicated.

costs expended in response to the motion to quash. The court pointed out that the parties had jointly expended more than $1 million in litigation costs since their separation.

On April 13, 2017, Beverly filed a notice of appeal from the attorney fee order. We consolidated her two appeals.

DISCUSSION

I. Applicable Law and Standard of Review

"[T]he father and mother of a minor child have an equal responsibility to support their child in the manner suitable to the child's circumstances." (§ 3900; see § 4053, subds. (a), (b).) Courts must adhere to the statewide uniform guideline in determining child support, unless the parties have stipulated to a different amount of child support or other special circumstances apply. (§§ 4052, 4057, subd. (b).) The guideline determines child support based on each parent's income and custodial time with the child. (§ 4055; *In re Marriage of McHugh* (2014) 231 Cal.App.4th 1238, 1245.) Courts may also award certain amounts as additional child support, including "[c]osts related to the educational or other special needs of the children." (§ 4062, subd. (b)(1).)

We review an order modifying child support for abuse of discretion. (*In re Marriage of Usher* (2016) 6 Cal.App.5th 347, 357 (*Usher*).) A court abuses its discretion only if no reasonable judge could have made the same decision, considering all of the relevant circumstances, or the court fails to act in accordance with the governing rules of law. (*In re Marriage of Williamson* (2014) 226 Cal.App.4th 1303, 1312; *New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422.) Notwithstanding the uniformity imposed by statutory guidelines, trial courts "must be permitted to exercise the broadest possible discretion in order to achieve equity and fairness in these most sensitive and emotional cases." (*In re Marriage of Fini* (1994) 26 Cal.App.4th 1033, 1044.)

We review any factual findings made in connection with a child support ruling under the substantial evidence test. (*In re Marriage of Wittgrove* (2004) 120 Cal.App.4th

1317, 1327.) We interpret de novo the provisions of a marital settlement agreement that are incorporated into a stipulated judgment dissolving the marriage. (*In re Marriage of Simundza* (2004) 121 Cal.App.4th 1513, 1518; *In re Marriage of Davis* (2004) 120 Cal.App.4th 1007, 1018.)

II. Denial of Request to Share Private School Expenses

Beverly argues that the trial court erred in finding the MSA precluded her request for Jeffrey to pay one-half of the children's tuition at Nueva. She contends the MSA is unambiguously clear that the parties did not contract for the children to attend Hillsborough public schools. She also notes the MSA provides that she has sole authority to "make decisions regarding . . . education decisions, including where the children reside and the children's education, including but not limited to where they attend school." She also correctly notes that neither the MSA nor the cotenancy agreement include an obligation to enroll the children in Hillsborough public schools. Regardless, the real issue is not where the children are permitted to go to school, but rather whether Jeffrey is obligated to share the cost if Beverly elects to send them to private school.

"Section 4062 'makes discretionary ("the court may order") additional child support for educational or special needs of a child or for travel expenses for visitation. Among the family law bench and bar, these are usually referred to as . . . discretionary add-ons.' [Citation.] 'The amounts in Section 4062, if ordered to be paid, shall be considered additional support for the children and shall be computed in accordance with the following: [¶] (a) If there needs to be an apportionment of expenses pursuant to Section 4062, the expenses shall be divided one-half to each parent, unless either parent requests a different apportionment pursuant to subdivision (b) and presents documentation which demonstrates that a different apportionment would be more appropriate.' (§ 4061.)" (*In re Marriage of Schlafly* (2007) 149 Cal.App.4th 747, 760 (*Schlafly*), italics omitted.)

As noted, the MSA provides that Beverly has sole decisionmaking authority with respect to the schooling of the children. It also permits her to draw upon the home's equity to pay for the schooling that she chooses, and all such debt is assigned to her. The MSA does not require Jeffrey to contribute to educational costs or school tuition for the children. On this basis, the trial court concluded that Beverly's request for Jeffrey to pay for half of the boys' school tuition was "in effect, a request to modify the MSA."

It is true that agreements purporting to restrict the court's authority to order or modify child support are void as against public policy. (*In re Marriage of Bodo* (2011) 198 Cal.App.4th 373, 386; *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 294 (*Cheriton*).) A court may modify a child support award at any time if the court determines that changed circumstances warrant a modification or the parties stipulated to child support below the guideline amount. (§§ 3651, subd. (a); 4065, subd. (d); *Usher, supra*, 6 Cal.App.5th 347 at pp. 357–358.)

Contrary to Beverly's contentions on appeal, however, the trial court *did* acknowledge that the MSA did not deprive it of jurisdiction to impose add-on support. Instead, the court considered and weighed the evidence, finding that the parties had negotiated a plan for Beverly both to make decisions about schooling, and to pay for those decisions. The court found this plan was bargained for, and reasoned that it was not appropriate to modify the plan based on the evidence presented. This was a proper exercise of the court's broad discretion.

There is substantial evidence to support the trial court's refusal to apportion the educational expenses of the parties' children. The MSA provides that Beverly can take a loan against the family residence to fund the tuition costs. From the MSA, it appears Jeffrey agreed not to sell the home when the parties got divorced, in part, so that equity would be available to Beverly for this purpose. It also was undisputed that the property

had a large amount of equity.[5] While there was some evidence that Jeffrey was less than fully cooperative in financial matters pertaining to the home, Beverly admitted she had never attempted to obtain a loan for educational expenses. Further, at trial Jeffrey indicated that he would sign the paperwork necessary for her to secure a loan.

Other evidence supports the conclusion that Beverly can afford the boys' private school tuition. Even without taking a loan on the house, she had paid for the older boy's private school education for approximately three years on her own. Also, she had made (or had committed to make) substantial voluntary donations to Nueva, totaling $75,000. The total amount of the tuition through 2016 that she sought to split with Jeffrey was $150,764, or approximately $75,000 per parent. Had she not made the donations to the school, she presumably would have had assets available to pay this amount herself, without any contribution from Jeffrey.

III. Guideline Child Support

Beverly complains that the trial court wrongfully disregarded "well over $700,000" in assets as a source of child support, and erroneously denied her request to impute $5,000 per month in employment income or at least issue a seek-work order. She notes Jeffrey had admitted by stipulation that he gave $400,000 to Duff in December 2010, reportedly "in recognition of the stress caused by this entire trial and process on their relationship." He also replaced his term life insurance policy with a whole life policy at a cost of $96,000 per year, far more than the $600 per year that his prior policy had cost. Beverly argues that "[t]he effect of both diversions was to lessen his present investment income available for support, and thereby reduce his calculated child support obligation, all while stashing away large sums for his own later benefit."

[5] At trial, Beverly testified that the home had about $1.8 or $1.9 million in equity.

Section 4058, subdivision (b)[6] requires the trial court to consider whether the best interests of the children would be served by imputing income that a divested asset would have produced in calculating the level of child support. Parents are not permitted to divest themselves of earning ability at the expense of minor children. (*Moss v. Superior Court* (1998) 17 Cal.4th 396, 424; see *In re Marriage of Dacumos* (1999) 76 Cal.App.4th 150, 155 (*Dacumos*).) We review decisions regarding imputation of income for abuse of discretion. (*In re Marriage of Destein* (2001) 91 Cal.App.4th 1385, 1393 (*Destein*).)

If the trial court in its discretion elects to consider the earning capacity of a parent in lieu of actual income, the court may take into account the ability to earn from capital as well as labor. (*Schlafly*, *supra*, 149 Cal.App.4th at p. 754; *In re Marriage of de Guigne* (2002) 97 Cal.App.4th 1353, 1363; see *Mejia v. Reed* (2003) 31 Cal.4th 657, 671 [court may consider earnings from invested assets in assessing earning capacity].) "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." (*Dacumos*, *supra*, 76 Cal.App.4th at p. 155.) In this regard, the "trial court has broad discretionary authority to impute income and need not defer to the parent's choice of investment. (*Destein*, *supra*, 91 Cal.App.4th at p. 1391.)" (*Schlafly*, at p. 755.) A parent may not place a source of possible income " ' " 'off-limits' " ' " through his or her choice of investment. (*Id.* at p. 756*; Cheriton*, *supra*, 92 Cal.App.4th at p. 292.) But when imputing investment income, the court must use a reasonable rate of return; the figures " 'must have some tangible evidentiary foundation.' " (*Schlafly*, at p. 756.)

As to the December 2010 gift to Duff, the trial court ruled that Jeffrey "has testified to his reason for the gift and the amount was taken into consideration in his

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[6] 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."

income and support calculations for the year in which the gift was made. Accordingly, the ruling is to deny the request to impute a rate of return." From this, we understand that in 2010, the $400,000 amount was characterized as income to Jeffrey and he paid child support that year based, in part, on that money. Beverly does not refute this point. Under these circumstances, we fail to see an abuse of discretion in the trial court's refusal to impute a rate of return to the gift.

As to the insurance policy issue, the facts are that Jeffrey maintains a life insurance policy that has $2 million in coverage, $1 million for the parties' children and $1 million for Duff. The trial court noted that Jeffrey testified he made the policy choice to cover the duration of his support obligation as well as to provide for his current wife. The court concluded that the language of the MSA "gives [Jeffrey] great latitude in his choice of policy and makes no restriction on the amount of premiums he is to pay." We agree.

The MSA states: "If *for any reason* this policy [referring to the prior term life policy], or a successor policy, is no longer available to [Jeffrey], [he] shall obtain a new life insurance policy that is the equivalent of the existing policy." (Italics added.) The phrase "for any reason" is very broad, and does not exclude that the policy is "no longer available" because Jeffrey himself had cancelled it. As the court found, the MSA does not contain any terms restricting the cost of a replacement policy. Further, it appears he complied with the MSA in that he selected a policy that will provide the children with the equivalent amount of coverage as before, namely, $1 million.

Finally, Beverly states in conclusory fashion that the trial court "uncritically accepted all the self-serving reasons Jeffrey gave for redirecting his assets to his wife and insurance investment, while paying absolutely no attention to the interests of the children whose level of support those assets determined." We are not persuaded. We have read through the reporter's transcripts and see no evidence suggesting that the court failed to act in even-handed matter in allowing the parties to present evidence and make their

arguments. It is apparent that the result is not what Beverly hoped for, but we are unable to conclude that the trial court abused its discretion or accorded Jeffrey preferential treatment.

IV. Attorney Fees

Section 3652 provides: "Except as against a governmental agency, an order modifying, terminating, or setting aside a support order may include an award of attorney's fees and costs to the prevailing party." The trial court awarded Jeffrey $138,000 in attorney fees on the basis that he was the prevailing party with respect to the determination of the level of child support he was obligated to pay. The trial court has broad discretion to award attorney fees and costs and, absent a clear abuse of discretion, its decision will not be disturbed. (*In re Marriage of Hargrave* (1995) 36 Cal.App.4th 1313, 1323.) Beverly has failed to establish an abuse of discretion.

Beverly first asserts the attorney fee award, like the order modifying child support, must be reversed because the trial court "misconstrued" Jeffrey's income, again raising the $400,000 gift to Duff and the purchase of the whole life insurance policy. We have already concluded the court did not abuse its discretion in declining to impute income based on the $400,000 gift or the life insurance policy.

Beverly next asserts that Jeffrey was not the prevailing party because he "failed to accomplish his litigation goals." Specifically, she notes that he was ultimately ordered to pay child support in an amount higher than that which he had sought.[7] The trial court found Jeffrey was the prevailing party because the order "reduce[d] his obligation for child support in stepdowns over time which reflected his decreasing employment income

[7] Beverly states that Jeffrey had asked in his trial brief to be ordered to pay about $225,000 in child support over the relevant time period, but the court ordered that he pay over $280,000. He counters that the offers he made to settle support for the hearings between 2013 and 2016 were in total within 6 percent of the final support awarded by the trial court.

during the period. In addition, the order denied [Beverly's] request for private school costs. [She] expended a good deal of time during the hearing on this request." Our review of the record does not suggest the court abused its discretion in so concluding.

Section 3652 does not define "prevailing party." Courts construing statutes that contain attorney fees provisions that do not define the term "prevailing party" have adopted a practical approach to determine the recoverability of attorney fees. (See, e.g., *Galan v. Wolfriver Holding Corp*. (2000) 80 Cal.App.4th 1124, 1127–1130 (*Galan*) [Civ. Code, § 1942.4 action against a landlord for substandard housing, which entitled the prevailing party to attorney fees]; *Gilbert v. National Enquirer, Inc*. (1997) 55 Cal.App.4th 1273, 1276–1277 (*Gilbert*) [commercial appropriation action based on Civ. Code, § 3344, subd. (a), which provides that the prevailing party shall be entitled to attorney fees and costs]; *Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568, 1571–1574 (*Heather Farms*) [Civ. Code, § 1354, subd. (f), which provides that in an action to enforce condominium conditions, covenants, and restrictions, "the prevailing party . . . shall be awarded reasonable attorney's fees and costs"].) In these cases, the determination to award attorney fees was based on whether the party seeking attorney fees had *achieved its main litigation objective*. (*Galan*, at pp. 1129–1130; *Gilbert*, at pp. 1277–1278; *Heather Farms*, at pp. 1574–1575.)

We agree with Jeffrey's summation that, while "the outcome of the case was mixed," it was "very lopsided in [his] favor." While he will pay approximately $55,000 more in child support over time than he had sought, Beverly largely failed in her intensive efforts to impute investment and employment income to Jeffrey. She also failed to compel him to pay half of the boys' private school tuition.[8]

[8] We also disagree with her assertion that add-on support cannot be properly regarded as a support modification upon which section 3652 fees can be based. She does not cite to any cases suggesting that this section is strictly limited to guideline support.

Beverly next argues that Jeffrey failed to present sufficient evidence to justify the amount of attorney fees awarded. We are not persuaded.

Beverly relies heavily on *Martino v. Denevi* (1986) 182 Cal.App.3d 553 (*Martino*) but that case is distinguishable. In *Martino,* a case involving the dissolution of a partnership, an accounting, and damages, the trial court awarded $40,000 in attorney fees to the prevailing party based solely on the attorney's request for a "flat fee for 'services rendered.' No documents, such as billing or time records, were submitted to the court, nor was an[y] attempt made to explain, in more than general terms, the extent of services rendered to the client." (*Martino,* at pp. 559–560.) The Court of Appeal reversed the attorney fee award. Acknowledging that "[i]n California, an attorney need not submit contemporaneous time records in order to recover fees" (*id.* at p. 559), the court concluded the evidence presented—a mere request for a flat fee for services rendered—was insufficient to support an award. Further hindering the court's review of the award was the trial court's failure to explain the basis for its decision. The case was remanded for a rehearing of the attorney fee issue. (*Id.* at p. 560.)

In contrast, here, in support of his motion for attorney fees, Jeffrey submitted his attorney's declaration signed under penalty of perjury, setting forth the time spent and fees incurred on behalf of Jeffrey.[9] As the *Martino* court itself stated, an attorney's declaration "as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records." (*Martino, supra,* 182 Cal.App.3d at p. 559; accord, *Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 698–699.)

[9] On appeal, Beverly challenges $15,000 in fees that were incurred representing Jeffrey's wife. It does not appear she raised this point below. By failing to raise this claim below, she has forfeited it on appeal. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 826.)

DISPOSITION

The orders are affirmed.

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Dondero, J.

We concur:

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Humes, P.J.

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Margulies, J.