Court of Appeal No. B266621
L.A.S.C. No. BF051758

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**
**SECOND APPELLATE DISTRICT**
**DIVISION FOUR**

| | | |
|---|---|---|
| **Y.R.,** Appellant, | ) | Case No. B266621 |
| vs. | ) | |
| **A.F.,** Respondent. | ) | |
| In Re the Matter of: | ) | |
| Petitioner: Y.R., | ) | L.A.S.C. Case No. BF051758 |
| and | ) | |
| Respondent: A.F. | ) | |

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
HONORABLE B. SCOTT SILVERMAN

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# RESPONDENT'S BRIEF FILED BY A.F.

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## I. INTRODUCTION

This Responsive Brief opposes Y.R.'s appeal from a *pendente lite* child support award that requires Respondent, A.F., to pay Mother a "child support package" including the following: (1) 100% of the minor's child's private school tuition at a school commensurate with the private schools Father's other children

attend, (2) 100% of the cost of a private health insurance plan for the child, (3) 90% of uncovered medical costs, (4) 75% of the minor child's extracurricular activities, including school related expenses, summer camp and tutoring, ***plus*** (5) $8,500 per month in child support. In making this child support order, the trial court appropriately deviated downward from the guideline pursuant to Family Code Section 4057(b), because Father is an extraordinarily high income earner and the amount of child support pursuant to the guideline calculated by the court was inappropriate and unjust due to the facts: (1) the court used an inflated number for Father's income to calculate the guideline support figure, (2) the court found that the total "child support package" would allow the child to live a lifestyle commensurate with Father's wealthy status, and (3) the "child support package" was in the best interests of the child because the way in which the court fashioned the award ensured that the funds contributed by Father were expended on the minor child at issue rather than equally spent on the minor child and her two half-siblings who had different Fathers and for whom Mother did not receive any child support. Affirmance of the lower court's order is required because Mother failed to meet her burden to show the court erred. In light of the evidence on the record, it cannot be said that no other court would have made the order the judicial officer made in this case. Assuming *arguendo*, that court finds error, however, any such error is harmless as it did not result in a miscarriage of justice.

## II. STATEMENT OF FACTS

### A.

### SUMMARY

Mother and Father, who were never married, are parents of a minor child who was eight years old at the time the initial child support appealed from was made. For the first eight years of the child's life Father voluntarily provided Mother, who resides with her three minor children whom all have different fathers, with financial support. Mother does not receive child support for two of her minor children. Mother requested guideline child support from Father in the amount of $25,325 per month based on her contention that Father's income was $336,470 per month, which included an add back of virtually all of Father's business expenses as nontaxable income. Father stipulated to being an extraordinarily high income earner within the meaning of Family Code Section 4057(b)(3) and that he could pay any amount of child support that met the child's needs. Father's Income and Expense Declaration filed with the court set forth his income of $190,209 per month and calculated guideline child support as $11,870 per month, which he argued exceeded the child's needs. Making the assumptions least favorable to Father, the trial court adopted Mother's figures for Father's income and guideline child support, but found that the figures were inflated and excessive. The court then properly deviated downward from the guideline due to the fact that Father's payment of 100% of private school tuition and medical insurance, 90% of uncovered medical costs, and 75% of school related expenses,

summer camp and extracurricular activities, ***plus*** $8,500 per month met the child's needs in light of Father's station in life, which is in the child's best interests.

**B.**

**PRIOR TO MOTHER FILING THE PATERNITY SUIT, FATHER PROVIDES MOTHER WITH FINANCIAL SUPPORT PLUS ADDITIONAL FUNDS AS REQUESTED BY MOTHER**

On October 29, 2014, Petitioner Mother, Y.R. (hereinafter "Mother"), filed a petition to establish a parental relationship against Father, A.F. (hereinafter "Father") of minor child Z.R., who was 8 years of age at the time of filing the petition. (1 CT 3). For several years before the filing of the paternity suit, Father voluntarily paid Mother's rent, the minor child's private school tuition, and Mother's Mercedes Benz lease payment, and gave Mother additional cash on a monthly basis to help with additional monthly expenses. (1 CT 208:17-20). During that time period, if Father did not give into Mother's demands for additional funds, Mother threatened that she would go public with their relationship. She even went as far as to post a poster outside Father's business manager's office that referred to Father as a "deadbeat", which contained photographs of Father with the minor child (1 CT 208: 20-27; 1 CT 225). Father is a successful director of major motion pictures. Any bad press would have negatively affected Father's career and his ability to provide support for Mother and the minor child. (1 CT 208:26-27). Still, notwithstanding Mother's tactics,

Father continued to voluntarily provide her with financial support, which averaged $5,000 per month. (1 CT 208:17-20). After the filing of the petition, and for the time period of October 1, 2014 through March 10, 2015, Father either paid Mother a sum of money or made payments directly on Mother's behalf, totaling $38,296, which averages $6,382 per month (1CT 208: 4-12).

**C.**

**UPON BEING SERVED WITH THE PETITION, FATHER'S ATTORNEY REQUESTED GENETIC TESTING**

Counsel for the parties were in communication prior to the service of the petition. (1 CT 213: 2-9). On November 3, 2014, 3 days before service of the petition and summons, Father's attorney requested genetic testing to confirm that Father was the parent of the minor child. (1 CT 52:17-25; 1CT 213:18-20). Thereafter, for the time period of November 7, 2014 through December 9, 2014 the parties attempted to reach a resolution of the issues without the involvement of the court or attorneys, so the genetic testing was put on hold. (1 CT 213:21-26). On December 9, 2014, Mother's counsel informed Father's counsel that the parties were unable to come to an agreement, so the genetic testing was conducted on December 18, 2014. (1 CT 55-:17-19). The genetic test results were released on December 22, 2014. (1 CT 151). Accordingly, in Father's response to the petition, filed on December 30, 2014, 8 days ***after*** the release of the genetic test

results, Father admitted to paternity of the minor child. (1 CT 59: 6-7; 1 CT 18).[1]

**D.**

**FATHER STIPULATES TO BEING AN EXTRAORDINARILY HIGH INCOME EARNER AND THAT HE CAN AFFORD TO PAY ANY REASONABLE AMOUNT OF CHILD SUPPORT**

In light of the outcome of the genetic testing, in his response to the petition, Father admitted that he was the parent of the minor child, Z.R. Father also requested the following order: "Any child support order should be below the guideline amount pursuant to Family Code Section 4057(b)(3)." (1 CT 20). On January 27, 2015, Father, who works as a director of major motion pictures, signed a declaration wherein he stipulated that he was an extraordinarily high income earner pursuant to Family Code Section 4057(b)(3). (1 CT171: 22-23). Father listed his total annual salary at $2,282,512 ($190,209 per month), stated that he could afford to pay any reasonable amount of child support, that he had provided a corporate and personal profit and loss statement to Mother, and that he would provide same to the Court at any future hearing. (1 CT 171:22-172:15).

**E.**

**MOTHER FILES A REQUEST FOR ORDER REQUESTING *PENDENTE LITE* GUIDELINE CHILD SUPPORT AND ATTORNEY'S FEES**

On January 22, 2015, Mother filed a Request for Order requesting (1)

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[1] Appellant misstates these facts in her opening brief, wherein she states that Father requested genetic testing ***after*** filing his response to the petition and admitting paternity (AB 11).

*pendente lite* guideline child support retroactive to the date of the filing of the petition, October 29, 2014; (2) medical insurance coverage for the minor child; (3) uninsured medical costs to be equitably apportioned based upon the parties' income pursuant to Family Code Section 4061(b)(2); (4) Father to pay one-half of the minor child's extracurricular activities; (5) life insurance as a security of child support, and (6) attorney's fees and costs payable by Father. (1 CT 41: 4-17). In Mother's declaration filed in support of her Request for Order she informed the Court that Father historically paid the child's private school tuition, Mother's rent, and provided her with an average of an additional $3,500 per month for her and the child's expenses. (1 CT: 10-11)

Mother's declaration further stated that she needed a four bedroom home in the Santa Monica area so that the child could have her own bedroom. (1 CT: 1-4). Mother stated that the child could not have her own bedroom in Mother's current three-bedroom home because the minor child shared a bedroom with her half-sister, Mother's minor child from a previous relationship, and Mother's minor son from a different previous relationship also resided with them and had his own bedroom. (1 CT 59:27). Mother stated that she wanted the child to attend a private school with a tuition cost of $34,000 per year. Mother also requested funds to pay for the minor child's extracurricular activities, travel, tutoring, and a nanny. (1 CT 60).

In her Memorandum of Points and Authorities, Mother arbitrarily stated with no authority whatsoever: "We contend that in Los Angeles, someone who

earns two to five or six million dollars a year is not a high earner." (1 CT 70: 17-18). Mother further requested that the Court issue a guideline order and preserve retroactivity in order to give Mother the opportunity to complete discovery and determine Father's true income. (1 CT 71: 15-19).

**F.**

**MOTHER LISTS HER HOUSEHOLD EXPENSES FOR HER FAMILY OF 4 AT $9,013 PER MONTH, SPECIFIES WHICH EXPENSES ARE FOR THE PARTIES' MINOR CHILD AND DOES NOT REQUEST ANY ADJUSTMENT FOR HER CHILDREN FROM OTHER RELATIONSHIPS THAT RESIDE WITH HER**

The Income and Expense Declaration filed by Mother in support of her Request for Order set forth her proposed needs in Section 13. (1 CT 28 at Section 13). Moreover, Mother listed the parties' minor child, who was 8 years old at the time, plus her fourteen year old son from a prior relationship and her thirteen year old daughter from a different prior relationship, as members of her household. (1 CT 28 at Section 12). Mother stated her average monthly household expenses for all four (4) household members totaled $9,013, including Mother's rent, Z.R.'s private school tuition, and Mother's Mercedes Benz lease payment, all of which were already paid for by Father (1 CT 208:18-20). Mother also listed the following expenses solely for the minor child, Z.R.: $350 for "other expenses", $25 for shoes, $100 for clothing, $33 for eyeglasses, and $300 for incidentals. (1 CT 32 at Section 13.q.) for a total of $808 per month in additional expenses

attributable solely to the minor child. (1 CT 32). The expenses listed in Section 13.q. were included in Mother's total $9,013 monthly proposed needs.

Section 19 of Mother's Income and Expense Declaration entitled "Special Hardships" asked her to list any additional expenses for minor children who are from other relationships and living with her. That section further requested Mother to list the amount of child support she received for those children. Mother left the entirety of Section 19 ***blank***. (1 CT 29).

**G.**

**FATHER PROVIDES AN LEGITIMATE EVIDENTIARY BASIS UPON WHICH TO DETERMINE HIS INCOME AND REQUESTS THE COURT TO DEVIATE BELOW THE GUIDELINE DUE TO HIS EXTRAORDINARILY HIGH INCOME AND THE FACT THE GUIDELINE CHILD SUPPORT FIGURE WOULD EXCEED THE REASONABLE NEEDS OF THE CHILD**

Father filed his responsive declaration to Mother's Request for Order on March 10, 2015. (1 CT 193). Father attached the declaration signed by him on January 27, 2015, wherein he stipulated to being an extraordinarily high income earner, with an annual income of $2,282,512 (190,042 per month). (1 CT 204). On his Income and Expense Declaration, Father set forth his annual income at $2,282,512, and attached a corporate profit and loss statement and a personal profit and loss statement as the foundation for the figures listed. (1 CT: 187-192). In addition, Father attached a personal profit and loss statement entitled

"Statement of Cash Receipts and Disbursements". (1 CT 187). The personal profit and loss statement listed his income from salary, residuals and fees, and listed all of his personal expenses for the household. Father stated that for the two minor children who reside with him, he paid $49,964 per year in children's tuition and school expenses and $33,629.29 per year in children's expenses. (1 CT 187).

Father also stated that he had another child support obligation of $13,457 per month. Father specifically informed the Court that his other child support obligation required him to pay $10,000 per month in child support, one half of private school tuition and school related fees, and half of child care up to a maximum amount of $2,500 per month. Father stated that the total of these items averaged to $13,457 per month. (1 CT 209: 26-210: 2).[2]

Based upon the information provided by each party in their respective Income and Expense Declarations, Father calculated guideline child support at $11,840 per month. (1 CT 198: 4). Father's declaration informed the Court that Mother has three minor children total, including Z.R., and all three (3) children have different fathers. (1 CT 209: 17-18). Mother told Father she never sought child support from either of the two fathers of her other minor children. (1 CT 209: 18-20). Father argued that the guideline child support figure he calculated of $11,840 was in excess of the child's needs because Mother's monthly expenses of

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2 Notwithstanding the confidentiality of the child support order setting forth Father's child support obligation of $13,457 per month, Father agreed that he would produce the order to Mother and her attorneys as long as they agreed to keep the order confidential. (1 CT 168). On February 6, 2015, a stipulation and order was issued setting forth the parties' agreement to keep the order for Father's existing child support obligation confidential. (1 CT 168).

$9,013 for her household of four (4) already included the following: (1) rent in a home where the child could have her own bedroom, (2) the minor child's private school tuition, summer camp, eyeglasses, incidentals, shoes, clothing, and "other expenses" (3) Mother's auto expenses including the Mercedes Benz lease payment, and (4) all household expenses for Mother, the minor child and Mother's two minor children from other relationships. (1 CT 198: 4 -15). In light of Mother's income of $1,833 per month (1 CT: 25 at item 1.h), Father requested that child support be ordered in the amount of $7,180 per month, as this amount would allow Mother to continue to pay expenses for the minor child that Mother claimed she wanted, such as private school, summer camp, extracurricular activities, clothing and incidentals. Moreover, Father argued this amount still provided an incidental benefit to Mother and her other two children, as it would allow Mother to continue to support herself and all three (3) children, notwithstanding the fact that Father only has the statutory duty to support Z.R. (1 CT 198: 4 - 199: 6).

Father also informed the Court of the historical payments he made either directly to the Petitioner or on her behalf, and explained how Mother would often make threats to publicize their relationship in order to obtain additional funds from Father. (1 CT 208: 17-26). Father further explained that, although he provided Mother with financial support prior to her filing the paternity action, once Mother filed the action, he believed that it was in his best interests to confirm that he was, in fact, the biological father of Z.R., so he requested genetic

testing. (1 CT 208: 28- 209: 3).

## H.

## FATHER COMPLIES WITH MOTHER'S ATTORNEY'S REQUESTS AND PRODUCES ADDITIONAL DOCUMENTS PERTAINING TO HIS INCOME

Upon receiving Father's Responsive Declaration and Income and Expense Declaration on March 11, 2015, Mother's attorney wrote a letter to Father's attorney, which stated that Father's Income and Expense Declaration did not have certain documents attached. (2 CT 251:1-9; 2 CT 380-382) In an effort to resolve the dispute, Father revised his Income and Expense Declaration, and included all of the attachments requested by Mother's attorney. (2 CT 251: 11-13). Father also provided Mother's attorney with his personal and corporate tax returns for 2012 and 2013. (2 CT 251:16-20). Mother's attorney received Father's Amended Income and Expense Declaration and additional documents on March13, 2015. (1 CT 251: 7-13). Father's amended Income and Expense Declaration did not set forth any significant change to his average monthly income, but did provide the following additional information that was not included on his initial Income and Expense Declaration: (1) The household expenses for his family of five, including his wife, one adult child and the two minor children (ages 10 and 13) of his marriage; (2) that Father does not own any real property; (3) that Father pays $665 per month in union dues; and (4) the names and ages of his household members. (2 CT 392-419). Additionally, Father completely filled out Section 13 entitled

"Average Monthly Expenses", which included a note that read: "Figures are based upon 2014 Statement of Cash Receipts and Disbursements". This personal profit and loss statement was attached to both Income and Expense Declarations filed by Father. ( 1 CT 187-188; 2 CT 396; 2 CT 389-399). Father's monthly expenses totaled $77,159.72 per month, including a $7,500 monthly payment to Mother, and a $2,500 non recurring monthly expense to furnish a new home, which was only incurred during 2014 (2 CT 397). Father also produced his personal tax returns and paystubs for the months of January and February 2015 to Mother. (1 CT 233).

## I.

## MOTHER ARGUES THAT FATHER DID NOT PRODUCE SUFFICIENT DOCUMENTS FOR THE COURT TO CALCULATE GUIDELINE CHILD SUPPORT, BUT NONETHELESS CALCULATES GUIDELINE CHILD SUPPORT AT $25,325 PER MONTH

In Mother's reply papers, Mother again requested guideline child support and maintained that she did not concede that Father is an extraordinarily high income earner. (1 CT 234: 17-18). Mother further argued that even if Father was an extraordinarily high income earner, he had not provided a legitimate evidentiary basis for the court to compute a guideline child support figure. (1 CT 235: 9-11). Mother admitted that she posted the "deadbeat" poster outside of Father's business manager's office out of anger. (2 CT 21-23), and conceded that she did not receive child support from either of the two (2) fathers of either of her

two (2) minor children from different relationships. Mother further stated that she "did not agree" to a below guideline child support figure. (2 CT 244: 8-12).

In support of her request for guideline child support, Mother filed a declaration by an accountant, Mr. David Blumenthal, CPA, with her reply papers. Notwithstanding Mother's argument that Father did not produce sufficient documents for the court to compute a guideline child support figure, Mr. Blumenthal calculated Father's income using what he referred to as the "least beneficial assumptions" standard. (2 CT 253: 16-19). Mr. Blumenthal stated in his declaration that he reviewed the following documents to calculate Father's income: (1) 2014 personal statement of cash receipts and cash disbursements for [A.F.]; (2) 2013 and 2014 statement of cash receipts and cash disbursements for Cartel Productions; (3) 2013 and 2014 statement of cash receipts and cash disbursements for Fuqua Films, Inc; (4) 2013 and 2014 statement of cash receipts and cash disbursements for Aktive Global Entertainment, Inc., (5) January and February 2015 paystubs issued to A.F. from Cartel Productions, Inc., (6) Respondent's Income and Expense Declaration dated March 10, 2015; and (7) Respondent's Income and Expense Declaration dated March 13, 2015. (2 CT 258: 23 - 259: 8).

Mr. Blumenthal stated that in order to calculate Father's income he "made assumptions concerning [Father's] disposable income, federal income tax filing status and deductions from gross income as are least beneficial to the extraordinary high earner." (2 CT 253: 24 - 26). According to Mr. Blumenthal,

under this "least beneficial assumptions" standard, the only expenses that Father deducted that were "clearly business expenses" were agent commissions and payroll taxes. Mr. Blumenthal stated that "all other expenses must be assumed to be perquisites under the 'least favorable' standard." (2 CT 255: 1-3). Mr. Blumenthal then added back 100% of all business expenses, except for agent commissions and payroll taxes, as nontaxable perquisite income to Father. Mr. Blumenthal added back all of Father's business expenses as nontaxable income, including bank charges, accounting and business management fees, union dues, employee welfare and benefits, data processing, insurance, office supplies and expenses, production cost, rent, research for characters, office salaries, telephone, etc. (2 CT 412), and took an average of Father's income for 2013 and 2014. Mr. Blumenthal concluded that Father, a successful film director, had virtually zero legitimate business expenses, and income of $336,470 per month (2 CT 255), including $94,422 per month in nontaxable perquisites. (2 CT 387-388). Annualized, Mr. Blumenthal's calculation of Father's income is $4,037,640 per year. Based upon this amount of income for Father, Mr. Blumenthal concluded that guideline child support was $25,325 per month. (2 CT 255:15-27; 2 CT 387) In her reply papers, Mother requested child support in the amount of $25,325 per month based upon Mr. Blumenthal's calculations. (2 CT 241:13).

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## J.

## THE COURT FINDS THAT FATHER IS AN EXTRAORDINARY HIGH INCOME EARNER AND FINDS THAT GUIDELINE CHILD SUPPORT IS $25,325 PER MONTH

Petitioner's Request for Order came on for hearing on March 23, 2015. At the hearing, Father's counsel argued that Mr. Blumenthal's tactic of adding back 100% of all business expenses other than agent commissions and payroll taxes, artificially increased Father's income and the amount of guideline child support. (3 CT 480:11- 483:19). Mother's counsel responded that in light of Father's claimed failure to produce documents, the court was required to make the least beneficial assumptions regarding Father's income, and those assumptions are that the business expenses he deducts are not legitimate business expenses. (3 CT 483:22-486:3).

When issuing its ruling, the court stated that both parties' arguments were too general. The court stated that Mother argued that the court should disregard all of Father's business expenses when some of the categories listed by Father were clearly business in nature, while Father requested the court use limited documents to determine his income. (3 CT 486:11-23). The court resolved the issue by finding that Father is an extraordinarily high income earner within the meaning of Family Code Section 4057(b)(3), and that an income in excess of two

to three million dollars per year is extraordinarily high income. (3 CT 487: 3-8).[3] The court rejected Father's income figure ($2,282,512 per year) and guideline child support calculation, however, because the court could not substantiate his claims as to his business expenses. (3 CT 487: 10-13). The Court adopted the calculations set forth in Mr. Blumenthal's declaration and found that Father's income was $336,470 per month and guideline child support was $25,325 per month. (3 CT 691: 10-22).

**K.**

**THE COURT FINDS THAT THE NEEDS OF THE MINOR CHILD CONSISTENT WITH FATHER'S STATION IN LIFE REQUIRE AN ORDER OF BASE MONTHLY SUPPORT OF $8,500 PLUS PAYMENT OF CERTAIN EXPENSES SOLELY ATTRIBUTABLE TO THE MINOR CHILD (WHICH TOTAL AT LEAST $12,105) AND FINDS THAT THE GUIDELINE AMOUNT OF $25,325 IS IN EXCESS OF THE CHILD'S NEEDS**

The court determined that the guideline child support figure of $25,325 would exceed the needs of the child. (3 CT 492:18-23). The court also expressed the difficulty in assessing the child's needs in light of the other two (2) children that reside with Mother. Specifically, the court stated: "My assessment of what her – the reasonable needs of the child are – and I think 4057 now requires that I

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[3] Even if Father's income figure of $2,282,512 per year had been adopted by the trial court, pursuant to the court's finding that income of two ***or*** three million dollars per year is extraordinarily high income, Father would still be an extraordinary high income earner.

do that – are – are complicated by virtue of [Mother] having two other children for which [Father] isn't responsible" (3 CT 489:6-10). The court went on to state that there are expenses which are solely attributable to the minor child at issue in this case. (3 CT 489:18-21). Accordingly, the court stated, "My inclination is to do the following, which is: to order that [Father] pick up certain specific expenses attributable to the child to assure that his personal needs are met." (3 CT 489:22-25). The court then ordered Father to pay expenses solely attributable to the minor child including: (1) 100% of private school tuition at a school comparable to the private schools his other children attend; (2) 100% of health insurance premium for a health insurance plan comparable to Father's; (3) 75% of the child's reasonable extra curricular activities; and (4) 90% of the minor child's uncovered medical costs. (3 CT 489:22-491:8; 3 CT 493:1; 3 CT 495:17-19). The court continued, "**with that**, a guideline child support number either based – certainly, on [Mother's] calculations I find would be far in excess of what the child's reasonable needs are, and I would order that a guideline child support number in the amount of $8,500 would be ordered to be paid as a reasonable assessment of the ***additional expenses that would allow the child to live at a standard of living that's appropriate for him and for [Father's] position in life.***"[4] (3 CT 491:9-17 *emphasis added*).

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[4] Contrary to the insinuation in the statement of facts of Appellant's Opening Brief, the court did ***not*** simply order $8,500 in child support. (AB 23). Rather, the court ***first*** ordered Father to pay specific expenses solely attributable to the child (private school, extracurricular activities, health insurance and uncovered medical costs), and ***only then*** in light of Father's payments of those expenses, found that $25,325 per month would exceed the needs of the child. (3 CT 491:9-17).

Mother filed a timely notice of appeal.

## III. STANDARD OF REVIEW

The standard of review for child support is an abuse of discretion standard. "The amount of child support rests in sound discretion of the trial court and an appellate court cannot interfere with the trial court order ***unless***, as a matter of law, an abuse of discretion is shown." *McGinley v. Herman* (1996) 50 Cal.App.4th 936 at 940. In this type of review the appellate court does not substitute its judgment for that of the trial court, and will disturb the trial court's decisions ***only if no judge could have reasonably made the challenged decision***. *In re Marriage of Cryer* (2011) 198 Cal.App.4th 1039 at 1046-1047 (emphasis added).

## IV. ARGUMENT

The trial court appropriately exercised its discretion along legal lines and fashioned a child support award that meets the needs of the child in light of the highly unusual circumstances of this case. This case is unusual because not only does guideline child support exceed the needs of the child due to Father's extraordinarily high income, but also Mother's household consists of two (2) other minor children who have different fathers who do not pay Mother child support. The trial court appropriately resolved these competing facts by ordering Father to pay certain expenses solely attributable to the child ***in addition*** to $8,500 per month, and found that this total "child support package" was in the best interests of the child because it met the needs of the child in light of the Father's station in

life, while ensuring that the funds received by Mother were expended directly on ***this*** child rather than equally expended on all 3 minor children who reside with her.

Mother's position that Father did not meet his burden of proof to show that the guideline child support figure exceeded the needs of the child is specious because the evidence shows that the child's needs based on Father's lifestyle are $11,193 per month, and the "child support package" ordered by the court totals at least $12,104 per month. Mother's argument that the court based child support on the child's historical expenses is false because had the court done so, the court would have ordered only $2,859 per month in child support. Mother's contention that the trial court ordered child support in an amount of one-third of the guideline is without merit because it does not take into account the expenses that Father was ordered to pay directly on behalf of the child.

Affirmance of the trial court order is required because the court made the required findings to deviate from the guideline child support figure based upon substantial evidence on the record. Assuming *arguendo* that this court finds error, however, any such error was harmless, and Mother has failed to show that the trial court's order resulted in a miscarriage of justice.

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## A.

## THE COURT PROPERLY DEVIATED FROM THE GUIDELINE CHILD SUPPORT FIGURE BECAUSE THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING THAT THE GUIDELINE FIGURE EXCEEDS THE CHILD'S NEEDS AND THE MANDATED STATUTORY FINDINGS ARE DISCERNABLE FROM THE RECORD

Section 4057(a) provides that the presumption that guideline child support is the correct amount of support to be ordered is a presumption affecting the burden of proof that may be rebutted by admissible evidence showing the guideline amount would be inappropriate in a particular case, consistent with the principles set forth in Section 4053. The factors listed in Section 4053 are:

> (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.
> (c) The guideline takes into account each parent's actual income and level of responsibility for the 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.
> (g) Child support orders in cases in which both parents have high levels of responsibility for the children should reflect the increased costs of raising the children in two homes and should minimize significant disparities in the children's living standards in the two homes.
> (h) The financial needs of the children should be met

> through private financial resources as much as possible.
> (i) It is presumed that a parent having primary physical responsibility for the children contributes a significant portion of available resources for the support of the children.
> (j) The guideline seeks to encourage fair and efficient settlements of conflicts between parents and seeks to minimize the need for
> litigation.
> (k) The guideline is intended to be presumptively correct in all cases, and only under special circumstances should child support orders fall below the child support mandated by the guideline formula.
> (l) Child support orders must ensure that children actually receive fair, timely, and sufficient support reflecting the state's high standard of living and high costs of raising children compared to other states.

A parent may rebut the presumption if one or more of the statutory factors listed in 4057(b) is found by a preponderance of the evidence. Section 4057(b)(3), lists one of those factors as: "The parent being ordered to pay child support has an extraordinarily high income and the amount determined under the formula would exceed the needs of the children."

> A presumption affecting the burden of proof places on the party against whom it operates the obligation to establish by evidence the requisite degree of belief concerning the nonexistence of the presumed fact in the mind of the trier of fact or the court; in other words, the affirmative obligation to prove it false by a preponderance of the evidence, unless a different standard of proof is required by law. Cal. Evid. Code, §§ 115, 606; *Pellerin v. Kern County Employees' Retirement Assn.* (2006) 145 Cal.App.4th 1099 at 1106. Such a presumption thereby "plays an essential part in directing the fact-finder." *O'Connell v. Unemployment Ins. Appeals Bd.* (1983) 149 Cal.App.3d 54 at 58.

"Burden of proof means the obligation of a party to establish by evidence a

requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence." Evid. Code § 115. "Burden of proof" thus means the burden to persuade the trier of fact on the issue involved. If the trier of fact is not persuaded to the required degree of certainty, its finding must be against the party with the burden on that issue. See *Metropolitan Water Dist. of Southern Calif. v. Campus Crusade for Christ, Inc.*, (2007) 41 Cal.4th 954 at 969; see also *Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.3d 875 at 880. In a civil case, a preponderance of evidence is all that is required. *People v. Miller* (1916) 171 Cal. 649 at 653. The preponderance of evidence standard has been defined by the California Supreme Court as "the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed. *People v. Miller*, *supra.*

In an extraordinarily high income earner case, the extraordinarily high earning parent has the burden of proof to show that guideline child support would be unjust or inappropriate and that a lower than guideline amount of support would be consistent with the child's best interests. See *In re Marriage of Hubner* (2001) 94 Cal.App.4th 175 at 183. Moreover, when assessing the child's needs in an extraordinarily high income earner case, the child's needs include more than the "bare necessities of life," and that the child is entitled to a standard of living

measured in terms of the standard of living attainable by the income available to the parents. *Johnson v. Superior Court* (1998) 66 Cal.App.4th 68 at 72 -73.

In extraordinarily high income earner cases where the high earner appropriately carries his burden of proof and persuades the court to deviate from the guideline, the court is required to make the findings set forth in Section 4056(a), or said required findings must otherwise be discernible from the record. *In re Marriage of Hubner* (2001) 94 Cal.App.4th 175 at 183. The findings set forth in Section 4056(a) are:

> (1) The amount of support that would have been ordered under the guideline formula.
> (2) The reasons the amount of support ordered differs from the guideline formula amount.
> (3) The reasons the amount of support ordered is consistent with the best interests of the children.

Thus, in order to determine whether the Court appropriately deviated from the guideline in this case, the inquiry is two fold. First, the reviewing court must determine whether there is substantial evidence on the record to persuade the trial court by a preponderance of the evidence that guideline child support was unjust or inappropriate because the guideline figure exceeded the child's needs, which are measured by Father's station in life. Secondly, it must be determined whether or not the trial court made the findings required by Section 4056(a), or whether those findings are otherwise discernable from the record.

In reviewing the evidence to resolve the inquiries, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences

indulged in to uphold the verdict if possible. It is an elementary principle of law, When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination. *Bowers v. Bernards* (1984) 150 Cal.App.3d 870 at 873. When two or more inference can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. *Id.* Thus, this reviewing court must review the evidence on the record in this matter with that legal principle in mind.

**1. There was overwhelming evidence before the trial court to conclude that Father met his burden of proof to show that guideline child support in the amount of $25,325 was unjust and inappropriate because it exceeded the child's needs.**

In her opening brief Mother argues that Father did not meet his burden of proof to show that the guideline child support amount exceeded the child's needs and that the trial court improperly shifted the burden of proof to prove the child's needs to Mother. (AB 37-40). Mother argues that the court looked only at the historical expenses of the child to determine that the guideline child support figure of $25,325 exceeded those needs. (AB 37-44). This is not the exercise that the Court engaged in, however, and Mother's position ignores substantial evidence that shows that Father appropriately met his burden of proof to show that $25,325

per month exceeded the child's needs.

The evidence before the trial court related to the child's needs in light of Father's station in life included: (1) Mother's expenses listed on her Income and Expense Declaration for her family of 4, (2) additional expenses Mother requested in her declaration based upon Father's wealthy status, (3) Father's breakdown of his household expenses for his family of 5, including the expenses of the minor children of his marriage (ages 13 and 10), his wife, and adult son; (4) Father's income; (5) Father's business expenses; (6) the Court's finding that Mother's calculation of Father's income was excessive; (7) the amount of child support Father paid for another child; and (8) Mother's income.

In Mother's Request for Order, Mother requested guideline child support to pay for rent in a four-bedroom home so the minor child could have her own bedroom, private school, tutoring, domestic travel, household help, extracurricular activities, dining out, and shopping at department stores. According to Mother, these were expenses the children of Father's marriage enjoyed. (1 CT 59:26-60:27). Mother listed the total proposed needs for her family of four (4) as $9,013 per month, including private school tuition, child care, entertainment, auto expenses, her Mercedes Benz lease, rent, utilities, clothes, uncovered medical costs, etc. (1 CT 28; 32).

In his responsive declaration, Father stated that he already paid rent for Mother and the minor child to live in a three bedroom where the minor child could have her own bedroom, and that he should not have to pay for Mother's

other two (2) children to have their own bedrooms. (1 CT 198:16-199:6). Father further argued that several of the expenses such as extracurricular activities, summer camp, private school tuition and a Mercedes Benz lease payment, which Mother claimed she needed to allow the child to enjoy a standard of living comparable to Father's other children, were already included in Mother's monthly expenses. (1 CT 198:16-28). Additionally, Mother's expenses included the expenses for the two (2) children from different relationships for whom she did not receive child support. (1 CT 28-29; 32). For these reasons, Father argued that the guideline figure calculated by him of $11,840 based on his income of $190,042 per month was in excess of the child's needs. (1 CT 198:4-15). Father specifically requested the court to order $7,180 per month **with no expenses paid directly by him**, other than health insurance premiums. (1 CT194:19-27).

*i. The child's needs in light of father's wealthy status are $11,193 per month, and the total child support package ordered by the court totals at least $12,104 per month.*

In Father's Income and Expense Declaration, he stated that he paid $3,913 per month in private school tuition for two (2) minor children of his marriage[5] to attend private school, and $3,294 per month in children expenses, for a grand total of $7,207 per month in expenses directly attributable to his two (2) minor children of the marriage, or $3,604 per child. (2 CT 396, item 13.j; 2 CT 397). Father

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5 The children of Father's marriage were ages 10 and 13 at the time of the hearing (2 CT 396), which is close in age to the minor child at issue in this case, who was almost 9 years old at the time of the hearing.

listed his total household monthly expenses at $77,160, including a $7,500 monthly payment to Mother and a nonrecurring expense of $2,500 to purchase furnishings for his home, which was only incurred during calendar year 2014 (2 CT 396-397). Accordingly, the total recurring monthly expenses for Father's household of five (5) persons is as follows:

| | |
|---|---|
| Total Household Monthly Expenses: | $77,160 |
| Less Monthly Payment to Y.R.: | ($7,500) |
| Less Nonrecurring Furniture Payment: | ($2,500) |
| **Total Monthly Household Expenses:** | **$67,160** |

In order to determine the expenses attributable to the two (2) minor children that reside with Father, 50% of the total household monthly expenses ($33,580) are allocated to Father and his wife and the remaining $33,580 are allocated to Father's three children (2 minors and 1 young adult) who reside in the home. Thus, the total amount spent per child that resides with Father is calculated as follows:

| | |
|---|---|
| 50% of Monthly Household Expenses: | $33,580 |
| **Total Expense per Child (divided by 3):** | **$11,193** |

This figure of $11,193 per month ***includes*** private school tuition and children's expenses, totaling $3,604 for each minor child that resides with Father. Thus, in order to enjoy a standard of living commensurate to Father's minor children of the marriage, the child in this case needs child support in the amount of approximately $11,193 per month. Based upon this evidence, a guideline child support award of $25,325 per month is absolutely unjust and inappropriate as it would cause Father to provide the minor child in this case more than double the

financial support that he provides his other children!

Father spends the following amount on himself and his wife:

| | |
|---|---|
| 50% of total household expenses: | $33,580 |
| Amount spent by Father per adult: | $16,790 |

Thus, $25,325 in guideline child support is also in excess of the amount that Father spends on each adult of his household! This outcome is not surprising, however, due to the fact that the trial court used the figure calculated by Mother's forensic accountant for Father's income, which added back almost 100% of Father's business expenses as nontaxable income to Father. (3 CT 487:3-488:6). The court stated the following about Father's income calculated by Mother's accountant:

> I tend to believe that a – that that [sic] number is ***inflated***; that a realistic analysis, even of the factors that were presented, would have resulted in Mr. Blumenthal readily conceding that some of those categories for a person in [Father's] position, were appropriate business expenses and should have been included [sic]. But I don't have to do that myself. So I tend to believe that the guideline number of 25,000-plus per month is probably ***excessive***. (3 CT 487:25-488:5 emphasis added).

As set forth above, based upon Father's Income and Expense Declaration, he spends $3,604 per month on expenses solely attributable to the two minor children who reside with him for school tuition and children's expenses. These amounts do not include health insurance premiums or uncovered medical costs. If Father were to spend the same amount on the expenses he was ordered to pay for the minor child in this case, namely 100% of private school tuition at a school

comparable to the school Father's other children attend, 100% of health insurance premiums for a health plan comparable to Father's, 90% of uncovered medical costs, and 75% of extracurricular activities, including camp and school related expenses, then the total child support package awarded to Mother is at least $12,104 per month calculated as follows:

| | |
|---|---|
| Father's Children's Expenses & Tuition per child: | $3,604 |
| Additional Child Support Ordered by Court: | $8,500 |
| **Total Child Support Package:** | **$12,104** |

A total child support package of $12,104 is in excess of the $11,193 that Father spends on the children of his marriage as calculated above, and does not account for the costs of the minor child's medical insurance premium or uncovered medical expenses. Additionally, the figure of $12,104 will only increase as the cost of living, private school tuition, summer camp, extracurricular activities, and school related expenses increases over time. Accordingly, the total child support package awarded to Mother is at least $12,104 per month and this amount more than meets the needs of the child in light of Father's wealthy status.

*ii. Contrary to Mother's argument, the court did not order child support based on the child's historical expenditures of $2,859 per month.*

Mother's argument that the court determined the child's needs based upon the child's historic expenses listed on Mother's Income and Expense Declaration (AB 40-44) is simply an inaccurate statement of the trial court's analysis in this

matter. Father concedes that it is not appropriate for the trial court to base a child's needs on the child's historical expenses, especially in the case of a wealthy parent. See *Marriage of Cheriton* (2001) 92 Cal.App.4th 269 at 293. In light of the total child support package valued at a minimum of $12,104, this is clearly ***not*** what the trial court did in this case. Had the trial court ordered support based solely upon the Mother's historical expenditures on this child, as the trial courts erroneously did in the cases of *In Re Marriage of Cheriton*, *supra*, and *In Re Marriage of Chandler* (1997) 60 Cal.App.4th 124, both relied upon heavily by appellant, child support would have been ordered in the amount of $2,859 per month. This figure is calculated by allocated 25% of Mother's total expenses to the minor child plus the expenses she stated were attributable solely to Z.R. As set forth above, Mother listed her total monthly expenses at $9,013 for her family of four (4) including rent, private school tuition, uncovered medical costs, groceries, clothes, auto expenses, life insurance, extra curricular activities, dining out, entertainment, her Mercedes Benz lease payment, utilities, phone, cable, etc., and $808 in "other expenses" specifically incurred for the minor child at issue in this case. (1 CT 32). Attributing 25% of each expense category to the child, except for the expenses listed at 13.q., which were designated as expenses specifically for this child (1 CT:32), sets the child's historical expenses at $2,859 per month:

| | |
|---|---|
| Mother's total expenses: | $9,013 |
| Less 13.q. expenses for Z.R.: | ($808) |
| Total household expenses less 13.q: | $8,205 |
| 25% of total expenses: | $2,051 |
| Plus expenses for Z.R. at 13.q.: | $808 |

**Child's Expenses/Child Support: $2,859**

As set forth above, the "child support package" ordered by the trial court totals at least $12,104 per month, which is more than ***quadruple*** the child's historical expenses of $2,859 per month.

*iii. The trial court properly exercised its discretion to resolve the competing facts that father was an extraordinarily high income earner and that mother supports a household of four, including 2 minor children for whom she does not receive child support.*

When the application of the guideline formula produces an unjust or inappropriate result, section 4057 vests the trial court with considerable discretion to approach unique cases on an ad hoc basis. *In re Marriage of Drake* (1997) 53 Cal.App.4th 1139 at 1158. Additionally, as stated above, when deviating from the child support guideline, the court must take the factors listed in Section 4053 into consideration. See § 4057(b). The 4053 factors include: It is presumed that a parent having primary physical responsibility for the children contributes a significant portion of available resources for the support of the children. Child support orders must ensure that children actually receive fair, timely, and sufficient support reflecting the state's high standard of living and high costs of raising children compared to other states. The guideline seeks to place the interests of children as the state's top priority. See 4053(e), (i), and (l).

Here, the trial court was faced with the fact that Father was an

extraordinarily high income earner who had a duty to support **one** minor child that resided with Mother, while Mother was the primary custodial parent for **three** (3) minor children, and did not receive any child support for two (2) of the children. Pursuant to Section 4053(i), the court presumed that Mother spent all available resources on all three of the children whom resided with her. Moreover, the trial court needed to issue an order that would ensure that the minor child at issue in this case would actually receive the support, as that is the State's top priority. Section 4053(e) and (l).

In order to achieve that end, the trial court ***granted*** Mother's request that Father pay for the minor child's private school tuition at a school comparable to a school that Father's other children attend, medical insurance comparable to Father's, extracurricular activities, summer camp, school related expenses, and uncovered medical costs. Rather than give Mother cash each month to cover those expenses, however, the trial court ordered Father to pay those expenses directly. Only after making these orders, did the court find that $25,325 exceeded the needs of the child. The trial court fashioned the "child support package" in such a manner to ensure that the funds were being applied to the minor child's lifestyle and not to all of Mother's children equally when the court stated, "My assessment of what her – the reasonable needs of the child are – and I think 4057 now requires that I do that – are – are complicated by the virtue of [Mother's] having two other children for which [Father] is not responsible." (3 CT 489: 6-10).

*iv. The total child support package ordered by the court allows the child to enjoy a lifestyle comparable to that of Father's other children.*

Contrary to the argument presented by Mother, the court did not set child support based upon what the court "believed" were the "reasonable needs of the child" (AB 39), rather the trial court properly found that $25,325 would exceed the needs of the child ***in light of*** the orders requiring Father to pay for the child's private school tuition, school related costs, summer camp, extracurricular activities, medical insurance and uncovered medical costs. (3 CT 489:22-491:17).

The only expenses for the child not covered by the trial court's orders requiring Father pay private school tuition, school related expenses, health insurance, uncovered medical expenses, extracurricular activities, and summer camp were dining out, clothes, household help, travel, and rent for a larger home. In Mother's declaration, she stated she needed $6,000 per month to rent a four bedroom condo, $1,800 per month for household help, and additional funds for dining out, travel and clothing. (1 CT 60:1-18). While Mother claimed she needed $1,800 per month for household help, Mother also testified that she only worked 17-20 hours per week and earned $1,833 in self employment income. (1 CT 25 item 1.g.). Mother's requests for $6,000 for rent and $1,800 for household help are not reasonable because Father is not legally obliged to pay for each of Mother's three (3) children to have their own bedroom or $1,800 for household help so Mother can earn the same amount in self employment income! If we

allocate 50% of the rent and household help expenses to Father's child support obligation, the amount needed by *this* child for rent and household help is $3,900 per month ($6,000 + $1,800 = $7,800 * 50% = $3,900).

The additional amount ordered by the court of $8,500 plus Mother's $1,833 per month in self employment income allows Mother to pay the rent, household help, and additional expenses requested by Mother allocated to ***this*** child as follows:

| | |
|---|---|
| Additional Child Support: | $8,500 |
| Mother's Income: | $1,833 |
| Less Rent & Household Help: | ($3,900) |
| **Mother's Excess Monthly Cash:** | **$6,433** |

After paying for the monthly rent and household help expenses allocated to this child, Mother has $6,433 per month to pay for the minor child's dining out, clothing, entertainment, gifts and travel. These are the additional expenses Mother requested in her declaration in order to allow the child to enjoy a lifestyle similar to that of Father's other children that Father was not ordered to pay directly by the court. (1 CT 60:1-27).

On Father's Income and Expense Declaration, his monthly expenses for his family of five (5), for the same categories (dining out, clothing, entertainment, gifts and vacation) are as follows (2 CT 396):

| | |
|---|---|
| Eating out: | $3,029 |
| Clothes: | $3,057 |
| Ent., gifts, vacation: | $3,203 |
| Total: | $9,289 |
| **Per person (total divided by 5):** | **$1,858** |

The trial court's order in this case thus, gave Mother the ability to spend $6,433 on eating out, clothes, entertainment, gifts, and travel for the minor child, when Father spends only $1,858 per month on these same categories per person of his household.

Mother's argument that the guideline figure of $25,325 does not exceed the child's needs because Father spends $20,900 per month on rent is a red herring, at best. (AB 44-45). Father does not spend anywhere near $20,000 on any other expense besides his rent. (2 CT:396-397). Moreover, Father resides with his wife and three (3) children, all of whom he has a duty to support. (2 CT:396-397). Father's rental expense allocated to each member of his household is $4,180 per month per person ($20,900/5 = $4,180). As set forth above, the court's child support order gives Mother sufficient funds to rent a home where the child can have her own bedroom. Lastly, housing, especially in Los Angeles, is usually the most expensive monthly expense of any family, even the extraordinarily wealthy. Mother's argument implies that any child support obligor is required to pay more in child support than he does on his monthly rent or mortgage. This proposition, especially in Los Angeles, is simply not workable.

Based on all of the evidence presented to the trial court, it is clear that Father appropriately carried his burden of proof to substantial evidence that the guideline figure of $25,325 was in excess of the minor child's reasonable needs in light of Father's wealthy status and the fac that Mother had primary custody of two minor cchildren . In light of the analysis of all of the evidence before the trial

court, it certainly **cannot** be said that no judge would have reasonably found that a $25,325 child support award was unjust and inappropriate under the same circumstances.

**2. There is sufficient evidence on the record to support the required finding that the child support award was in the minor child's best interests.**

Mother argues that the court did not make a finding that the child support award ordered was in the best interests of the child, as required by section 4056, subdivision (a)(3) because the court did not make a specific statement that the order was "in the best interests of the child." (AB 45-48). This argument is without merit as the best interest finding is implicit in the court's other findings and based upon substantial evidence contained on the record.

"In general, the failure to make a material finding on an issue supported by the pleadings and substantial evidence is harmless when the missing finding may reasonably be found to be implicit in other findings. [Citation omitted.] The court's failure to make findings is also harmless when, under the facts of the case, the finding would necessarily have been adverse to the appellant." *Rojas v. Mitchell* (1996) 50 Cal.App .4th 1445, 1450. Failure to make mandatory statutory findings, with respect to a child support order that falls below presumed amount under statewide uniform guidelines, may constitute reversible error ***only if*** the missing information is not otherwise discernible from the record. *In re Marriage of Hubner* (2001) 94 Cal.App.4th 175. Indeed, cases have held that the best

interests finding may be implied from the record. See *In Re Marriage of Kerr* (1999) 77 Cal.App.4th 87 at 96; and *In re Marriage of Laudeman* (2001) 92 Cal.App.4th 1009.

The doctrine of implied findings, which applies here, provides that the most fundamental rule of appellate review is that an appealed judgment or order is presumed to be correct. "All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." *Denham v. Superior Court (Marsh & Kidder)* (1970) 2 Cal.3d 557 at 564. Any ambiguity in the record is resolved ***in favor*** of the appealed judgment or order. In the absence of a statement of decision, the appellate court will presume that the trial court made all factual findings necessary to support the judgment for which substantial evidence exists on the record; i.e. the necessary findings of ultimate facts will be implied and the only issue on appeal is whether the implied findings are supported by substantial evidence. *Michael U. v. Jamie B.*, (1985) 39 Cal.3d 787 at 792-793 (reversed on other grounds).

In the case of *In re Marriage of Jones*, (1990) 222 Cal.App.3d 505, Husband appealed the trial court's order both increasing the amount and extending the period of spousal support payments. On appeal, Husband correctly pointed out that Wife had the burden of proof to make a showing of changed circumstances to modify spousal support, the lower court was required to make such a finding, and the trial court did ***not*** make an express finding of change of

circumstances on the record, but nonetheless modified support. *Id.* at 515. While the court of appeal agreed that there was no explicit statement of a finding of changed circumstances, in affirming the lower court's order, the Fourth District stated:

> Upon waiver of a statement of decision it is required of the court only that it issue a written order or judgment. (Citation omitted). In reviewing a judgment without a statement of decision the appellate court indulges every intendment in favor of the judgment, and assumes the trial court found every essential fact to support the judgment. The task of the appellate court is limited to searching the record for any substantial evidence which will support the judgment. (citing *Golde v. Gox* (1979) 98 Cal.App.3d 167, 173-174).
>
> Neither of the parties in this case requested a statement of decision. While the trial court made certain findings in its tentative decision, stated from the bench, and the form of order prepared by prevailing counsel incorporated these statements as a preface to the order, they cannot in any sense be deemed complete findings of fact. One of the purposes of section 632 is to gain input by counsel into the preparation of the statement of decision and cause the preparation of a statement of findings which covers all issues. Where no statement has been requested or prepared it would be unfair to the trial court to criticize the fragmentary factual statements included in an oral tentative decision as an incomplete statement.
>
> We therefore treat the order in this case as *only* an order, and consider the factual statements included in its preface as only partial and incomplete statements of the basis for the order. We therefore decline to find error in the judge's failure to make a finding of change of circumstances, and search the record to determine whether there are facts supporting a presumed finding of change of circumstance. *Marriage of Jones*, *supra* at 515-516.

The facts of the instant matter are similar to those of *Marriage of Jones*, *supra*. There is no statement of decision in this case.[6] Just as in *Jones*, the trial court made findings and orders from the bench that were incorporated into the order prepared by Father's counsel. The Court did not sign the Proposed Order After Hearing prepared by Mother's counsel because it did not accurately reflect the court's order. The Proposed Order After Hearing prepared by Mother's counsel stated that child support in the amount of $8,500 was sufficient to meet the child's needs and was in the best interests of the child (3 CT 711:23-25). This did not accurately reflect the court's order! The trial court's order was that Father's payment of private school tuition, medical insurance, uncovered medical costs, school related expenses, summer camp, and extracurricular activities, ***plus*** $8,500 per month met the needs of the child and was in her best interests. In making the order, the trial court stated, "[this order] would allow the child to **live at a standard of living that's appropriate for him [sic] and for [Father's] position in life.**" (3 CT 491:12-17). In light of this statement made by the court, Mother's argument that it cannot be implied from the trial court's express findings that the child support order is in the best interests of the child (AB 45-46), necessarily fails. The order of the court was in the best interests of the child due to the well established principle, that "a child ... is entitled to be supported in a style and condition consonant with the position in society of [his] parents." ...

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6 At the March 23, 2015, hearing Mother's counsel stated that she was going to recommend that Mother appeal the trial court's ruling. (3 CT 498: 7-10). Notwithstanding this statement, Mother's counsel did not request a Statement of Decision.

"The father's duty of support for his children does not end with the furnishing of mere necessities if he is able to afford more." ...' "Clearly where the child has a wealthy parent, that child is entitled to, and therefore "needs" something more than the bare necessities of life." *Marriage of Hubner*, *supra*, at 187.

Here, rather than simply apply the guideline formula as requested by Mother, the court soundly exercised its discretion to order Father to pay certain expenses that were solely attributable to the parties' minor child. The trial court expressed its concern that the child's needs were complicated by the fact that two (2) minor children from different relationships for whom Mother did not receive child support resided with Mother and the minor child. The trial court was concerned that if Mother was granted an award solely requiring Father to pay Mother a certain amount each month sufficient to meet the minor child's needs, Mother would expend those funds equally amongst all three (3) children residing with her[7], rather than to pay for the expenses of the minor child at issue in this case. Such a result would ***not*** be in the best interests of the minor child because she is entitled to a more luxurious standard of living than those of her half-siblings with whom she resides due to her Father's wealthy status. While it is true that the custodial household may benefit from the child support order (See *Johnson v. Superior Court* 66 Cal.App.4th at 71), it does not follow that Father is required to provide Mother's other two (2) children with a luxurious standard of

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7 It is presumed that a parent having primary physical responsibility for the children contributes a significant portion of available resources for the support of the children Section 4053(i).

living because he is the parent of one minor child that resides in that home. Nor does it follow that the minor child at issue should have a lower standard of living than that attainable by Father's income, which would occur if Mother equally expended the child support received from Father for one child amongst all three of her children. The trial court, by ordering Father to pay for particular expenses directly, ensured that the expenses solely attributable to the parties' child were paid by Father and then gave Mother sufficient cash to support the child at a level commensurate with Father's station in life, which is in the child's best interests.

Moreover, the child in this case suffers no detriment from the order. The child's expenses that are solely attributable to her are taken care of including 100% of school tuition at a school comparable to Father's other children, extracurricular activities to ensure she is well-rounded, summer camp, medical expenses and school related fees, plus Mother has an additional $10,333 per month ($8,500 in support plus her income of $1,833 per month) to spend on rent, travel, clothing and food, including dining out. Mother is receiving far in excess of the funds that were previously voluntarily paid by Father for the duration of the child's 8 years of life, which averaged to $5,000 per month prior to the filing. (1 CT 208:1-14). In light of the evidence before the trial court of how much Father spends on the children of his marriage, assessed in more detail hereinabove, the minor child in this case is treated similarly, if not better.

Nor is the child in this case treated differently from the other child for which Father pays child support as suggested by Mother. (AB 47). In her

opening brief, Mother misstates the record when she states that Father pays $13,457 in "base support" for his other child. (AB 47). Father's responsive declaration clearly stated that he pays $13,457 on average per month to support another child, including $10,000 of "base support" per month, ***one-half*** of private school tuition, and ***one-half*** of child care up to a max of $2,500. (1 CT 209:26-210:2). For that child, Father pays only ***one-half*** of childcare and tuition and no other expenses, but yet he expends, on average, an additional $3,457 per month on that child over and above the $10,000 in monthly support. In light of this evidence, the child support package ordered by the trial court here will cause Father to pay Mother far more than the $8,500 figure Mother argues is not in the child's best interests. The order in this case requires Father to pay more because rather than pay 50% of only private school and child care, as he is required to in the other case, here he was ordered to pay 100% of school tuition and health insurance, 90% of uncovered medical costs, and 75% of extracurricular expenses, summer camp and school related expenses. Adding up all of these additional expenses plus the additional $8,500 per month, the trial court reasonably calculated that all of its orders would equal the same amount of support for this minor child as Father's other child for which he pays support. Such an order is not only in the best interests of the minor child in the instant matter, but also in the best interests of the other minor child for which Father pays child support.

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## B.

## THE COURT HAD SUFFICIENT INFORMATION ON THE RECORD TO DETERMINE THE EXTRAORDINARILY HIGH EARNER THRESHOLD

Contrary to Mother's argument that the court did not make a finding as to the amount of guideline support at the extraordinarily high earner threshold as required by *McGinley v. Herman*, *supra* (AB 48), that information was clearly on the record. In his responsive declaration, Father calculated the guideline child support figure of $11,840 per month based upon his actual income of $2,282,512 (1 CT 197:16-198:4). The trial court found that income in excess of $2 million ***or*** $3 million is extraordinarily high income. (3 CT 487:6-8). Accordingly, the guideline child support figure of $11,840 per month is the figure at the lower end of the court's finding that income in excess of $2 million is extraordinarily high income. As set forth above, the value of the child support package ordered by the trial court totals a minimum of $12,104 per month. This amount is in excess of the guideline figure of $11,840 calculated by Father. Father is thus, paying more in child support than a child support obligor who earns income of $2,282,512 per year.

## C.

## ASSUMING *ARGUENDO* THAT THE COURT DID ERR AS ALLEGED BY MOTHER, ANY SUCH ERROR IS HARMLESS AND DOES NOT REQUIRE REVERSAL

Even assuming *arguendo* that the court did improperly shift the burden of

proof that the guideline child support figure exceeded the child's reasonable needs to Mother or that the best interests findings is not implicit in the record, Mother failed to meet her burden to show that such error resulted in a miscarriage of justice.

The California Constitution permits reversal only if an error resulted in a miscarriage of justice: Courts cannot set aside a judgment or grant a new trial based on instructional, evidentiary, pleading or procedural error "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Cal. Const., Art. VI, § 13. A "miscarriage of justice" will be declared only when the appellate court, after examining the entire case, ***including the evidence***, is of the opinion that "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800 (emphasis added). It is well settled that the appellant has the burden of affirmatively demonstrating prejudicial error. *Pool v. City of Oakland* (1986) 42 Cal.3d 1051 at 1069. Thus, if the court finds that the court erred in either manner promoted by Mother, reversal is ***not*** required unless Mother can affirmatively show that such errors resulted in a miscarriage of justice. Mother failed to meet this burden.

The only argument set forth by Mother in her opening brief on appeal that the alleged error by the trial court was prejudicial is as follows:

"Reversal is required due to the court's failure to make the

> findings required by Section 4057[8], and its failure to set support according to the guideline because the father did not introduce sufficient evidence to rebut the guideline. These were not harmless errors. (See *Rojas v. Mitchell, supra*, 50 Cal.App.4th at p.1450-51.) The mother was prejudiced because child support was ordered at roughly one-third the guideline, representing a loss of substantial child support that should have been ordered." (AB 50).

In other words, Mother alleges the errors prejudiced her because child support was ordered at "one-third" the guideline. Mother again completely misstates the order issued by the trial court! The court ***granted*** Mother's request for payment of private school tuition, medical insurance, extracurricular activities, school related costs, summer camp, and uncovered medical costs. It simply required that Father pay those items directly rather than give Mother cash each month to pay them herself. Mother does not analyze all of the evidence on the record, but nonetheless concludes that guideline child support should have been ordered because one-third of the inflated guideline amount is prejudicial to her. As set forth above, the total child support package is valued at a minimum of $12,104 per month. This amount allows the child to enjoy a lifestyle similar to Father's. This outcome is ***not*** a miscarriage of justice.

As to Mother's alleged error that Father did not introduce sufficient evidence to rebut the guideline, it cannot be said that a more favorable result would have been reached in absence of the alleged error. Father does ***not*** concede

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[8] Although Mother states the court failed to make the findings required by Section 4057, Father believes this citation is in error and Mother intended to cite Section 4056(a).

the court erred in this manner. Assuming *arguendo* that the trial court did err in shifting the burden of proof to Mother, however, if the burden was properly placed on Father there is substantial evidence on the record to conclude that the guideline figure of $25,325 is unjust and inappropriate because it is in excess of the child's needs. First, the figure is based upon an income figure that is artificially high in that it did not account for any of Father's legitimate business expenses other than payroll taxes and management fees. Moreover, as described in detail above, the guideline figure of $25,325 is far in excess of the amount that Father spends on any member of his family, including his children, his wife and himself!

As to Mother's second alleged error, namely that the trial court failed to make the findings required by 4056(a) and failed to use the Mandatory FL-342a form caused prejudicial error (AB 45-50), Mother's reliance on *Rojas v. Mitchell*, *supra*, is misplaced. There, the trial court was presented with a modification proceeding in which the parties previously stipulated that the father would pay the mother $5,000 per month in child support. Three (3) years later, the father moved to reduce the support obligation because his income had been reduced by the amount of $270,000 per month. The court decreased child support to $4,000 per month and set the matter for a review hearing 6 months later. By the time the review hearing came around, Father signed a new contract for an annual salary of $3 million, a $900,000 signing bonus and other incentives. After the review hearing, the court took the matter under submission and issued a written order

requiring the father to recommence paying $5,000 per month in child support retroactive to three (3) months before the review hearing. *Id.* at 1451. Within 10 days of the written order, Mother requested a Statement of Decision or Information required by Family Code 4056, but the court did not respond to the request. When the First District found that the trial court committed prejudicial error by not stating the reasons why the monthly support award met the child's reasonable needs, the court stated, "Unfortunately, the error cannot be considered harmless ***since the missing reasons cannot be implied in the court's express findings and we cannot conclude the missing information would have been adverse to appellant.***" *Id.* at 1451 (emphasis added). Although the appellate court reversed in doing so, it stated, "while we are constrained to reverse and remand for the required information under section 4056, subdivision (a), we are not suggesting that the support order is otherwise defective or unsupported by substantial evidence, particularly in light of respondent's extraordinarily high income." *Id.* at 1451.

The major difference between *Rojas* and this case, is that the Court here did **not** take the matter under submission and issue a written ruling, rather the trial court made stated its findings and reasons orally from the bench. Accordingly, as explained above, the doctrine of implied findings applies to the facts of this case. Also, Mother did not request a written statement of decision or a statement of information pursuant to Family Code 4056, notwithstanding the fact that Mother's counsel stated that she was going to recommend an appeal. (3 CT 498:7-10).

Even if the court did fail to state the reasons why the support order was in the best interests of the child, such error does not constitute reversible error because there is substantial evidence on the record that shows the child support package ordered by the court is in the best interests of the child because it meets the needs of the child in light of Father's station in life and it ensures that the child receives the funds paid by Father. It cannot be said, after reviewing all of the evidence, that Mother would have achieved a more favorable result in absence of these alleged errors.

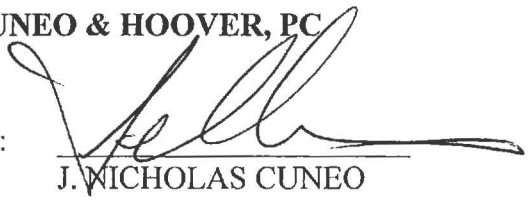
## V.

## CONCLUSION

Father respectfully requests the court to affirm the lower court's decision because after review of the substantial evidence on the record, it cannot be concluded that the court committed prejudicial error, and Mother has not met her burden to affirmatively demonstrate any such error resulted in a miscarriage of justice.

Dated: September 28, 2016

**CUNEO & HOOVER, PC**

By: 

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## Rule 14(c) Certificate

The undersigned certifies that the text of the preceding RESPONDENT'S BRIEF including captions and footnotes, and exclusive of Title Pages, Table of Contents and Authorities, and this Certification page, contains 12,632 words, based upon the computerized word-count function of Word Perfect for Windows 12.

Dated: September 28, 2016

**CUNEO & HOOVER, PC**

By: _____
J. NICHOLAS CUNEO

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 12100 Wilshire Boulevard, Suite 1980, Los Angeles, California 90025.

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/X/ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

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Signature