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COURT OF APPEAL
STATE OF CALIFORNIA

First Appellate District
Division 1

In re Marriage of

LISA HUNT,
Appellant,

vs.

WILLIAM HUNT,
Respondent.

Appeal from Contra Costa Superior Court
Case No. D17-00588
Hon. Richard C. Berra (Temp. Judge)

RESPONDENT'S BRIEF

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I. INTRODUCTION

The trial court properly deferred ruling whether the approximately $2.5 million in funds respondent, William Hunt ("Billy"), received from his company in early 2018 was income for child support purposes. When the court considered the evidence at the child support hearing in August 2018, it could not determine if the money was a loan, return of capital, or distribution of profits. It decided to wait until Billy filed his 2018 tax return to see how the funds were treated for tax purposes. Meanwhile, monthly support was set on each party's base income. Billy was ordered to pay additional child support per the uniform statewide guideline on any income he received over his base, within 10 days of filing his 2018 income tax return. The court reserved jurisdiction over any dispute on the true-up. The trial court acted within its discretion by ordering support on each party's established monthly income and requiring Billy to pay a guideline percentage of any extra income he received in 2018.

After Lisa appealed the ruling, Billy filed his 2018 tax return and reported $3,092,480 in business income over his base. This is more income than Appellant, Lisa Hunt ("Lisa"), had asked the court to use in setting support at the hearing.[1] Lisa has not invoked the trial court's reserved jurisdiction over the true-up of 2018 child support. Instead, she persists in appealing the base

[1] A motion for judicial notice is filed concurrently, as discussed below in section VI(F) of this brief.

child support order, claiming the trial court should have included the $2.5 million as "income" when it set support in August 2018.

Lisa's complaint is about timing, insisting that the $2.5 million should have been counted as income at the hearing, even though she failed to persuade the trial court that the money was, factually, income for support. No miscarriage of justice occurred because the court ordered Billy to pay guideline child support on all of his income. If there is a dispute over the support due on Billy's 2018 income, Lisa may ask the trial court to exercise its reserved jurisdiction.

Lisa claims the court deviated from the child support guideline by not counting the $2.5 million as income, and it needed to make special findings for its alleged deviation. The trial court followed the guideline and made the necessary findings.

Finally, Lisa states the court erred in imputing wages to her when it calculated base support. Lisa admitted she can work full time and asked the trial court to impute wages to her at $11 per hour. She incorrectly states there was a stipulation to her earning capacity being $11 per hour. The court found her earning capacity was $20 per hour based on the opinion of a vocational examiner that jobs were available to Lisa at $20 per hour. The vocational examiner recommended steps Lisa could take to increase her chances of finding work above minimum wage, but she followed none of that advice. Substantial evidence supports the finding on Lisa's earning capacity.

II. ISSUES ON APPEAL

(A) Was it an abuse of discretion to defer ruling on Billy's 2018 income until the annual true-up?

1. Lisa's position.

The funds Billy received from his company in 2018 were "income" per Family Code section 4058, so child support should have been ordered on that money in the ruling of August 30, 2018. (A.O.B. pp. 18, 33.) She claims: "The judge did not know the taxability of Billy's distributions, so he punted the issue until after Billy files his tax returns." (A.O.B. p. 38.) Lisa says the trial court abused its discretion by making her wait until the true-up. (A.O.B. p. 38.) She requests reversal with instructions to order support on the $2.5 million. (A.O.B. p. 38.)

2. Billy's position.

The trial court understood the definition of income in section 4058.[2] The funds advanced to Billy from his company in 2018 were primarily so he could buy a home for himself and the children after the divorce. (R.T. pp. 41:91-12, 42:20-43:2.) Billy considered the money as a loan or advance against future distributions. Lisa failed to prove the money was income, so the court deferred the issue for the annual true-up. Billy's 2018 tax return would assist the court in determining if the money is income for support because the guideline uses a tax code definition of income. The trial court reserved jurisdiction over any dispute on the calculation of additional child support. (6 A.A. p.

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

682:3-11.) Lisa appealed without invoking the reserved jurisdiction on the true-up of 2018 child support. The appealed ruling should be affirmed as a proper exercise of discretion. Lisa's complaints should be raised in the true-up at the trial level.

(B) Was it an abuse of discretion to set monthly support on base income until the true-up?

1. Lisa's position.

This argument is similar to the previous one. Lisa claims the court should have used a higher base income for Billy in setting monthly support. (A.O.B. pp. 7, 29-31.) Lisa believes monthly support should have been set on an annualized average of his base plus the $2.5 million, with an order for additional child support on any income he received over that amount. (R.T. p. 20:12-18.) She seeks reversal with instructions to "revise the base child support to reflect a more representative base amount…" of income. (A.O.B. p. 38.)

2. Billy's position.

It is, again, a timing issue. The trial court calculated monthly child support on the amount each party could reliably make on a monthly basis, with an annual true-up requiring Billy to pay additional child support on any excess income. The trial court did not abuse its discretion in using the monthly guaranteed payments Billy received in calculating base monthly child support. Any income over that base is subject to the order for additional guideline support at the true-up. Lisa is not deprived of support on any portion of Billy's income under the

ruling. It is common for courts to set child support by percentage of fluctuating income with an annual true-up.

(C) Is there substantial evidence for the finding that Lisa's earning capacity is $20 per hour?

1. Lisa's position.

No substantial evidence exists that Lisa's earning capacity is $20 per hour. (A.O.B. pp. 18, 36-37.) She asks for reversal with instructions to "revise the calculation [of guideline child support] to reflect Lisa's [sic] being imputed $11 per hour minimum wage rather than $20 per hour." (A.O.B. p. 38.)

2. Billy's position.

Lisa's admission she could work full-time at minimum wage (R.T. p. 204:1-2) did not bind the court on the maximum amount it could impute to her. A vocational examiner's report showed jobs available to Lisa at $20 per hour (4 A.A. p. 433), which is substantial evidence for the finding of her earning capacity. The examiner recommended that Lisa take steps to increase her earning capacity a year before the hearing, but she did not try to do so.

(D) Are any required findings missing from the child support order?

1. Lisa's position.

The trial court deviated below the child support guideline in failing to include the $2.5 million in its monthly support order, and needed to make findings supporting that deviation. (A.O.B.

pp. 34-35.) Lisa does not specify what findings she wants the trial court to make on remand. (See A.O.B. p. 38 [prayer].)

2. Billy's position.

Lisa's position assumes incorrectly the trial court deviated from the guideline. (A.O.B. p. 35.) The guideline was used to calculate monthly and additional support, so no findings for a deviation were required. The court did not have to set monthly support on the $2.5 million because there was insufficient evidence at the hearing that the money was, in fact, income under section 4058. The trial court satisfied section 4056, subdivision (b) by attaching a calculation of guideline support to its order and issuing a written ruling with findings. (6 A.A. pp. 681:23-24, 685.)

(E) <u>Did a miscarriage of justice occur?</u>

1. Lisa's position.

No discussion is included in the opening brief of how the alleged errors resulted in a miscarriage of justice.

2. Billy's position.

Any errors were not prejudicial to Lisa because the trial court ordered guideline support on all of Billy's income, and reserved jurisdiction to determine if additional support is due on the money Billy received from the company in 2018. Any income Billy received in 2018 over the base income the court used to set monthly support will be captured in the annual true-up, and support would be due thereon per the guideline. Lisa has not asked the trial court to rule on how much support she is due on

the $3 million in business income Billy reported for 2018. Any negative effects of the order are speculative until she receives that ruling.

III. APPEALABILITY

Lisa concludes the order is appealable without discussion. (A.O.B. p. 16.) It appears the order is final, even though a hearing might occur on the true-up of 2018 support.

An appeal may only be taken from an order after a final judgment. (Code Civ. Proc., § 904.1, subd. (a)(2).) Child support orders are appealable. (*Id.*, subd. (a)(10) [allowing appeal from orders made appealable by Fam. Code]; Fam. Code, § 3554 [child and spousal support orders are appealable].) Appellate jurisdiction depends on there being an appealable judgment or an appealable order as defined by statute. (*In re Marriage of Lafkas* (2007) 153 Cal.App.4th 1429, 1432 (*Lafkas*).)

The order could be viewed as interlocutory because it reserves jurisdiction over the total support due for 2018. An order preliminary to a final ruling is not appealable. (*Lafkas, supra,* 153 Cal.App.4th at p. 1433.) In *Lafkas*, the husband appealed from an order in a marital dissolution action on a bifurcated issue characterizing his business interest as community property. No appeal was taken from the final judgment. The *Lafkas* court explained: "Although the order on the bifurcated trial resolved some of the issues concerning [the business], it did not resolve all of them, and issues concerning other property were still pending. … Thus, the order appealed from is merely preliminary to a final order characterizing, valuing, and dividing all the marital

assets." (*Lafkas, supra,* 153 Cal.App.4th at p. 1433, fn. omitted; see also *In re Marriage of Ellis* (2002) 101 Cal.App.4th 400 [same].) The *Lafkas* court dismissed the appeal because the order was not appealable and no certificate of probable cause was obtained for an immediate appeal. (*Id.,* at p. 1432; see § 2025 [certification of bifurcated issue for appeal]; Cal. Rules Ct., rule 5.392(d) [motion to appeal if probable cause certificate granted].)

Billy considered a motion for dismissal under *Lafkas*, but the difference here is that no future hearing was set to occur on the total child support due for 2018. Lisa must ask the court to exercise its reserved jurisdiction, whereas in *Lafkas* a subsequent trial had to occur over the valuation of the business interest and other community property to result in a final judgment. (*Lafkas, supra,* 153 Cal.App.4th at p. 1435.) If a dispute arises on the true-up as to Billy's total "income" for 2018, Lisa may request a hearing and a finding of his total income for the year. This appears to be a question of enforcement more than appealability.

A child support order can be final although payment of additional support is conditioned on a parent having excess income. Such conditional orders are standard in family law. (See *In re Marriage of Ostler & Smith* (1990) 223 Cal.App.3d 33, 53 (*Ostler/Smith*); *In re Marriage of Minkin* (2017) 11 Cal.App.5th 939, 949.) An otherwise final order or judgment that is conditional is appealable if it requires no further order. (*In re C.M.* (2017) 15 Cal.App.5th 376, 385 [order directing agency to remove child from appellant's care on condition she exposed the children to stepfather or violated a restraining order was ripe for

appeal even if the conditions had not arisen]; compare with *Yarbrough v. Yarbrough* (1956) 144 Cal.App.2d 610, 614 ["It is only where the conditional order [setting aide default judgment] is not self-executing, that is, it contemplates or requires a second order setting aside the judgment, that the first order is interlocutory, and not appealable"].)

Because no further hearing was set in the August 2018 ruling, it appears the ruling is final and can be appealed.

IV. STANDARD OF REVIEW

(A) The interpretation of a statute is reviewed de novo.

"[A]ppellate courts independently determine proper interpretation of statutes…." (*Y.R. v. A.F.* (2017) 9 Cal.App.5th 974, 982 (*Y.R.*) [interpreting § 4056].)

In her opening brief, "Lisa challenges the trial court's definition of what constitutes income available for child support and the adequacy of the required 4056 findings" and argues for de novo review. (A.O.B. p. 18.) But the trial court did not make a finding whether the money Billy received from the company was income. Billy was ordered to pay child support on "*any income* in excess of the [base] income" on which monthly support was set. (6 A.A. p. 682:3-11, italics added.) Although the court commented that the 2018 tax return would bear on that question (6 A.A. p. 679:9-16), the order provides for support on "any income" and does not qualify or re-define that word (6 A.A. p. 682:3-11).

A ruling on Billy's total 2018 income has not occurred because Lisa has not requested a true-up hearing. If she does, the trial court will make a finding of Billy's 2018 income, as defined in section 4058, and the existing order will require him to pay guideline child support on that income. The issue Lisa complains about is not the interpretation of section 4058. The crux of her appeal is the court's decision to defer the determination of Billy's total 2018 income for the true-up, which was an exercise of discretion not a matter of law.

(B) Child support orders are reviewed for abuse of discretion.

A child support order is reviewed for abuse of discretion. (*In re Marriage of Macilwaine* (2018) 26 Cal.App.5th 514, 527 (*Macilwaine*) [reversing below-guideline child support order for applying wrong standard in determining child's needs]; *Y.R., supra,* 9 Cal.App.5th at p. 982 [same].)

> 'Under this standard, we consider only "whether the court's factual determinations are supported by substantial evidence and whether the court acted reasonably in exercising its discretion." [Citation.] 'We do not substitute our judgment for that of the trial court, but confine ourselves to determining whether any judge could have reasonably made the challenged order.' [Citation.]

(*Macilwane, supra,* 26 Cal.App.5th at p. 527.) Because the child support guideline is a highly regulated area and there is strong public policy for adequate child support, the court must exercise its discretion along legal lines. (*Macilwane, supra,* 26 Cal.App.5th

at p. 527; *Y.R., supra,* 9 Cal.App.5th at p. 983.) When the trial court has "exercised its discretion along legal lines, its decision will not be reversed on appeal if there is substantial evidence to support it." (*McGinley v. Herman* (1996) 50 Cal.App.4th 936, 940-941.)

The opening brief acknowledges the standard of review but claims error is presumed: "Although given the holding in *Macilwaine*, Lisa does not believe she needs to show an abuse of discretion, here one is patently obvious." (A.O.B. p. 31, fn. omitted.) Lisa believes a "per se abuse of discretion…" has occurred. (A.O.B. p. 38.) Perhaps Lisa is stating the rule that an abuse of discretion occurs when the court misapplies the law. (See *Thayer v. Wells Fargo Bank, N.A.* (2001) 92 Cal.App.4th 819, 833 [scope of discretion governed by principles of law].) Even so, Lisa has the burden to affirmatively establish error; it is presumed. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 ["error must be affirmatively shown"].) "[A] fundamental principle of appellate procedure [is] that a trial court judgment is ordinarily presumed to be correct and the burden is on an appellant to demonstrate, on the basis of the record presented to the appellate court, that the trial court committed an error that justifies reversal of the judgment. [Citations.]" (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608–609 [failure to provide adequate record].)

The trial court acted within legal lines by applying the guideline to each party's base monthly income and ordering Billy to pay additional child support under the guideline on his income

over base. The court could not determine whether the $2.5 million was income at the hearing on the evidence presented so it deferred that ruling and reserved jurisdiction. Lisa has the right to a hearing on the true-up of 2018 support, but has not asked for one.

(C) Findings of fact are reviewed for substantial evidence.

"If the trial court's resolution of [a] factual issue is supported by substantial evidence, it must be affirmed." (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) The key question is whether, on the entire record, "there is substantial evidence, contradicted or uncontradicted, which will support the [trial court's] determination." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874.) In that analysis, "the appellate court 'accept[s] the evidence most favorable to the [appealed] order . . . and discard[s] the unfavorable evidence as not having sufficient verity to be accepted'…." (*In re Michael G.* (2012) 203 Cal.App.4th 580, 595.)

The only finding Lisa challenges is that she can earn $20 per hour. (A.O.B. pp. 18, 36-37.) No findings regarding Billy's income were claimed to be unsupported by substantial evidence.

(D) A miscarriage of justice must be shown.

Even when a court commits error, the appealed judgment or order must be affirmed unless a miscarriage of justice occurred. (Cal. Const., art. VI, § 13; *F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108 (*F.P.*).) A miscarriage of justice results when it reasonably appears that the appealing party would have

achieved a more favorable result. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.) A miscarriage of justice is not presumed, absent "structural error" that prevents a reviewing court from evaluating prejudice. (*F.P., supra,* 3 Cal.5th at p. 1108; Code Civ. Proc., § 475.)

No prejudice resulted from the ruling because Lisa will receive guideline child support on all of Billy's income. Having to wait until the true-up is not a miscarriage of justice. She suffered no harm from the ruling because she has not gone through the true-up process on 2018 support.

V. PROCEDURAL HISTORY

A stipulated judgment was entered May 11, 2018, dissolving the marital status of the parties, dividing community property, setting non-modifiable spousal support, and resolving other issues. (3 A.A. pp. 310-320.) Child support and custody were reserved for later determination. (3 A.A. p. 318:11-12.)

On July 25, 2018, Lisa filed a Request for Order ("RFO") to set aside specific provisions in the judgment and to establish guideline child support. (3 A.A. pp. 322-353.) In his response of August 2, 2018, Billy consented to paying guideline child support and opposed the set aside request. (4 A.A. pp. 423-424.) Billy also sought sanctions against Lisa per Family Code section 271 for the set aside motion. (4 A.A. pp. 428:17-20.)

The RFO was heard August 16, 2018, by the Honorable Richard C. Berra, temporary judge appointed by stipulation. (3 A.A. pp. 298-308.) Lisa requested findings on the child support

issue. (6 A.A. p. 659.) A written tentative decision was issued August 20, 2018. (6 A.A. pp. 660-675 [signed, un-conformed copy].) No objections to the tentative decision appear in the record.

A Findings and Order After Hearing was filed on August 30, 2018, denying Lisa's motion to set aside and Billy's request for sanctions, and setting guideline child support. (6 A.A. pp. 676-693.) Lisa filed a notice of appeal from that ruling on October 26, 2018. (6 A.A. p. 694.)[3]

VI. STATEMENT OF FACTS

The parties were married November 16, 2002, and separated in October 2016. (2 A.A. p. 137; 6 A.A. p. 677:4-5.) They have two children, who were ages 10 and 14 when the action was filed. (2 A.A. p. 137.)

(A) The parties stipulated to a judgment of dissolution on property.

Per the stipulated judgment of dissolution entered May 11, 2018, Lisa was awarded the entire community property interest in the former family residence on Matchem Court in Alamo, California. (3 A.A. p. 313:3-6.) The agreed-upon equity in the residence was $2,285,937, comprised of $2,045,000 in community equity plus $240,937 to reimburse Billy per section 2640 for his separate property down payment when they purchased the home. (R.T. pp. 173:8-174:6, 175:5-21.)

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[3] The opening brief states only the child support ruling is appealed. (A.O.B. p. 8, fn. 4.)

In exchange, Billy received the entire community interest in his businesses, with no equalizing payment due to either party for that trade; the other community property was divided equally in the judgment. (3 R.T. pp. 175:22-176:9; 3 A.A. p. 313:10-15.) As the trial court found, the parties agreed to a judgment "that Lisa would receive the family home, Billy would receive the businesses…, child support and child custody was reserved and spousal support for Lisa was agreed to be a specified amount each year for four years." (6 A.A. p. 677:16-21.)

(B) <u>Lisa filed a request for child support and to set aside of portions of the judgment.</u>

In her RFO of July 25, 2018 (3 A.A. pp. 322-353), Lisa requested "an award for guideline support…" in an unspecified amount. (3 A.A. pp. 326:10-12, 324, ¶ 3(a).) She also asked to set aside unrelated provisions in the judgment that required her to contribute up to $75,000 towards the parties' 2017 income tax liability, and allowed the parties to pay their living expenses from a certain bank account. (3 A.A. pp. 328:9-12, 329:1-3.)

Billy responded on August 2, 2018 (4 A.A. p. 423 through 5 A.A. p. 590), consenting to a guideline child support order "with appropriate imputation of income to [Lisa]" and opposing the set aside request (4 A.A. pp. 423, ¶ 3, 424, ¶ 8). Billy requested that Lisa be imputed with "a minimum of $20.00 per hour" when setting child support. (4 A.A. pp. 425:28-426:1.) He denied Lisa's allegation that he had refused to pay child support, explaining that his counsel asked for Lisa's proposal on child support on March 5, 2018, but none was received. (4 A.A. p. 425:12-16.) Billy

sought $2,500 in sanctions against Lisa per Family Code section 271 for the set aside motion, and gave examples of Lisa's litigation conduct. (4 A.A. pp. 428:17-20, 429:9-430:23.)

(C) <u>An evidentiary hearing is conducted.</u>

The RFO was heard August 16, 2018, with both parties testifying as witnesses. (6 A.A. p. 677:10-12.) All of their pleadings on the RFO were received in evidence by agreement. (6 A.A. p. 677:12-13.) "The major contested issues regarding child support were time share, Billy's income and attribution of income to Lisa." (6 A.A. p. 678:2-3.)[4]

1. The trial court did not believe Lisa's testimony that the parties shared 50/50 custody of their oldest daughter.

Custodial time is a guideline child support factor. (§ 4055, subd. (b)(1)(D).) As to their youngest child, the parties agreed to use a 50 percent time share in calculating support for that child. (6 A.A. p. 678:10-16.)

The testimony was "diametrically opposed" regarding the time they spent with their oldest child—Billy testified the daughter had spent no time with Lisa since early 2018, while Lisa claimed "they had a 'shared' parenting arrangement…." (R.T. pp. 178:3-180:10, 182:9-17; 6 A.A. p. 678:4-9.) Lisa described it as "loosely 50/50…." (R.T. pp. 152:12-157:11, 70:22-71:13.) The

[4] On the denial of Lisa's motion to set aside the judgment, the trial court found Lisa was not surprised or misled in stipulating to the judgment. (6 A.A. p. 680:19-681:12.) Lisa has not appealed that ruling (A.O.B. p. 8, fn. 4.)

trial court found Lisa's "memory about how many overnights [she had with the child] was unclear, at best … [and] it was clear by Lisa's testimony and her demeanor that Lisa's time with her oldest daughter was not nearly 50%." (6 A.A. p. 678:6-10.) The court estimated Billy had 80% of the time and Lisa had 20%, being "mindful that for the best interests of the child the time share issue should not be allowed to be such a valuable monetary issue to either party that it causes undue stress to the child." (6 A.A. p. 678:4-16.)[5]

2. The trial court found Lisa could earn $20 per hour, but she made no efforts to work.

Lisa has a bachelor's degree in elementary education. (R.T. pp. 82:10, 141:3-9.) She was 49 years old and in good health at the time of the hearing. (R.T. pp. 141:25-142:3.) Lisa's peak earnings were $40,000 per year when she last worked in 2001. (4 A.A. p. 433.) Lisa participated in a vocational exam over two sessions in October 2017 with Marlis Bruns, M.A. (4 A.A. p. 432.) The report of the vocational examiner was admitted in evidence by stipulation. (4 A.A. pp. 432-455 [report]; R.T. pp. 11:18-12:3 [admitted as Ex. 7], 149:2-12 [identified as Ex. A to Ex. 7].) The examiner was unsure about Lisa's willingness to obtain employment. (4 A.A. p. 432.) Several job titles were considered by the examiner as appropriate for Lisa's background. (4 A.A. pp. 433-439.) The examiner opined that "[p]otential entry-level job" opportunities existed for Lisa as a receptionist, office clerk, or

[5] The opening brief does not challenge this finding.

administrative assistant with wages ranging "from $16.00 to $20.00 per hour." (4 A.A. pp. 433, emphasis removed, 438.) The October 2017 report concluded:

> [Lisa] is capable of working a regular 40-hour work week despite her expressed intention to remain available for parenting. *Immediate employment options are most likely limited to jobs paying at or near minimum wage.* To increase Ms. Hunt's employment options and earning potential over her remaining work life will require an investment in skills training, as well as job search skills training. … *The following next steps are made to assist Ms. Hunt and to increase probability of a successful return to paid employment in a position above minimum wage* and where there is potential opportunity to build on her college education.

(4 A.A. p. 440, italics added.) The examiner then proposed nine "next steps" that Lisa could take to increase the probability of obtaining a job above minimum wage. (4 A.A. pp. 440-441.) Those steps included developing her computer and keyboarding skills, job-specific training, consulting with a job coach, creating a written plan to find work, networking, volunteering to make connections, practicing for interviews, using job placement services, setting aside time for her job search, and researching potential employers. (4 A.A. pp. 440-441.)

At the hearing in August 2018, Lisa acknowledged reviewing the recommendations in the October 2017 report and said, "I think I've done some [of the next steps], but I don't know." (R.T. pp. 149:6-150:16.) Lisa complained about the wording of the

report, saying "it's all subjective language anyway. Like [I] 'would need' or 'should do' [next steps to find employment]." (R.T. p. 150:20-23.) Lisa said her working friends told her "it would be fruitless … to even turn in a resume right now." (R.T. p. 151:9-15.) Lisa submitted no employment applications and had no written records regarding her job search. (R.T. pp. 142:21-145:9; 148:9-13.) When pressed, she testified: "So I think I've done about, maybe, 85 percent of this stuff [recommended by the examiner]." (R.T. p. 151:24-25.)[6]

By closing argument, Lisa's attorney "consent[ed] to the imputation of full-time minimum wage income." (R.T. p. 204:1-2.) Her opening brief incorrectly states "for the purposes of this hearing [minimum wage] was stipulated to be $11 per hour. (A.A. p. 679:18-20; R.T. p. 197:1-7.)" (A.O.B. p. 37.) That is not what occurred. Lisa's attorney told the trial court that minimum wage was "$11 an hour" and the court disagreed, stating it was higher. (R.T. p. 204:10-16.) Lisa's attorney responded: "Okay. Well, *I'll leave that … for the Court's consideration*. I used the state minimum wage." (R.T. p. 204:17-19, italics added.) There was no agreement at the hearing on the hourly rate for minimum wage work or how much Lisa could earn had she tried to become employed. Billy asked the trial court "to impute earnings of at least $20 an hour to [Lisa], which is [$]3467 a month." (R.T. p. 210:8-9.)

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[6] In her opening appellate brief, however, Lisa admits she "hadn't followed most of [the examiner's] recommendations. [Citation.]" (A.O.B. p. 13.)

The court imputed to Lisa $20 per hour in wages in calculating child support, totaling $3,467 per month in income, which was "the minimum finding of the vocational evaluator's estimate of her earning capacity." (A.A. pp. 679:26-680:1.)[7] The trial court found that "Lisa's testimony confirmed the vocational evaluator's (Marlis Bruns) comments and opinions that Lisa had no intention of working outside the home." (6 A.A. p. 679:17-18.) "This Court finds that Lisa has done almost nothing since the parties separated in October 2016 to look for employment and has not done any of the steps Ms. Bruns recommended she do to make herself employable." (6 A.A. p. 679:20-22.) "Lisa must realize that she has an equal duty to contribute to the needs of the children and must do all that is reasonably necessary to meet that duty." (A.A. p. 680:1-2.)

3. There was insufficient evidence whether the $2.5 million Billy received from his company were income.

Billy is the sole shareholder of Coriolis, Inc., a corporation that holds a 50% member interest in aMind Solutions LLC ("aMind"). (1 A.A. p. 21.) Billy's business partner is the other 50% member of aMind, through the partner's loan-out corporation. (1 A.A. p. 21.)

Guaranteed payments of $17,666 are made to Billy monthly as a salary for his work for aMind. (R.T. pp. 40:9-11, 86:16-24.)

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[7] Lisa claims "the court's finding is directly contradicted by the only evidence in the record as to Lisa's earning capacity" [i.e., the vocational examiner's report] and therefore lacks substantial evidence. (A.O.B. p. 37.)

The money is transferred from aMind then Coriolis, Inc., which pays Billy. (R.T. p. 40:9-11.) These monthly payments are his base salary. (R.T. pp. 40:18-23, 86:16-24, 204:20-21.)

In April 2018, Billy received an advance of $2,285,260 from aMind, which he used to purchase a home for himself and the children. (4 A.A. p. 420; R.T. pp. 42:20-43:2.) Billy and his partner discussed how the divorce had been difficult for Billy and that Billy wanted a home because he had substantial parenting responsibility for his daughters. The business partner told Billy to borrow the cash on hand from the business to buy a house for his daughters as an advance against future distributions, and they would work out the details later. (R.T. pp. 64:10-19, 66:13-22.) The partner took no matching distribution of $2,285,000. (R.T. p. 43:10-12.) Interest to be paid on the loan had not been determined. (R.T. p. 65:12-13.) Billy executed no loan documents before receiving the money. (R.T. p. 43:13-16.) Lisa argued that Billy's testimony about the funds being a loan was not credible. (R.T. pp. 196:25-197:4; A.O.B. p. 21.)

Billy selected $2.285 million for the advance because that was the agreed value of the community interest in the business that he received in exchange for the community equity in the family residence per the stipulated judgment. (R.T. pp. 174:18-176:22, 209:24-210:2; 3 A.A. p. 313:3-17.) To him, it was a withdrawal of capital from the business he had exchanged with Lisa for his equity in the family residence, so he could purchase a home for himself and their children. (R.T. pp. 211:14-212:9.) Billy argued it would be a windfall for Lisa to receive the family

residence in exchange for the business, then support on the funds he withdrew from the business to buy a home. (R.T. p. 212:10-24.)

No taxes were withheld by aMind on the payment. (R.T. p. 44:4-6.) Billy believed the advance was nontaxable to him, but did not know how the company would report the payment on its tax return for that year. (R.T. pp. 44:22-45:3, 177:2-5.)

Billy had invested at least $2.2 million in the company over the prior 13 years. (R.T. p. 46:15-20.) Billy was unsure about the balance of his capital account prior to the payments from aMind. (R.T. p. 45:4-7.) Per the 2016 partnership tax return, the combined capital account for Billy and his partner at the end of 2016 was $949,243. (R.T. p. 84:6-9; 1 A.A. p. 19, sch. L, line 21(d).) Lisa argued that the $2,285,000 could not be a return of capital because the business did not have sufficient funds in the capital accounts to withdraw that figure (R.T. 195:18-20; A.O.B. p. 21), but that was the capital account balances in 2016—more than a year before Billy received the advance.

In June 2018, Billy received an additional $220,000 advance from aMind which he also considered a loan. (R.T. p. 41:9-12.) Lisa argued that both advances (i.e., $220,000 and $2,285,260) should be treated as "nontaxable income" to Billy in calculating child support. (R.T. pp. 204:25-205:25.) Lisa requested "for the remainder of 2018, [an] order that any distributions [Billy] receives in excess of his base of $17,666 per month be paid over pursuant to this bonus table. And that the Court order a

true up to occur within a reasonable number of days after the date of that distribution." (R.T. p. 206:17-20.)[8]

Billy agreed that any income he received over $17,776 should be subject an order requiring him to pay a guideline percentage thereof to Lisa as additional child support. However, he did not believe the advances were "income." He also objected on jurisdictional grounds to either advance being considered because the money was received before Lisa filed her request for child support: "Both of those distributions … were prior to [Lisa]'s request for order which was filed on July 25th of 2018. The Court has jurisdiction to issue an order for child support retroactive only to the date of filing of [Lisa]'s request for order. There is nothing in this judgment that reserves jurisdiction retroactively to any date." (R.T. p. 33:18-24.)

The court found Billy had fixed income of $17,667 per month, and sometimes received further income which was unpredictable. (6 A.A. p. 678:17-19.) The court was "troubled" by the distributions, indicating that he would deal with that issue. (R.T. p. 214:16-17.) The court found the distributions received by Billy in 2018 to be a "perplexing issue." (6 A.A. p. 678:20-23.) The

[8] Lisa incorrectly claims in her opening brief that Billy's forensic accountant admitted Billy had earnings of $212,000 per month. (A.O.B. p. 7.) She states: "Even Billy's expert opined his earnings were $212,000 per month. (A.A., p. 460.)" (A.O.B. p. 7.) The document Lisa references shows income of $212,00 *per quarter* for the fourth quarter of 2016 and for the third quarter of 2017. (4 A.A. p. 460 ["Wages" line]; R.T. p. 192:6-21 [acknowledging report states wages per quarter].)

court considered Billy's testimony that the funds were partially a capital distribution and partially a loan. (6 A.A. p. 678:23-24.) The court summarized Billy's argument that the amount withdrawn was equal to his value in the businesses and that he had "converted a comparable value in the businesses assigned to him in order to purchase his home." (6 A.A. pp. 678:24-679:1.)

The trial court considered Lisa's argument that the distributions should be counted as income available for support because Billy's capital account was not high enough to take the distributions and because there was no written loan agreement. (6 A.A. p. 679:3-6.) The court stated that he will order an "*Ostler-Smith*" over $17,666 income per month. (R.T. p. 216:12-15.)

The court deferred its ruling whether the 2018 distributions were income available for support until a final piece of information was known, i.e. how the distributions are reported on 2018 tax documents. (6 A.A. p. 679:9-13.) "Since the Court cannot tell and there was no evidence confirming what the distributions were for[—]to be able to determine if the distributions are income or tax-free return of capital or loans[—]the Court must defer that determination until the annual 'true-up' occurs for 2018 and leave it up to how the distributions are treated on Billy's filed 2018 tax returns." (6 A.A. p. 679:9-13.)

(D) <u>A tentative decision is issued and Lisa does not object.</u>

A written tentative decision was issued on August 20, 2018. (6 A.A. pp. 660-675 [signed, un-conformed copy].) No objections to the tentative decision appear in the record.

(E) The court set monthly support and ordered additional support on any excess income.

A Findings and Order After Hearing was filed on August 30, 2018, denying Lisa's motion to set aside and Billy's request for sanctions, and setting guideline child support. (6 A.A. pp. 676-693.) The trial court made orders relating to the time share of the children, Billy's income and Lisa's income. (6 A.A. pp. 678-682.) Billy was ordered to pay $537 per month in base child support. (6 A.A. pp. 681:21-682:4, 685.) The court stated that its statutory findings are contained in the guideline support calculation attached to the order "per Family Code Sections 4005 and 4056(b)." (6 A.A. pp. 681:23-24, 685.)

If Billy received any income over the base income on which monthly support was set, he was ordered to pay additional child support according to the guideline. (6 A.A. p. 682:5-8.) Tables showing the guideline percentages and dollar amounts due on any excess income were attached to the order. (6 A.A. pp. 686-692.) Within 10 days of filing his tax returns each year, Billy was ordered to produce a copy of his federal and state returns to Lisa and pay any additional support forthwith. (6 A.A. p. 682:5-8.) "The Court shall retain jurisdiction to resolve any disputes between the parties regarding said additional support." (6 A.A. p. 682:8-10.)

For 2018, Billy's annual income was apportioned based on the five months of the year that Billy was subject to paying child

support.[9] The court ordered Billy to pay additional child support, per the guideline, on 42 percent of any income he receives in 2018 in excess of the base income on which monthly support was calculated. (6 A.A. p. 682:3-11.) The court deferred the determination whether the $2.5 million is "income" for support until Billy files his 2018 tax returns. (6 A.A. p. 679:9-16.)

(F) <u>After the hearing, Billy filed his 2018 tax return, reporting $3.3 million in taxable income.</u>

When Lisa appealed on October 26, 2018 (6 A.A. pp. 694), the 2018 tax year had not ended. Billy recently filed his return for that year and filed an Income and Expense Declaration, stating:

> I reported total taxable income in the amount of $3,325,636 for the 2018 tax year on my 2018 federal income tax return. This amount consists of the following:
>
> | | |
> |---|---|
> | Wages: | $220,000 |
> | Schedule D Income: | -$3,000 |
> | Schedule E Income: (from aMind/Coriolis) | $3,092,480 |

[9] The court acknowledged Billy's argument that the $2.5 million was received before Lisa filed her RFO on July 25, 2018, and her request for support on that money could be "a retroactive determination of support which is prohibited." (6 A.A. p. 679:7-9.) The court prorated any excess income for 2018. The five months remaining in the year (i.e., August to December) divided by 12 equals 42 percent. (6 A.A. p. 682:10-11.)

Taxable refunds/credits: $15,777

(Motion for Judicial Notice, Ex. A, p. 3:3-9.)[10]

Lisa has not asked for a hearing on the true-up of 2018 support.

VII. DISCUSSION

(A) The citations in the opening brief to the Reporter's Transcript are incorrect.

A brief must support its references to the record with citations to where the matter appears in the record. (Cal. Rules Ct., rule 8.204(a)(1)(C).) The citations in the opening brief do not coincide with the Reporter's Transcript on Appeal. (See, e.g., A.O.B. p. 9 [citing to "RT, pp. 47-48, 110, 158"].) Lisa should file a corrected brief. (See Cal. Rules Ct., rule 8.204(e)(2)(A) [order returning brief for correction and refiling].)

(B) No legal error occurred in interpreting the definition of income in section 4058.

The statewide uniform guideline for determining child support orders "is intended to be presumptively correct in all cases" absent special circumstances. (§ 4053, subd. (k).) The amount established by the statutory formula for setting support "is presumed to be the correct amount of child support to be ordered." (§ 4057, subd. (a).) It "may be rebutted by admissible

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[10] A motion for judicial notice of the Income and Expense Declaration dated September 5, 2019 ("I&E") is filed concurrently with this brief. Billy relies on the I&E per local rule 6 pending a ruling on the motion. (See, Ct. App., First Dist., Local Rules, rule 6(b).)

evidence showing that application of the formula would be unjust or inappropriate…." (§ 4057, subd. (b).)

Lisa claims the trial court had to treat the $2.5 million as income when it calculated child support regardless of why Billy received the money (A.O.B. p. 21-22), but the guideline definition of income in section 4058 does not include all money a parent receives. Lisa failed to present sufficient evidence showing that the money qualified as income, so the court ordered Billy to pay child support on all income he received over his base salary on which monthly support was set and required an annual true-up of child support after he filed his 2018 tax return, reserving jurisdiction over any dispute on the additional child support due. This was a proper exercise of discretion. The 2018 tax return was a key piece of evidence that would assist the trial court in resolving the issue because the statutory definition of income for child support is the same as federal tax law, to make it easier to set child support.

1. The definition of income for child support is the same as for federal income taxes.

Guideline child support is calculated on the income of both parents and other factors in the statutory formula for calculating support. (§ 4055, subd. (a).) Income for child support "means income from whatever source derived … and includes, but is not limited to, the following…." (§ 4058, subd. (a).) That is identical to the definition of income under federal tax law. (26 U.S.C., § 61, subd. (a) ["gross income means all income from whatever source derived, including (but not limited to) the following items…"];

Marriage of Riddle (2005 125 Cal.App.4th 1075, 1080 (*Riddle*) [the guideline definition of income was " 'lifted' straight from the Internal Revenue Code"].)

Using the well-developed definition of income in the tax code to calculate child support serves one of the main principles of the guideline: "The guideline seeks to encourage fair and efficient settlements of conflicts between parents and seeks to minimize the need for litigation." (§ 4053, subd. (j).) To avoid disputes over the calculation of child support, "the child support laws (see Fam. Code, §§ 4058, 4059) are very exacting as to the definition of income." (*Riddle, supra,* 125 Cal.App.4th at p. 1080.) As *Riddle* explained: "That means that if the tax laws say you have income because of the forgiveness-of-debt, you have income, and that forgiveness-of-debt income must go into the calculation of adjusted gross income under section 4058, subdivision (a), which in turn is the basis for income under section 4059, subdivision (a)." (*Ibid.*)

2. Income reported on a tax return is presumptively correct for child support.

Because a tax-based definition of income is used for child support, there is a rebuttable presumption that a parent's reported income on his or her income tax return is correct when calculating support. (*Marriage of Loh* (2001) 93 Cal.App.4th 325, 332 (*Loh*).) "Returns are, after all, ultimately enforced by federal and state criminal penalties. Hence it is not surprising that tax returns are the core component of determinations under the guideline formula." (*Ibid.*) There is a "statutory tie to actual tax

returns" filed by the parents because the guideline formula uses the "annual net disposable income" which requires knowledge of the taxes "actually payable" by the parents. (§ 4059, subd. (a); *Loh*, supra, 93 Cal.App.4th at pp. 332-333.) As the *Loh* court explained:

> In more commonsense terms, the use of income as stated on a tax return accords with the Legislature's goal of uniformity and expedition. Section 4050 refers, after all, to a 'statewide uniform' guideline, and determining income by using tax returns has the advantage of not only being relatively easy, but, as we have just said, enforced by federal and state civil and criminal penalties. It also spares chronically overcrowded family courts the burden of determining income on an ad hoc basis, with the risk of inconsistent results. [¶]
>
> Accordingly, much of the jurisprudence governing determination of income has followed, or been consistent with, basic income tax law principles. That is, if one knew the tax law, one could predict whether a given item would, or would not, be included in section 4058 income for purposes of the guideline calculation. [Citations.]

(*Loh, supra,* 93 Cal.App.4th at p. 333.)

3. Income for child support does not include all payouts to a parent.

Despite the "broad and inclusive language" in section 4058, "it has not been read so expansively as to encompass every financial payout." (*In re Marriage of Heiner* (2006) 136 Cal.App.4th 1514, 1521 (*Heiner*) [unallocated personal injury

award is not income under section 4058]; *In re Marriage of Schulze* (1997) 60 Cal.App.4th 519, 529 ["gifts or other 'freebies' that come one's way in life" are not income].) The *Heiner* court stated: "The common thread in [cases holding that certain financial payouts are not income] is that such payments do not meet the generally accepted definition of income, that is, 'the gain or recurrent benefit that is derived from labor, business, or property [citation] or from any other investment of capital [citation].' " (*Heiner, supra,* 136 Cal.App.4th at p. 1521.)

" '[T]he purpose of the [guideline] calculation is to determine how much money a parent has *available* for the support of the minor children.' [Citation.]" (*Macilwaine, supra*, 26 Cal.App.5th at p. 529, italics in original.) Under Lisa's interpretation of *Macilwaine*, all money available to a parent would have to be counted as income under section 4058, but that is not the law. Although the definition of income in the guideline could include non-taxable payments (*Macilwaine, supra*, 26 Cal.App.5th at p. 529), it does not include all money flowing to a parent. As the *Riddle* court stated: "While we recognize that family lawyers and forensic accountants sometimes use the phrase 'cash flow' as a sloppy synonym for the word 'income' as it appears in the support statutes, it isn't." (*Riddle, supra,* 125 Cal.App.4th at p. 1080.) "[T]he definition of income in section 4058 is broad, it is not limitless. [Citation.]" (*In re Marriage of Pearlstein* (2006) 137 Cal.App.4th 1361, 1372 (*Pearlstein*) [value of unsold stock received from the sale of a business is not income for child support].)

Lisa also relies on *In re Marriage of Berger* (2009) 170 Cal.App.4th 1070 (*Berger*) for the proposition that "Billy's financial shenanigans" justify treating the $2.5 million as income for support. (A.O.B. p. 25.) *Berger* does not mention section 4058. Instead, *Berger* held that the trial court erred either by (1) not imputing wages to a parent who quit an accounting job to start an unprofitable landscaping business, or (2) not deviating from the guideline to set support on the income the parent would have received if the business had been paying him a salary. (*Berger, supra,* 170 Cal.App.4th at p. 1081.) That is not the case here. Billy receives a salary of $17,776 per month, so there were no wages to impute to him. Lisa's counsel insisted on using the guideline to set support, rejecting any idea that the court should use a non-guideline approach, stating: "There is no factual or legal basis to deviate from a guideline award." (R.T. p. 206:5-7.)

Berger and *Macilwaine* do not support Lisa's position because both cases involved a parent who deferred the receipt of income otherwise available. Here, Billy states he received money as a loan or advance from the company. There was no effort by him to reject or delay the receipt of money to avoid payment of support.

4. Borrowed money is not income, unless the obligation to repay the loan is forgiven.

Loan proceeds are not income for child support. (*In re Marriage of Rocha* (1998) 68 Cal.App.4th 514, 516-517 (*Rocha*) [proceeds from a student loan not income].) In *Rocha*, the court noted that the examples in section 4058 "all represent a form of

income where there is no expectation of repayment or reimbursement." (*Rocha, supra,* 68 Cal.App.4th at p. 516.) Similarly, an advance to be repaid from an expected inheritance is not income for calculating a child support obligation.(*In re Marriage of Williamson* (2014) 226 Cal.App.4th 1303, 1306.)

Federal tax law is the same. Loan proceeds are not income unless the lender forgives the debt, which results in forgiveness-of-debt income. (*Riddle, supra,* 125 Cal.App.4th at p. 1078; 26 U.S.C., § 61, subd. (a)(11).)

(C) <u>The court could not characterize the money Billy received from the business as "income" on the evidence presented, so the ruling was deferred for the annual true-up.</u>

The trial court did not slavishly follow the federal income tax definition of income to set child support as Lisa accuses. (A.O.B. pp. 25-26.) The trial court understood the legal definition of income and that it was not straightjacketed by the tax code definition. The issue the trial court grappled with was not with the legal definition of income but over the lack of evidence whether the $2.5 million was, factually, income. Lisa had not presented enough evidence at the hearing to prove her claim the money was income for support. Her lack of proof did not result in a denial of the right to receive guideline support on the money if it was, in fact, income. The court properly deferred its ruling until better evidence was available, and retained jurisdiction over any dispute over the true-up calculation. No prejudice resulted from the order. The court made a guideline order that depends on

whether Billy has excess income for 2018, with reserved jurisdiction to make that determination.

1. There was credible evidence the $2.5 million was not income.

Billy received an advance against his right to receive distributions of profits from the business. The recognition of income for tax purposes would occur when his right to a distributive share of business income accrued. (See 26 U.S.C., § 61, subd. (a)(12) [income includes distributive share of partnership income].) Billy's partner received no corresponding payment because this was a special advance against future distributions to Billy so he could buy a home, subject to repayment if the business did not generate income to distribute profits to him. There is no reason to include as "income" for support the receipt of money subject to a repayment obligation because doing so would require Billy to pay support on money he might have to pay back, with no opportunity to offset against future support if that were to occur. If the company forgave the repayment obligation, it would be forgiveness-of-debt income.

It was not within the company's control whether to declare a distribution or dividend for Billy to have taxable income. As the trial court noted, if Coriolis recognizes any income from its member interest in aMind, that income passes-through to Billy on his individual tax return as income, whether or not any money is distributed to him. (See R.T. pp. 105:25-106:4.) "An S corporation, like a partnership, does not pay income taxes. [Citations.] Instead, its income and losses are ' "passed through" '

on a pro rata basis to its shareholders, who report those items on their personal tax returns. [Citation.]" (*In re Marriage of Morton* (2018) 27 Cal.App.5th 1025, 1032.)

Lisa's counsel referred to the S corporation (Coriolis) and the limited liability company (aMind) interchangeably at the hearing, and argued that the money Billy received is a taxable distribution referring to Internal Revenue Code section 1368. (See R.T. pp. 196:7-15, 107:13-108:18.) That citation was misplaced because Internal Revenue Code section 1368 applies to distributions from a S corporation, treating the money as income only if it exceeds the shareholder's basis in the stock of the corporation. (26 U.S.C., § 1368, subd. (b)(1).) Here, the advance was paid by aMind, the limited liability company that is the parent entity.[11] (R.T. p. 176:16-18.) Therefore, Internal Revenue Code section 1368 does not control. The fact Billy received the money directly from aMind, an entity in which he holds no direct interest, and his equal business partner received no corresponding payment, was consistent with Billy's testimony that the money was an advance or loan.

The implied finding is that the evidence presented was credible enough to show that the money was a loan or a return of capital on which no child support would be due, but it did not want to deny Lisa the right of support on that money if it turned out to be income. Because the evidence for Lisa's income theory

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[11] The S corporation, Coriolis, is a fifty percent member interest in aMind. (1 A.A. p. 21.) Billy is the sole shareholder of Coriolis.

was insufficient, the court deferred its ruling on the $2.5 million until Billy filed his tax return. He was ordered to pay guideline child support on all of his 2018 income that exceeded $17,776 per month, without qualification, other than the proration of partial year 2018. (6 A.A. p. 682:3-11.)

2. Lisa misstates the record in asserting the money was in lieu of wages.

Lisa claims the money was "obviously taken in lieu of taxable earnings." (A.O.B. p. 21.) That assertion is not supported by any citation to the record. There is no evidence that Billy's guaranteed payments of $17,776 would be reduced based on receiving the $2.5 million. His later-filed I&E shows he received total wages of $220,000 for 2018, which averages $18,333 per month, plus $3,092,480 in business income for the year. (Motion for Judicial Notice, Ex. A, p. 3:3-9.)

3. The court did not put Billy in control whether the money is income.

Lisa argues: "The judge did not know the taxability of Billy's distributions, so he punted the issue until after Billy files his tax returns. Then, the Annual Bonus table comes into play, but only for income Billy elects to classify as taxable." (A.O.B. p. 38.) While true the court deferred its determination whether the $2.5 million qualifies as income for the true-up after the 2018 tax return was filed, Lisa incorrectly states that Billy can control if the money qualifies as income. Billy is under a legal obligation to honestly report his income to the taxing authorities and faces substantial consequences for failing to do so. (*Loh, supra,* 93

Cal.App.4th at p. 332 ["Returns are … enforced by federal and state criminal penalties"].) Per *Loh*, Billy's tax return will provide presumptively-correct evidence of his income for support, which Lisa can rebut if she believes he did not honestly report his taxable income.

The opening brief states: "Since Billy testified none of the $2.5 million in 'distributions' he received in 2018 were taxable, they will be excluded from the child support calculation." (A.O.B. pp. 6-7.) The court did not rule that way; the court said that child support will be due if the money is reported as taxable income on that year's tax return. Federal tax law defines income, and taxpayers do not have control over whether money is, or is not, reportable as income. The trial court did not say it would blindly accept whatever Billy choses to report as income on his tax return. Lisa reads the order that way, ignoring the reservation of jurisdiction to resolve any dispute over the calculation of additional support. If the tax return was *fait accompli* there would be no need for the reservation of jurisdiction. Lisa can ask for a hearing on the additional child support due for 2018, but has not done so.

4. The *Ostler/Smith* approach was proper because Billy's income fluctuates.

The court made a conditional order under *Ostler/Smith* because it did not know if Billy would have excess income for 2018. The court noted that Billy had fluctuating income. (R.T. p. 190:4-7.) Lisa agrees an *Ostler/Smith* was "appropriate" but claims it "should be based on all of the income Billy receives,

whether he declares it as taxable or not." (A.O.B. p. 7, fn. omitted.) The law does not require a court to assess support on non-taxable income, as discussed above. The *Ostler/Smith* order protects both parties by requiring guideline support on all of his income under section 4058, while not requiring Billy to pay support on non-income.

(D) Lisa could have attempted to rebut the guideline to consider the $2.5 million as non-income, but she elected not to.

The guideline is classified as "a rebuttable presumption affecting the burden of proof." (§ 4057, subd. (b).) The parent seeking a deviation must rebut the presumption of correctness of the guideline amount of child support. (*In re Marriage of Hubner* (2001) 94 Cal.App.4th 175, 183; *In re Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1326; *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 297.) The Evidence Code explains: "The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." (Evid. Code, § 606; see also Evid. Code, § 550 [burden of producing evidence is on party allocated the burden of proof].)

The approach recommended in *Loh* to deal with money that does not qualify as income is to ask for a rebuttal of the guideline. In *Loh*, the trial court ordered the father to pay child support based on evidence of his lifestyle, which was subsidized by a new nonmarital partner, rather than what he reported as income on his tax returns. The *Loh* court reversed, stating that the trial

court first had to calculate support on the income of each party, then consider a rebuttal to the guideline "to adjust the [guideline] amount upward in light of the free housing benefit." (*Loh, supra,* 93 Cal.App.4th at p. 335.) "Such an approach respects the rebuttable correctness of the mechanically calculated guideline amount, and allows child support awards to properly reflect the parents' standard of living without doing violence to the word 'income' …." (*Loh, supra,* 93 Cal.App.4th at pp. 335–336.)

Here, it was Lisa's burden to prove that the guideline amount of child support produced on Billy's section 4058 income was unjust or inappropriate and she had to provide evidence to the trial court to make that determination. Lisa could have asked for a deviation from the guideline to consider the $2.5 million as a non-taxable payment, but chose guideline support. Lisa's counsel told the trial court: "There is no factual or legal basis to deviate from a guideline award." (R.T. p. 206:5-7.) It was not error for the court to apply the guideline to established income of the parties when Lisa insisted that the guideline be used.

(E) <u>There was no deviation from the guideline as Lisa claims.</u>

One of Lisa's complaints is that the court deviated from the guideline by not treating the $2.5 million as income. (A.O.B. p. 35.) This was not a deviation from the guideline. The court did not include the $2.5 million in its base monthly support order because Lisa failed to prove, factually, that the money was income.

(F) The court properly used $17,776 as Billy's base income to set monthly child support.

Lisa claims the trial court should have set monthly support "on a significantly higher base monthly amount than Billy's 'guaranteed salary.' " (A.O.B. p. 7.)

When a parent has fluctuating income, base support must be set on the income a parent can reliably make each month, using a representative time sample. (*Riddle, supra,* 125 Cal.App.4th at p. 1082.) "The theory is that the court is trying to predict *likely* income for the immediate future, as distinct from extraordinarily high or low income in the *past*." (*Ibid.*, italics in original.)

Billy receives guaranteed payments of $17,667 every month plus sporadic distributions of income. As the trial court observed:

> The Court received information that over the past several years that Billy had a 'fixed income', salary, if you will, of $17,667 per month and then at unspecified times during the year he received further income none of which was predictable. That situation is routinely handled with the Annual Bonus tables set out in the Dissomaster.

(6 A.A. p. 678:17-20.)

It was not an abuse of discretion to set monthly support on $17,667, with an order requiring Billy to pay a guideline percentage of any excess income. This is a classic case for an *Ostler/Smith* order.

(G) No special findings were needed because the court did not deviate from the guideline.

Section 4005 states: "At the request of either party, the court shall make appropriate findings with respect to the circumstances on which the order for support of a child is based." (§ 4005.) These findings must include the following information used to calculate guideline support:

> (1) The net monthly disposable income of each parent.
>
> (2) The actual federal income tax filing status of each parent (for example, single, married, married filing separately, or head of household and number of exemptions).
>
> (3) Deductions from gross income for each parent.
>
> (4) The approximate percentage of time pursuant to paragraph (1) of subdivision (b) of Section 4055 that each parent has primary physical responsibility for the children compared to the other parent.

(§ 4056, subd. (b).) If support deviates from the guideline, additional findings are required. (§ 4056, subd. (a).)

"Lisa requested the Court make the mandatory child support findings. (R.T. p. 101:22-25; A.A. p. 659 [Exhibit H].) Her proposed Dissomaster findings were admitted as Exhibit G. (R.T. p. 102:9-20; A.A. p. 727.)" (A.O.B. p. 12.)

The trial court made the findings required by section 4056, subdivision (b) by incorporating its guideline calculation of child support. (6 A.A. pp. 681:23-24, 685.) There are no missing

findings. Lisa's contention that additional findings were needed is based on her claim that below-guideline support was ordered. The court followed the guideline so no other findings were necessary.

(H) The imputation of wages to Lisa is supported by substantial evidence.

Lisa claims the finding that her earning capacity is $20 per hour "is directly contradicted by the only evidence in the record as to Lisa's earning capacity…." (A.O.B. p. 37.) That is incorrect. The vocational examination report was received in evidence and lists job opportunities for Lisa paying $20 per hour.[12] (R.T. pp. 11:18-12:3; 4 A.A. pp. 433, 438.)

Lisa selectively focuses on the vocational examiner's opinion in October 2017 that Lisa's immediate job prospects would pay "at or near minimum wage" to support her argument that the trial court had to use minimum wage (A.O.B. p. 37), while ignoring the "next steps" recommended by the examiner to increase the chances of Lisa being hired "in a position above minimum wage…." (4 A.A. p. 440.) Lisa testified she completed "85 percent" of the steps (R.T. p. 151:24-25), but the court found "Lisa has done almost nothing since the parties separated in October 2016 to look for employment and has not done *any* of the steps Ms. Bruns recommended she do to make herself

[12] On appeal, she states that "no evidence [was] presented as to whether [the report] was still current…." (A.O.B. p. 37.) It was her burden to challenge whether a 10 month old report was stale at the hearing, not for the first time on appeal.

employable." (6 A.A. p. 679:20-22, italics added.) Her opening brief states she "hadn't followed *most* of [the] recommendations." (A.O.B. p. 13, italics added.)

Had Lisa made good faith efforts to become employed, either after separation in October 2016, or a year later when the vocational examiner made the recommendations, she would have increased her chances of earning more than minimum wage. It was the examiner's opinion Lisa could earn $20 per hour as starting pay if she followed the steps outlined in the report. (4 A.A. pp. 434 [receptionist, etc.], 436 [preschool teacher], 438 [clerical assistant], 447 [job openings], 449 [same].) There was adequate time for her to follow the recommendations by the hearing in August 2018, but she did nothing. The court, therefore, imputed Lisa with $20 per hour in wages, totaling $3,467 per month in income. (A.A. pp. 679:26-680:1.)

Lisa misrepresents in her opening brief she "could be employed 'at or near minimum wage,' which for the purposes of this hearing *was stipulated to be $11 per hour*. (AA, p. 679:18-20; RT, p. 197:1-7.)" (A.O.B. p. 37, italics added.) There was no stipulation. Lisa asked the court to impute minimum wage earnings to her, which her attorney claimed was "$11 an hour" but the court disagreed, stating it was higher. (R.T. p. 204:10-16.) Lisa's attorney responded: "Okay. Well, I'll leave that … for the Court's consideration…." (R.T. p. 204:17-19.) Lisa's claimed earning capacity is not binding on the court. Billy asked the trial court to impute earnings of at least $20 an hour, which is $3,467

a month. (R.T. p. 210:8-9.) That was the amount the court imputed to Lisa and is based on substantial evidence.

(I) Lisa has not demonstrated any miscarriage of justice.

It is the appellant's burden to articulate how the outcome would have been different had the alleged errors not been made. (See *Century Sur. Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963 ["Nor will this court act as counsel for appellant by furnishing a legal argument as to how the trial court's ruling was prejudicial"].)

Lisa does not address this issue in her opening brief. The lack of prejudice is fatal to any claimed error. Lisa wanted support set on the $2.5 million at the hearing in August 2018, even though she failed to establish the money was income for support. The court ordered Billy to pay support on any income he received over his base monthly income and reserved jurisdiction over the true-up of support after he filed his 2018 tax return.

Lisa filed her appeal from that guideline order, on the assumption that Billy would not report the money as income and no support would be ordered on it. The return was filed, showing more income than she wanted support set on. Lisa has not invoked the court's reserved jurisdiction over any dispute on the true-up. Until she does so and receives a ruling on 2018 support, any harm resulting from the August 2018 ruling is speculative.

VIII. CONCLUSION/DISPOSITION

The Findings and Order After Hearing should be affirmed.

Dated: October 17, 2019 WALZER MELCHER LLP

By: /s/
Christopher C. Melcher
Attorneys for Respondent

CERTIFICATE OF WORD COUNT

I certify, under Rule 8.204(c)(1) of the California Rules of Court, the attached brief contains less than 14,000 words according to the program used to create this document, excluding tables, certificates and the cover page.

Dated: October 17, 2019 WALZER MELCHER LLP

By: /s/
Christopher C. Melcher
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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: 5941 Variel Avenue, Woodland Hills, California 91367.

On October 17, 2019, I served the foregoing document described as **RESPONDENT'S BRIEF** upon the following by placing a true copy thereof in sealed envelopes addressed as follows:

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

/s/
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