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Court of Appeal
State of California

Second Appellate District
Division Four

Y. R.
Appellant,

vs.

A. F.
Respondent.

Appeal from an Order of the Superior Court of Los Angeles
Hon. B. Scott Silverman
Case No. BF051758

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Child support is set by a presumptively-correct guideline to achieve uniform results and ensure children receive adequate support. When the guideline exceeds the child's needs for support because a parent has extraordinarily high income, support is set according to the standard of living attainable by the wealthy parent's income. Rarely can a wealthy parent rebut the guideline, as the lifestyle attainable by extraordinarily high income must also be extraordinarily high. The court here found the father has extraordinarily high income, but measured the child's needs for support based on the *mother's* living expenses. This was error because the incorrect legal standard was used to determine needs.

This case arises out of a paternity action in which an unwed mother seeks guideline support from a wealthy father who has little to no relationship with their child. The father admitted he can pay any reasonable amount of child support and, instead of submitting to discovery, he invited the court to make the least favorable assumptions concerning his income and lifestyle. Without detailed information about the father's income, the court's focus was cleverly shifted to the mother's lower standard of living. Then, the father attempted to bias the court by arguing the mother is trying to enrich herself with guideline support, implying that their child should receive below-guideline support due to the fleeting nature of her parent's relationship.

This well-polished strategy has been used by extraordinarily high income earners to convince courts to order support in an amount less than a parent making "ordinarily high" income would have paid under the guideline. It creates a lack of uniformity and a two-tiered system of justice when the law is misapplied for wealthy parties. The respected judicial

officer here noted the lack of explicit case law illustrating how to measure a child's need for support when deviating from the guideline. This Court has the opportunity to give that guidance.

The trial court did not follow the legal pathway for a guideline rebuttal. Instead of assessing whether the guideline amount of $25,325 per month exceeded the child's needs for support according to the lifestyle attainable by the father's[1] gross income of $336,470 per month, the trial court deviated from the guideline and set child support according to the mother's living expenses at $8,500 per month plus incidental expenses. The court assigned the burden of proof to the mother to show the child's needs for support, even though that burden was squarely upon the father. No finding was made that application of the guideline would have been "unjust or inappropriate," and the court did not explain why it was in the child's best interests to receive a below-guideline support award. Those two findings are required by statute to rebut the guideline. Reversal is required because the father did not carry his burden of proof and the court failed to make the required findings to rebut the guideline. This Court should remand the case with instructions to set child support per the guideline in the amount of $25,325 per month, retroactive to October 29, 2014 (i.e., the date this action was filed and the commencement date of child support according to the order), with credits to the father for the support he paid during that period.

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[1] Appellant, Y.R., is referred to as "the mother" and Respondent, A.F., is referred to as "the father" in this brief. No disrespect is intended.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Summary.

The mother filed this paternity action against the father and sought guideline child support regarding their eight-year-old daughter. The court found that the father has $336,470 per month in gross income, which includes substantial non-taxable income. The mother has income of $1,833 per month. The mother has sole legal and physical custody. Based on those findings, the guideline is $25,325 per month. The father's income was found to be extraordinarily high, which the court defined as income above $2 million or $3 million per year for Los Angeles. The trial court stated it was the mother's burden to supply evidence of their child's needs for support, and focused on her monthly living expenses of $9,013, which she paid from earnings and the support the father had provided pending the hearing. The trial court set child support at $8,500 per month plus incidental expenses for the child. The mother asked why the award of $8,500 was in the child's best interests, but the court did not provide those reasons. No finding was made that the guideline would have been unjust or inappropriate based on the lifestyle attainable by the father's income. The court did not calculate guideline child support at its $2 million per year threshold for extraordinarily high income, to compare that amount to what it ordered the father to pay.

B. The mother files this action and requests guideline child support.

The parties have a daughter born on July 4, 2006. (1 CT 3 & 175.) The father was not present at his daughter's birth. (1 CT 57.) Other than some minimal time spent with his child when she was between two and three years old, he has not seen his daughter. (*Id.*) The mother filed a Petition to Establish Parental Relationship and Child Support on October

29, 2014. (1 CT 3-4.) The father filed a response to the petition, stating that "[a]ny child support order should be below the guideline amount pursuant to Family Code Section 4057(b)(3)." (1 CT 20, item 12.) His response also admitted to paternity and consented to sole legal and physical custody to the mother, requesting no visitation time with his daughter. (1 CT 18-20, items 5.a & 8.d.)

Despite the prior admission of paternity (1 CT 18, item 5.a), the father requested a paternity test, which showed a 99.9999% probability that the child is his daughter. (1 CT 151.) The parties thereafter stipulated to paternity and agreed the mother would have sole physical and legal custody without visitation for the father. (1 CT 175-80.)

On January 22, 2015, the mother filed a Request for Order seeking guideline child support. (1 CT 33-37, item 3.c.; 41:2-5.) Her declaration provided this background:

- The father has been voluntarily paying for their child's tuition, the rent for the mother's apartment, plus an average of $3,500 per month for other expenses. (1 CT 58:10-11.) The father initially refused to pay the rent for November 2014, and did so only after the mother was served with a three-day notice and she involved counsel to resolve the issue. (1 CT 58:15-18.) The January 2015 rent payment by the father was also late. (1 CT 58:21-24.)
- The father conditioned future payments on the results of a paternity test, even though he admitted to paternity in his response to the petition. (1 CT 58:27 - 59:2; 1 CT 18, item 5.a.)
- The child does not have health insurance. (1 CT 59:15.)

- The mother lives in a 3 bedroom, 2 bath apartment in Santa Monica, which she rents for $2,840 per month. (Id.) The child shares a room with her 13 year old sister from another relationship. (1 CT 59:20-28.) The mother also has a 14 year old son from another relationship who lives in the apartment. (1 CT 27.) She would like for their daughter to have a room of her own. (1 CT 60:1-4.) A four bedroom house in Santa Monica would cost between $6,000 to $15,000 per month to rent. (1 CT 60:2-4.)
- The child attends a private catholic school in Santa Monica, which costs $400 per month. (1 CT 60:5-6.) The father has other children from his marriage, who attend private school. (1 CT 60:6-7.) She would like their child to attend Crossroads School in Santa Monica, which costs approximately $34,000 per year in tuition. (1 CT 60:7-8.)
- The mother cannot afford tutoring for their child, which would cost approximately $480 per month. (1 CT 60:9-10.) She needs household help, such as a nanny for their daughter, which would cost approximately $1,800 per month. (1 CT 60:17-18.)
- The mother would like their daughter to have a closer relationship with the child's great grandparents in Michigan and her grandfather in Hawaii, but she cannot afford to pay for that travel. (1 CT 60:13-16.) She would also like to take their daughter on occasional weekend vacations, but the father has refused to provide funds for that purpose. (1 CT 60:11-13.)
- Their daughter is interested in theatre and participates in three plays per year, at a cost of approximately $2,100 per year. (1 CT60:19-20.) Their child has taken art classes and piano lessons, but the mother

cannot afford to continue paying for those activities. (1 CT 60:20-22.)

- When they dine out, the mother and the child go to restaurants such as The Souplantation or Wood Ranch. Clothing is purchased at The Gap and Target. She would like to take their daughter to more upscale restaurants and department stores . (1 CT 60:24-27.)

Besides guideline child support, the mother requested an order requiring the father to obtain health insurance for their daughter, an order equitably apportioning their daughter's uninsured healthcare expenses between the parties, an order for the father to pay for one-half of their daughter's extracurricular activities, an order for him to provide life insurance as security for child support, an order for attorney's fees and costs, and for sole legal and physical custody. (1 CT 41.)

C. The father acknowledges paying $13,547 per month in child support for another child out of wedlock.

The father is paying $13,457 per month in child support for another child from a different relationship (1 CT 183, item 10.d), which is a different child than the one here and the two children he has with his wife. According to the father, he was ordered to pay $10,000 per month in "base support, half of tuition/school related fees, and half of child care up to a cap of $2,500 per month [which] has averaged $13,457 per month" for that child. (1 CT 209:26 - 210:2.) It is not clear from his statement whether support was set by agreement or by order after hearing, and whether the guideline was used.[2] It also is unknown what level of income the support

[2] The reference to "base support" implies he was ordered to pay additional child support based on any "bonus" income per *Marriage of Ostler & Smith* (1990) 223 Cal.App.3d 33.

order was based upon, whether he has any visitation with the child, and the custodial mother's income, which are all guideline factors.

D. The father objects to discovery about his finances and admits he can pay any reasonable amount of support.

The mother served inspection demands and special interrogatories on the father, seeking information about his finances and standard of living. (2 CT 249; 293-318.) The father served blanket objections as discussed below. The special interrogatories asked for this information: (a) the address of all homes he owns; (b) the square footage of his family residence; (c) the number of bedrooms in that residence; (d) the private school tuition he has paid for his other minor children; (e) the extra-curricular activities in which his other minor children participate; (f) the cost of those activities; (g) gifts over $1,000 he has given to his other minor children in the past two years; (h) a description of the entertainment he has provided for his other minor children's birthday parties in the past two years; (i) the cost of nannies and tutors for his other minor children; (j) the frequency and locations of vacations his other minor children have taken in the past three years; and, (k) how much he has paid for entertaining, clothing, and entertainment for his other minor children in the past year. (2 CT 308-314; 249:19-26.)

The father objected and refused to comply with any of the discovery requests, claiming the requests were unwarranted and irrelevant. (2 CT 249:26 - 250:5.) Citing to *Estevez v. Superior Court* (1994) 22 Cal.App.4th 423, *White v. Marciano* (1987) 190 Cal.App.3d 1026, and *Johnson v. Superior Court* (1998) 66 Cal.App.4th 68, he asserted this blanket objection:

> [The father] stipulates that he is an extraordinarily high income earner within the meaning of Family Code §

> 4057(b)(3) and that he has the ability to pay child support in any amount commensurate with the reasonable needs of the minor child. Where there is no question of the noncustodial parent's ability to pay any reasonable support order, evidence of detailed lifestyle is irrelevant to the issue of the amount of support to be paid and thus protected from discovery and inadmissible in determining the support order.

(2 CT 319-20; 323-24.) The father invoked the same argument throughout the litigation to resist discovery. (1 CT 186; 2 CT 249; 2 CT 378-379.)

E. The father files an Income and Expense Declaration, stating his income is $190,209 per month.

The father ultimately provided some financial information about himself by filing the mandatory Income and Expense Declaration, form FL-150 ("I&E") on March 10, 2015.[3] (1 CT 181-192.) Even then, he provided only general, high-level financial information about himself and one of his corporations. (1 CT 187-191.) The profit and loss statements attached to his I&E listed general categories of expenses without detail. (*Id.*) The father admitted that some items listed as "business expenses" on the profit and loss statements were actually personal expenses (referred to as perquisites), which he voluntarily added back into his income to calculate child support.[4] (1 CT 186; 197:20-22.) He provided no documentation,

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[3] Cal. Rules Ct., rule 5.260, subd. (a) provides "for all hearings involving child ... support, both parties must complete, file, and serve a current Income and Expense Declaration (form FL-150) on all parties."

[4] When calculating business income for purposes of child support, the court normally considers "gross receipts from the business reduced by expenditures required for the operation of the business." (Fam. Code, § 4058, subd. (a)(2).) Benefits from employment or self-employment may be deemed additional income, "taking into consideration the benefit to the employee, any corresponding reduction in living expenses, and other relevant facts." (*Id.,* subd. (a)(3).)

however, showing whether the remaining expenses on the profit and loss statements were truly incurred for business .

After making those adjustments, the father declared his income was $190,209 per month. (1 CT 181, item 1.h.) Attached to the I&E was a summary showing gross income of $2,282,512 per year, which is $190,209 per month on average. (1 CT 186.) He also admitted he could pay any reasonable amount of child support, including attorney's fees, with the disclaimer: "Accordingly, the scope of permissible discovery and disclosure of the [father's] income and expenses is limited to [his] actual gross income…." (*Id.*)

The father stated in his I&E he is 48-years-old (1 CT 181, item 2.a), that he files taxes jointly with his wife (*Id.*, item 3.b), and claims tax exemptions for himself, his spouse, and two children from his marriage (*Id.*, item 3.d). He estimated the mother's income is $1,833 per month. (*Id.*, item 4.)

F. The father declares monthly living expenses of $77,159 per month, and invites the court to make the least favorable assumptions about his income and lifestyle.

Six days after filing his I&E, the father amended it March 16, 2015. (2 CT 391-419.) He maintained his total income was $190,209 per month (2 CT 391, item 1.h), but declared his salary or wages in the prior month was $410,000 (*Id.*, 393, item 5.a). He stated his average monthly expenses were $77,159.72 per month, including (a) $20,900 per month in rent, (b) $3,504 per month in groceries and household supplies, (c) $3,029 per month for eating out, (d) $2,400 per month for laundry and cleaning, (e) $3,057 per month in clothing, (f) $3,913 per month in education "for 2 children including after school programs", and (g) $31,174.23 in "Other" expenses. (2 CT 396, item 13.)

Those Other monthly expenses included items such as (i) $3,294 per month in "Children Expenses," (ii) $3,504 in fitness expenses, (iii) $7,167 per month in "Miscellaneous Cash Expenses," and (iv) $2,000 per month in "Miscellaneous Household Expenses." (2 CT 397.)

The mother disputed the father's representations about his income and complained about his failure to respond to discovery. (1 CT 230:1-10.) In response, the father argued that his personal and corporate profit and loss statements were all the trial court needed to make an award of child support: "Based upon these 'legitimate evidentiary bases' the Court may make assumptions regarding the [father's] income and lifestyle that are the least favorable to him. There is no need to conduct any further discovery into [his] income." (1 CT 201:17-21.) The father added that his I&E contains "enough information to make the least beneficial assumptions to him [sic] regarding his income and his lifestyle. No further discovery into [his] income or lifestyle is warranted in this case." (1 CT 202:6-10.)

G. The mother urges the court to set support at $25,325 per the guideline.

The mother's forensic accountant, David Blumenthal, CPA, presented a report opining the father's income available for support is $336,740 per month based on the information provided, not the $190,582 per month claimed on the father's I&E. (2 CT 256:7-22.) Mr. Blumenthal noted the father's income could be higher than $336,740 per month because that figure was calculated based upon the limited information the father presented. (1 CT 233:19-25.) Mr. Blumenthal calculated guideline child support at $25,325 per month. (2 CT 255:15-24.) The mother requested $25,325 per month in child support per guideline. (1 CT 230:7-8.)

H. The court finds income of $336,740 per month and calculates the guideline at $25,325 per month.

At the start of the hearing on March 23, 2015, the court asked how it could "determine which of the alleged, quote, business expenses which are … written off at the level of the loan-out corporation are business expenses, and which are perquisites [to the father that were] merely paid by the loan out?" (RT 3/23/15, 3:6-10.) Father's counsel responded that a precise finding of income was not crucial to the analysis (*Id.*, 3:15-16), and that the trial court had sufficient information from which to make the "least favorable assumptions" about the father's income due to his admission he can pay any reasonable amount of support and his decision to produce limited financial information (*Id.*, 4:13-24).

Mother's counsel complained: "[The father] doesn't want to produce any documents regarding his perquisites. Then he objects because we include them back because there's no proof of any business purpose." (RT 3/23/15, 5:23-26.) "[He] goes through the category and picks out what he says are his personal expenses. [¶] But we don't know if 'public relations" is really public relations. . . . For example, . . . he paid some attorney fees. But he also had another paternity action. We have no way to tell if some of these [attorneys' fees] are from that [paternity action] because he won't give us checks, he won't give us any bank records." (*Id.*, 6:9-16.)

The trial court felt "a little torn" between the arguments. (RT 3/23/15, 8:11-23.) The trial court stated: "I will admit, however, that the conundrum is resolved somewhat because I do believe that he is an extraordinary wage earner… Now, nonetheless, I do have to have some guideline number to work with." (*Id.*, 8:24 -9:10.) The trial court found that the father's presentation of his income was not supported by the evidence because his expense claims were not substantiated. (*Id.*, 9:10-13.)

Likewise, the trial court believed that Mr. Blumenthal's calculation of income was excessive and inflated; "that a realistic analysis, even of the factors that were presented, would have resulted in Mr. Blumenthal readily conceding that some of those [expense] categories, for a person in [the father's] position, were appropriate business expenses and should have been included. But I don't have any way to do that myself. So I tend to believe that the guideline number of 25,000-plus per month is probably excessive, but it's the most accurate number I've got." (*Id.*, 9:25 -10:6.)

Ultimately, the trial court adopted the proposed findings by the mother's expert and concluded the father has $336,470 per month in income to set support, which comprises $239,333 in taxable wages, $2,714 of other taxable income, and $94,422 of non-taxable income. (3 CT 691:11-12.) The court found the mother's taxable income was $1,833 per month. (3 CT 691:13.) Based on these and the other findings made by the court, guideline child support was determined to be $25,325 per month. (3 CT 691:22.)

I. The father argues that support should be set at $7,180 per month and that the mother is trying to enrich herself.

The father objected to paying guideline support: "I am an extraordinarily high income earner and the guideline amount is inappropriate and unjust becuase [sic] it exceeds the reasonable needs of the child…. [C]hild support should be in the amount of $7,180 per month." (1 CT 193.) He then shifted the focus away from the lifestyle attainable by his income to the amount the mother was spending:

> [She] is able to pay all of her expenses, including those for her two children from other relationships with a child support award of $7,180. [She] lists her monthly expenses on her I&E at $9,013, which even includes [their child's] tuition at private school, summer camp, eyeglasses,

> 'incidentals', all auto expenses (including [her] Mercedes Benz lease payment), and all household expenses for [herself], the minor child and [her] two other children from different relationships. [She] earns income in the amount of $1,833 per month. Accordingly, [she] needs $7,180 per month to pay her monthly expenses. The guideline amount of $11,840 gives [her] $4,660 more per month than she needs to pay the monthly expenses for [herself], the minor child and [her] two other children from prior relationships. [¶]

(1 CT 198:7-15, emphasis removed.)

An ignoble comment was added about the mother's circumstances, which presumably existed when the father had a relationship with her: "The only reason the minor child does not have her own bedroom is because the [mother] has two children from other relationships. [She] has not sought child support from the other children's fathers, and she is attempting to use the … child support obligation as to one child as a means to support her family of 4." (1 CT 198:21-25.)

The father consented to provide health insurance as additional child support, besides his proposed $7,180 per month in child support. (1 CT 195.) He requested that any uninsured healthcare expenses be paid equally, that extracurricular activities be paid equally subject to a cap of $500 per month, and objected to all other relief sought by the mother. (1 CT 194.)

J. The court finds the father has extraordinarily high income.

"By [the mother's] calculation [of the father's income], I think he's particularly a high earner…. [W]hile there are no definitive standards for that and there are certainly substantial earners in Los Angeles, I do think income that exceeds two or three million dollars a year is, by any measure, extraordinarily high income." (RT 3/23/15, 9:3-8; 3 CT 691:7-9.)

K. The court deviates from guideline and sets support at $8,500 per month based on the mother's expenses.

After resolving the dispute about the father's income and calculating guideline support at $25,325 per month, the trial court commented that "[the mother's] Income and Expense Declarations consistently show expenses that don't approach that, that never exceed $9,000 per month…." (RT 3/23/15, 10:7-9.) "Her claimed expenses are $9,013. She includes the $400 tuition that the [father] pays. It wasn't clear to me whether she added that in or whether she just listed it and excluded it, so I don't know whether it overlaps." (*Id.*, 10:28 - 11:4.) "My assessment … of the reasonable needs of the child are … complicated by virtue of [her] having two other children for which the respondent isn't responsible." (*Id.*, 11:6-10.) "If I take her expenses -- which she doesn't claim are solely for this child. She says those are her personal expenses and she's included the full amount of her rent -- I have to infer that some amount of those expenses are attributable to the other two children for which the respondent isn't responsible. But it's impossible for me to … sort them out." (*Id.*, 11:11-17.) "A guideline child support number … on [the mother's] calculation I find would be far in excess of what the child's reasonable needs are, and I would order that a [non-] 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 the child to live at a standard of living that's appropriate for him [sic] and for the respondent's position in life." (RT 3/23/15, 13:9-17.)

The mother asserted the father failed to meet his burden of proof to rebut the guideline because :

- "The fact that the child can continue to live as she has in the past [on a below-guideline support award], does not rebut the guideline

amount or show that a deviation is in the best interests of [the child].” (1 CT 230:16-17.)

- The current expenses for mother do not determine their child’s needs according to the station of life attainable by both parents. (1 CT 238:7-8.)
- This child is entitled to live at the same standard of living as the father’s other children, but he failed to present evidence regarding the lifestyle of those children. (1 CT 238:10-16.)
- It is irrelevant under the law that child support will improve the standard of living in the child’s household, benefitting the mother and the child’s other siblings. (2 CT 239:1-8.)
- “[I]t is unconstitutional to grant marital children the right to support from their fathers, but deny that right to nonmarital children. It is illogical and unjust to do so. (*Gomez v. Perez* (1973) 409 U.S. 535, 538-539.)” (2 CT 239:9-11.)

L. The court states the mother had to prove the child’s needs because the guideline was rebutted.

Mother’s counsel argued: “You can’t look at what she’s spent in the past [to determine the child’s needs for support] because she didn’t have the money.” (RT 3/23/15, 13:23-24.) “[The father] has the burden to show credible evidence that [the guideline] is in excess of [the child’s] needs.” (*Id.*, 13:27 - 14:1.) “[T]here is not [sic] competent evidence to rebut the guideline number. Also, there is no showing that it would be in [the child’s] best interest…. He’s paying $13,500 for another child under another court order -- to treat her in a less favorable fashion that [sic] he treats his other child that was born out of wedlock….” (*Id.*, 14:2-10.)

The trial court stated: "I do believe that [the mother's] Income and Expense Declaration is evidence of the reasonable needs of the child, together with the other evidence that's been submitted to me about the [expenses] the child's incurring. "I think [she] has a burden to show me what … the child's reasonable needs are where I've deviated. But regardless, that's the evidence that I find before me at this point having made a finding that the $25,000 is far in excess of any reasonable needs of the child. I think that my finding that this fits a [Family Code section] 4057 extraordinary income situation warrants the orders I made, and that's my orders." (RT 3/23/15, 14:12-23.)

M. Child support add-ons are ordered and support is set retroactively to October 29, 2014.

Besides the $8,500 per month in support, the trial court ordered the father to "pick up certain expenses attributable to the child to assure that his [sic] personal needs are met. And those would be health insurance for the child. [He] will be ordered to … provide that at his own expense." (RT 3/23/15, 11:22-28.) "I'm going to order that [he] contribute 90 percent of the uninsured medical, and [the mother] 10 percent."[5] (*Id.*, 17:17-19.) The father was also ordered to pay for private school tuition at his own expense. (RT 3/23/15, 11:28 - 12:1.) "To guide the parties, my view would be that this child is entitled to attend schools comparable in nature to the schools attended by his other children at [his] expense." (*Id.*, 12:11-14.) He was also ordered to pay 75% of the child's extracurricular activities. (3 CT

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[5] The court is required to apportion reasonable uninsured health care costs "as additional child support." (Fam. Code, § 4062, subd. (a), 4061.) The court has discretion to award educational expenses as additional child support. (§ 4062, subd. (b).) All of these items are in addition to guideline support.

691:24-27.) The request for life insurance as security for child support was denied. (RT 3/23/15, 18:11 - 19:16.)

The order of support was made retroactive to October 29, 2014, the date the petition to establish paternity was filed. (3 CT 691:28 -692:3; 1 CT 3.) The father was allowed credit for payments he made in support since that date. (3 CT 691:28 -692:3.)

N. The court comments on the complexity of this issue.

In a subsequent hearing regarding the mother's request for fees for this appeal, the trial court commented: "And, frankly, I don't find this issue to be all that simple. The issue of deviating from child support, the court itself found to be -- while I'm -- I'm comfortable with the decision I rendered. The court does note that there's no explicit case law about what's the financial standard for deviation from guideline based on extraordinary income. And the question of how one then assesses appropriate support, I think it is an issue that -- that is of some complexity. [¶] Moreover, I agree with the argument that -- that [the mother] makes, that there is a difference in the kind of briefing that's prepared for the Court of Appeal that needs to be prepared here. I only wish I had the opportunity to consider briefs of the kind; that I understand the difficulties that busy trial counsel have in writing that kind of brief." (RT 7/7/15, 34:8-22.)

III. STATEMENT OF APPEALABILITY

A pre-judgment child support order, like the one at issue here (3 CT 690-693), is directly appealable. (*In re Marriage of Gruen* (2011) 191 Cal.App.4th 627, 637-38; *In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368.)

IV. STANDARD OF REVIEW

The standard of review for child support orders was explained in *In re Marriage of Cryer* (2011) 198 Cal.App.4th 1039:

> [C]hild support orders are subject to an abuse of discretion standard of review. [Citation.] As is standard in this type of review, we do not substitute our judgment for that of the trial court, and we will disturb the trial court's decision only if no judge could have reasonably made the challenged decision. (*Ibid.*) We review factual findings by determining whether they are supported by any substantial evidence. (*Ibid.*) Since we are reviewing a child support order, however, we are mindful that "determination of a child support obligation is a highly regulated area of the law, and the only discretion a trial court possesses is the discretion provided by statute or rule. [Citation.]"

(*Id.*, pp. 1046-47.)

It is acknowledged that most appeals from discretionary orders are "'dead on arrival' at the appellate courthouse." (*Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448-49.) However, the discretion afforded by law to deviate from the child support guideline is a narrow passage, bounded by statutory mandates on one side and strong public policy on the other. The trial court only gets to exercise discretion after it makes its way through to the other end. A court has no discretion to stray from the legal requirements for setting child support. However, when the trial court has complied with legal requirements in rebutting the guideline and "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 trial court's decision to deviate from the guideline was outside the "legal lines" and the award of child support is not supported by substantial evidence.

V. DISCUSSION

The trial court set child support at one-third the presumptively-correct amount without following statutory mandates. There is no finding the guideline would be unjust or inappropriate based on the lifestyle attainable by the father's income, and there is no explanation why the below-guideline award is in the child's best interests. Reversal is required because guideline support had to be ordered absent those findings, and the missing information cannot be discerned from the record.

A. The child support guideline is based on strong public policy and is presumptively correct in all cases.

The law governing child support is "highly regulated." (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 283.) "California has a strong public policy in favor of adequate child support. [Citation.] That policy is expressed in statutes embodying the statewide uniform child support guideline." (*Id.*) Family Code[6] section 4053 states: "In implementing the statewide uniform guideline, the courts shall adhere to the following principles:

> (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.

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[6] Statutory references are to the Family Code unless otherwise indicated.

> (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.

(§ 4053.) Any deviation from the guideline "must be consistent with the [foregoing] principles." (§ 4057, subd. (b).)

1. California adopted its statewide uniform guideline to comply with federal law.

California adopted its first child support guideline in 1984. "To remedy the long history of inadequate child support awards and guarantee that a minimum floor be set for such support, the Legislature enacted the Agnos Child Support Standards Act of 1984 (the Agnos Act). (Stats. 1984,

ch. 1605, § 4, pp. 5664–5671.)" (*In re Marriage of Ostler & Smith* (1990) 223 Cal.App.3d 33, 51.)

> The Agnos Act established a 'two-tiered' system of child support guidelines—a mandatory minimum statewide component, and an 'advisory' county-by-county 'discretionary' component for higher-than-minimum child support awards. [Citation.] However, this system of multiple county-based discretionary guidelines offended federal law requiring states to establish one 'guideline' that is uniformly applied throughout the state [citation] and put California in jeopardy of losing its public assistance program federal funding.

(Hogoboom & King, Cal. Practice Guide: Family Law, The Rutter Group 2016, Ch. 6-A, ¶ 6:132, emphasis removed.)

The current guideline was adopted as of July 1, 1992, "to ensure that this state remains in compliance with federal regulations for child support guidelines." (§ 4050; Stats. 1992, ch. 46.) Under federal law, the guideline must include:

> a rebuttable presumption … that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.

(42 U.S.C. § 667, subd. (b)(2).) Each state may establish its own criteria for determining whether application of the guideline would be unjust or inappropriate in a particular case. (42 U.S.C. § 667, subd. (b)(2).)

"To comply with federal law," California requires its courts to make these findings, in writing or on the record, whenever deviating from the statewide uniform guideline formula amount of child support:

> (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.

(§ 4056, subd. (a).) The requirement for these findings is a condition of federal law, so California's guideline qualifies for federal funding. (See 42 U.S.C. §§ 655 & 667, subd. (a).) The California guideline complies with federal law because Section 4057 creates a presumption the guideline is correct and lists the findings a court must make to rebut that presumption.

2. The guideline is presumptively correct in all cases.

Courts must calculate child support under the mathematical formula in the statewide uniform guideline. (§§ 4052, 4055.) "The amount of child support established by the formula … is presumed to be the correct amount of child support to be ordered." (§ 4057, subd. (a).) "The court shall adhere to the statewide uniform guideline and may depart from the guideline only in the special circumstances set forth in [§§ 4050-4076]." (§§ 4052; 4053, subd. (k).) The reference to the child support presumption as a "guideline" is really not accurate, as observed in *In re Marriage of Hubner* (2001) 94 Cal.App.4th 175:

> The term "guideline," … is a euphemism. The support amount rendered under the guideline's algebraic formula "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." (§ 4053, subd. (k); see also §§ 4050, 4057, subd. (a).) One special circumstance involves cases where evidence shows that the application of the formula is unjust or inappropriate under the circumstances because "[t]he 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." (§ 4057, subd. (b)(3).)

(*In re Marriage of Hubner, supra,* 94 Cal.App.4th at p. 183.)

The guideline is classified as "a rebuttable presumption affecting the burden of proof." (§ 4057, subd. (b).) 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.) The burden of proof includes the burden of producing evidence to disprove the presumed fact. (See Evid. Code, § 550.) Here, the "presumed fact" is that the guideline produces the "correct amount of child support to be ordered" in all cases. (§§ 4057, subd. (a); 4053, subd. (k).) That presumption is rebutted only by a "showing that application of the formula would be unjust or inappropriate in the particular case, consistent with the principles set forth in Section 4053…." (§§ 4057, subd. (b).) "When the extraordinarily high earning supporting parent seeks a downward departure from a presumptively correct guideline amount, it is that parent's 'burden to establish application of the formula would be unjust or inappropriate,' and the lower award would be consistent with the child's best interests." (*In re Marriage of Hubner, supra,* 94 Cal.App.4th at p. 183; see also, *In re Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1326 [same]; and *In re Marriage of Cheriton, supra,* 92 Cal.App.4th at p. 297 ["As the high earner, it is [that party's] burden to rebut the guideline amount with a showing that it exceeds his children's reasonable needs"].)

The father, here, was the one arguing against guideline support, so he had to persuade the court to deviate from the guideline and produce admissible evidence to prove that claim. The court had to order guideline support absent such evidence. However, the court deviated from the guideline by improperly shifting the burden of proof to the mother.

B. The court deviated from the guideline without making the required findings and it used the wrong standard to determine the child's needs.

Three requirements must be satisfied to rebut the guideline. Section 4057, subdivision (b) states that the guideline "may be rebutted by admissible evidence showing that **[1]** application of the formula would be unjust or inappropriate in the particular case, consistent with the principles set forth in Section 4053, **[2]** because one or more of the … factors [listed in subparts (1) to (5) of Section 4057, subdivision (b)] is found to be applicable by a preponderance of the evidence[7], and **[3]** the court states in writing or on the record the information required in subdivision (a) of Section 4056…" (§ 4057, subd. (b)), which requires these statements:

> (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.

(§ 4056, subd. (a).)

Here, the trial court did not comply with those requirements. **[1]** There is no finding that application of the formula would be unjust or inappropriate, and the court did not adhere to the principles in Section 4053 when it deviated from the guideline. **[2]** The court found the father has extraordinarily high income, but used the wrong test for determining the guideline would exceed the child's needs and stated it was the mother's

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[7] The court in this case relied on the following rebuttal factor: "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." (§ 4057, subd. (b)(3).)

burden to prove the child's needs for support. **[3]** Although the court calculated guideline support and explained its reason for deviating from the guideline, it did not state why the child's best interests are served by the support it awarded. (See 3 CT 690-693 for the written order, and RT 3/23/15, 1-28 for the transcript, for the absence of the required findings.)

"The statutory findings are mandatory. The failure to make them precludes effective appellate review and may constitute reversible error if the missing information is not otherwise discernible from the record. [Citations.]" (*In re Marriage of Hubner, supra,* 94 Cal.App.4th at p. 183.) In *Hubner*, which was decided in 2001, the trial court found that the father was an extraordinarily high earner because he had $288,000 per month in pretax income. "Without identifying specific past or projected future expenditures, the [trial] court found that monthly child support of $19,000 would enable Ryan to share in William's standard of living, but 'anything over $19,000 would be excessive and not consistent with [Ryan's] reasonable needs.'" (*Id.* at p. 182.) The Court reversed because the trial court failed to calculate guideline support based on the father's actual income, as required by Section 4056, subdivision (a)(1). (*Id.* at p. 187.) In remanding the case, the trial court was directed to accurately calculate the guideline, then make the required findings before any deviation from the guideline:

> Because the court failed to make a guideline calculation based on William's actual income, we are unable to assess the merits of any argument as to whether the child support determination was an abuse of discretion. This portion of the appeal is dismissed because it is not yet ripe for judicial review. [¶] However, even if factual basis existed for William's assumed $3.5 million annual income, we would be unable to adequately assess, based on the record, whether the monthly $19,000 child support award is appropriate. The court failed to make findings mandated

> by section 4056. On remand, in the event the court determines a guideline departure is warranted, it is directed to comply with the requirements of section 4056 by specifying (1) the child support amount calculated under the guideline formula, (2) the reasons for awarding an amount of support that deviates from the formula, and (3) the reasons the award is consistent with Ryan's best interests. (§ 4056, subd. (a).) Such findings not only will enable the parties to appreciate the basis for the child support order, they will facilitate judicial review in any future appeal.

(*In re Marriage of Hubner, supra*, 94 Cal.App.4th at pp. 187-88.)

A failure to make required findings also occurred in *Rojas v. Mitchell* (1996) 50 Cal.App.4th 1445. In *Rojas,* the mother sought a modification of a stipulated child support order that required the father to pay $5,500 per month in child support, due to the increase in the father's income to $3 million after the child support agreement was made. Instead of ordering guideline support based on the father's current income, the trial court deviated from the guideline because the earlier child support agreement stated that $5,500 per month "met the reasonable needs of the child." (*Id.* at p. 1449.) The mother contended on appeal that the court failed to state the reasons the below-guideline order was in the child's best interests. In reversing, the *Rojas* court explained:

> 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.] 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. (Ibid.) [¶] Here, after considering documentary evidence and arguments submitted on behalf of the parties, the court expressly found that a $5,500 monthly child support award met the reasonable needs of the child. However, it did not give the *reasons* for this finding. Unfortunately, the error cannot be

> considered harmless since the missing reasons cannot be implied in the court's express findings and we cannot conclude that the missing information would necessarily have been adverse to appellant….

(*Rojas v. Mitchell, supra,* 50 Cal.App.4th at pp. 1450-51, italics in original.)

The trial court here, like in *Hubner* and *Rojas*, deviated from guideline without stating the reasons the below-guideline support was in the child's best interests. There is no mention of best interests in the ruling. The court also did not find that application of the guideline would be unjust or inappropriate after consideration of the principles in Section 4053. Failing to make these findings is "reversible error if the missing information is not otherwise discernible from the record. [Citations.]" (*In re Marriage of Hubner, supra,* 94 Cal.App.4th at p. 183.)

1. It cannot be concluded from the record that application of the guideline would have been unjust or inappropriate.

Any deviation from the guideline must be based on "admissible evidence showing that application of the formula would be unjust or inappropriate in the particular case, consistent with the principles set forth in Section 4053…." (§ 4057, subd. (b).) This is especially important when a party claims a below-guideline order is too low to meet the child's needs, since the state has a compelling interest in ensuring children receive proper support. (*In re Marriage of Hall* (2000) 81 Cal.App.4th 313, 320-21; § 4053.) In *Hall*, a below-guideline child support order was reversed on a "judgment roll" because the trial court failed to make the required findings under Section 4057. (*Id*. at p. 314) As the court explained in *Hall*:

> Not only is it important to the judiciary's legitimacy that parents understand the basis for child support orders, an

> important issue of substantive family law is also involved. [T]he child support statutes even today still allow for the exercise of discretion in making support orders. (§ 4057, subd. (b).) The potential for the exercise of discretion plays an important role in the statutory scheme, considered as a whole.… [Citations.] However, when orders are strictly the products of unreported chambers conferences, there is no opportunity for the court to exercise its discretion, because any discretion, under the current statutory scheme, requires either a statement on the record or some kind of writing. In essence, making an order in an unreported chambers conference deprives the parents of their right under section 4057, subdivision (b) to have the family court at least *consider* whether the guideline result should be varied under the circumstances of their particular case.
>
> Finally, the need for an explanation of the child support order is grounded in an important part of public policy from the point of view of the best interests of children. Section 4053, subdivision (e) declares that the formula guideline 'seeks to place the interests of children as the *state's* top priority.' (Italics added.) A logical corollary of this statute is that appellate courts must have enough information in the record to evaluate whether a court correctly followed the formula guideline (in most situations, unlike the present case, a deviation will not be apparent on the face of the order) or whether it abused its discretion in differing from it. While most appeals in this area are brought by payor parents who complain that they are being forced to pay too much, one need only reflect on the case where an error in the calculation of the guideline formula resulted in an order that was *too low* to appreciate the importance of appellate review to the implementation of the public policy. An adequate record on appeal is vital to the implementation of that policy

(*In re Marriage of Hall, supra,* 81 Cal.App.4th at pp. 320-21, italics in original.)

Section 4053 lists the public policies upon which the guideline is based, which courts must adhere to when making a child support order. (§

4053, quoted in Part V.A above.) Those principles must be considered in determining whether application of the guideline would be unjust or inappropriate. (§ 4057, subd. (b) [the guideline "may be rebutted by admissible evidence showing that application of the formula would be unjust or inappropriate in the particular case, consistent with the principles set forth in Section 4053…"].)

The court here made no finding about the guideline being unjust or inappropriate. It cannot be concluded from the record why application of the guideline would have been unjust or inappropriate, consistent with the principles stated in Section 4053. Although this Court may draw reasonable inferences from the record, there is no reason to believe the court considered the twelve principles in Section 4053, as there is no mention of those principles in the ruling.

The court's finding that the guideline would exceed the child's "reasonable needs" does not mean that application of the guideline would have been "unjust or inappropriate." Even when a court finds a particular amount of support will meet the child's needs, reversal is required unless the reasons for that finding are apparent from the record. (*Rojas v. Mitchell, supra,* 50 Cal.App.4th at pp. 1450-51.) The trial court here, like in *Rojas,* determined that the guideline would exceed the child's "reasonable needs" and that the support it awarded would meet those needs (3 CT 691:23-27), but failed to make the findings required by law to deviate from the guideline. The *Rojas* court held that the "missing reasons cannot be implied in the court's express findings" about the child's needs. (*Rojas v. Mitchell, supra,* 50 Cal.App.4th at pp. 1450-51.)

Therefore, the findings the court made about the guideline exceeding the child's "reasonable needs" cannot be used to justify a conclusion that the guideline amount was unjust or inappropriate.

2. The court used the wrong standard to determine needs and improperly shifted the burden of proof to the mother.

The rebuttal factor employed by the court to deviate from the guideline is that "[t]he 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." (§ 4057, subd. (b)(3).) The court made those two findings, but used the wrong standard for assessing needs.[8]

Section 4057(b)(3) does not define how needs are to be determined. The plain meaning of "needs" is:

> 1. Circumstances in which something is necessary, or that require some course of action; necessity.
>
> 2. (often **needs**) A thing that is wanted or required.
>
> 3. The state of requiring help, or of lacking basic necessities such as food.

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[8] The extraordinarily high income finding seems appropriate because $336,740 per month is a lot of income, even for Los Angeles. The court has discretion to determine when income becomes extraordinarily high. (*In re Marriage of Cheriton, supra,* 92 Cal.App.4th at p. 297.) "In exercising that discretion, however, the trial court must at least approximate the point at which the guideline support obligation due from a high earner would exceed the children's needs. (*McGinley v. Herman, supra,* 50 Cal.App.4th at p. 945.)" (*In re Marriage of Cheriton, supra,* 92 Cal.App.4th at p. 297.) Here, the court found that a person making over $2 million or $3 million per year has extraordinarily high income for purposes of rebutting the child support guideline. (3 CT 691:7-9.) That finding is not challenged on appeal.

(Oxford American College Dictionary, emphasis in original.) Here, Section 4057(b)(3) refers to "the needs of the children" in the sense of something that is *wanted or required* for a child to live at her parent's standard of living. There is no requirement that child support be set according to the bare necessities of life if the parents can afford to pay more. (*In re Marriage of Hubner, supra,* 94 Cal.App.4th at p. 187.) "[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. (§ 4053, subd. (a).) Therefore, "child support must to some degree reflect the more opulent lifestyle [of the extraordinarily high income parent] even though this may, as a practical matter, produce a benefit for the custodial parent." (*Johnson, supra,* 66 Cal.App.4th at p. 71.)

In case of an extraordinarily high income earner, "child support must be measured by the standard of living attainable by the parent's income…." (*In re Marriage of Hubner, supra,* 94 Cal.App.4th at p. 175.)

> California law regarding child support is clear: " '[A] child ... is entitled to be supported in a style and condition consonant with the position in society of its parents.' [Citation.] '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.' [Citation.]" (*McGinley v. Herman, supra,* 50 Cal.App.4th at p. 941, 57 Cal.Rptr.2d 921.) " 'Clearly where the child has a wealthy parent, that child is entitled to, and therefore 'needs' something more than the bare necessities of life.' " (*Johnson, supra,* 66 Cal.App.4th at p. 72, 77 Cal.Rptr.2d 624.) After *Johnson*, a parent's "ability" to support a child may depend upon whether the supporting parent is merely rich or is very rich, and "this discrepancy can affect the [trial court's determination as to the] child's needs." (*Id.* at p. 74, 77 Cal.Rptr.2d 624.)

(*In re Marriage of Hubner, supra,* 94 Cal.App.4th at p. 187.)

Since a child's needs under Section 4057(b)(3) are based on the lifestyle *attainable* by the supporting parent's income, evidence of that parent's actual lifestyle is irrelevant. (*Johnson v. Superior Court, supra,* 66 Cal.App.4th 68, 72.)

> 'The standard of living to which a child is entitled should be measured in terms of the standard of living attainable by the income available to the parents rather than by evidence of the manner in which the parents' income is expended and the parents' resulting lifestyle. It matters not whether the ... noncustodial parent miserly hoarded his $1 million per year income and lived the life of a pauper or whether he lived the life of a prince spending every cent of the available income. [¶] [E]vidence of detailed lifestyle and net worth [is] relevant only in those situations where the ability of the noncustodial parent to make adequate support payments may be affected by the unwise expenditure of income to the detriment of the supported minor. Where there is no question of the noncustodial parent's ability to pay any reasonable support order, ... evidence of detailed lifestyle [is] irrelevant to the issue of the amount of support to be paid and thus protected from discovery and inadmissible in determining the support order.' [Citation.]

(*Johnson v. Superior Court, supra,* 66 Cal.App.4th 68, 72.)

Here, the court found the guideline amount of "$25,325 per month would exceed the child's reasonable needs" (3 CT 691:22-27) and that the $8,500 per month, plus the incidental expenses it ordered, "will meet the minor child's reasonable needs" (*Ibid*). Setting support based on what the court believed were the child's "reasonable needs" was the wrong standard because Section 4057(b)(3) does not use the word "reasonable" to qualify a child's needs.

It is clear the court was not using "reasonable needs" as shorthand for "needs measured by the standard of living attainable by her father's

income" because the court focused exclusively on *her mother's living expenses* to determine those needs. At the hearing, mother's counsel objected to the court considering the mother's historical living expenses to determine the child's needs for support: "You can't look at what she's spent in the past because she didn't have the money." (RT 3/23/15, 13:23-24.) The trial court responded:

> I do believe that [the mother's] Income and Expense Declaration is evidence of the reasonable needs of the child, together with the other evidence that's been submitted to me about the [expenses] the child's incurring. "I think [she] has a burden to show me what … the child's reasonable needs are where I've deviated. But regardless, that's the evidence that I find before me at this point having made a finding that the $25,000 is far in excess of any reasonable needs of the child. I think that my finding that this fits a [Family Code section] 4057 extraordinary income situation warrants the orders I made, and that's my orders.

(RT 3/23/15, 14:12-23.)

The court's comments reveal two major errors in the way it approached the case. First, the court placed the burden on the mother to prove her child's needs for support, even though the burden of proof was on the father. Absent proof to rebut the guideline, the court was required set support according to the guideline. The court, however, ruled against the mother on the mistaken belief she had to provide the missing evidence of their child needs for support. Any question about the child's needs for support should have been resolved in the mother's favor, as the father invited the court to "make assumptions regarding [his] income and lifestyle that are the least favorable to him" based on his election to produce limited financial information. (1 CT 201:17-21)

Second, the court was not allowed to set support according to the mother's historical living expenses. The legally-correct method to measure needs under Section 4057(b)(3) is "by the standard of living attainable by the [extraordinarily high earner] parent's income…." (*In re Marriage of Hubner, supra,* 94 Cal.App.4th at p. 175.) The court erred by analyzing the child's needs solely in terms of her mother's living expenses. The court stated:

> [The mother's] Income and Expense Declarations consistently show expenses that don't approach [the guideline amount], that never exceed $9,000 per month…. Her claimed expenses are $9,013. She includes the $400 tuition that the [father] pays. It wasn't clear to me whether she added that in or whether she just listed it and excluded it, so I don't know whether it overlaps…. My assessment … of the reasonable needs of the child are … complicated by virtue of [her] having two other children for which the respondent isn't responsible…. If I take her expenses -- which she doesn't claim are solely for this child. She says those are her personal expenses and she's included the full amount of her rent -- I have to infer that some amount of those expenses are attributable to the other two children for which the respondent isn't responsible. But it's impossible for me to … sort them out.

(RT 3/23/15, 10:7 - 11:17.) The mother argued that setting support based on her spending was inappropriate because her ability to spend money on their child was limited by the amount the father had been voluntarily providing: "By using a [custodial] parent's income and expense declaration to determine reasonable needs, before a child support order is made, rewards a parent who does not voluntarily support his/her child because the child's expenses are unreasonably low because there is no money to pay for such expenses." (3 CT 512:12-16.)

The same error was made in *In re Marriage of Cheriton, supra,* 92 Cal.App.4th 269. In *Cheriton*, the trial court estimated the expenses of the children to be between $3,000 and $5,000 per month based on the mother's Income and Expense Declarations. (*Id.* at p. 297.) The trial court found that annual income over $350,000 was extraordinarily high and that "[s]upport generated at that level of income under the guidelines would equal the highest number in the range of expenses of the needs of the children as set forth above." (*Ibid.*) In reversing the Court of Appeal held:

> The court's reasoning … assumes that the children's needs are defined by their expenses. Where the children of a high earner are involved, however, this is not always so. (See, e.g., *In re Marriage of Chandler* [1997] 60 Cal.App.4th [124,] 129; *McGinley v. Herman, supra,* 50 Cal.App.4th at pp. 944-945.) Thus, the court erred to the extent that it based the $350,000 income ceiling on the children's expenses rather than their needs.

(*In re Marriage of Cheriton, supra,* 92 Cal.App.4th at pp. 297-98.) Just like in *Cheriton*, the trial court here measured needs by the custodial parent's living expenses, rather than the lifestyle attainable by the wealth of the parent responsible for paying support.

Similarly, the trial court in *In re Marriage of Chandler, supra,* 60 Cal.App.4th 124, estimated a child's needs for support at $3,000 per month by deducting the mother's portion of the total household expenses and attributing the remaining $3,000 as the child's needs. (*Id.* at p. 129.) The father had $117,000 per month in gross monthly income (*Id.* at p. 124), and guideline support based on that income was $9,197 per month (*Id.* at p. 127). The trial court ordered the father to pay $3,000 per month in child support plus $4,000 per month in trust for their child for other expenses. In reversing, the Court of Appeal held:

> First, we would have no difficulty finding a monthly child support order of $3,000, standing alone, constitutes an abuse of discretion under the facts of this case. Given father's monthly income, plus the findings on mother's reasonable monthly expenses and the fact Ashley spends 90 percent of the time with her, an award of less than one-third the guideline figure, is erroneous. Similar cases have recognized such a drastic deviation from the guidelines constitutes an abuse of discretion. (See *McGinley v. Herman, supra,* 50 Cal.App.4th at pp. 944-946 [award of $2,150 a month where the supporting parent's monthly income exceeded $116,000; reversed]; *In re Marriage of Hubner, supra,* 205 Cal.App.3d at pp. 667-669 [trial court erred by awarding less than one-half the discretionary guideline amount where the supporting parent's gross monthly income exceeded $43,000]; I*n re Marriage of Catalano* (1988) 204 Cal.App.3d 543, 552 [251 Cal.Rptr. 370] [error to award $1,110 a month where the supporting parent's gross monthly income was $32,000].) After finding father had an extraordinarily high income, the court determined Ashley's monthly needs amounted to only $3,000. The court did not explain how it calculated this figure, but apparently it "attributed" $7,000 in monthly expenses to mother and subtracted this sum from the custodial household's total monthly expenses, rather than independently determining the expenses for Ashley. This approach was erroneous.

(*In re Marriage of Chandler, supra,* 60 Cal.App.4th at p. 129.)

Likewise, the trial court here set support based on the mother's standard of living, rather than measure the child's needs according to the lifestyle attainable by her father's income. The "drastic deviation" from guideline that occurred in *Chandler* also occurred here. In *Chandler*, the court held that it was an abuse of discretion to order support order support at one-third of the guideline under those facts. (*In re Marriage of Chandler, supra,* 60 Cal.App.4th at p. 129.) Here, guideline support was $25,325 per month (3 CT 691:22), but the court set support at $8,500 per month plus incidental expenses, roughly one-third of the guideline amount.

Courts may not limit child support to what the custodial parent spends, out of concern that higher support will increase the custodial parent's standard of living. The guideline specifically allows for child support to increase the standard of living of the custodial parent. "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." (§ 4053, subd. (f).) "'Accordingly, where the supporting parent enjoys a lifestyle that far exceeds that of the custodial parent, child support must to some degree reflect the more opulent lifestyle even though this may, as a practical matter, produce a benefit for the custodial parent.'[Citation.]" (*Johnson v. Superior Court, supra,* 66 Cal.App.4th at p. 71.)

The court did not explain how this child can live at the standard of living attainable by the father's income of $336,470 per month on the amount it awarded. Just as the father's income was extraordinarily high, the court should have recognized the lifestyle attainable by that income must also be extraordinarily high. The opulent lifestyle attainable by her father's $336,470 per month in income can never be attained on $8,500 per month in support. The guideline did not exceed the standard of living attainable by the father's income. If anything, the court might have questioned whether $25,325 was adequate for the child to reach the standard of living attainable by her father's income.

Although the proper focus is on the lifestyle attainable by the father's income—not his actual lifestyle—one way to know what lifestyle is "attainable" on $336,470 per month in income is to see what he has attained on that income. The father spends $77,159 per month on his

lifestyle, including $20,900 per month in rent. (2 CT 396-397.) To say the guideline amount of $25,325 per month is "unjust or inappropriate" is to ignore that the father spends almost that much in rent alone. The father admitted to his ability to pay any reasonable amount of support, so he cannot argue that a guideline order would have presented any hardship to him. The calculation of guideline support[9] shows the father would have "net spendable income" of $179,119 per month, *after* paying $25,325 in guideline support for this child, the $13,547 in support he pays for his other child out of wedlock, and federal and state income taxes. Had guideline support been ordered, the father would have $179,119 per month left over to pay for the living expenses of himself, his wife, and their two children. Since his living expenses are $77,159 per month, he could save over $100,000 per month after paying those expenses, guideline support, his other child support obligation, and income taxes. Nothing is unjust or inappropriate about that result.

The guideline amount of $25,325 was not only presumptively correct, it produced the just and appropriate amount of support to meet the child's needs.

3. No reasons were given why it is in the child's best interests to receive below-guideline support.

The court was also required to explain "[t]he reasons the amount of support [it] ordered is consistent with the best interests of the child[]." (§ 4056, subd. (a)(3).) The court did not mention the child's best interests in

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[9] Although a formal report showing the calculation of the guideline is not attached to the order, it appears that the court adopted the one submitted by the mother's forensic accountant, as it matches the income findings and guideline amount stated in the court order. (2 CT 387, *cf.*, 3 CT 691.)

its ruling. Based on the record, it would be unreasonable to assume this child would be better off receiving support from her father in an amount less than the guideline provided. Children benefit from greater, not lesser, support. It was in this child's best interests to receive guideline support, as the guideline considers each parent's income, station in life, standard of living, custodial responsibilities, and the high cost of raising children in this state. (§ 4053.) That is why the guideline "is intended to be presumptively correct in all cases…." (*Id.,* subd. (k).)

There are times when a parent must work extreme hours to maintain a certain level of income, depriving that parent of time with the child or placing an unhealthy burden on the parent. (See *Marriage of Lim & Carrasco* (2013) 214 Cal.App.4th 768, 775-76.) In such cases, it would not be in the child's best interest for his or her parent to maintain an extraordinarily rigorous work schedule, just so guideline support could be calculated on a higher level of income. Instead, the parent may work a normal schedule, without income being imputed on an unreasonable work regime. (*Id.*) To address that problem, the guideline allows for consideration of a parent's earning capacity in setting support "consistent with the best interests of the children." (§ 4058, subd. (b).) That issue does not exist here. The father admitted he has "the ability to pay any reasonable amount of child support ordered by this Court, including attorney's fees." (1 CT 171:22-23.) The father does not see the child at all (1 CT 57), so his work regime will not interfere with any custodial responsibilities he has for this child. Nor would the payment of guideline support interfere with the best interests of any of his other children. This is a proper inference because he invited the court to make the least favorable assumptions about his income and lifestyle when he opted to provide limited financial information. (1 CT 201:17-21.) Based on the father's admission of ability

to pay any reasonable amount of support and his income of $336,470 per month, he could have paid guideline support of $25,325 per month without interfering with the best interests of any of his children.

The court did not explain how it was in the child's best interest to receive support less than the father's other child out of wedlock, who is receiving $13,547 per month in "base support." (1 CT 183, item 10.d., 1 CT 209:26-210:2.) It cannot be determined from the record whether support for that child was set according to the guideline, or the factual basis for the support award (e.g., the amount each parent stated as his or her income, the custodial time share, or other guideline factors). It is clear, though, that the other child is receiving more than the $8,500 per month and incidental expenses that the court awarded here. The court should have explained why it was in this child's best interest to be treated differently than the father's other child out of wedlock.

Nor did the court explain how the child here can have a lifestyle comparable to that of the father's two children from marriage on the support it awarded. The father's children from marriage presumably share in his lavish lifestyle, but the court did not state the reason this child is treated differently. A guideline order was in the child's best interests. It was not in this child's interests to receive inadequate support.

At the hearing, mother's counsel informed the court "there is no showing that [the ordered support] would be in [the child's] best interest, nor would it be appropriate for [the father] … to treat her in a less favorable position than he treats his other child was born out of wedlock." (RT 3/23/15, 14:4-9.) Mother's counsel renewed the objection about the lack of a best interests finding when the proposed written order was submitted. (3 CT 511:13-18). Father's counsel, however, urged the court to adopt his

proposed order, which omitted the best interests finding. (3 CT 515-523.) Mother's counsel did not approve the order based on her objections. (See 3 CT 693, the approval section is not signed.) The court issued the order as proposed by father's counsel, without a best interests finding. (See, 3 CT 690-693).

4. No finding was made regarding the guideline amount of support at the extraordinarily high earner threshold.

Although Section 4057(b)(3) permits extraordinarily high income earners to rebut the guideline in certain circumstances, case law clarifies that a trial court may not set support lower than what an *ordinarily* high income earner would have paid under the guideline. (*McGinley v. Herman, supra,* 50 Cal.App.4th at p. 945.) As the Court explained in *McGinley*:

> We think it no more than common sense that a parent who rebuts the guideline[] support presumption because of an extraordinarily high income not be permitted to pay less support than a parent whose income is not extraordinarily high. Because of the lack of meaningful findings in this case, we have no way of ascertaining the level of income which must have been imputed to Herman in order to yield a figure of $2,150 monthly child support under the guidelines formula. What we can say with certainty is that, if this imputed amount of income were less than the level of income that could properly be considered extraordinarily high, the support award of $2,150 would be prima facie inadequate.

(*McGinley v. Herman, supra,* 50 Cal.App.4th at p. 945.)

The trial court here found that a person making over $2 million or $3 million per year is an "extraordinarily high income" earner to rebut the child support guideline. (3 CT 691:7-9.) It found that father's income was $336,470 per month, which is $4,037,640 per year. The court, however, did not calculate the guideline at either the $2 million or $3 million income

mark. Due to the lack of meaningful findings, it cannot be determined if the court permitted the father to pay less child support than he would have had to pay under the guideline had his income been $2 million instead of $4 million.[10]

5. Mandatory form FL-342a was not used.

The Judicial Council of California adopted form FL-342a (Non-Guideline Child Support Findings Attachment) for mandatory use when a court deviates from guideline. It was not used here. The form assists trial courts in complying with Section 4057 when deviating from the guideline. One of the pre-printed findings on form FL-342a is that the below-guideline order is "in the best interest of the child and that application of the formula would be unjust or inappropriate in this case." (Form FL-342a, item 2.c.) Even when the form is used, the court must state the reasons for those findings either on the record or in writing, as there is no place on the form to do so. (See, §§ 4056, subd. (a), 4057, subd. (b); *Rojas v. Mitchell, supra,* 50 Cal.App.4th at pp. 1450-51.)

Failing to use a mandatory court form violates the rules of court. (Cal. Rules Ct., rule 5.7, subd. (a); see also Fam. Code, § 211 ["the Judicial Council may provide by rule for the practice and procedure in proceedings under this code"].) "The Judicial Council may prescribe by rule the form and content of forms used in the courts of this state. When any such form has been so prescribed by the Judicial Council, no court may use a different form which has as its aim the same function as that for which the Judicial Council's prescribed form is designed." (Gov. Code, § 6851; Cal. Rules Ct.,

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[10] The mother filed a Motion for Judicial Notice to receive the guideline calculations at $2 million or $3 million per year in income, which this Court denied on May 9, 2016.

rule 1.31, subd. (a).) Forms adopted for mandatory use are identified in the lower left corner of the first page. (Cal. Rules Ct., rule 1.31, subd. (c).)

Form 342a is designated as a "Form Adopted for Mandatory Use" in the lower left corner of the form. Therefore, the court had to use the form. The error was prejudicial because the court did not make the required findings as discussed above.

C. Reversal is required due to prejudicial error.

Reversal is required due to the court's failure to make the findings required by Section 4057, 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 pp. 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.

D. The court should be directed to order guideline support on remand.

In *Hubner, supra,* this Court could not determine whether the trial court abused its discretion in ordering below-guideline support because the trial court did not accurately calculate the guideline. (*In re Marriage of Hubner, supra,* 94 Cal.App.4th at pp. 187-88.) Without knowing the guideline amount, the Court could not say in *Hubner* whether the $19,000 child support award was an abuse of discretion based on the father's $288,000 per month in pretax income. The case was reversed and remanded with instructions to accurately calculate the guideline and make the other required findings before deviating from the guideline. Similarly, the *Rojas* court remanded with instructions to make the required findings because it could not be determined from the record whether the support

awarded was an abuse of discretion. (*Rojas v. Mitchell, supra,* 50 Cal.App.4th at p. 1451.)

Here, the trial court accurately calculated the guideline as being $25,325 per month. There is no evidence in the record upon which a conclusion can be reached that the guideline is unjust or inappropriate, and there is no evidence to justify a finding that a below-guideline award is in the child's best interests. The father did not meet his burden in rebutting the guideline because he presented no evidence that the guideline exceeded the child's needs according to the standard of living attainable by his income. Therefore, the court should be instructed on remand to award guideline support of $25,325 per month.

The guideline order should be made retroactive to October 29, 2014, which is the date the petition to establish paternity was filed (1 CT 3), with credit to the father for the support payments he made since that date. "An original order for child support may be made retroactive to the date of filing the petition, complaint, or other initial pleading." (§ 4009.) The court used October 29, 2014, as the effective date for its support order, and the father was allowed credit for payments he made in the nature of support since that date. (3 CT 691:28 -692:3.)

VI. CONCLUSION

The mother respectfully requests that the child support order be reversed and remanded with instructions to award guideline support of $25,325 per month, retroactive to October 29, 2014, with credit to the father for the support payments he made since that date.

DATED: June 29, 2016

Respectfully submitted,

WALZER MELCHER LLP

/s/

Christopher C. Melcher
Steven K. Yoda
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

Counsel of record certifies that under Rule 8.204(c)(1) of the California Rules of Court, the Appellant's Opening Brief contains less than 14,000 words according to the program used to create this document.

DATED: June 29, 2016 WALZER MELCHER LLP

/s/
Christopher C. Melcher

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