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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of RENDA and BRIAN
JOSEPH QUINN.

RENDA QUINN,

Respondent,

v.

BRIAN JOSEPH QUINN,

Appellant.

D068829

(Super. Ct. No. D505203)

APPEAL from an order of the Superior Court of San Diego County, Harry L.

Powazek, Judge. Affirmed in part and reversed and remanded in part.

Bruce M. Beals and Stephen M. Hogan for Appellant.

Stephen Temko and Dennis Temko for Respondent.

Appellant Brian Joseph Quinn appeals from a postjudgment order granting the petition of Respondent Renda Quinn to increase spousal support and child support and

award attorney fees and costs.¹ Brian argues that: (1) the trial court did not find a material change of circumstances, as is required before a court may modify spousal support; (2) Renda achieved the statutory goal to become self-supporting in the eight years since their separation, such that an order tripling her spousal support was an abuse of discretion; and (3) the trial court abused its discretion by relying on a single, nonrecurring real estate sales commission to estimate his monthly income and calculate his support obligations.

We conclude that the trial court erred by including a single, nonrecurring sales commission to determine Brian's monthly income and using that income figure to calculate child support, spousal support and the amount he would be required to pay for Renda's attorney fees and costs pursuant to section 2030 of the Family Code.² We remand for further consideration of Brian's income and his obligations, consistent with this opinion. In all other respects, we affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Brian and Renda separated in 2007 after 16 years of marriage. Brian, a commercial real estate broker, was the sole earner during the marriage. Renda had a college degree but stayed at home to raise their triplets, who were born in 1997. After the parties separated, Renda began working at the University of San Diego, where she earned \$60,000 per year.

¹ To avoid confusion, we refer to the parties by their first names. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475, fn. 1 (*Smith*).)

² Further statutory references are to the Family Code unless otherwise specified.

The court entered a stipulated judgment of dissolution in September 2009 (2009 Judgment). The 2009 Judgment included the parties' marital settlement agreement, which resolved issues of property division, child custody, child support, and spousal support. Brian agreed to pay Renda \$550 per month in spousal support until the death of either party, Renda's remarriage, or further order of the court. Brian also committed to pay \$1,550 per month in child support. Renda retained ownership of the family home and took over the mortgage. The couple agreed to share custody of their three children. The 2009 Judgment included a *Gavron* admonishment³ that instructed each party to "make reasonable good faith efforts to become self-supporting."

Brian worked on commission. The 2008 economic downturn significantly affected his earnings. His earnings decreased from \$422,461 in 2006 to \$118,000 in 2009. In February 2010, Brian sought to modify his child support and spousal support obligations. Renda opposed Brian's request, arguing that the children's needs had increased and that she was unable to make ends meet at the current level of support. The court entered a temporary order in April 2010 based on DissoMaster⁴ results; the court maintained spousal support at \$550 per month and reduced child support to \$715 per

³ Pursuant to *In re Marriage of Gavron* (1988) 203 Cal.App.3d 705, 711-712 (*Gavron*), courts must advise supported spouses of their expectation that the supported spouse will become self-supporting within a reasonable time. Absent such notice, it is an abuse of discretion for the court to cut off support based on a supported spouse's failure to make good faith efforts toward self-support. (*In re Marriage of Schmir* (2005) 134 Cal.App.4th 43, 58.)

⁴ DissoMaster is a computer software program widely used by family law judges to set child support and temporary spousal support. (*In re Marriage of Olson* (1993) 14 Cal.App.4th 1, 5, fn. 3.)

month. In May 2010, prior to the hearing to set a permanent award, Renda and Brian stipulated to set child support at \$715 per month and maintain spousal support at \$550 per month.

Renda's gross income increased from roughly \$68,000 in 2010 to \$95,000 in 2014. Brian's gross income also increased: he earned \$158,059 in 2013, \$234,859 in 2014, and \$216,190 in the *first quarter* of 2015. In November 2014, Renda filed a request for order increasing child support and spousal support, and for attorney fees. Renda argued that Brian's income had increased substantially since 2010, whereas she was unable to make ends meet or to maintain their "upper class" marital standard of living.

Brian opposed Renda's motion, arguing that Renda had become self-supporting and that the marital standard of living had little significance eight years after separation. He contested Renda's characterization of their lifestyle during the marriage, claiming that they had "lived modestly in a tract home, bought used cars and a minivan," and visited family on vacations. Brian argued that his earnings had never returned to 2006 levels and were unlikely to do so in the coming years; although he received a \$172,753 sales commission in early 2015, he described it as an "anomaly" and a "one-time deal." Brian filed a request for order to set a date to terminate Renda's spousal support or, in the alternative, to issue a jurisdictional step-down order pertaining to spousal support. He also filed a written request for a statement of decision and factual findings as to the factors affecting spousal support.

The trial court held a hearing on both petitions on May 6, 2015. The court made preliminary findings as to certain issues and took the matter under submission. On May

13, 2015, the court informed the parties of its ruling by letter. The court increased Renda's spousal support to \$1,700 per month, increased child support to \$2,031 per month,⁵ and directed Renda's counsel to prepare an order. Renda's attorney prepared a "Findings and Order after Hearing" (FOAH), which Brian's counsel signed without objection. The court entered the FOAH in August 2015. The FOAH reiterated the court's findings from the May 6th minutes and its May 13th letter. The court issued Renda another *Gavron* admonishment and denied Brian's request "to terminate the court's jurisdiction to award spousal support to [Renda] at this time or anytime in the future." The court also ordered Brian to pay Renda \$7,500 for attorney fees and costs. Brian timely appealed.

DISCUSSION

Brian argues that the trial court committed reversible error when it increased Renda's monthly spousal support from \$550 to \$1,700 and awarded need-based attorney fees and costs of \$7,500. Brian contends that the trial court erred when it: (1) failed to issue a statement of decision or make specific findings; (2) failed to find a material change of circumstances before modifying spousal support; (3) decided the marital standard of living *de novo* on Renda's petition for modification; (4) utilized nonrecurring past income to calculate Brian's child support and spousal support obligations, and to

⁵ Child support obligations were in effect until the children married, died, reached the age of 18, or emancipated. If on reaching 18 years, a given child was not married, not self-supporting, and a full-time high school student, the order required Brian to continue paying support until that child married, died, became self-supporting, was no longer a full-time high school student, completed 12th grade, or reached 19 years of age, whichever occurred first.

order that he pay Renda's attorney fees and costs; (5) increased spousal support threefold when Renda had become self-supporting; and (6) stated that Brian could not seek to terminate spousal support at "anytime in the future." We address these arguments in turn.

I.

STATEMENT OF DECISION AND FINDINGS

Brian argues that the trial court committed reversible error by failing to issue a statement of decision or to make specific factual findings. Although Brian filed a written request for a statement of decision and findings before the court took the matter under submission, we conclude that he forfeited his right when he failed to raise the issue below in response to the court's May 13th letter or to the FOAH prepared by Renda's attorney.

If requested by a party, the trial court must issue a statement of decision providing the factual and legal basis for its decision as to each principal contested issue. (Code Civ. Proc., § 632.) Family Code section 3654 requires the court to issue a statement of decision at the request of either party when it modifies spousal support.⁶ It is reversible error if a trial court does not render a statement of decision after a timely request has been

⁶ The court was not required to make findings under section 4332; that section requires findings as to the parties' standard of living in the dissolution proceeding and does not apply to postjudgment orders modifying spousal support. (*In re Marriage of Shimkus* (2016) 244 Cal.App.4th 1262, 1278, fn. 9 (*Shimkus*).

made. (*In re Marriage of Sellers* (2003) 110 Cal.App.4th 1007, 1010 (*Sellers*); *Shimkus, supra*, 244 Cal.App.4th at p. 1278.)⁷

In January 2015, Brian filed a request for a "written decision explaining the findings of fact and conclusions of law on all controverted issues in this proceeding." Brian requested a statement of decision and "[s]pecific factual findings with respect to the standard of living during the marriage and appropriate factual determinations with respect to other circumstances on which any orders for spousal support are based." (See § 4320.⁸) Brian also sought findings with respect to Renda's request for attorney fees and costs, including as to whether there was a disparity in the parties' access and ability to pay for legal representation. (See § 2030, subd. (a)(2).⁹)

The trial court did not issue a statement of decision or make findings as to each section 4320 factor. It also did not render findings to support its award of \$7,500 in attorney fees and costs to Renda. The unsigned minutes from the May 2015 hearing and the court's May 13th letter to the parties include findings as to only some of the section

⁷ The California Supreme Court is currently considering whether the failure to issue a statement of decision upon a timely request is reversible per se. (*F.P. v. Monier*, S216566, review granted April 16, 2014.)

⁸ Section 4320, discussed *post*, defines the criteria a court must use to set a spousal support award.

⁹ Section 2030, subdivision (a)(2) provides: "When a request for attorney's fees and costs is made, the court shall make findings on whether an award of attorney's fees and costs under this section is appropriate, whether there is a disparity in access to funds to retain counsel, and whether one party is able to pay for legal representation of both parties. If the findings demonstrate disparity in access and ability to pay, the court shall make an order awarding attorney's fees and costs."

4320 factors; the FOAH merely reiterates these partial findings. The findings themselves do not disclose how the court considered the section 4320 factors or weighed the evidence introduced. (See *Shimkus, supra*, 244 Cal.App.4th at p. 1279 [court's failure to make findings was reversible error; although husband pointed to evidence that he introduced supporting the order, there was nothing to show the court actually considered that evidence" when it set spousal support].)¹⁰

However, Brian does not point to anything in the record that suggests that he renewed his request for a statement of decision at the May 2015 hearing or that he brought the lack of a statement of decision to the trial court's attention at any time thereafter. After the hearing, the court sent a letter to the parties. The court's May 13th letter made partial findings under section 4320 and directed Renda's counsel to prepare a FOAH for Brian's review. Brian's counsel signed the FOAH, and the court entered the order in August 2015. There is nothing in the record that suggests that he brought to the trial court's attention its failure to issue a statement of decision at any point after receiving the court's May 13th letter and before the August entry of the FOAH. We therefore conclude that he forfeited the matter for appellate review. (See *In re Marriage*

¹⁰ Renda points out that for hearings of less than eight hours in duration, the court may issue factual findings orally. (Code Civ. Proc., § 632.) She suggests that Brian has not shown that the trial court did not do so here. The May 6th hearing was not reported, and we do not have a reporter's transcript to facilitate review. (See Super. Ct. San Diego County, Local Rules, rule 5.1.8(B), Family Law [official court reporters are not provided in family law matters unless the parties engage a reporter at their own expense].) However, the minutes for the May 6th hearing state that the court took "the marital standard of living, child support, spousal support, and [need-based attorney] fees under submission." We therefore infer that the trial court did not issue oral findings at the May 6th hearing.

of Falcone & Fyke (2008) 164 Cal.App.4th 814, 826 ["an appellate court will ordinarily not consider procedural defects or erroneous rulings where an objection could have been, but was not raised below"]; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1138 ["It is clearly unproductive to deprive a trial court of the opportunity to correct . . . a purported defect [in a statement of decision] by allowing a litigant to raise the claimed error for the first time on appeal."]; compare *In re Marriage of Cauley* (2006) 138 Cal.App.4th 1100, 1109 [failure to renew request for statement of decision resulted in waiver on appeal] with *Shimkus, supra*, 224 Cal.App.4th at p. 1268 [appellant who requested a statement of decision and objected when one was not forthcoming preserved the issue for appeal] and *Sellers, supra*, 110 Cal.App.4th at p. 1011 [by reminding trial court of the request for a statement of decision when one was not forthcoming, appellant preserved the issue for appeal].)

II.

MODIFICATION OF SPOUSAL SUPPORT

Brian challenges the trial court's increase of Renda's spousal support, arguing that the trial court did not find a material change of circumstances; improperly reviewed the marital standard of living de novo; calculated Brian's support obligations based on nonrecurring income; and increased Renda's spousal support threefold despite her substantial increase in income. We address each of these contentions in turn. As we explain, we conclude that the trial court erred by relying on nonrecurring income to estimate Brian's monthly earnings.

A. Legal principles governing modification of spousal support and standard of review

Section 4330, subdivision (a) permits a trial court to "order a party to pay for the support of the other party an amount, for a period of time, that the court determines is just and reasonable, based on the standard of living established during the marriage, taking into consideration the circumstances as provided in Chapter 2 (commencing with Section 4320)." Section 4320 sets forth a number of circumstances relevant to setting spousal support, including the extent to which each party's earning capacity is sufficient to maintain the standard of living established during the marriage (subd. (a)); the extent to which the supported party contributed to the supporting party's training or career (subd. (b)); the supporting party's ability to pay (subd. (c)); each party's needs based on the marital standard of living (subd. (d)); each party's assets and obligations (subd. (e)); the duration of the marriage (subd. (f)); the age and health of the parties (subd. (h)); the balance of hardships to each party (subd. (k)); the goal that the supported party be

self-supporting within a reasonable time period (subd. (l)), and any other factors the court deems just and equitable (subd. (n)).

A spousal support award may be modified only if the court first finds a material change in circumstances since the time the prior order was entered. (*In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 396 (*Dietz*)). The changed circumstances requirement applies equally to modifications of *stipulated* spousal support. (*Id.* at p. 398; *In re Marriage of Aninger* (1990) 220 Cal.App.3d 230, 238 (*Aninger*)). "Absent a change of circumstances, a motion for modification is nothing more than an impermissible collateral attack on a prior final order." (*Smith, supra*, 225 Cal.App.3d at p. 480.) A change of circumstances includes all factors affecting the supported spouse's needs and the supporting spouse's ability to pay. (*In re Marriage of McCann* (1996) 41 Cal.App.4th 978, 982; *In re Marriage of West* (2007) 152 Cal.App.4th 240, 246 (*West*)). If the supported party claims changed circumstances based solely on the supporting party's increased ability to pay, he or she must *also* show that his or her needs were not met at the time of the prior order. (*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 364 (*Hoffmeister*); *Smith, supra*, at pp. 482-483; *In re Marriage of Hopwood* (1989) 214 Cal.App.3d 1604, 1608 (*Hopwood*)).

If there is a material change in circumstances, the court evaluates whether to modify spousal support based on the same factors that apply in setting initial spousal support awards. (§ 4320; *West, supra*, 152 Cal.App.4th at p. 247; *In re Marriage of Shaughnessy* (2006) 139 Cal.App.4th 1225, 1235 (*Shaughnessy*)). Although the trial court must consider all of the enumerated factors under section 4320, it has broad

discretion as to the weight to give each factor. (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 304 (*Cheriton*); *Shimkus, supra*, 244 Cal.App.4th at p. 1273.)

We review a trial court's modification of spousal support for abuse of discretion. (*Dietz, supra*, 176 Cal.App.4th at p. 398.) In exercising its discretion, the trial court must apply established legal principles and base its findings on substantial evidence. (*Shaughnessy, supra*, 139 Cal.App.4th at p. 1235.) If the trial court follows these requirements, its order modifying spousal support will be upheld regardless of whether the appellate court would have made the same order. (*Ibid.*)

Because Brian forfeited his right to a statement of decision, the issue on appeal is whether there is substantial evidence to support the trial court's implied findings. (*Aninger, supra*, 220 Cal.App.3d at p. 238; *In re Marriage of Catalano* (1988) 204 Cal.App.3d 543, 548 (*Catalano*); *In re Marriage of McHugh* (2014) 231 Cal.App.4th 1238, 1248; *In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 549, fn. 11.) "In reviewing findings supporting a trial court's exercise of discretion in modifying spousal support, ' . . . this court must accept as true all evidence tending to establish the correctness of the trial judge's findings, resolving all conflicts in the evidence in favor of the prevailing party and indulging in all legitimate and reasonable inferences to uphold the judgment' . . . '[O]ur power begins and ends with a determination of whether there is any substantial evidence which will support the conclusions reached by the trial court.' " (*In re Marriage of Stephenson* (1995) 39 Cal.App.4th 71, 82, fn. 5.)

Our review is hindered by the lack of a reporter's transcript of the May 6th hearing. An appellant bears the burden of affirmatively demonstrating error by providing

an adequate record. (*In re Marriage of Wilcox* (2004) 124 Cal.App.4th 492, 498; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 448.) "[T]he absence of a verbatim record can preclude effective appellate review, cloaking the trial court's actions in an impregnable presumption of correctness regardless of what may have actually transpired." (*In re Marriage of Obrecht* (2016) 245 Cal.App.4th 1, 9, fn. 3; see *Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259.) Absent a reporter's transcript or a statement of decision that summarizes the evidence presented at the hearing, we must presume that there was sufficient evidence to support whatever factual determinations were necessary to support the court's postjudgment order. (*Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039.)¹¹

B. *Material change of circumstances*

In order for Brian's increased earnings *alone* to constitute a material change of circumstances, Renda had to show that her needs were not met at the time the court entered the prior support order in 2010. (*Hoffmeister, supra*, 191 Cal.App.3d at p. 364; *Smith, supra*, 225 Cal.App.3d at pp. 482-483; *Hopwood, supra*, 214 Cal.App.3d at p.

¹¹ The clerk's minutes suggest that the court heard argument from counsel at the May 6th hearing, but that there was no live testimony. By contrast, the court's May 13th letter states that the court considered the "testimony of the parties" and the "court file" in making its findings. These discrepancies underscore the difficulty of appellate review without an adequate record. It is not clear whether the court heard live testimony at the May 2015 hearing, or whether it relied instead on the parties' declarations (including income and expense declarations). Brian's trial counsel, who also represents him on appeal, indicates that the trial court received no new evidence at the May hearing, and Renda does not challenge this representation. We therefore consider the declarations that the parties submitted with their requests for order in reviewing the trial court's implied findings for substantial evidence.

1608.)¹² There is substantial evidence to support the trial court's implied finding that Brian's increased earnings constituted a material change in circumstances. (See, e.g., *Catalano, supra*, 204 Cal.App.3d at p. 551 [substantial evidence supported trial court's implied finding regarding changed circumstances].) Brian admitted that his income had increased. After years of declines, his 2013 and 2014 earnings increased, albeit not to 2006 levels.

In addition, the record supports a finding that the support ordered in 2010 was insufficient to meet Renda's needs at that time. The 2009 Judgment set monthly child support at \$1,550 and spousal support at \$550, without any reference to Renda's needs at the time of separation. However, in 2010, in recognition of the fact that Brian's income had significantly decreased, Brian and Renda stipulated to decrease monthly child support to \$715 and to maintain spousal support at \$550. Declarations filed shortly before the 2010 stipulation indicate that \$550 per month was insufficient to meet Renda's needs; Renda stated that she was operating in the negative every month on the support levels set in the 2009 Judgment and that she could not make ends meet.

Brian argues that the trial court failed to give appropriate deference to the parties' stipulated spousal support award. He points to the trial court's remark that the May 6th

¹² The triplets were in their junior year of high school at the time Renda and Brian filed their requests for order. Renda argued before the trial court that Brian's termination of child support obligations in June 2016 would constitute changed circumstances justifying an increase in spousal support. Renda does not raise this argument in her reply brief on appeal, and Brian is correct that a *future* termination of child support does not constitute a material change in circumstances allowing modification of spousal support. (*In re Marriage of Stephenson, supra*, 39 Cal.App.4th at p. 81.)

hearing "was sort of a de novo hearing" to suggest that the trial court failed to find changed circumstances before it modified spousal support.

A trial court may not "simply discard the negotiated agreement and design a new one more to its liking." (*Aninger, supra*, 220 Cal.App.3d at p. 241.) On a petition to modify a stipulated support award, the trial court presumes that the parties arrived at a fair award, after arm's-length negotiations, taking into consideration all of the circumstances then in existence. (*In re Marriage of Khera and Sameer* (2012) 206 Cal.App.4th 1467, 1484 (*Khera and Sameer*); *Dietz, supra*, 176 Cal.App.4th at p. 399.) However, there is evidence in the record *from 2010* reflecting that the 2010 stipulation was not sufficient to meet Renda's needs at that time.¹³ Brian filed a request for order in February 2010 to decrease child support and spousal support from the level set in the 2009 Judgment, based on the significant decrease in his income. Renda opposed his request, stating that she could not make ends meet at the current level of support (\$550 per month in spousal support and \$1,550 in child support). In May 2010, prior to the hearing on Brian's request for order, Brian and Renda stipulated to decrease child support to \$715 per month and to maintain spousal support at \$550 per month. Because there is evidence in the record from 2010 that the 2010 spousal support order was insufficient to meet Renda's needs *in 2010*, her request for increased support does not constitute a collateral attack on the 2010 order. (Cf. *Aninger, supra*, 220 Cal.App.3d at pp. 242-243

¹³ Brian argues that Renda's petition for modification was a collateral attack on the 2009 Judgment. However, on review from the trial court's 2015 order modifying spousal support, we look to whether there were changed circumstances since the previous postjudgment order (the 2010 stipulation) that would justify modification.

["[T]he trial court was without authority to remake the agreement in ways inconsistent with the expectations and intent of the parties."].)¹⁴ Evidence of Brian's increased income, combined with evidence that the prior award was insufficient to meet Renda's needs at the time of the 2010 stipulation and order, supports the trial court's implicit finding of material changed circumstances since that order was entered.

C. *Marital standard of living*

The marital standard of living is a "general reference point" for determining the needs of the supported spouse. (*Khera and Sameer, supra*, 206 Cal.App.4th at p. 1483; *In re Marriage of Nelson* (2006) 139 Cal.App.4th 1546, 1560 (*Nelson*)). It describes the general station in life that the parties had achieved at the time of their separation.

(*Nelson, supra*, at p. 1560; *Smith, supra*, 225 Cal.App.3d at p. 491.) The FOAH stated

¹⁴ Some courts have held that a trial court may independently assess whether the supported spouse's needs were met at the time of the prior support order. (*Hoffmeister, supra*, 191 Cal.App.3d 351 at p. 361; *Smith, supra*, 225 Cal.App.3d at p. 492.) Such an assessment may invite an impermissible collateral attack on the judgment, by allowing a supported spouse to argue that his or her needs were never met in the first place, even if the record at the time of the prior support order contains no evidence to that effect. (See, e.g., *Aninger, supra*, 220 Cal.App.3d at p. 241 [supporting spouse's salary did not constitute changed circumstance because the parties presumably considered it when negotiating their marital settlement agreement]; *Khera and Sameer, supra*, 206 Cal.App.4th at p. 1483 [no changed circumstances where parties' settlement did not reveal expectation to facilitate supported spouse's attainment of education beyond a master's degree]; *Dietz, supra*, 176 Cal.App.4th at p. 399 [no changed circumstances where parties' stipulation anticipated increased value of retirement accounts].) We do not address whether a trial court may, for the first time on a petition for modification, determine whether a prior support order met the supported spouse's needs at the time it was entered, without evidence in the record to this effect from the time the order was entered. Here, declarations filed shortly before the 2010 stipulation reflect that \$550 per month was insufficient to meet Renda's needs at the time of the 2010 stipulation and order.

that the couple's marital standard of living toward the end of the marriage was "upper middle class."

Brian argues that the trial court improperly determined the marital standard of living de novo on Renda's petition for modification. The only support that he offers to indicate that this actually occurred is the court's statement in the May 6th hearing minutes that "[t]his is sort of a de novo hearing." "It is a fundamental rule of appellate review that a judgment is presumed correct and the appealing party must affirmatively show error." (*Khera and Sameer, supra*, 206 Cal.App.4th at p. 1484.) Without a reporter's transcript, we have no way of knowing whether the quoted comment impacted the court's finding as to the couple's marital standard of living.

In any event, the marital standard of living is one of the factors that a trial court must consider in evaluating a petition to modify spousal support. (§ 4320, subd. (d) [court must consider the "needs of each party based on the standard of living established during the marriage"].) While a court has discretion as to the weight it affords to each factor, it may not ignore any of the section 4320 factors in evaluating a petition to modify spousal support. (*Cheriton, supra*, 92 Cal.App.4th at p. 304; *Shimkus, supra*, 244 Cal.App.4th at p. 1273.) The trial court thus did not abuse its discretion in evaluating the marital standard of living on Renda's petition to modify Brian's support obligations.

Brian cites *Khera and Sameer, supra*, 206 Cal.App.4th 1467 for the proposition that the trial court's evaluation of the marital standard of living on Renda's petition for modification amounted to a collateral attack on the stipulated judgment. Brian misconstrues *Khera and Sameer*. In that case, a former wife challenged the trial court's

denial of her petition to increase spousal support from the amount set in the parties' stipulated agreement. She did not point to any changed circumstances, and the Court of Appeal denied her request as a collateral attack on the stipulated judgment. (*Id.* at p. 1483.) Without changed circumstances, the court did not have to consider any of the section 4320 factors, including the marital standard of living (§ 4320, subd. (d)). (See *Dietz, supra*, 176 Cal.App.4th at p. 396.) Instead, the wife pointed to the marital standard of living as an *alternate* basis to modify the award. (*Khera and Sameer, supra*, at p. 1483.) She claimed that the trial court erred when it failed to make an independent finding of the marital standard of living, given that the stipulated judgment was silent on the matter. The Court of Appeal rejected that argument as an impermissible collateral attack on the stipulated judgment. The court explained that where the parties stipulate to a spousal support award, courts must presume that the parties " 'arrived at a fair support award, after arm's-length negotiations, that took into consideration all of the circumstances as they then existed.' " (*Id.* at p. 1484.) The court also noted that spousal support did not have to permit the supported party to meet the marital standard of living. (*Id.* at pp. 1483-1484.)

Khera and Sameer stands for the proposition that where there are no changed circumstances, a petition for modification amounts to an impermissible collateral attack on the prior judgment. It does not stand for the proposition that where there *are* material changed circumstances, as the court implicitly found here, a court may not evaluate the

marital standard of living.¹⁵ The trial court was required to consider all of the section 4320 factors (*Cheriton, supra*, 92 Cal.App.4th at p. 304) and did not abuse its discretion when it considered the marital standard of living (§ 4320, subd. (d)).

Substantial evidence supports the trial court's finding that Renda and Brian's marital standard of living toward the end of their marriage was upper middle class. Before they separated, Brian's gross earnings were over \$400,000 in 2004, 2005, and 2006. The couple took two vacations per year, held country club memberships, made charitable contributions, shopped at high-end department stores, dined out, and employed a gardener and a housekeeper. While Brian submitted evidence that the couple lived modestly in a tract home, bought used cars, and spent vacations visiting family, we do not reweigh the evidence or substitute our judgment for that of the trial court. (*Stephenson, supra*, 39 Cal.App.4th at p. 82, fn. 5.) The trial court did not abuse its discretion in determining that the marital standard of living was upper middle class.

Brian is correct, however, that the marital standard of living matters less with the passage of time. (*Shaughnessy, supra*, 139 Cal.App.4th at p. 1247; *In re Marriage of Rising* (1999) 76 Cal.App.4th 472, 478, fn. 9.) The marital standard of living is merely a general reference point to assist the court in setting spousal support; it has never been considered an absolute target. (*Smith, supra*, 225 Cal.App.3d at pp. 484, 488; *Nelson,*

¹⁵ Unlike in *Khera and Sameer*, there is evidence in the record in this case that the spousal support previously awarded to Renda was insufficient to meet her needs at the time of the previous order. (Cf. *Khera and Sameer, supra*, 206 Cal.App.4th at pp. 1483-1484.) Renda's 2010 declaration, combined with Brian's increased income, supported the court's implied finding of material changed circumstances that allowed a modification of spousal support.

supra, 139 Cal.App.4th at p. 1560.) "In most instances, it is impossible at separation for either party to have sufficient funds to continue to live in the same life-style enjoyed during marriage." (*Smith*, at p. 488.)

Renda and Brian were married from 1991 to 2007 and have been separated for more than half the duration of their marriage. Because their marriage was of "long duration," the usual rubric that a supported spouse should become self-sufficient in half the length of the marriage does not apply. (*West, supra*, 152 Cal.App.4th at p. 252.) Even so, and despite their lengthy marriage, the trial court has discretion to reduce support below what would be required to maintain the marital standard of living. (*In re Marriage of Rising, supra*, 76 Cal.App.4th at p. 478, fn. 9 [court properly reduced spousal support below what was needed to maintain marital standard of living where supporting spouse provided support for 13 years after dissolution of an 18-year marriage].) Brian's gross earnings in 2014 were a little over half of what he earned in 2006. Although Brian earned \$216,190 in the first quarter of 2015, there is no indication that his current earnings enable him to provide Renda with the same lifestyle that the couple enjoyed during their marriage. (*Smith, supra*, 225 Cal.App.3d at p. 488.)

Further, "although the marital standard of living is an important factor in determining spousal support, it is not the only factor, and its importance in determining whether it is 'just and reasonable' (§ 4330) to award spousal support will vary based on the court's evaluation of the section 4320 factors." (*Shaughnessy, supra*, 139 Cal.App.4th at p. 1247; see *Smith, supra*, 225 Cal.App.3d at p. 490 ["The marital standard is just one factor to be weighed with all other applicable factors to reach a 'just and reasonable'

result."].) We therefore turn to the other section 4320 factors to determine whether the modified spousal support award was "just and reasonable." (*Shaughnessy, supra*, at p. 1247.)

D. *Brian's ability to pay support (§ 4320, subd. (c))*

Brian argues that the trial court improperly utilized nonrecurring income from a single, anomalous real estate transaction to calculate his monthly income and thus, his support obligations. We agree.

The trial court estimated Brian's monthly income as follows: It added Brian's adjusted gross income from 2013 (\$137,803), his adjusted gross income from 2014 (\$213,941) and his gross income from the first quarter of 2015 (\$216,190). The court then divided this total by 28 to arrive at Brian's average monthly gross income. There are two errors with the trial court's approach.

First, the court made a computational error when it did not estimate and deduct business expenses for January through April of 2015 from Brian's gross income for that time period. The court relied on Brian's adjusted gross income for 2013 and 2014, which deducted roughly \$20,000 in annual business expenses. By contrast, it relied on Brian's gross income for January through April 2015, without adjusting for estimated business expenses over this four-month period.

Second, and more important, the trial court's income estimate for Brian was improperly skewed by a large, nonrecurring commission that did not reflect Brian's usual earnings. Section 4320, subdivision (c) directs courts to consider the "ability of the supporting party to pay spousal support, taking into account the supporting party's

earning capacity, earned and unearned income, assets, and standard of living." The trial court may estimate a supporting party's prospective income by looking at a representative sample of past income streams. (*In re Marriage of Riddle* (2005) 125 Cal.App.4th 1075, 1082 (*Riddle*)). In most cases, a twelve-month time period is an appropriate sample. (*Id.* at p. 1083.) A longer period might be appropriate in certain cases, if that would be more representative of a party's income in the immediate future, but a period that extends back *too far* may not be representative because it might simply capture fluctuations due to long-term economic trends. (*Id.* at p. 1084.)

The trial court has discretion to select the appropriate sample to determine a supporting party's prospective earnings. (*In re Marriage of Mosley* (2008) 165 Cal.App.4th 1375, 1386 (*Mosley*)). However, "[a] sample must be representative of what is being sampled." (*Riddle, supra*, 125 Cal.App.4th at p. 1082.) It is an abuse of discretion to use an unrepresentative sample in calculating future income, such that the income determination essentially becomes arbitrary. (*Id.* at p. 1083; *Mosley, supra*, at pp. 1386-1387.) Thus, for example, in *Riddle*, the court held that it was an abuse of discretion to rely solely on the former husband's last two months of earnings because the time period was too short, and earnings during those two months were not representative of the prior year. (*Riddle, supra*, 125 Cal.App.4th at p. 1083.) As the court explained, "Husband obtained a whopping large commission in February 2003, and the trial court predicated its order on the unrealistic theory that such commissions, clearly out of line with what he was making in the previous 12 to 14 months, would continue indefinitely." (*Id.* at p. 1084.) Similarly, in *Mosley, supra*, at pp. 1385-1387, it was an abuse of

discretion for the trial court to calculate spousal support obligations based on the husband's potential bonus that was "completely discretionary" and might not recur, "especially in a precarious real estate market."

Those principles require partial reversal here. As a commercial real estate broker, Brian worked on commission. His income decreased significantly with the economic downturn in 2008 and has yet to return to pre-separation levels. Brian's gross earnings were \$422,461 in 2006, \$326,208 at the time of the parties' separation in 2007, and \$118,000 at the time of the 2009 Judgment. Brian's income began rebounding in 2013. His gross income was \$158,059 in 2013 and \$234,859 in 2014. In the first quarter of 2015, he received a sizable commission from the largest single real estate transaction of his 23-year career. Brian described the 2015 commission as "an anomaly," a "one-time deal" that was not likely to recur. Brian's employer of 23 years submitted a declaration stating that the transaction in the first quarter of 2015 represented the "largest single commission of [Brian's] career," "is not indicative of his typical earnings and will not be recurring in the future in all likelihood." This evidence was uncontroverted.

By including the anomalous 2015 commission in its sample, the trial court artificially inflated Brian's estimated gross monthly earnings. This was an abuse of discretion. (*Mosley, supra*, 165 Cal.App.4th at pp. 1386-1387; *Riddle, supra*, 125 Cal.App.4th at p. 1083.) A better approach would have been to average Brian's 2014 adjusted gross income—or, if the court deemed it proper, average his 2013 and 2014 adjusted gross income. The trial court also could have awarded Renda a fraction or percentage of the 2015 commission as an additional award. (*Mosley, supra*, 165

Cal.App.4th at p. 1387.) However, estimating Brian's prospective income by including an undisputedly anomalous transaction that clearly skewed the result constituted an abuse of discretion. (*Id.* at p. 1386.)

Renda argues that the trial court "diluted" the effect of the 2015 transaction by including Brian's 2013 income, a lower income year, in its average. While including Brian's 2013 income did have the effect of reducing the court's monthly income calculation, that did not solve the problem. Brian earned \$172,753 from the anomalous 2015 transaction; that commission is more than three times higher than his next highest commission of \$53,490, in 2014. Including a commission that was not representative of Brian's regular earnings skewed the court's estimation of Brian's estimated gross monthly income. (Cf. *Riddle, supra*, 125 Cal.App.4th at p. 1086 ["samples must be representative, not selected to skew results one way—or the other"].)

We therefore remand the matter to the trial court for further consideration of Brian's income and his support obligations. (§ 4320, subd. (c).) On remand, in determining Brian's obligations to pay child support, spousal support, and Renda's attorney fees and costs, the court must base its award on a representative sample of Brian's earnings.

E. *Other section 4320 factors*

Although Brian's earnings had increased, Renda's had as well, from \$60,000 at the time of dissolution in 2009 to \$95,000 in 2014. Brian contends that Renda had become self-supporting (§ 4320, subd. (1)), thus rendering any additional award of spousal support unwarranted. We conclude that the trial court did not abuse its discretion in

increasing Renda's spousal support, despite her substantial increase in earnings.

However, because the court relied on an unrepresentative sample to calculate Brian's earnings, we remand for further consideration of the appropriate amount of spousal support.

The trial court found Renda's monthly gross income to be \$7,900 and her monthly net income after taxes, mortgage payments, and insurance to be \$5,620. Although Renda was working to her capacity, the trial court found that her earnings did not meet her needs, given her monthly expenses of \$7,800. (§ 4320, subd. (a).) The trial court found that Renda had assets of \$350,000 and that Brian had assets of \$600,000. (§ 4320, subd. (e).) The trial court determined that Renda took care of the triplets during their marriage while Brian built his career. (§ 4320, subd. (a)(2), (b).) The court further concluded that Renda would not meet the upper middle class marital standard of living, even with increased spousal support of \$1,700 per month. (§ 4320, subd. (d).) By contrast, the court determined that Brian had the ability to pay additional support, given that his net monthly income of \$13,678 exceeded his \$11,000 in monthly expenses.

Substantial evidence supports the trial court's findings as to Renda's income, assets, and expenses and as to Brian's assets and expenses. Renda's income and expense declarations and paystubs support the findings as to her assets, earnings, and expenses. Renda's declarations indicate that she stayed at home with the children during the marriage while Brian developed his career, and that the couple enjoyed an upper middle class marital standard of living. Brian's income and expense declarations support the court's findings as to his assets and expenses.

Based on the court's findings, Renda could not make ends meet. Each month, her expenses were \$2,180 more than her net earnings. Even with an increase in spousal support to \$1,700, Renda would not be able to close this gap. Brian contested Renda's expenses and her characterization of their marital lifestyle.¹⁶ However, we do not reweigh the evidence or substitute our judgment for that of the trial court. (*Stephenson, supra*, 39 Cal.App.4th at p. 82, fn. 5.)

Considering all relevant factors, the trial court determined that it would be "just and equitable" (§ 4320, subd. (n)) to increase Renda's spousal support from \$550 per month to \$1,700 per month. However, as explained *ante*, the trial court reached this award based on its erroneous inclusion of nonrecurring income to estimate Brian's

¹⁶ Brian submitted Renda's income and expense declarations from 2010 and 2014 to show that over this period, her expenses were decreasing while her earnings were increasing. Renda's 2010 income and expense declaration showed monthly expenses of \$7,210, while her 2014 declaration showed expenses of \$6,289. However, Renda's 2015 income and expense declaration listed \$7,744 in monthly expenses. There is thus substantial evidence to support the trial court's finding that Renda's expenses were \$7,800 per month. (*Stephenson, supra*, 39 Cal.App.4th at p. 82, fn. 5.)

monthly earnings. On remand, a reevaluation of Brian's monthly earnings may affect the amount of spousal support.¹⁷

F. *Retention of jurisdiction*

Brian argues that the trial court committed reversible error by barring Brian from seeking to terminate spousal support at "anytime in the future." The FOAH indicates that the court retained jurisdiction to modify spousal support upon death of either party, Renda's remarriage, or further order of the court. The trial court did not preclude Brian from bringing a petition to terminate Renda's spousal support at a later date. To the contrary, it issued another *Gavron* admonishment to Renda, emphasizing her obligation to become self-supporting and leaving the door open to future termination of spousal support. (*In re Marriage of Gavron, supra*, 203 Cal.App.3d at pp. 711-712.)

¹⁷ We caution that spousal support is not intended to be a pension for life. "Although the marriage in this case was a lengthy one, that fact alone does not justify an unlimited spousal support award. In the absence of circumstances demonstrating that a spouse is incapable of becoming self-supporting, a person in [Renda's] position cannot reasonably expect to receive spousal support indefinitely. Rather, the spouse should expect to be required to become self-supporting within a reasonable period of time." (*Shaughnessy, supra*, 139 Cal.App.4th at p. 1249.) Renda was 43 years old and had a college degree in business at the time she and Brian separated. To her credit, she has rebuilt her career over the past eight years at University of San Diego and now holds a director-level position that pays \$95,000 per year. Their children are now 18 years old, and her household needs could decrease. In the future, changed circumstances may well warrant a reduction, termination, or step-down of Brian's spousal support obligations. (*Shaughnessy, supra*, at p. 1240 [supported party's failure to diligently seek to become self-supporting constituted a material change of circumstances allowing for modification of spousal support].)

III.

CHILD SUPPORT AND ATTORNEY FEES AND COSTS

The trial court ordered Brian to pay monthly child support of \$2,031. It also ordered Brian to pay \$7,500 for Renda's attorney fees and costs, at a rate of \$500 per month. (§ 2030.) To the extent that the court determined Brian's child support and attorney fees and costs obligations based on an incorrect assessment of Brian's monthly income, the court on remand shall reconsider Brian's child support and attorney fees and costs obligations consistent with the views expressed in this opinion.

DISPOSITION

The FOAH is reversed insofar as the trial court included a nonrecurring commission to determine Brian's earnings in order to calculate spousal support, child support, and the amount he would be required to pay for Renda's attorney fees and costs. On remand, the trial court must use a representative sample to determine Brian's monthly earnings and use this new figure to calculate spousal support, child support and his attorney fee and cost obligation. In all other respects, the order is affirmed.¹⁸ In the interests of justice, the parties shall bear their own costs on appeal.

AARON, Acting P. J.

WE CONCUR:

IRION, J.

PRAGER, J.*

¹⁸ Assuming that the parties do not settle the matter on their own, the hearing on remand should be assigned to Judge Powazek, unless he is retired, disqualified pursuant to Code of Civil Procedure section 170.6, subdivision (a)(2), or not available within the meaning of Code of Civil Procedure section 661. (*Riddle, supra*, 125 Cal.App.4th at p. 1087, fn. 12.)

* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.