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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of OLGA AND JASON
FRIEND.

OLGA FRIEND,

Respondent,

v.

JASON FRIEND,

Appellant.

E053652

(Super.Ct.No. SWD017294)

OPINION

APPEAL from the Superior Court of Riverside County. Robert W. Nagby,
Temporary Judge. (Pursuant to Cal. Const., art VI, § 21.) Affirmed in part; reversed in
part.

Law Offices of Catherine A. Vincent and Catherine A. Vincent for Appellant.

Bennett & Bennett and Kelly A. Bennett for Respondent.

I. INTRODUCTION

Jason Friend appeals from orders regarding child support, spousal support, visitation, custody, and attorney fees. He contends: (1) the trial court abused its discretion in conducting a trial on child custody and visitation when (a) court-ordered mediation had not been completed and (b) his former wife's failure to follow court orders deprived the court of a therapy report before trial; (2) the trial court erred in ordering child support to commence retroactive to a prior support order; (3) the trial court erred in modifying child support when the issue was not before the court, and he was not properly given notice; (4) the trial court abused its discretion in imputing self-employment income to him for purposes of determining child support; (5) there was no substantial evidence to support an imputation of earning capacity to him; (6) the trial court erred in imputing self-employment income to him simultaneously with unemployment income; (7) there was no substantial evidence to support an imputation of income to him based on property in foreclosure at time of trial; (8) there was no substantial evidence to support an imputation of income to him based on property in Texas; (9) there was no substantial evidence to support the trial court's factual findings under Family Code section 4320; (10) the trial court abused its discretion in making a permanent spousal support order; and (11) the trial court abused its discretion in ordering him to pay \$4,000 for Olga's attorney fees.

We conclude the trial court exceeded its jurisdiction in retroactively modifying the prior child support order, and the trial court's findings as to Jason's income are not supported by substantial evidence. We also conclude the trial court abused its discretion

in refusing to modify spousal support, and the errors also affected the attorney fee award. We therefore reverse the trial court's child and spousal support orders and attorney fee order. We find no error in the orders concerning child custody and visitation.

II. FACTS AND PROCEDURAL BACKGROUND

Jason and Olga Friend were married on August 26, 2005, and separated on March 12, 2009. They have one child, born in July 2005. In October 2009, James and Olga¹ entered into a marital settlement agreement, which provided that Olga would have sole legal and physical custody of their child, subject to Jason's right to reasonable visitation, so long as Jason was working and residing overseas, and when he returned to the United States permanently, they would share joint legal custody. Jason agreed to pay spousal support of \$3,106 per month from August 2009 through February 2012, and to pay child support of \$1,954 per month. The stated bases for support were that Jason was working overseas and earning \$15,000 per month, while Olga was unemployed and had full-time custody of the child.

On August 12, 2010, Jason filed an order to show cause (OSC) regarding modification of child custody and visitation, child and spousal support, and reimbursement of overpayment. He stated that on July 29, 2010, his contract to work overseas with a government contractor was completed, and he was currently unemployed, although he planned to start a business. He requested the court "to order guideline child support and spousal support" On his income and expense declaration, he listed

¹ We refer to the parties by their first names for clarity and convenience, and not intending any disrespect.

\$1,200 in rental income. In her response, Olga consented to guideline child support but did not consent to the spousal support order requested.

The parties participated in mediation, and the mediator filed a report with the court. The mediator stated that an investigation had taken place with Child Protective Services regarding an allegation that Jason had sexually abused the child. Jason contended Olga had fabricated the allegation to impede his ability to have contact with the child. Following forensic interviews of the child, the social worker found the allegation inconclusive. The mediator recommended therapy for the child.

On October 13, 2010, the trial court (Commissioner John Vineyard) ordered that the parents would have joint legal and physical custody of the child and established a schedule under which the child would spend 36 percent of his time with Jason. The trial court calculated Jason's income as \$1,719 and ordered Jason to pay Olga \$175 per month in child support commencing August 15, 2010. The court set the matter for "EVIDENTIARY HRG (4320 factors) / OVERAGES / CAR EXPNSE." Olga did not appeal from the child support order.

Jason filed another income and expense declaration on January 21, 2011. He declared that he had unemployment compensation income of \$1,800 per month² and rental income of \$1,200 per month. He declared, "My financial situation has changed significantly over the last 12 months because . . . [¶] Employment contract ended on

² On his declaration, he attributed the income to worker's compensation. He clarified at trial that he had listed the income on the wrong line, and the correct source of the income was unemployment compensation.

July 29, 2010. As of 3/24/2011, I will no longer receive \$1,200 mo. rental income.”

(Capitalization omitted.) He listed his real property assets as \$14,000, apparently attributable to some lots he owned in Alaska, and his debts as approximately \$75,500.

Olga filed an OSC on January 26, 2011, requesting needs-based attorney fees.

In his trial brief filed February 2, 2011, Jason stated he had previously worked as a contract employee in Iraq for SOS International, a company that “delivers private support to the U.S. military, intelligence, law enforcement and diplomatic agencies.” He stated he “agree[d] to an order for state guideline formula child support based upon the parties’ current financial circumstances,” and he requested termination of spousal support.

Olga filed an income and expense declaration on February 2, 2011. She estimated Jason’s income as \$4,681 per month, based on \$1,800 unemployment benefits, \$800 from a lobster business, and \$2,081 from consulting fees and rental income. She stated she earned \$1,650 per month as a transaction coordinator for a real estate company.

The parties filed a joint stipulation on February 8, 2011, discussed at more length below as relevant to the issues on appeal.

Trial began before Commissioner Nagby on February 15, 2011. Following trial, Commissioner Nagby continued in effect the October 13, 2010, orders regarding custody and visitation and ordered Jason to pay child support of \$1,203 per month retroactive to August 15, 2010. Commissioner Nagby imputed income to Jason as follows: \$7,192 in self-employment income; \$1,800 in unemployment income; \$1,272 in rental income from an Arizona property; and \$1,000 in rental income from a Texas property.

Commissioner Nagby ordered that spousal support of \$3,106 per month would continue under the terms of the parties' marital settlement agreement until February 2012. The court explained: "Reviewing the factors set forth in Family Law Code § 4320, the sum agreed to within the [marital settlement agreement] would be justified. [¶] (1) Although the family lived in a lower middle class existence, the court finds that the family lifestyle was well below their means and the status should have been upper-middle class. Parents travelled abroad but vacationed only on trips associated with business. The family owned a home in Arizona and other properties. Both parties now live in a shared housing situation. [¶] (2) The marriage was short in duration, was just over three (3) years and six (6) months. [¶] (3) [Jason] has advanced degrees and a history of high salary employment. [Jason] continues to have a salary much higher than [Olga]. [Olga] has vocational education attained in her country of origin and has attained licensure as a real estate agent. Although [Olga] is employed, her monthly income remains modest. [¶] iv) The basis of the spousal support order is entwined with other negotiations of the parties with regard to the division of assets. To disturb the spousal order alone in this judgment would create an inequitable result. [¶] v) Although [Jason] alleges that the spousal support order found in the judgment was based on error or excusable neglect, the court finds that a request to set aside this portion of the judgment pursuant to [Code of Civil Procedure section] 473 is untimely. [¶] vi) The court finds that no substantial change of circumstances ha[s] been proved to warrant a modification of the spousal support agreement ordered as part of the judgment." Commissioner Nagby also ordered Jason to pay Olga's attorney \$4,000 for fees.

Additional facts are set forth in the discussion of the issues to which they relate.

III. DISCUSSION

A. Request for Judicial Notice

Both parties have moved to augment the record with various documents. Neither party opposed the other's request. We deemed both motions to be requests for judicial notice, and we reserved ruling on the requests for consideration with the appeal. We deny both motions. All the documents the parties have designated relate to proceedings in the trial court after this appeal was filed, and such documents are irrelevant to the resolution of the issues before us. (See *Hard v. California State Employees Assn.* (2003) 112 Cal.App.4th 1343, 1346, fn. 2.)

B. Child Custody and Visitation

Jason contends the trial court abused its discretion in conducting a trial on child custody and visitation when (a) court-ordered mediation had not been completed; and (b) Olga's failure to follow court orders deprived the court of a therapy report before trial.

1. Additional Background

At the October 13, 2010, hearing, the trial court ordered Olga, Jason, or their attorneys "to schedule appointment with mediation prior to hearing" on February 1, 2011. The court also ordered Olga to "enroll the child in counseling with a licensed therapist"; ordered both parents to "participate and cooperate as arranged with the child's therapist"; and ordered that "Therapist shall provide a brief report to the Court."

Shortly after that hearing, Jason told Olga he had researched therapists, and the parties agreed the child would attend therapy with the therapist Jason had selected and

that Jason would enroll the child and take him to the sessions. Jason thereafter took the child to the sessions, which Olga did not attend. On January 20, 2011, Jason filed a declaration “re Status of Minor’s Counseling and Proof of Completion of Co-Parenting Counseling.” (Capitalization omitted.) Jason stated he had enrolled the child in counseling and had participated in the counseling sessions. He attached the therapist’s report, which stated that the therapist had seen the child for four sessions to help him “identify and express his feelings related to his parent[s]’ separation and how it is affecting him.” The therapist stated the child was doing well, and “according to his father he is expressing his feelings appropriately at this time.”

Mediation was scheduled in January 2011. Because Olga failed to appear, the mediation did not go forward. When the trial began on February 15, Commissioner Nagby observed that the mediation had not taken place and suggested, “Only thing we might be able to do is sever that issue with regard to the review, send folks back to mediation and then get a report on that But I’ll leave that for Counsel to discuss.” Jason’s counsel instead called Jason to the stand to begin the presentation of his case, during which he introduced evidence on the custody and visitation issues.

2. Therapist’s Report

As noted, Jason attached to his own declaration a report to the court from the therapist Jason engaged for the child. That report satisfied the court’s order that the child be enrolled in counseling and that a therapist’s report be provided to the court. It is irrelevant that Jason, rather than Olga, enrolled the child in the counseling sessions.

3. Mediation

Olga contends Jason waived the issue of the lack of a mediation report. As recounted above, at the commencement of the trial, Commissioner Nagby suggested severing the custody and visitation issues based on the lack of a mediation report. Jason's counsel did not respond to the suggestion, but instead presented his case in chief, including evidence relating to child custody and visitation. Thus, Jason has waived or forfeited any issue relating to lack of a mediation report. (See, e.g., *Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1126, fn. 3.)

In summary, we conclude the trial court did not abuse its discretion in issuing orders on child custody and visitation. We will therefore affirm those orders.

C. Jurisdiction to Enter Child Support Order

Jason contends Commissioner Nagby erred in ordering child support to commence retroactive beyond Commissioner Vineyard's prior support order, because the issue of child support was not properly before the court, Commissioner Vineyard had already conclusively ruled on the issue, and Olga had not filed an OSC for modification of child support.

1. Additional Background

As recounted above, on August 12, 2010, Jason filed an OSC to modify, among other things, child support and spousal support. Following the October 13 hearing, Commissioner Vineyard ordered Jason to pay child support in the amount of \$175 per month, effective August 15, 2010. Commissioner Vineyard had initially stated that guideline spousal support would be set at zero with the same effective date but later

vacated that order and stated, “Post judgment, after judgment has been entered. I’m required to have an evidentiary hearing regarding factors set forth in Family Code Section 4320. I’ll set that hearing date. The parties to provide information for me to consider potential modification of spousal support.” A date was set in December for “a hearing regarding spousal support,” at which the court would “take evidence and consider a modification of spousal support.” The court again stated, “I’ll address all the spousal support-related issues on that date. *Child support order is in effect as of today.*” (Italics added.) The court also set a hearing date in February for custody and visitation review. The October 13 minute order stated, “As to SPOUSAL SUPPORT: [¶] . . . [¶] Hearing re: EVIDENTIARY HRG (4320 Factors) / OVERAGES / CAR EXPNSE set 12/21/10”

The parties filed a joint stipulation on February 8, 2011, which listed the disputed issues as child custody and visitation, child support, spousal support, and attorney fees, among other things. As to child support, the stipulation stated: “On 10/13/2010 court found 36% timeshare to [Jason], imputed minimum wage income to [Olga], reduced child support from \$1,954 to \$175 per month payable [Jason] to [Olga]. [Olga] and [Jason] dispute income, existence of child support overpayments ([Jason] claims) and underpayments ([Olga] claims) and [Jason] seeks 50% timeshare calculation;”

When the hearing began on February 15, 2011, Commissioner Nagby stated, “It appears we’re here for an evidentiary hearing with regard to spousal support, child support, custody and visitation, reimbursement, attorney fees and costs.” Jason’s counsel responded: “By way of clarification, child support was actually handled last time. I

mistakenly included it in the disputed issues statement, but child support was considered, [and] set [T]he minute order from October will indicate that child support was handled at that time.” Olga’s counsel stated, “My understanding, based on a review of the minute order from prior, was that custody, visitation and support were being reviewed. And unless I misread it, I understood that support was being reviewed as well.” The court responded that the minute order of October 13, 2010, “does indicate as to spousal support, finds case is post-judgment, short-term marriage of three years, six months, an evidentiary hearing set as to the 4320 factors. . . . And then it says Court reserves on the issue with regard to spousal support overages. . . .” Olga’s counsel stated, “I think what triggered it, your Honor, for me was under the overages order. There’s an indication if there’s an overage, it would be credited at a rate. There was not a finding of overage. And because that is a part of the reimbursement claim, it seems to me that the child support amounts are at issue and remain at issue.” Commissioner Nagby concluded, “We’ll be handling the child support overpayment or arrearages, whatever it happens to be, and then the issue of spousal support and 4320 factors.” Near the conclusion of the presentation of evidence, Jason’s counsel stated to the court that “child support, again, isn’t at issue in this proceeding,” and “[i]t’s not on calendar.”

Following the hearing, Commissioner Nagby ordered Jason to pay “guideline child support in the sum of \$1,203.00 per month . . . retroactive to the date of August 15, 2010”

2. Analysis

Family Code section 3603 provides that an order for child support “may be modified or terminated at any time except as to an amount that accrued before the date of the filing of the notice of motion or order to show cause to modify or terminate.” Family Code section 3653 provides: “(a) An order modifying or terminating a support order may be made retroactive to the date of the filing of the notice of motion or order to show cause to modify or terminate, or to any subsequent date, except as provided in subdivision (b) or by federal law (42 U.S.C. Sec. 666(a)(9)).”

Under federal law, each state must have in effect procedures “which require that any payment or installment of support under any child support order, whether ordered through the State judicial system or through the expedited processes required by paragraph (2), is (on and after the date it is due)— [¶] (A) a judgment by operation of law, with the full force, effect, and attributes of a judgment of the State, including the ability to be enforced, [¶] . . . , and [¶] (C) not subject to retroactive modification by such State or by any other State; [¶] except that such procedures may permit modification with respect to any period during which there is pending a petition for modification, but only from the date that notice of such petition has been given, either directly or through the appropriate agent, to the obligee or (where the obligee is the petitioner) to the obligor.” (42 U.S.C. § 666(a)(9).)

Under those statutes, Commissioner Vineyard’s child support order was a judgment as of the date of entry. (*In re Marriage of LaMoure* (2011) 198 Cal.App.4th 807, 818-819 [Fourth Dist, Div. Two].) Such an order could be modified only from the

date of notice of a petition for modification. Olga never appealed from or filed a petition to modify that order, but she now argues that the parties, by their pretrial stipulation, conferred jurisdiction on the court to modify child support.

We agree that pretrial stipulation of February 8, 2011, was the functional equivalent of a petition and notice. By entering into that stipulation, Jason was made aware that child support would be addressed at the February 15 hearing. Thus, we conclude Commissioner Nagby had jurisdiction to make a child support order retroactive to February 8, 2011, but not before. (Fam. Code, §§ 3603, 3653.)

D. Challenges to Amount of Child Support Award

We next consider Jason's various challenges to the components of income Commissioner Nagby considered in fixing the amount of child support. Jason contends (1) the trial court abused its discretion in imputing self-employment income to him for purposes of determining child support; (2) there was no substantial evidence to support an imputation of earning capacity to him;; (3) the trial court erred in imputing self-employment income to him simultaneously with unemployment income; (4) there was no substantial evidence to support an imputation of income to him based on property in foreclosure at time of trial; and (5) there was no substantial evidence to support an imputation of income to him based on property in Texas.

1. Standard of Review

“We review a child support order for abuse of discretion. [Citation.] In so doing, we determine “whether the court’s factual determinations are supported by substantial evidence and whether the court acted reasonably in exercising its discretion.” [Citation.]

We do not substitute our own judgment for that of the trial court, but determine only if any judge reasonably could have made such an order.’ [Citation.] In exercising its discretion, however, the trial court must follow established legal principles. [Citation.] To decide whether the trial court followed established legal principles and correctly interpreted the child support statutes, we apply the independent standard of review. [Citation.]” (*In re Marriage of Alter* (2009) 171 Cal.App.4th 718, 730-731.)

2. *Additional Background*

(a) Rental income from Arizona property

On his income and expense declaration of January 21, 2011, Jason listed \$1,200 per month in rental income from an Arizona property. At the trial, he testified his tenants were moving out on March 24 because the property was in foreclosure. He produced a letter from Recontrust Company dated December 14, 2010, informing him that he owed approximately \$175,000 on the Arizona property, and the creditor was attempting to collect the debt.

(b) Rental income from Texas property

Jason did not claim any property in Texas in his discovery responses, income and expense declarations, or schedules of assets and debts, and no property in Texas was mentioned in the judgment for dissolution of marriage. The parties’ joint tax return for 2008 showed net rental income of \$7,223 based on total rent receipts of \$15,271, apparently attributable to the Arizona property. In her declaration in response to Jason’s OSC, Olga stated that Jason “also has rental property in Texas.” In her February 14, 2011, trial brief, Olga stated that Jason had income property in Arizona and Texas. When

asked at trial about “[a]ny other real estate,” Olga testified, “Well, Jason mentioned to me that he partner [*sic*] with his friends that he work [*sic*] in Afghanistan and they purchased a rental property, I believe it’s duplex or fourplex in Texas.” Jason continues to deny adamantly that he owns property in Texas.

(c) Other income

During discovery, Jason provided copies of bank statements for his personal account. The September 22, 2010, statement reflected a beginning balance of \$14,528; deposits of \$11,047; and withdrawals of \$24,049. The October 21, 2010, statement reflected deposits of \$2,528; and withdrawals of \$3,430. The November 19, 2010, statement reflected deposits of \$4,139.40; and withdrawals of \$5,116.13. The December 23, 2010, statement reflected deposits of \$7,190.67; and withdrawals of \$6,272.04 with an ending balance of \$565.32. Jason also provided bank statements for two lobster business accounts showing deposits totaling approximately \$4,500 and withdrawals totaling approximately \$2,800 from September through December 2010.

(d) Trial court’s findings

For purposes of child support, Commissioner Nagby attributed total income to Jason of \$11,264 per month, comprising \$7,192 per month from self-employment, \$1,800 per month from unemployment compensation; \$1,272 per month from the rental of Arizona property; and \$1,000 per month imputed from the rental of Texas property. With respect to Texas property, the trial court found, “No disclosure was made by [Jason] as to the rental amount received for this property. No evidence was offered regarding the fair rental value of the property or that the property was vacant and unable to be rented.

[Olga] proposes that the fair rental value to be imputed should be \$2,000.00 per month for this four-plex. According to the testimony, because there is at least one partner with regard to ownership of the property, the court imputes \$1,000.00 as the fair rental value.”

(e) Analysis

The party seeking a modification of a support order “bears the burden of showing that circumstances have changed such that modification is warranted.” (*In re Marriage of Cryer* (2011) 198 Cal.App.4th 1039, 1054.) That showing must be made through admissible evidence. (*Ibid.*; *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 298.) Here, because we construe the pretrial stipulation as the functional equivalent of a petition by Olga to modify child support, Olga bore that burden. In *In re Marriage of Loh* (2001) 93 Cal.App.4th 325, the court explained the moving party’s responsibility to conduct adequate discovery so as to meet the burden of showing such changed circumstances and outlined the remedies available when the other party fails to provide complete and accurate information. (*Id.* at p. 330.)

Jason argues the trial court erred in imputing his earning capacity based on his prior employment in extremely hazardous overseas work for a defense contractor. We agree that *if* the trial court had done so, it would have been error—no parent should be required to subject himself indefinitely to dangerous conditions overseas to maintain his earnings. Here, however, the record shows that the trial court did *not* base its calculation of Jason’s income on his supposed earning capacity as an overseas defense contractor employee. Rather, the trial court explicitly based its calculation on Jason’s *actual* deposits to his checking account over a four-month period.

Jason next argues there was no evidence he had the ability to earn \$7,192 per month through self-employment (his lobster business), as the trial court imputed, and no evidence the lobster business ever earned a profit. Again, the trial court relied on actual deposits to his bank accounts. Jason had the opportunity through discovery and in his income and expense declaration to explain the sources of those deposits and to provide information about the costs and expenses associated with his business, but he failed to do so. He is bound by the record for which he alone is responsible. In short, he is the victim only of his own lack of candor.

Nonetheless, we do agree with Jason that the trial court erred by attributing to him *both* \$7,192 per month in self-employment income and \$1,800 per month in unemployment income. The trial court reached the figure of \$7,192 per month based on actual cash deposits to Jason's bank account. However, it appears that in doing so, the trial court double counted Jason's unemployment income.

Jason next argues that the trial court erred in imputing rental income from his Arizona property because the property was in foreclosure. A support order must be based on facts and circumstances existing at the time the order is made and may be modified only on a showing that circumstances have materially changed since the previous order. (*In re Marriage of Tydlaska* (2003) 114 Cal.App.4th 572, 575.) Thus, the trial court was not required to take into account *prospective* changes in Jason's income. The trial court could properly include rental income from the Arizona property in calculating Jason's total monthly income. However, again, it appears likely the trial court double counted

Jason's rental income in that such income formed the basis for part of the cash deposits to Jason's bank account during the relevant period.

We also agree with Jason that the trial court erred in imputing income from a Texas property. Olga's testimony and the trial court's conclusions about the existence of a Texas property, the number of partners involved in that property, the size of the property, and putative rental income were mere speculation. We conclude Olga failed in her burden of establishing such income. The trial court's imputation of \$1,000 per month in rental income from property in Texas was based on insufficient evidence.³

For the above reasons, we conclude the trial court's finding that Jason's total income was \$11,264 per month is not supported by substantial evidence.

E. Spousal Support Order

Jason contends there was no substantial evidence to support the trial court's factual findings under Family Code section 4320, and the trial court abused its discretion in making a permanent spousal support order.

³ We must observe that Jason's declarations of income and expenses and his responses to discovery are incomplete to the point of disingenuousness. He has provided no satisfactory explanation for his continuing to make substantial cash deposits to his bank accounts while claiming that his only income is from unemployment compensation, and he has failed to provide current income tax returns. Although we reverse the trial court's child support award, we do not condone flouting the requirements of full disclosure on which child support orders must be based. A party who does so may expect sanctions and orders to pay costs of discovery to the opposing party. (*In re Marriage of Loh, supra*, 93 Cal.App.4th at p. 330.)

1. *Standard of Review*

The trial court has broad discretion to decide whether to modify a spousal support order, and on appeal, we review the trial court's decision for abuse of discretion. (*Tydlaska, supra*, 114 Cal.App.4th at p. 575.) However, to the extent the trial court based its decision on its interpretation of the marital settlement agreement, we determine the meaning of a contract de novo. (See, e.g., *In re Marriage of Davis* (2004) 120 Cal.App.4th 1007, 1017-1018.)

2. *Additional Background*

Paragraphs C, D, and E of the parties' 2009 marital settlement agreement were captioned "Child Support"; "Spousal Support"; and "Basis for Support (Guideline)," respectively. (Underlining omitted.) Paragraph E stated, "Husband is currently employed working overseas and earning an average of \$15,000 per month. Mother is currently unemployed and has custody of the child 100% of the time. Husband will file single for income tax purposes and Wife will file head of household." In addition, paragraph G.4 of the marital settlement agreement stated: "[B]oth parties acknowledge that the *guideline spousal support payments* to [Olga] are reduced by \$684.00 per month to reflect that [Olga] is paying the balance owed on the vehicle against her spousal support payments" (Italics added.)

In ruling on spousal support, Commissioner Nagby stated: "The court finds that nowhere in the [marital settlement agreement] does it reference that the spousal support ordered in the agreement was based on a 'guideline order.' The only reference to 'guideline' is found in paragraph E of the MSC which seems to be related to the factors

which would be utilized in calculating child support.” Commissioner Nagby then found that the amount of spousal support set forth in the marital settlement agreement was justified based on the facts that during the marriage the parties had lived below their means; the marriage was short in duration; Jason “has advanced degrees and a history of high salary employment,” and continued to “have a salary” much higher than Olga’s; Olga had obtained vocational education in her native country and had received a real estate license in California, but her monthly income was modest; the basis for spousal support was “entwined with other negotiations of the parties” regarding division of assets; and “no substantial change of circumstances [has] been proved to warrant a modification” of spousal support.

The trial court’s order was based in part on its interpretation of the marital settlement agreement. Specifically, the trial court found that spousal support in that agreement was not based on guidelines and thus was not subject to modification based on a change of circumstances. We disagree with that interpretation of the marital settlement agreement. First, Paragraph E of the marital settlement agreement states that the basis for support is guidelines. The trial court stated that Paragraph E was intended to apply only to child support; however, the sequence of the provisions of the agreement indicates otherwise: Paragraph C addressed child support; Paragraph D addressed spousal support; and Paragraph E addressed the basis for support. Thus, we conclude Paragraph E was intended to refer to both child and spousal support, not just to child support. In addition, the trial court found that the only reference to guideline support was in Paragraph E. However, Paragraph G.4, specifically relating to spousal support, stated, “[B]oth parties

acknowledge that the *guideline spousal support payments* to [Olga] are reduced by \$684.00 per month to reflect that [Olga] is paying the balance owed on the vehicle against her spousal support payments” (Italics added.) We thus conclude the trial court erred in holding that the parties did not intend to base spousal support on guidelines.

In addition, the trial court found no substantial change of circumstances to warrant modification of spousal support. However, spousal support in the marital settlement agreement was explicitly based on Jason’s then-current earnings of \$15,000 and Olga’s unemployment. At the time of the February hearing, Olga was earning \$1,732 per month and Jason’s earnings had decreased substantially. We conclude the trial court erred in failing to determine spousal support based on the current circumstances of the parties. Jason’s argument that the court erred in making a permanent support order is therefore moot.

F. Challenges to Attorney Fee Order

Jason contends the trial court abused its discretion in ordering him to pay \$4,000 for Olga’s attorney fees.

1. Standard of Review

We review the order for attorney fees under the deferential abuse of discretion standard. (*In re Marriage of Rosen* (2002) 105 Cal.App.4th 808, 829-830.) We overturn such an order only if, considering all the evidence in the light most favorable in support of the order, no court could reasonably have made such an order. (*In re Marriage of Bower* (2002) 96 Cal.App.4th 893, 902.) The record must reflect that the trial court

considered the statutory factors regarding a need-based award. (*Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238, 242.)

2. *Analysis*

The trial court may order one party to pay the other’s attorney fees when both the making of the award and its amount are “just and reasonable under the parties’ relative circumstances.” (Fam. Code, § 2032, subd. (a).) In determining what is just and reasonable, the trial court must consider a party’s ability to pay the award after payment of other obligations. (*In re Marriage of Keech* (1999) 75 Cal.App.4th 860, 867-868.)

Here, the trial court found that Jason had monthly income of \$11,264. As discussed above, that finding is not supported by substantial evidence. Because the trial court based the attorney fee award, at least in substantial part, on its erroneous finding as to Jason’s income, we will reverse the attorney fee award as well.

IV. DISPOSITION

We reverse the trial court’s orders regarding child support, spousal support, and attorney fees and remand for further proceedings on those issues. We affirm the trial court’s orders regarding child custody and visitation.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

CODRINGTON

J.