

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of LACEE and RICHARD
KRUPER.

LACEE KRUPER,

Respondent,

v.

RICHARD KRUPER,

Appellant.

G045320

(Super. Ct. No. 07D005733)

O P I N I O N

Appeal from orders of the Superior Court of Orange County, James L.

Waltz, Judge. Affirmed

Merritt L. McKeon for Petitioner and Respondent.

Law Offices of Donald A. Ellison and Donald A. Ellison for Respondent
and Appellant.

*

*

*

Richard Kruper appeals from the family court's order requiring that he pay \$3,000 a month in child support for his two minor children and \$1,000 in monthly spousal support to his former wife, Lacey Kruper, and from a separate order that he pay \$10,000 of Lacey's attorney fees.¹ Richard claims the trial judge impermissibly relied on his own experience in questioning the price Richard testified he paid for an automobile, thereby compromising Richard's credibility in a manner that could not be rehabilitated on cross-examination. Richard also contends the child support order departed from Family Code requirements for nonguideline support orders, i.e., orders not based on the parties' actual income, and he argues the trial court failed to examine the factors for spousal support under Family Code section 4320. (All further undesignated statutory references are to this code.) Finally, he asserts the attorney fee award is unfounded because the disparity of the parties' assets and monthly cash flow stemmed from his personal resources not subject to child support assessment, and the trial court incorrectly imputed income to him though he was unemployed.

As we explain, Richard's core misapprehension is he does not recognize it was his burden to prove a downward modification of his support obligation corresponding to his asserted inability to find work. He makes no effort on appeal to show how he met that burden, nor does he dispute the trial court's finding he remained "purposefully under-employed while being well supported by" the assets he claimed were beyond child support calculation. We therefore affirm the contested orders.

I

FACTUAL AND PROCEDURAL BACKGROUND

Richard and Lacey married on July 4, 2000, and separated almost seven years later on April 20, 2007. By August 2007, they reached an agreement that Richard

¹ We refer to the parties by their first names for clarity and ease of reference, and intend no disrespect. (*In re Marriage of Olsen* (1994) 24 Cal.App.4th 1702, 1704, fn. 6.)

would pay Lacey a monthly “family support” amount totaling \$6,404 to cover both spousal and child support. The couple had two young children, ages six and four, and Lacey stayed home to care for them. Richard, a successful accountant and businessman, owned a profitable commercial signmaking company (CenSource) with a business partner. Richard drew a monthly salary of \$14,000, which did not include potentially substantial bonuses and partnership distributions.

Richard and Lacey obtained a status judgment terminating their marriage on March 28, 2008, but the family court reserved other issues for later determination, including a final support order and property division. Richard’s business relationship also soured to the point of litigation in 2008: he alleged his partner froze him out of the CenSource sign company, and Richard successfully obtained court orders directing his partner to pay Richard’s \$7,000 semi-monthly salary as the pair engaged in protracted buyout negotiations. Richard’s partner apparently made the \$7,000 payments only sporadically and with court prodding. Despite the upheaval in his business life, Richard agreed in September 2008 to a final marital settlement agreement labeled “Stipulation and Order for Judgment on Reserved Issues” to continue his \$6,400 monthly support obligation. The court accepted and entered the parties’ support stipulation and it became part of the court’s judgment on reserved issues.

As Richard had agreed, the judgment required him to pay six months of support upfront, covering September 2008 through February 2009, and Richard complied. The judgment also divided the couple’s property as they agreed. For example, as relevant here, Lacey received the family home, in which she and Richard estimated they had — before the subsequent market downturn — \$400,000 to \$500,000 in equity. The judgment in turn awarded Richard “the full right to pursue the litigation against” his CenSource business partner to secure “the separate and community interests in the business . . . ,” which Richard and Lacey expected would yield far more than \$500,000 in damages or settlement proceeds. The judgment provided Richard would bear all the

litigation costs, but he was entitled to the first \$500,000 from any settlement or judgment, after deducting all attorney fees and litigation expenses.

As Lacey had agreed, the judgment provided that litigation proceeds over \$500,000 net to Richard were to be split 75 percent for Richard and 25 percent for Lacey. As Lacey also agreed, the judgment awarded Richard 100 percent of a \$170,000 check he already received from CenSource.

The judgment divided the couple's debt and obligations by awarding Richard two "underwater" residential properties in or near Las Vegas that held no equity and which Richard was eventually able to rent out, but without quite covering his monthly expenses for the properties. The judgment required Lacey to pay the first mortgage obligation of an unspecified amount on the family residence, a \$2,400 monthly payment. The judgment assigned to Richard responsibility for a home equity line of credit (heloc) in an unspecified amount on the family home, which Richard later testified required a \$400 monthly payment. The judgment specified that "[n]o community debt other than the HELOC exists." As the couple had agreed, the judgment directed Richard to make a \$40,000 equalizing payment to Lacey from the heloc.

When Richard's prepayment of family support concluded in February 2009, he filed a petition to modify his support obligation. Richard stated in his income and expense declaration that his last gainful employment (presumably with CenSource) ended in May 2008, he had expected to "be re-employed by now" but was not, and therefore he sought the modification. Richard did not suggest a new support figure, if any, but noted he was "NO LONGER EMPLOYED" (his emphasis). He admitted in his declaration, however, that despite no recent salary or wages, his "Additional Income" in the last 12 months included a \$120,000 "bonus" and \$70,000 in "Dividends from 2007." He identified accounting as his "vocational training," but did not recount any reemployment efforts since he lost his job nine months earlier.

Instead, Richard declared he was “attempting to start a new business” and complained Lacey’s failure to make her house or car payments hampered his credit because his name remained listed on those obligations and, “in order to get a new business off the ground, my credit is crucial to the success of any start-up business.” Opposing Richard’s modification petition, Lacey denied she had done anything to adversely affect his credit. According to Lacey, the car and house payments Richard claimed he had made on her behalf to protect his credit were actually deducted from the \$40,000 equalization payment he owed her and timely paid, thereby safeguarding his credit contrary to his misleading representation.

While Richard’s modification petition remained pending, he sought in June 2009 a court order to have Lacey and the children’s home sold and her vehicle returned to him because she was not making payments on either, forcing him to do so on her behalf “to protect my credit, which is crucial to my business.” Richard complained Lacey failed to make the payments “despite receiving six months of advanced support and other assets,” but he did not explain how his prepayment of support through February 2009 was relevant to Lacey’s ability to make home or car payments into June 2009, nor did he suggest he continued to meet his \$6400 support obligation or otherwise make *any* monthly support payment pending a ruling on his modification petition. It appears Richard paid the monthly mortgage on the family home (\$2,400), Lacey’s car payment (\$775), and gave Lacey \$500 a month, totaling approximately \$3,675 a month, but Richard claimed Lacey should be ordered to reimburse him for these sums, effectively leaving him with no support obligation.

Richard’s income and expense declarations stated that his salary at his new shipping company was \$2,000 in May 2009 and \$4,000 in June 2009, he started the company either in November 2008 or February 2009, and he worked 25 hours a week at the job. The record would later reflect Richard’s former business partner paid hundreds of thousands of dollars in multiple disbursements throughout 2009 into Richard’s

business lawyer's trust account in the partnership dissolution litigation, including what appeared to be sporadic payments of Richard's semi-monthly \$7,000 salary. Richard's attorney also explained that CenSource eventually made the \$7,000 payments directly to Richard instead of through the trust account. It appears Richard's position was that none of the payments constituted continuing income in his role as a CenSource principal pending final dissolution of the partnership, but instead were proceeds of his litigation against his partner, which the divorce judgment granted to him up to a net \$500,000.

Meanwhile, the Department of Child Support Services (DCSS) had attempted to enforce Richard's child support obligation, apparently with little success. Richard complained the enforcement measures hampered his credit and his attempts to grow his new business, in turn hindering his ability to make support payments. In August 2009, the family court continued an enforcement hearing at DCSS's request and, presumably at Richard's request, "temporarily" suspended his \$6,400 monthly support obligation. The court, however, ordered Richard "to continue paying the mortgage, the car payment and the \$500."

Before the next enforcement hearing, Lacey agreed in a stipulation filed with the family court in September 2009 that support would be reduced to "zero *temporarily without prejudice*," effective retroactively to Richard's February 2009 modification petition. (Italics added.) The stipulation therefore provided, and DCSS agreed, that "DCSS shall forthwith return to [Richard] any money seized from the tax refund or any other sources. There are currently no arrears. DCSS to remove any negative credit reporting from March 1, 2009 through September 30, 2009" The stipulation also provided that Richard would continue to pay the home and car payments on Lacey's behalf, plus \$500 per month "directly to her." The stipulation did not characterize these amounts as support, but instead provided that Richard was entitled to reimbursement from Lacey's share of eventual CenSource litigation proceeds, "except as to whatever amount this court deems should have been [Richard's child and spousal

support obligation] at the continued hearing.” In other words, Richard’s right to an offset depended on the court’s determination of his support obligation in his still-pending modification petition.

In the process of reaching their September 2009 interim stipulation, the parties updated their income and expense declarations. Lacey had begun working about 17 hours a week in a “Temporary Sales/Marketing” position for a gross weekly income around \$225, or less than \$1,000 per month. Richard stated in his declaration that he continued working about 25 hours a week at his shipping company, but it was “bankrupt,” had “one last possible profitable job, which would produce \$2,000,” but insupportable expenses including a \$4,200 monthly lease with 18 months remaining. His income was therefore down to “zero.”

Richard’s modification petition and other matters, including Lacey’s attempts to gain an update on Richard’s CenSource litigation, in which a provisional settlement notice had apparently been filed, remained pending and were continued to January 2010, then to April, and finally to June 2010, where they were heard before a substitute commissioner, Richard Vogl, after the former commissioner had been transferred to a new assignment. Richard declined to stipulate to Vogl as a temporary judge; nonetheless, as reflected in a later court order, the June evidentiary hearing “went forward with Commissioner Vogl sitting as a referee.” Among other recommended findings and orders, the referee concluded Richard’s child support obligation should be reduced to a total of \$2,176 a month for both children, with the proviso for an increase of 25 percent of any gross sums Richard earned over \$13,000 a month. Thus, “if [Richard] earns a gross of \$14,000 in a single month, he shall pay the support indicated above (\$2,176), plus \$250.00.” The referee reserved the matter of spousal support to a future hearing.

The referee struggled to determine an appropriate monthly income figure on which to base Richard’s child support obligation. The referee concluded absolving

Richard entirely of any child support obligation based on his reported “zero” income was “inappropriate and unjust,” and therefore warranted a departure from the guideline formula amount. The referee reasoned, “It has long been clear that a parent’s first and principal obligation is to support his or her minor children according to their circumstances and station in life. See Family Code § 4053. What is the cost [at] which [Richard] has . . . maintain[ed] his lifestyle?” The referee found from Richard’s income and expense declarations over the preceding 18 months that he was living a lifestyle with an average of \$10,600 in monthly expenses. Specifically, “[t]he court finds that to maintain his lifestyle and standard of living, [Richard] is actually expending [on] average, a [net monthly] sum of about \$10,600.” Consequently, the referee concluded Richard’s children were entitled to be supported in a manner reflecting that lifestyle, and used \$10,600 as the basis for ordering a monthly support obligation of “\$783 for the older child and \$1,394 for the younger child, for a total of \$2,176”

Richard timely objected to the referee’s recommendations and after a failed settlement conference in September 2010, the trial court set a trial de novo date in December 2010. Meanwhile, the trial court in July 2010 had temporarily fixed Richard’s support obligation at \$2,176 a month as recommended by Commissioner Vogl, subject to retroactive adjustment depending on the outcome of Richard’s petition to modify the judgment’s \$6400 monthly support figure. Richard therefore paid Lacey \$2,176 each month pending trial.

Trial finally commenced in January 2011 and over the course of three days the court heard testimony concerning settlement of the CenSource litigation and whether Richard had carried his burden to modify the family support judgment to zero based on his lack of employment income. Richard’s business attorney explained the CenSource litigation had recently settled on terms that included payments to Richard totaling more than \$300,000 in 2009, more than \$800,000 in 2010, and a further \$1.2 million to be paid in \$18,785 monthly installments from January 2011 through December 2016. The

testimony showed the CenSource funds disbursed to Richard in 2010 while he was paying \$2,176 in interim child and spousal support included approximately 11 monthly \$18,860 installments. Richard did not invest the installment funds, but instead used them for his monthly expenses, “[b]asically” living “off of the \$18,000” and bridging the gap between sometimes sporadic installments by using credit cards, which he timely paid to protect his credit.

Richard asserted at trial that of the more than \$1.1 million in CenSource payments he received in 2009 and 2010, he spent nearly \$1 million in litigation expenses, including attorney fees and fees for business valuation and other experts. Although his business attorney testified his fees totaled \$541,900, but Richard still put them closer to \$700,000 in calculating his expenses. Richard had estimated in his income and expense declaration in September 2009 that his cash, checking account, and other assets totaled only \$9,000 but, despite his contention litigation expenses exhausted virtually all the CenSource funds received through 2010, he paid \$200,000 in cash for a down payment on a home in 2010, plus \$15,000 in move-in upgrades, and he also purchased a new Mercedes for \$50,000. Richard initially testified the Mercedes cost “[a]pproximately 25 or 30,000” dollars, but when the trial court expressed surprise (“For a 2009, ML 350?”), noting, “I own one, you know,” Richard revised his estimate to \$50,000.

During the trial, the court observed that Richard “has a duty to support his children commensurate with his standard of living,” either under statutory guideline calculations (§ 4055) based on the parents’ respective incomes or on a recognized “departure theory” (§ 4056) from those guidelines. Richard’s attorney acknowledged that while “his income is zero,” which served as the basis for Richard’s modification petition, “however, I also agree that there should be some sort of a departure. Obviously, zero support isn’t going to be just, under the circumstances.”

The trial court issued its ruling in March 2011. The court concluded a departure was necessary from estimated guideline support calculations that would require

*Lacee to pay Richard \$825 a month based on her employment at \$14 an hour as an office manager and occasional CPR instructor, while Richard would pay nothing to support his children based on “working a few irregular hours as a consultant” in January and February 2011, doing accounting for a friend’s electrician business. The trial court found “the guideline result unjust and wholly inappropriate and on that basis, the court departs from the guideline formula and instead . . . orders the **father to pay the mother 3000 dollars p[er]/m[onth] as and for child support.”** (Original emphasis.)*

The trial court limited the retroactivity of its order to July 2010 when Richard began paying \$2,176 in support. The court concluded the \$3,675 a month Richard previously paid between February 2009 and July 2010, including for Lacee’s house and car payments, should be characterized as child support even though the parties earlier had agreed in a stipulation “without prejudice” to a temporary reduction from \$6404 a month to zero. The court explained, “Unless the funds are characterized as child support, the father will have paid zero to support the children during this time frame[,] escaping his moral and legal duty to do so.” The court also ordered Richard to pay \$1000 a month in spousal support, but only prospectively for one year until March 2012 because by that date the parties would be divorced for more than half the length of their almost seven-year marriage.

The trial court concluded Richard had not carried his burden to modify his child support obligation to less than \$3,000 a month. The court found “father’s explanation for his long-standing un-employment and under-employment status is not persuasive,” specifying, “The court finds the father is purposefully under-employed while being well supported by recurring and sustainable CenSou[r]ce settlement funds and while partially supported by his girlfriend’s income.” The court observed that, “[e]xcept for his failed attempt to start a business known as [K]ing Shipping, Richard has been un-employed since leaving CenSource in 2008 except for a few hours working as a consultant.” Richard’s income and expense declarations stated his role at CenSource

ceased in May 2008, he did not begin his shipping business in earnest until January 2009, it was bankrupt by September 2009, and through the succeeding 18 months into February 2011 he had only done a few hours' accounting work for a friend. The court concluded Richard was "satisfied to remain un-employed" and noted that "[w]hile the mother struggles to support herself and the children while earning a modest income, the father is living an upper middle class standard of living supported by over 18,000 dollars p[er]/m[onth]; living in a recently purchased home in an upper middle class gated community . . . and driving a newly purchased ML 350 Mercedes Benz"

Observing that Richard, in his early forties, "has a long history of earning substantial income," the court held that absent "depart[ure] from the guidelines, the father will escape his moral and legal duty to support his children commensurate with his standard of living and according to his ability." The court in a separate order also required Richard to pay \$10,000 of Lacey's legal fees based on the disparity of their monthly resources, and he now appeals.

II

DISCUSSION

A. *The Trial Court Did Not Err in Questioning Richard about the Mercedes Benz*

Richard argues the trial court "impermissibly" relied on "the trial court's own understanding" of a vehicle's value to question him about the price Richard testified he paid for it. Richard asserts reversal is required because the trial court's admitted out-of-court familiarity with the vehicle violated both his right to cross-examine witnesses and due process because it unfairly undermined his credibility. We are not persuaded.

The colloquy occurred when Richard testified he could not remember what he recently paid in 2010 for a "demo" 2009 Mercedes Benz ML 350. The following exchange ensued in which the trial court asked Richard: "Q. Do you have an estimate? [¶] A. Approximately 25 or 30,000, maybe. [¶] Q. For a 2009, ML 350? [¶] A. Yes, Your Honor. [¶] Q. With a thousand miles? [¶] A. Yes. [¶] Q. Do you want to think

harder on that. I own one, you know, so I have some basis to ask this question. [¶] A. No. I got a great deal . . . of money for the [Chrysler] 300 [trade-in]. [¶] Q. I'm asking about the purchase price. [¶] A. I don't know the exact amount. [¶] Q. I'm asking for your best estimate? [¶] . . . [¶] A. 50,000. Am I correct? [¶] Q. (Inaudible response.) You have to testify, Sir, but it's certainly not \$25,000. [¶] A. No. No. [¶] Q. You're in the ballpark at around 50 and that is all I'm asking for, just an estimate. [¶] And I'm sorry. Did you pay cash? [¶] A. Yes, Your Honor."

Richard's challenge fails because a litigant is not entitled to a trier of fact devoid of life experience. This is particularly true concerning witness credibility, where the Supreme Court has observed factfinders at trial "well may, and, in fact, must, use their own knowledge and experience in the ordinary affairs of life to enable them to see where is the truth." (*Jacksonville, M., P. Ry. & Nav. Co. v. Hooper* (1896) 160 U.S. 514, 530.) In any event, Richard's counsel neither objected to the trial court's questions, nor sought to strike or limit the inquiry. Consequently, Richard forfeited his challenge. "“No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right'" (*In re Marriage of Nelson* (2006) 139 Cal.App.4th 1546, 1558; see also *People v. Kennedy* (2005) 36 Cal.4th 595, 612 [forfeiture "prevents a party from engaging in gamesmanship by choosing not to object, awaiting the outcome, and then claiming error"].) Richard's trial counsel presumably did not object because the exact value of the vehicle was not in dispute, nor central to the litigation. And we presume the court decided the matter with scrupulous fairness according to the evidence. (Evid. Code, § 664.) There is no basis for reversal.

B. *Guideline Support Departure*

Richard challenges the trial court's departure from a guideline support determination based on his actual income (§ 4055), which was virtually zero except for a

few recent hours of contract accounting work in 2011 at the time of trial. Richard does not deny the trial court may depart (§ 4056) from the guideline formula in appropriate cases, nor does he suggest this is an inappropriate case for departure, given his attorney conceded departure was warranted. Rather, he challenges the departure on grounds the trial court “did not state the *reasons* the non-guideline support order would be in the best interests of the children.” Richard miscites the applicable code provision (§ 4056, subd. (a)(3), not subd. (c)) for the necessity of a statement the departure is in the children’s best interests, but a failure to make mandatory statutory findings constitutes reversible error only if it precludes effective appellate review (*In re Marriage of Hubner* (2001) 94 Cal.App.4th 175, 183 (*Hubner*)).

Here, the trial court amply explained that while a “parent’s first and principal obligation is to support his or her minor children” (§ 4053, subd. (a)), Richard had purposely remained underemployed and therefore, absent a departure, “father will escape his moral and legal duty to support his children commensurate with his standard of living and according to his ability.” Thus, we may readily infer as the *reason* for the trial court’s departure simply that it was not in the children’s best interest to receive no support from their father while he shirked his duty to find means to support them.

Richard makes no attempt on appeal to explain how he met *his* burden in moving to modify his support obligation to show he could not provide for his children. Richard testified at trial that he had looked “[v]ery feverishly” for work, but he submitted no documentary evidence to support his claim. Nor did he consult or rely on a vocational expert to substantiate or focus his search and meet his burden to show grounds to eliminate his support obligation for lack of ability or work opportunities. His declarations suggested that in the nearly three years since his CenSource employment ended in May 2008, he worked just 25 hours a week for eight or nine months at his shipping business before it failed. He claimed he often devoted *more* than 25 hours a week to pursuing the CenSource litigation, but in nearly the same breath he contended the

result of those efforts was not income on which to base support for his children because he and Lacey had agreed it was his separate property, at least up to \$500,000. But as the trial court explained, “Parents do not have the power to agree between themselves to abridge their child’s right to support,” and therefore Richard could not remain “satisfied to remain unemployed” solely enjoying his “property” without regard to producing means to support his children.

To the contrary, he had to find work, but he failed his burden in seeking a support modification to “establish a lack of ability [or] opportunity to earn.” (*In re Marriage of Bardzick* (2008) 165 Cal.App.4th 1291, 1308 (*Bardzick*)). Oddly, Richard relies on the principle that a parent need not work himself to death to support offspring, and instead may “weigh a reduced income against a need to spend more time with his or her family” (*id.* at pp. 1314 (conc. opn. of Rylaarsdam, J.)). But that truism in no way justifies a decision not to work *at all*,² nor what the trial court found was Richard’s “purposeful[]” unemployment. In sum, the trial court’s order and the record amply support the conclusion a departure from a guideline amount of *no* support was in the children’s best interests, and Richard’s challenge therefore fails.

C. “Imputed” Income

Richard argues that though the trial court “did not ‘impute’ an income” to him, its “non-guideline order” amounted to “a ‘back door’ method of imputing income[.]” Based on this premise, Richard challenges the sufficiency of the evidence to support imputing income to him, asserting there was no evidence he had an “‘ability to earn income and become employed.’” Richard’s challenge is fatally flawed in two respects. First, unlike guideline support, nonguideline support is by definition not

² The proposition is worthy of Huck Finn’s father and more charming literary ne’r-do-wells, but has no basis in family support law.

dependent on income (§ 4056) and therefore Richard's attempt to tie it income by imputation is a logical fallacy.

Second, Richard's fundamental misapprehension is that he does not recognize it was his burden to prove a downward modification of his support obligation corresponding to his asserted inability to find work. "For example, in the very ordinary situation where the payor parent loses his or her job and seeks a reduction in court-ordered support based on the changed circumstances of lack of income, it will be the payor parent, as moving party, who bears the burden of showing a *lack* of ability [or] opportunity to earn income." (*Bardzick, supra*, 165 Cal.App.4th at p. 1304.) Thus, "there can be no doubt that it is the moving party who bears the burden of showing sufficient facts to establish the change of circumstances that justifies modifying what a previous court order has already wrought." (*Id.* at p. 1303.) As noted, Richard failed by remaining purposefully unemployed to demonstrate his support obligation should be reduced to zero based on his lack of income.

Richard complains that in modifying his original support obligation from \$6,400 to \$3,000 in child support, the trial "plucked a number from mid-air . . . by making the order non-guideline to avoid imputing an income it could not impute." But as noted, nonguideline support is not tied to income as Richard incorrectly suggests. Additionally, in considering Richard's modification petition the trial court was not bound to a Hobson's choice of either rejecting the petition entirely and leaving his judgment support obligation unmodified or reducing support all the way to zero. Rather, nonguideline support is committed to the trial court's sound discretion and may not be disturbed on appeal absent a clear abuse of discretion. (*Hubner, supra*, 94 Cal.App.4th at p. 183.) We note the trial court's \$3,000 figure roughly split the difference between the interim, de facto support amounts of \$3,675 and \$2,176 that the parties and the referee, respectively, settled upon, and also roughly split the difference between the original \$6,400 support amount and a \$0 sum based on Richard's unemployment. But in any

event, Richard does *not* challenge on appeal the *amount* of support the trial court ordered, but that it ordered support as a “back door” method of imputing income. As discussed, that challenge has no merit.

D. *Wife’s Income, Spousal Support, and Attorney Fees*

Richard makes several unmeritorious variations of his imputed income argument. He suggests the trial court imputed his new wife’s income to him in requiring him to pay child support though he had virtually no income. Not so. The trial court did not require Richard to pay child support because his wife had an income, but because he had failed to meet his burden to prove he should be relieved of child support because he could not work or find a job.

Richard argues the trial court did not examine the factors pertinent to an award of spousal support (§ 4320). To the contrary, the trial court’s order expressly stated the court “surveyed all the applicable FC § 4320 factors and[,] among other factors, noted the parties[’] age, health, *earning capacity and financial circumstances* and the division of assets according to the judgment entered [in] 2008.” (Italics added.) Richard dismisses this recitation as “insufficient for much of the same reasons . . . the child support ‘non guideline’ [findings] are insufficient.” Specifically, “the court in deviating from the child support guidelines made a ‘non guideline’ order without imputing *any* income to Richard.” As discussed, however, there is no imputation requirement in making a nonguideline order, which by definition is not dependent on income.

Richard reiterates his imputation argument in challenging the trial court’s attorney fee order. Richard argues that in concluding he had the ability to pay a portion of Lacey’s attorney fees though it was undisputed he did not have a job, the court essentially imputed income to him. Richard italicizes portions of *In re Marriage of Keech* (1999) 75 Cal.App.4th 860, 866-867, which recognizes the validity of a fee-

shifting order, to make his argument: the court in “*determining an ability to pay*,” must consider “the *respective* incomes and needs of the parties” to ensure “*each* party has access to legal representation,” and may order “any party” to pay amounts “*reasonably necessary* for attorney’s fees . . . ,” provided it is “*just and reasonable under the relative circumstances* of the respective parties,” etc. Nothing in *Keech* prohibits the court’s attorney fee award, but instead authorizes it.

Richard asserts the trial court’s fee order “baldly state[s] that . . . Richard had the ability to pay, without factoring in the debts he assumed in the Judgment, or comparing the assets and debts awarded to Lacey,” and he complains the court “again made a finding that Richard could find a job, without any substantial evidence” But Richard again ignores *he* bore the modification burden to establish he could not find through diligent effort a job to support his children, and he continues to suppose he may rest on the CenSource proceeds until his portion is exhausted before proving he is unemployable. That is not the law.

III

DISPOSITION

The attorney fee and support orders are affirmed. Respondent is entitled to her costs on appeal.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.