

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 SCOTT E. and TANYA
McKEAN.

SCOTT E. McKEAN,

Appellant,

v.

TANYA McKEAN,

Respondent.

G045511

(Super. Ct. No. 09D004987)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Kim R. Hubbard, Judge. Affirmed.

Law Offices of Jeffrey W. Doeringer and Jeffrey W. Doeringer; J. Michael Jacob, for Appellant.

Masson & Fatini and Richard E. Masson; Broedlow Lewis and Jeffrey Lewis for Respondent.

Scott E. McKean appeals from the temporary child and spousal support order in favor of his former wife, Tanya McKean.¹ Scott contends the court made multiple errors in calculating his and Tanya's respective incomes for purposes of calculating child support, and Tanya has no need for temporary spousal support. We reject Scott's contentions and affirm the order.

FACTS & PROCEDURE

In June 2009, Scott filed a petition for dissolution of his 12-year marriage to Tanya. In 2004, Tanya and the couple's three young children were in a horrible car accident when another driver ran a red light. Their oldest daughter, Cheyenne, was killed. Their daughter Sierra suffered massive head injuries and was left with permanent major brain damage that necessitates constant medical attention and therapy. The couple had another daughter, Savannah, and their son, Wyatt, was born in March 2006. In the legal action following the car accident, Sierra received a settlement that provides \$20,000 a month for her treatment, therapy, and caregivers. Tanya received a settlement of \$2.4 million, and Scott received a settlement of \$1.2 million.

Sadly, the accident did more than take the life of one child and devastate the life of another—it left in its wake the eventual destruction of Scott and Tanya's marriage. The record is replete with accusations and recriminations leveled by each demonstrating the parties are utterly unable to agree on even the smallest of matters when it comes to Sierra's care, and to the parenting and custody of the children.

In July 2009, Scott, who is employed full-time as a police officer, filed an order to show cause (OSC) seeking child custody and child support from Tanya, who has not worked outside the home since the couple's first child was born. In September 2009,

¹ As is the custom in family law cases, we hereafter refer to the parties by their first names for ease of reading and to avoid confusion, and not out of disrespect. (*In re Marriage of James & Christine C.* (2008) 158 Cal.App.4th 1261, 1264, fn. 1.)

Tanya filed an OSC seeking spousal support. There have been numerous income and expense declarations filed in this case.

Tanya's September 17, 2009, income and expense declaration showed she had no regular income, \$3,500 in average monthly dividends or interest income, and \$2.4 million in cash accounts.

Scott's October 2, 2009, income and expense declaration showed average monthly wage income of \$6,808 and \$78 in overtime, plus \$2,952 in "other" income. Scott listed his assets as including \$1.2 million in cash accounts, with the caveat that amount "does [not] include personal injury proceeds currently in [Tanya's] possession." He claimed an estimated average of \$750 a month in investment income.

Scott's March 10, 2010, income and expense declaration showed average monthly wages of \$7,991. Although the declaration showed he had \$0 average monthly "other" income, it stated the previous month he had \$3,386 in "other" income. Scott's declared assets included \$1.1 million in cash accounts, and he again claimed an average of \$750 a month in interest or dividend income. He had \$8,350 in monthly expenses that again included \$2,700 in rent and \$300 in child care expenses.

Tanya's May 10, 2010, income and expense declaration again indicated she had no wage income, but she claimed an average of \$371 monthly in investment income, and \$2.5 million in cash accounts. She had \$10,801 in monthly expenses. The income and expense statement included Tanya's 2009 federal income tax return showing total taxable income (taxable interest, ordinary dividends, and capital gains) of \$4,452 ($\$4,452/12=\371), but also showing that in 2009 she had tax exempt interest of \$10,365.

On July 8, 2010, the court issued extensive custody and visitation orders. In its minute order the court stated it found Tanya to be "hyper-defended, has some paranoid traits and is hyper-conscious of anything to do with Sierra. Court finds this to be normal for what [Tanya] has been through but finds it may not be in the best interests of the minor children." It similarly found Scott had obvious anger directed at Tanya,

which while “natural under the circumstances, it is not in the best interests of the minor children.” While the court found both were “excellent parents,” both were in need of counseling for their respective issues. The court awarded Scott and Tanya joint legal and physical custody of the children, and approved an extensive detailed custody schedule. As relevant to the issues in this appeal, the court ordered “guideline child support, based upon the current [income and expense statement] of the parties. The Court does not impute income to [Tanya] at this time. Counsel are to meet and confer regarding child support. [¶] [Tanya] is advised that if in six months . . . she has not made any effort to find employment, the Court will impute substitute teacher salary to her. [¶] The issue of spousal support is reserved subject to retroactivity.”

The record contains a series of letters between counsel disagreeing over the parties’ timeshare to be input into the DissoMaster² for calculation of support: In short, Scott placed his time share at “50-50” while Tanya calculated it at 43 percent with Scott and 57 percent with Tanya.

Tanya’s December 21, 2010, income and expense declaration stated she had no income whatsoever, cash accounts of approximately \$2 million, and monthly expenses of \$8,995.

² The DissoMaster is one of two computer programs widely and routinely used by family law judges in California. (*In re Marriage of Carter* (1994) 26 Cal.App.4th 1024, 1027, fn. 3 (*Carter*).) Produced by California Family Law Reports, it assists courts in setting child support according to the statutory formula (Fam. Code, § 4055, all further statutory references are to Family Code), and temporary spousal support as provided by local rules for the ordinary case. (*Carter, supra*, 26 Cal.App.4th at p. 1027, fn. 3.) “The benefit of the program[] is that [it] enable[s] a family law judge to input appropriate factual information about the income of the parties and have temporary spousal support computed in accordance with local rules, automatically taking into account the tax consequences of the order to each party.” (*Ibid.*) The judge is free to make adjustments to the calculations made by the DissoMaster for unusual factors affecting temporary spousal support, and rebuttal factors to the statutory formula for child support. (*Ibid.*)

Scott's December 30, 2010, income and expense declaration showed average monthly income of \$6,412 from his job, plus \$3,207 average monthly "other" income, \$1.1 million in cash accounts, and \$750 a month in interest or dividend income. He had \$9,394 in monthly expenses, which again included \$300 a month in childcare expenses.

At a continued hearing on January 11, 2011, counsel reminded the court there were as yet no temporary support orders in place because of the dispute in calculating the timeshare. The court ordered counsel to further confer on their calculations. The court found Tanya had made no effort to find employment (Tanya had worked as a teacher before the couple had children, after which she stayed home full-time, and she indicated to the court she would not seek outside employment in view of Sierra's needs), and stated it would impute \$1,000 a month income to her. The court entered a partial judgment concerning custody and visitation awarding joint legal and physical custody and adopted a custody schedule. It reserved jurisdiction on remaining issues.

Scott's March 9, 2011, and April 6, 2011, income and expense declarations showed average monthly income of \$6,412 from his job plus \$3,207 in average monthly "other" income, \$1.1 million in cash accounts, and \$750 in interest or dividend income. Scott had \$9,394 in monthly expenses, which included \$300 a month in child care expenses.

Tanya's March 11, 2011, income and expense declaration showed she had no wage income, but stated she had \$6,000 in investment income the previous month and \$6,000 average monthly investment income and \$2 million in cash accounts. She had \$10,182 in monthly expenses.

In a minute order issued April 7, 2011, the court stated it had taken the temporary support matter under submission on March 11, 2011, at a trial setting conference. It found Scott had a timeshare of 48 percent and Tanya 52 percent. The

order attached the DissoMaster report in which the court attributed to Scott \$9,619 in wages plus \$750 a month in other income. It attributed to Tanya \$1,000 in wages plus \$500 a month in other income. Based on those numbers, the court ordered that Scott must pay Tanya \$1,763 a month in child support and \$870 a month in temporary spousal support commencing March 15, 2011, and it reserved the issue of retroactivity.

Scott filed a motion for reconsideration on the grounds Tanya's March 11, 2011, income and expense declaration was filed *after* the court took the support matter under submission and the new declaration showed Tanya had average monthly investment income of \$6,000, which had not been put into the calculations.

In her opposition, Tanya stated her March 11, 2011, income and expense declaration's reference to \$6,000 a month investment income was an error. She provided a chart showing her monthly investment income supported by various bank statements. For the months of March 2010 through December 2010, Tanya's funds were in two bank accounts (Multi Financial and Bank of America) earning nominal interest—a total of \$497.05 for the two accounts. Beginning in January 2011, the funds were moved to two different investment accounts (Arroyo Tax-Exempt and Taxable), where she earned \$1,299.98 in January 2011, and \$2,535.25 in February 2011. Accordingly, Tanya's investment income for the past 12 months totaled \$4,332.28, an average of \$361 per month. (An update to Tanya's opposition indicated she earned \$5,084.72 interest on her new accounts in March 2011.) The bank statements showed Tanya received monthly \$6,000 withdrawals from her investment account in January and February. Tanya provided a revised income and expense declaration showing her February 2011 investment income was \$2,535.29, and her average monthly investment income from February 2010 to March 2011 was \$361.

In his reply, Scott complained there was no credible explanation for the \$6,000 figure being an error. He argued Tanya should have been earning at least that much monthly interest on the \$2.4 million dollars account she controlled, and absent an

explanation for why she had not properly invested the money, the court should find the \$6,000 figure to be a correct indication of her average monthly investment earnings. Scott's reply also attached a photocopy of what he claimed was a 2009 credit card application by Tanya stating she had an annual salary from her "current employer" Tustin Unified School District of \$120,000. Scott argued the loan application supported attributing a higher monthly income to Tanya.

At the hearing on Scott's motion for reconsideration, the court expressed concern about the variances between Tanya's income and expense declarations, and granted Scott's motion for reconsideration. Tanya's counsel explained there was an ongoing dispute as to whether Tanya had been maximizing her returns on property in her control (i.e., the \$2.4 million settlement), so beginning in 2011, she moved the money from one financial planner to another and began earning more on her money. Counsel explained, "The scrivener's error isn't the \$6,000 necessarily in March. That's what she anticipates receiving. The scrivener's error is the 12-month \$6,000 that she claimed she had received. That's incorrect."

Counsel reminded the court that on July 8, 2010, it had ordered interim guideline support, to be worked out by the parties, but they were still disagreeing over timeshare matters etc., so there was as yet no monetary order. Counsel explained Tanya's income and expense declaration from the time the July 8 order was made (i.e., the May 10, 2010, statement), showed she had \$371 average monthly investment income. The court indicated it would use the figures from the old income and expense declarations to calculate support from July 15, 2010, to January 1, 2011, and then calculate support differently for the time period thereafter. When Scott continued to complain about the credibility of Tanya's income and expense declaration, the court observed that if at trial Scott could show a deliberate falsification of the income and expense declarations, "we'll deal with it at that time."

On May 24, 2011, the court issued an order granting reconsideration of the April 7 support order based on new information. It kept the timeshare the same—Scott 48 percent and Tanya 52 percent. The new support order broke support into two time periods: July 15, 2010, to January 1, 2011 (hereafter “Period One”), and January 1, 2011, and ongoing (hereafter “Period Two”). The order attached two DissoMaster reports—one for each time frame.

As relevant to this appeal, in the DissoMaster report we ascertain pertained to Period One, the court input the following data for Scott: wages \$11,377, other taxable income \$750, other nontaxable income \$0, and child support add-ons \$200. The court input for Tanya: wages \$0, other taxable income \$371, other nontaxable income \$0. Based on those figures, DissoMaster calculated presumed child support of \$2,370, and spousal support of \$1,018.

In the DissoMaster report we ascertain pertained to Period Two, the court input the following data for Scott: wages \$9,619, other taxable income \$750, other nontaxable income \$0, and child support add-ons \$200. The court input for Tanya: wages \$1,000, other taxable income \$371, other nontaxable income \$0. Based on those figures, DissoMaster calculated presumed child support of \$1,821, and spousal support of \$862.

In the actual order, the court ordered that for Period One (July 15, 2010-January 1, 2011), Scott must pay Tanya \$2,370 per month in child support plus arrearages. The court reserved jurisdiction on the issue of spousal support for Period One. For Period Two (January 1, 2011, and ongoing) the court ordered Scott to pay Tanya \$1,821 per month in child support plus arrearages, and \$862 a month in spousal support, plus arrearages.

On May 31, 2011, Scott filed written objections to the trial court’s calculation of support. He asserted as to Period One support: (1) the court input the wrong wages for Scott—Scott’s March 2010 income and expense declaration showed

wages of only \$7,991, but the court input \$11,377; (2) court charged Tanya with only the \$371 in taxable investment income she claimed but should also have charged her with the \$10,363 in nontaxable interest that was listed on her 2009 tax return (another \$864 a month); and (3) the court erroneously input only \$200 in child care expenses (child support add-ons) when Scott's income and expense declaration claimed he had \$300 a month in such expenses. As for Period Two, Scott objected: (1) the court erroneously charged Tanya with only \$371 a month in other taxable income and should have charged her with the \$6,000 listed on her original March 11, 2011, income and expense declaration, which was consistent with what her counsel indicated she anticipated she would receive on her settlement proceeds and reflected her current account gains; and (2) the court should have input \$300 a month in child care expenses for Scott because that was what he claimed.

The record does not indicate if the court ever ruled on Scott's objections. Scott filed a notice of appeal designating the April 7 and May 24 orders.

DISCUSSION

Scott challenges the order awarding temporary child and spousal support. He contends the order was based on incorrect financial information because: (1) the court failed to adequately attribute income to Tanya based on income she either was or should have been earning on the \$2.4 million cash account she controlled; and (2) the court made other errors in inputting Scott's financial information. We find no abuse of discretion and affirm the order.

General Legal Principles

The general legal principles are nicely set forth in *In re Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317 (*Wittgrove*), and we repeat them here. "Pending a marriage dissolution or legal separation action where there is an issue of support of a minor child, the court may order either or both parents to pay 'any amount necessary for the support of the child' (. . . §§ 3600, 4001), and may order either spouse to pay 'any

amount that is necessary’ for the other spouse’s support, consistent with the requirements of sections 4320, subdivisions (i) and (m), and 4325. (§ 3600.)” (*Wittgrove, supra*, 120 Cal.App.4th at p. 1326, fn. omitted.)

“With regard to child support, notwithstanding the language of section 3600 regarding ‘any amount necessary,’ courts are required ‘to adhere to the statewide uniform guideline and may depart from the guideline only in the special circumstances set forth in this article.’ (§ 4052.) As pertinent here, the statutory formula for computing child support in section 4055 yields a presumptively correct amount of support per child which may only be rebutted ‘by admissible evidence showing that application of the formula would be unjust or inappropriate in the particular case [¶] Although section 4053 grants a court broad discretion in applying the principles in implementing the statewide uniform guidelines for child support, the main concern is the child’s best interests. (§ 4053;)” (*Wittgrove, supra*, 120 Cal.App.4th at p. 1326.)

“We review child support awards under an abuse of discretion standard. [Citation.] ‘We cannot substitute our judgment for that of the trial court, but only determine if any judge reasonably could have made such an order. [Citation.] Our review of factual findings is limited to a determination of whether there is any substantial evidence to support the trial court’s conclusions. [Citation.]’ [Citation.]” (*Wittgrove, supra*, 120 Cal.App.4th at p. 1327.)

“We also review temporary spousal support orders under the abuse of discretion standard. [Citation.] Generally, temporary spousal support may be ordered in ‘any amount’ based on the party’s need and the other party’s ability to pay. [Citations.] ‘Whereas permanent spousal support “provide[s] financial assistance, if appropriate, as determined by the financial circumstances of the parties after their dissolution and the division of their community property,” temporary spousal support “is utilized to maintain the living conditions and standards of the parties in as close to the status quo position as possible pending trial and the division of their assets and obligations.” [Citations.]’

[Citation.] The court is not restricted by any set of statutory guidelines in fixing a temporary spousal support amount. [Citation.]” (*Wittgrove, supra*, 120 Cal.App.4th at p. 1327.)

“Rather, in exercising its broad discretion, the court may properly consider the ‘big picture’ concerning the parties’ assets and income available for support in light of the marriage standard of living. [Citation.] Subject only to the general ‘need’ and ‘the ability to pay,’ the amount of a temporary spousal support award lies within the court’s sound discretion, which will only be reversed on appeal on a showing of clear abuse of discretion. [Citation.]” (*Wittgrove, supra*, 120 Cal.App.4th at p. 1327.)

Period One Child Support

With these general principles in mind, we turn to the orders. The temporary support orders were based on straightforward DissoMaster calculations broken into two time periods. The court identified Period One as being from July 15, 2010, to January 1, 2011, which roughly corresponds to the date of the hearing at which the court first ordered “guideline” child support (July 8, 2010) and the date on which the court would begin imputing income to Tanya (the court warned Tanya that absent evidence she was looking for employment, it would begin imputing income to her in six months).

Scott challenges the award of \$2,370 a month temporary child support *and* \$1,018 a month temporary spousal support for Period One. However, in view of the fact the trial court *did not* order any spousal support for Period One—the May 24, 2011, minute order states the court reserved jurisdiction on the issue of spousal support for Period One—we need not address Scott’s arguments concerning spousal support for Period One.

As for Period One child support, the trial court calculated support utilizing the parties’ income and expenses declarations on file at the time of the July 8, 2010, order—Scott’s filed March 10, 2010, and Tanya’s filed May 10, 2010. Scott contends the trial court made three errors in its Period One calculations: (1) it charged Scott with

\$11,377 a month wages and salary, when his income and expense declaration showed he had only \$7,991 in average monthly wages; (2) it credited Scott with only \$200 a month in childcare expenses, when he declared he had \$300 a month in childcare expenses; and (3) it failed to include in Tanya's monthly income the tax exempt interest shown on her 2009 income tax return. We will abide by the court's calculations if supported by any substantial evidence. (*In re Marriage of Chandler* (1997) 60 Cal.App.4th 124, 128 ["Our review of factual findings is limited to a determination of whether there is any substantial evidence to support the trial court's conclusions"].)

Scott's Inputs

The trial court did not abuse its discretion by charging Scott with \$11,377 in average monthly wages and salary for Period One based upon his March 10, 2010, income and expense declaration. The form income and expense declaration contains two columns—the left side is the last month's income for each category and the right side is the average monthly income (i.e., all income received in that category for the last 12 months divided by 12). On his March 10, 2010, statement Scott listed on line 5a, average monthly wages of \$7,991. On line 5l, under "other" income Scott declared that in the last month (i.e., the left hand column) he had \$3,386 income from "court, holiday, longevity . . ." pay, but he put \$0 in the right hand average monthly column. The trial court obviously construed this as a typographical error on Scott's part and it carried the \$3,386 figure from the last month to the average monthly column: $\$7,991 + \$3,386 = \$11,377$. It did not abuse its discretion in so doing. We disagree with Scott's suggestion that carrying his last month's "other" income into the average monthly column violated the rule the court consider an appropriate "representative sample" of the income (see *In re Marriage of Riddle* (2005) 125 Cal.App.4th 1075, 1081-1084 (*Riddle*)). The figure comports with other income and expenses declarations Scott has filed (e.g., October 2, 2009—\$2,952.50 average monthly "other" income; December 30, 2010, March 9, 2011, and April 6, 2011—\$3,207 average monthly "other" income).

Nor can we say the trial court abused its discretion by setting Scott's monthly childcare add-on at \$200, when Scott's March 10, 2010, income and expense declaration stated he had monthly child care expenses of \$300. Section 4062, subdivision (a)(1), requires a child support "add-on" only for *employment-related* child care costs only. As Tanya points out, the parties' custody sharing arrangement is designed to place the children in Scott's custody on the days he does not work. Thus, we cannot say the court abused its discretion by adjusting his allowable work-related childcare expenses to \$200 a month.

Tanya's Inputs

Finally, Scott complains the trial court failed to accurately input Tanya's Period One income. The DissoMaster report for Period One input for Tanya \$371 in monthly "other taxable income" and no other income. Tanya's May 10, 2010, income and expense declaration listed as her only income an average of \$371 monthly in investment income for the past 12 months and her assets were \$2.5 million in cash accounts. The declaration attached Tanya's 2009 federal income tax return showing total taxable income (taxable interest, ordinary dividends, and capital gains) of \$4,452 ($\$4,452/12=\371), but also showing 2009 tax exempt interest of \$10,365. Scott contends that because Tanya's 2009 tax return is presumed correct (see *In re Marriage of Loh* (2001) 93 Cal.App.4th 325, 332), an additional \$10,365 should have been included as part of Tanya's income—a monthly average of \$863.75.

We cannot say the trial court abused its discretion by not including Tanya's 2009 reported tax exempt interest as it is not clear it was representative of her income during the time frame of the Period One support was to cover, i.e., July 2010 to January 2011. Section 4055's formula for determining child support is "predicated on knowing what both parents' income is in nominal static dollars at the time the order is made." (*In re Marriage of Hall* (2000) 81 Cal.App.4th 313, 317-318, fn. omitted.) When income fluctuates, the court looks at a representative time period to assess income. (*Riddle*,

supra, 125 Cal.App.4th at p. 1081.) The goal is to arrive at a stable number that reasonably predicts what each spouse will earn in the immediate future. (*Ibid.*) “Past income is a good measure of the future income from which the parent must pay support.” (*M.S. v. O.S.* (2009) 176 Cal.App.4th 548, 554.) But “the time period on which income is calculated must be long enough to be *representative*, as distinct from *extraordinary*.” (*Riddle, supra*, 125 Cal.App.4th at p. 1082.) It is an abuse of discretion “to take so small a sliver of time to figure income that the determination essentially becomes arbitrary.” (*Id.* at p. 1083 [two months].) As a general rule, “the most recent 12 months” is appropriate in most cases. (*Id.* at p. 1083.)

There is nothing in the record indicating when in 2009 Tanya received the tax exempt interest, i.e., whether it was received during the 12 months preceding her May 2010 income and expense declaration. The fact she did not include it on her May 2010 income and expense declaration in her average “other” income for the past 12 months, supports the conclusion it was not received during the past 12 months, and thus not indicative of what her income was likely to be during the support time frame. Indeed, we note the documents Tanya provided in opposition to Scott’s motion for reconsideration bear this out—they show that from March 2010 through February 2011, Tanya received a total of \$4,332.28 in investment interest, an average of \$361 a month, which is consistent with the \$371 average monthly interest she listed on her May 2010 income and expense declaration. In short, Scott has not demonstrated the trial court abused its discretion in calculating presumed child support for Period One.

Period Two Child and Spousal Support

Scott contends the trial court’s temporary support award for Period Two constitutes an abuse of discretion because the court failed to accurately account for Tanya’s investment income. Scott contends Tanya was either receiving considerably more interest than she claimed on the \$2.4 million personal injury settlement proceeds she controlled, or the trial court should have imputed to Tanya a higher rate of investment

return and/or taken into account her unrealized gains on her investment account. We find no abuse of discretion in setting Tanya's income for purposes of calculating temporary support.

The trial court identified Period Two as being from January 1, 2011, forward. The court ordered temporary support in the amounts set forth on the DissoMaster report, showing the following inputs as relevant here: (1) for Scott average monthly wages of \$9,619, other taxable income \$750, and child support add-ons of \$200;³ and (2) for Tanya average monthly wages of \$1,000 (imputed), other taxable income \$371, other nontaxable income \$0. Based on those figures, the DissoMaster set presumed child support at \$1,821, and spousal support at \$862.

Scott contends the trial court should have input a minimum of \$6,000 in average monthly income for Tanya based upon the original income and expense declaration she filed on March 11, 2011, on which she claimed \$6,000 in investment income the previous month and \$6,000 average monthly investment income. But Tanya explained the \$6,000 figure was an error. She provided documents showing from March 2010 through December 2010, she earned a total of \$497.05 interest, but after moving her funds, in January 2011 she earned \$1,299.98, and in February 2011 she earned \$2,535.25. Accordingly, her interest income from March 2010 through February 2011 was \$4,332.28, an average of \$361 per month.

Scott complains Tanya's explanation and statements as to her income are not to be believed because she offered no reasonable explanation as to why her original March 11, 2011, income and expense declaration was in error, and she has failed to accurately account for investment interest she claimed on earlier declarations (e.g., Tanya's September 17, 2009, income and expense declaration claimed \$3,500 in average monthly investment income). But we are only concerned with whether substantial

³ As to his inputs, Scott's only challenge as to Period Two is as to the child care expense add-on, which we have already addressed and rejected above.

evidence supports the order and have no power to judge Tanya's credibility. (*In re Sheila B.* (1993) 19 Cal.App.4th 187, 199 ["It is axiomatic that an appellate court defers to the trier of fact on such determinations, and has no power to judge the effect or value of, or to weigh the evidence; to consider the credibility of witnesses; or to resolve conflicts in, or make inferences or deductions from the evidence".])

Scott's arguments and the evidence were before the trial court. Although some of Tanya's reasoning is shifting, it is not entirely inconsistent. Tanya's counsel indicated below that the \$6,000 a month erroneously listed as her average monthly income was what Tanya was hoping to get from her newly moved investment account; on appeal, the explanation is a tad more cogent—\$6,000 was not the "earnings" on the account, but what she was going to regularly withdraw monthly from her investment account to help with her expenses. The latter explanation comports with the documents from below showing a \$6,000 withdrawal in February and March 2011.

Scott separately argues the trial court should have set Tanya's income at a minimum of at least \$6,000 a month and perhaps even at \$10,000 a month, based upon a document he attached to his reply to her opposition to his motion for reconsideration. Scott attached a photocopy of what he claims is a 2009 credit card application by Tanya that he had obtained by subpoena. He argues Tanya claimed to have an annual salary from her "current employer" of 16 years, Tustin Unified School District, of \$120,000, and a household income of \$120,000. Scott argues the court could find Tanya's income as stated on a loan application is a correct statement of her income, or at least as proof she had at least that much in investment earnings. The pages to which Scott refers are completely lacking in any evidentiary foundation. They appear to be a bank/lender computer generated document and there is nothing to confirm their authenticity or that any of the information thereon was supplied by Tanya. The trial court rightly did not consider the documents in its recalculation of support on his motion for reconsideration and we decline to further consider Scott's arguments concerning this document.

Scott counters that \$6,000 a month investment income was the minimum Tanya should be charged with because she should have been earning at least that much interest on her \$2.4 million settlement fund and the court should have taken into account her unrealized gains on her investment account. Generally a personal injury settlement is not income for purposes of calculating support. (*In re Marriage of Rothrock* (2008) 159 Cal.App.4th 223, 232.) And while interest and dividends *actually earned* constitute income for purposes of child support (*County of Kern v. Castle* (1999) 75 Cal.App.4th 1442, 1453), principal and unrealized gains do not. (*In re Marriage of Pearlstein* (2006) 137 Cal.App.4th 1361, 1373-1374 & fn. 10, 1375 (*Pearlstein*) [excluding from income (1) market value of stock on which gain has not yet been realized and (2) proceeds of assets sold for purposes of reinvesting in income-producing assets]; see *In re Marriage of Henry* (2005) 126 Cal.App.4th 111, 119 [“Every type of income . . . is money actually received by the support-paying parent, not merely the appreciation in value of their assets. . . . If the Legislature had intended that the unrealized increase in the value of an asset should be considered income, it would have said so”].)

There is authority for imputing income on an asset of a support obligor as part of the court’s discretion to consider a parent’s earning capacity. (§ 4058, subd. (b).) In *Pearlstein, supra*, 137 Cal.App.4th at page 1373, the court noted that “where the supporting party has chosen to invest his or her funds in non-income-producing assets, the trial court has discretion to impute income to those assets based on an assumed reasonable rate of return. [Citations.]” (Footnote omitted.) But the court may impute income only so long as it would be “consistent with the best interests of the children.” (§ 4058, subd. (b); *In re Marriage of Destein* (2001) 91 Cal.App.4th 1385, 1391, 1392-1393 (*Destein*).)

Here, there are several problems with Scott’s position. First, while the \$2.4 settlement fund is controlled by Tanya, Scott apparently asserts a community property interest in those settlement proceeds (although he does not suggest the \$1.2

million settlement fund he controls is similarly community property). There has not yet been a final adjudication of the character of the settlement funds, nor has it been awarded to Tanya as her separate asset. Additionally, Scott presented absolutely no evidence the needs or best interests of the children merited imputing income to the principal of Tanya's settlement account at this time, and he presented no evidence the investment account could have been safely invested to earn a higher yield. In contrast, in *Destein, supra*, 91 Cal.App.4th at pages 1396-1397, the court imputed income based on expert testimony concerning husband's real estate holdings, considering factors such as the non-income-producing history of the assets, how long the husband had owned the assets, the market for real estate, and the disparity in the children's lifestyles at the home of each parent. There is nothing similar here. Under these circumstances, Scott cannot establish the trial court abused its discretion by not imputing income to Tanya's investment account (or for that matter to Scott's investment account) *at this time* for purposes of calculating child support.

Scott separately argues that distinct from the relevance of Tanya's \$2.4 million settlement in calculating her income for purposes of child support, is its relevance to awarding Tanya temporary spousal support of \$862 a month. In short, he argues that because Tanya has the settlement money, she has no need for temporary spousal support, and it was an abuse of discretion to award temporary spousal support. We disagree.

The purpose of temporary spousal support is to maintain the parties' living conditions and standards as close to the status quo position as possible pending trial and division of assets and obligations. (*In re Marriage of Burlini* (1983) 143 Cal.App.3d 65, 68; *Wittgrove, supra*, 120 Cal.App.4th at p. 1327.) Moreover, the purpose of a temporary support order is not to determine the merits but “solely to preserve the family and the [supported spouse's] separate property intact until the court eventually determine[s] the case on the merits.” [Citations.]” (*In re Marriage of Askmo* (2000) 85 Cal.App.4th 1032,

1038.) The settlement money has not yet been confirmed as Tanya's separate property, and her earnings at the time the support order was made were meager (as were Scott's earnings on his \$1.2 million cash account). By contrast Scott has almost \$10,000 a month in wage income. We cannot say the court abused its discretion by not requiring Tanya to solely rely on her settlement account for her own support at this point in the proceedings.

DISPOSITION

The order is affirmed. Respondent is awarded her costs on appeal.

O'LEARY, P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.