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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

M.V.,

Respondent,

v.

K.B.,

Appellant.

H038905

(Santa Clara County

Super. Ct. No. 107CP015749)

**I. INTRODUCTION**

Upon application of M.V., the trial court reduced his child support obligation for his nine-year-old son pursuant to the guideline formula. On appeal, K.B., the mother, contends that the court abused its discretion by failing to order child support in excess of guideline, based on the existence of special circumstances under Family Code section 4057.<sup>1</sup> According to mother, the special circumstances are that she and father share equal time with their son, and that she spends a greater percentage of her income for housing than father. (*Id.*, subd. (b)(5)(B).)

For reasons that we will explain, we will affirm the judgment.

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<sup>1</sup> All further statutory references are to the Family Code unless otherwise indicated.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### ***A. Father's Application for Modification of Child Support***

In October 2011, father filed an application for modification of child support, requesting that it be reduced from \$2,427 per month under an existing order to \$709 per month. Father sought to have child support “set at guideline” to reflect “an equal timeshare” of the child. In a supporting declaration, father stated that the existing order was based on (1) mother having primary physical custody of their son and father “having 20% timeshare,” (2) an inflated monthly income figure for father, and (3) an outdated monthly income figure for mother.

### ***B. Mother's Responsive Declarations***

In a responsive declaration dated February 21, 2012, mother stated that she did not consent to the order requested by father, but that she did consent to guideline child support. The parties filed multiple income and expense declarations between 2011 and 2012.

On July 11, 2012, mother filed an amended responsive declaration in which she stated that “[c]hild support [should] be increased consistent with the best interests of [the child] pursuant to Family Code sections 4053 and 4057.” She contended that there was a “significant disparity in the standard of living between” when the child was with her and when the child was with father. She argued that child support “should be increased to minimize the disparity in the living standards in the two homes.” She stated that although she and father “share approximately equal time” with their child, she spends “a much higher percentage of [her] income for . . . housing as compared to [father], and [he] spends a much lower percentage of his income for housing.”

### ***C. The Hearing***

An evidentiary hearing was held on June 25 and August 13, 2012. The parties and their accounting experts testified. Father presented evidence first, although mother's expert testified out of order.

Relevant to this appeal, mother's expert Michael S. Thompson, a certified public accountant, testified that he looked at Schedule C from mother's 2011 tax return. It reflected that mother, a small business owner, had approximately \$246,000 in gross revenue. It also reflected that after deducting expenses for running the business, her annual taxable income was \$14,359. Thompson divided that amount by 12 to determine her monthly income of \$1,197. Thompson did not evaluate any of the expenses that mother deducted from her gross revenue, and mother did not show him any documentation to establish the basis for those expenses. Thompson acknowledged that if mother worked 40 hours per week as stated in her income and expense declaration, she would probably be earning less than minimum wage.

Mother was called as an adverse witness under Evidence Code section 776.<sup>2</sup> She testified that she was a self-employed internet sales and consignment services operator. Prior to 2010, she bought items and sold them on the internet. Beginning in April 2010, she became a "trading assistant as an eBay registered drop-off location." In this role, instead of buying her own inventory, she receives items on consignment. Her clients bring her items to sell, she posts it on eBay, and then she takes a commission. Mother testified that she worked 40 hours per week or more.

According to her income and expense declaration, mother's income before taxes was \$1,241 per month. Mother testified that this amount was based on her 2011 tax return. She did not know why her calculation of \$1,241 per month differed from her expert Thompson's calculation of \$1,197 per month, which was based on the same tax return. She testified that Schedule C (profit or loss from business) from her 2011 tax return reflects gross receipts of \$246,336 for the used merchandise that she sold on eBay. She explained that out of this amount, she paid clients and expenses, such as postage,

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<sup>2</sup> Evidence Code section 776, subdivision (a) states: "A party to the record of any civil action . . . may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by the party calling the witness."

subcontractors, and rent for a warehouse. After subtracting these amounts, her 2011 federal tax return lists business income of \$14,359.

Mother has a degree in justice studies and attended a master's program in justice studies for one and half years. She previously worked as a wine broker making \$30,000 a year. Mother's household includes her boyfriend, their two children who are four and five years old, her boyfriend's three children who are 22 years old and 18-year-old twins, and mother's child with father. Mother testified that in addition to the income she earns and the child support of \$2,427 that she receives from father, her boyfriend contributes to the household the amount of \$1,400, which is a death benefit from his deceased wife.

Mother testified that she moved into a single-family home in August 2012, and that the rent is \$2,795 per month.

On the second day of the hearing in August 2012, mother testified that after the first day of the hearing in June, her counsel told her to go home and get "every record that . . . proves every item" in her 2011 federal tax return because an issue had arisen at the hearing as to whether mother could prove that the tax return was correct. Mother testified that the records she collected, which were admitted into evidence as exhibit F, substantiated her gross income and deductible expenses for her business for 2011. She acknowledged, however, that if someone pointed to one of the lines on her tax return, she would not be able to show in a reasonable period of time the corresponding entries in exhibit F. She indicated that exhibit F is not what she would use to do her tax return. Instead, she would need to go online and "extract information from PayPal," which issues 1099 forms to her and provides an annual history report concerning her internet sales and consignments.

Before father rested his case, the court admitted several exhibits into evidence, including father's income and expense declaration which was filed June 22, 2012. In the declaration, father estimated his average monthly expenses to include \$1,959 for a home mortgage, \$452 for real property taxes, and \$148 for homeowner's insurance.

After father rested his case, mother's counsel indicated to the court that mother had filed the amended responsive declaration on July 11, 2012 "to conform to the evidence" that had been presented on the first day of the hearing in June. Mother's counsel then made an opening statement in which he characterized the parties' case as one involving special circumstances warranting a deviation from guideline child support. Counsel referred to section 4057, subdivision (b)(5)(B), involving the special circumstance in which both parents have substantially equal time-sharing of the child and one parent has a much lower or higher percentage of income used for housing than the other parent. Counsel stated that mother would be spending 108 percent of her gross income for housing in the next month while father would be spending 18 percent of his gross income for housing. In addition, counsel stated that the evidence would show a "great disparity in [the child's] standard of living when he's with his dad and his standard of living with his mom," and that it was "appropriate to make a support order that improves the standard of living in the custodial home." Mother's counsel sought a child support award of \$6,000. The court thereafter heard further testimony from mother and father, and received various exhibits into evidence.

***D. The Statement of Decision and Order***

The court filed a proposed statement of decision and an amended proposed statement of decision. The record reflects that father filed objections to both proposed statements.

On September 28, 2012, the court filed a statement of decision and order. The court's summary of the evidence concerning the living situation and finances of the parties included the following.

Father was paying child support of \$2,427 per month. For the past three years, his son had been spending half the time with him.

Father had a weight room and a basketball net at his home, which was on a 1.1 acre property. He had a pool installed on the property for \$40,000. Father also

purchased rental property. He paid for vacations with his son to Disneyland, Lake Tahoe several times, and Hawaii twice. Father was a part owner/shareholder of a corporation that operated three liquor stores. The court found father's income to be as follows: \$8,497 in salary, \$8,726 in additional taxable income, and \$5,421 in nontaxable income.

Regarding mother, she lived with her boyfriend, their two children, the boyfriend's three older children, and mother's child with father. The boyfriend received a death benefit as father of the children whose mother was deceased. The court observed that, based on the amount of (1) the death benefit the boyfriend received, (2) mother's purported earnings of \$1,197 per month, and (3) the child support mother received from father, mother's total household income appeared to "hover[] around \$5,000 per month."

The court further observed that mother had testified that she moved with her family (two adults and six children) to a three-bedroom home and that she had borrowed money to pay rent. She indicated that she rarely bought new clothing and instead bought clothing at thrift stores. She had taken the child to the beach and Great America, but had not taken him on any vacations in recent years. The court observed that mother had indicated through her testimony that she cannot "make ends meet" on her earnings alone, and that the child "seems to have things at [father's] home that she can't afford to provide." The court determined that it was "clear that [mother's] standard of living is significantly lower than [father's]."

Regarding mother's finances, the court referred to mother's self-employment as a seller through eBay. The court observed that there was testimony that mother worked 40 hours or more per week, but earned only \$1,197 per month, which was less than minimum wage. Mother previously worked as a wine broker making \$30,000 a year.

The court found that mother's "business records are inadequate, unorganized and difficult to follow. The only clear number is her gross of \$246,000 per year." Regarding mother's income and expense declaration, the court stated: "The income shown is

amazingly low, given the gross revenues for her business and the length of time she has operated the business.”

The court stated that mother had “produced a stack of documents labeled . . . Exhibit F. This ‘Transaction History’ purported to provide every expense and item of income for her business. Together, the three inch stack of documents would show all of the component parts of the Schedule C submitted to the court as part of [mother’s] tax returns. [Mother] prepares her own tax returns with TurboTax . . . .”

Later in the statement of decision, the court stated: “[Mother] has supplied a stack of reports she created from her eBay/PayPal business. Unfortunately, nothing is sorted, so the court can’t determine any of the income or expenses except on an individual entry basis. There seem to be thousands of entries. [Mother] hasn’t met her burden on proving her finances. [¶] The court, must, therefore, come to some conclusion about [mother’s] real income without the benefit of the source documents. Schedule C of her 2011 personal tax return is not credible. [¶] Using the most recent . . . Income and Expense Declaration, [mother’s] monthly expenses total \$6,630. She has a number of credit cards and installment payments, all of which are current. She acknowledges payment of \$1400 and \$2427 each month ([her boyfriend’s] kids’ benefit and child support paid by [father]). The court will use the current monthly expense at a rate of \$6630 and deduct the amount paid by others in the sum of \$3827, leaving a net income from [mother’s] business of \$2803. The court finds the [income and expense declaration] to be the most reliable source of financial information, having considered the 2011 tax return and the stacks of unintelligible papers submitted by [mother].”

The court ultimately ordered that father pay monthly child support in the amount of \$1,827 for the period of November 2011 through May 2012, and from August 2012 forward “per guideline.” For June and July 2012, the court set monthly child support at \$2,103 “per guideline.”

### ***E. The Notices of Appeal***

Father filed a notice of appeal on October 4, 2012. Mother filed a cross-appeal on October 30, 2012. Upon father's request, his appeal was dismissed on May 30, 2013.

## **III. DISCUSSION**

### **A. Mother's Claim on Appeal**

Mother contends that the "trial court abused its discretion when it set child support at guideline and ignored the provisions of Family Code section 4057(b)(5)(B) that defines the instant case as a special circumstance case" and "ignored its responsibility to implement the principles of Family Code section[] 4053(f) and (g)." According to mother, "[t]he special circumstances in the instant case which provided the trial court with discretion to set support for [mother] in excess of guideline were that [mother] and [father] share time equally with their son, and [mother] uses over 101% of her income for housing, and [father] spends only 11% of his income for housing."

Father responds that the trial court has discretion regarding whether to deviate from guideline support, and that the court's decision in this case to order guideline support was not an abuse of discretion.

#### **1. *The Standard of Review***

Generally, a child support order may be modified at any time the court deems it necessary. (*In re Marriage of Williams* (2007) 150 Cal.App.4th 1221, 1234.) "The party seeking the modification bears the burden of showing that circumstances have changed such that modification is warranted. [Citation.]" (*In re Marriage of Cryer* (2011) 198 Cal.App.4th 1039, 1054.)

"The standard of review for an order modifying a child support order is well established. '[A] determination regarding a request for modification of a child support order will be affirmed unless the trial court abused its discretion, and it will be reversed only if prejudicial error is found from examining the record below.' [Citations.] Thus, '[t]he ultimate determination of whether the individual facts of the case warrant

modification of support is within the discretion of the trial court. [Citation.] The reviewing court will resolve any conflicts in the evidence in favor of the trial court's determination. [Citation.]' [Citation.]" (*In re Marriage of Williams, supra*, 150 Cal.App.4th at pp. 1233-1234.)

"[H]owever, . . . the trial court has 'a duty to exercise an informed and considered discretion with respect to the [parent's child] support obligation . . . .' [Citation.] Furthermore, 'in reviewing child support orders we must also recognize that determination of a child support obligation is a highly regulated area of the law, and the only discretion a trial court possesses is the discretion provided by statute or rule. [Citations.]' [Citation.] In short, the trial court's discretion is not so broad that it 'may ignore or contravene the purposes of the law regarding . . . child support. [Citations.]' [Citation.]" (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 282-283.)

## **2. Guideline Child Support and Special Circumstances**

"California has a strong public policy in favor of adequate child support. [Citations.] That policy is expressed in statutes embodying the statewide uniform child support guideline. [Citations.]" (*In re Marriage of Cheriton, supra*, 92 Cal.App.4th at p. 283.) "The guideline seeks to place the interests of children as the state's top priority." (§ 4053, subd. (e).) In setting guideline support, a court must adhere to certain principles, including the following. "A parent's first and principal obligation is to support his or her minor children according to the parent's circumstances and station in life." (*Id.*, subd. (a).) "Each parent should pay for the support of the children according to his or her ability." (*Id.*, subd. (d).) "Children should share in the standard of living of both parents. Child support may therefore appropriately improve the standard of living of the custodial household to improve the lives of the children." (*Id.*, subd. (f).) "Child support orders in cases in which both parents have high levels of responsibility for the children should reflect the increased costs of raising the children in two homes and should minimize

significant disparities in the children’s living standards in the two homes.” (*Id.*, subd. (g).)

“To implement these policies, courts are required to calculate child support in accordance with the mathematical formula set forth in the statute. [Citations.]” (*In re Marriage of Cheriton, supra*, 92 Cal.App.4th at p. 284.) “[A]dherence to the guidelines is mandatory, and the trial court may not depart from them except in the special circumstances enumerated in the statutes. [Citations.]” (*Ibid.*) In this regard, section 4057 provides that “[t]he amount of child support established by the formula . . . is presumed to be the correct amount of child support to be ordered.” (*Id.*, subd. (a).) Section 4057 further states that the presumption “is a rebuttable presumption affecting the burden of proof and *may be rebutted* by admissible evidence showing that application of the formula would be unjust or inappropriate in the particular case, consistent with the principles set forth in Section 4053, because one or more of the following factors is found to be applicable *by a preponderance of the evidence*, and the court states in writing or on the record the information required in subdivision (a) of Section 4056: [¶] . . . [¶] (5) Application of the formula would be unjust or inappropriate due to special circumstances in the particular case. These special circumstances include, but are not limited to, the following: [¶] . . . [¶] (B) *Cases in which both parents have substantially equal time-sharing of the children and one parent has a much lower or higher percentage of income used for housing than the other parent.*” (§ 4057, subd. (b)(5)(B), italics added.)

### **3. Analysis**

Mother contends that the special circumstance set forth in section 4057, subdivision (b)(5)(B) applies in this case because her housing cost is a much higher percentage of her income as compared to father. She argues that the trial court’s failure to set child support in excess of guideline based on the application of this special circumstance constitutes an abuse of discretion.

In seeking to rebut the presumption that guideline support was appropriate, mother had the burden of proving by a preponderance of the evidence that the special circumstance described in section 4057, subdivision (b)(5)(B) was applicable. (*Id.*, subd. (b).) Among other matters, mother was required to establish her housing costs as a percentage of her income. (*Id.*, subd. (b)(5)(B).) The trial court, after hearing testimony from mother and her expert and receiving documentary evidence, found that mother “ha[d]n’t met her burden on proving her finances.” The court stated that although mother’s business records indicated that her gross income was \$246,000 a year, the monthly income of \$1,241 set forth on her income and expense declaration was “amazingly low, given the gross revenues for her business and the length of time she has operated the business.” The court also observed that mother would be earning less than the minimum wage, based on the testimony concerning the amount of hours she worked and the amount she earned, and that she had previously earned about \$30,000 per year as a wine broker. Moreover, the court was unable to determine whether the “stack of documents” submitted by mother supported her claimed income and expenses because those business records were “inadequate, unorganized and difficult to follow.” The court found that Schedule C of mother’s personal tax return was “not credible.”

On appeal, mother does not challenge the trial court’s finding that she failed to meet her burden to establish her income. Instead, she relies on the court’s determination that her income was \$2,803, and uses that amount for her argument that the special circumstance concerning housing cost as a percentage of income applies in this case.

We are not persuaded that this determination by the trial court relieved mother of her burden of establishing her income for purposes of determining whether the special circumstance applies. As the court made clear in its statement of decision, while mother failed to meet her burden with respect to establishing her finances, the court still had to “come to some conclusion about [her] real income” in order to calculate guideline support. Based on the evidence the court had received, the court considered mother’s

income and expense declaration “to be the most reliable source of financial information, having considered the 2011 tax return and the stacks of unintelligible papers submitted by [her].” However, the court did not simply use the amount of income (\$1,241) that mother had stated on the income and expense declaration. Instead, the court determined mother’s total monthly *expenses* (\$6,630), then subtracted payments that mother’s household had indisputably received (\$1,400 death benefit for the boyfriend’s children, and \$2,427 in child support from father), which left a remainder of \$2,803 in *expenses*. The court then concluded that mother’s business *income* was the *same amount* as these remaining *expenses*: \$2,803. It thus appears that the court believed mother was earning *at least* enough income for the household to break even each month. Indeed, within this discussion in the statement of decision, the court observed that mother “has a number of credit cards and installment payments, all of which are current.” The court’s observation that mother was “current” on these obligations indicates that the court believed mother had more income than the \$1,241 that she had listed on the income and expense declaration.

In sum, the trial court worked backwards to estimate mother’s income by looking at expenses, subtracting known payments to the household, and assuming mother made at least enough to cover the remaining expenses in view of her ability to remain current on other financial obligations. Under these circumstances, it is apparent that the court determined her income to be *at least* \$2,803. Given that the court was unable to determine how much more than \$2,803 her income was, and given that mother herself failed to meet the burden of establishing the amount of her income and what percentage was being used for housing for purposes of applying the special circumstance described in section 4057, subdivision (b)(5)(B), we conclude that no abuse of discretion has been shown by the court setting child support at guideline.

## **B. Father's Claims**

In his respondent's brief, father contends that, although the trial court correctly ordered guideline child support, the court committed "reversible error" in the method used to calculate it. Specifically, father contends that the court should not have granted a hardship deduction to mother under sections 4059 and 4071, and that the court should not have imputed certain income to him. Father seeks entry of a new judgment providing for child support of \$1,194 per month from November 2011 through May 2012 and from August 2012 forward, and \$1,428 per month from June through July 2012.

In her reply brief, mother contends that father's claims should be "ignore[d]" because they are not responsive to the arguments made in her opening brief and because father's claims pertain to issues that are not before this court given the dismissal of his appeal.

"As a general matter, 'a respondent who has not appealed from the judgment may not urge error on appeal.' [Citation.]" (*Estate of Powell* (2000) 83 Cal.App.4th 1434, 1439.) " 'A limited exception to this rule is provided by Code of Civil Procedure section 906, which provides in pertinent part: "The respondent . . . may, without appealing from the judgment, request the reviewing court to and it may review any of the foregoing [described orders or rulings] *for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal or modification of the judgment from which the appeal is taken.*" (Italics added.)' [Citations.] . . . [¶] 'The purpose of the statutory exception is to allow a respondent to assert a legal theory which may result in affirmance of the judgment.' [Citations.]" (*County of Los Angeles v. Glendora Redevelopment Project* (2010) 185 Cal.App.4th 817, 828.) Thus, a respondent who fails to appeal may not seek *reversal* of the judgment and entry of a new judgment more favorable to respondent. (*Estate of Powell, supra*, at p. 1439; *California State Employees' Assn. v. State Personnel Bd.* (1986) 178 Cal.App.3d 372, 382, fn. 7 (*California State Employees' Assn.*) [if a respondent fails to appeal, the

appellate court will not review the respondent's contentions of error where the "respondent seeks not to save the judgment but to overthrow it".)

In this case, father seeks reversal of the judgment and entry of a new judgment more favorable to him. As father's appeal was dismissed upon his request, he may not seek such affirmative relief. (See *Estate of Powell, supra*, 83 Cal.App.4th at p. 1439; *California State Employees' Assn., supra*, 178 Cal.App.3d at p. 382, fn. 7.)

#### IV. DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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GROVER, J.