231 Cal.App.4th 1238
Court of Appeal,
Fourth District, Division 3, California.

IN RE MARRIAGE OF Charles D. and Connie A. MCHUGH.
Charles D. McHugh, Appellant,
v.
Connie A. McHugh, Respondent;
Orange County Department of Child Support Services, Respondent.

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Synopsis
Background: Child support obligor filed an order to show cause asking the trial court to reduce his child support obligation, which had already been reduced once. Child support obligee opposed the request and asked the trial court to increase child support. The Superior Court, Orange County, No. 09D008768, Duane T. Neary, Temporary Judge, increased child support by imputing income at the same level obligor had earned when the court made its original support order. Obligor appealed.

Holdings: The Court of Appeal, Aronson, J., held that:

[1] evidence supported finding that child support obligor had ability to continue performing his job;

[2] obligor failed to meet his burden to prove he could not secure an agreement for continued employment in the job; and

[3] voluntary nature of obligor's termination justified imputing income at same level he had earned when court made its original support order.

Affirmed.

West Headnotes (19)

[1] Child Support
Discretion

Determining the amount of child support is a highly regulated area of the law, and the only discretion the trial court has is the discretion conferred by statute or rule. Cal. Fam. Code §§ 4050, 4055.

Cases that cite this headnote

[2] Child Support
Assignment of errors and briefs
Divorce
Briefs

Any issue that might pertain to the distinction between imputation of income for child support and spousal support was waived for purposes of obligor's appeal challenging trial court's order denying obligor's request to decrease child and spousal support and granting obligee's request to increase child support, where the parties' briefs only addressed the child support order. Cal. Fam. Code § 4058(b).

1 Cases that cite this headnote

[3] Child Support
Imputed income of obligor

While deliberate avoidance of family responsibilities is a significant factor in the decision to consider earning capacity for purposes of imputing income to child support obligor, the imputation statute explicitly authorizes consideration of earning capacity in all cases, consistent with the child's best interests. Cal. Fam. Code § 4058(b).

Cases that cite this headnote

[4] Child Support
Imputed income of obligor

"Earning capacity," for purposes of imputing income to a child support obligor, is composed

of the "ability to work," including such factors as age, occupation, skills, education, health, background, work experience and qualifications, and "opportunity to work," which exists when there is substantial evidence of a reasonable likelihood that a party could, with reasonable effort, apply his or her education, skills, and training to produce income. Cal. Fam. Code § 4058(b).

2 Cases that cite this headnote

[5] Child Support
Imputed income of obligor

Child Support
Imputed income of custodian

When the ability to work or the opportunity to work is lacking, earning capacity is absent and application of the "earnings capacity" standard to impute income for purposes of child support is inappropriate. Cal. Fam. Code § 4058(b).

1 Cases that cite this headnote

[6] Child Support
Voluntary unemployment or underemployment

The only limitations against imputing income in calculating the child support obligation of an unemployed or underemployed parent is where the parent in fact has no "earning capacity" or relying on earning capacity would not be consistent with the children's best interest. Cal. Fam. Code § 4058(b).

2 Cases that cite this headnote

[7] Child Support
Burden of proof

On an application to modify child support by imputing income to a parent based on earning capacity, the burden of proof as to ability and opportunity to earn imputed income changes depending on which parent—the payor or the payee—is seeking to change the status quo. Cal. Fam. Code § 4058(b).

1 Cases that cite this headnote

[8] Child Support
Imputed income of obligor

Child Support
Imputed income of custodian

The parent seeking to impute income for purposes of child support must show that the other parent has the ability or qualifications to perform a job paying the income to be imputed and the opportunity to obtain that job, i.e., an available position, but the parent seeking to impute income does not bear the burden to show the other parent would have obtained employment if it had been sought. Cal. Fam. Code § 4058(b).

1 Cases that cite this headnote

[9] Child Support
Discretion

Child Support
Modification

Court of Appeal reviews an order establishing or modifying child support based upon earning capacity for an abuse of discretion. Cal. Fam. Code § 4058.

Cases that cite this headnote

[10] Child Support
Findings

A statement of decision on the modification of a child support order generally must provide the factual and legal basis for the trial court's decision as to each of the principal controverted issues. Cal. Fam. Code § 3654.

4 Cases that cite this headnote

[11] Child Support
Estoppel to raise particular issue

Child Support
Presumptions and burden of proof

Under the doctrine of implied findings, when parties waive a statement of decision on

the modification of a child support order expressly or by not requesting one in a timely manner, appellate courts reviewing the appealed judgment must presume the trial court made all factual findings necessary to support the judgment for which there is substantial evidence, and a party who does not request a statement of decision may not argue the trial court failed to make any finding required to support its decision. Cal. Fam. Code § 3654.

3 Cases that cite this headnote

[12] Child Support

Estoppel to raise particular issue

Child support obligor's failure to ask the trial court for a statement of decision waived any argument on appeal that the trial court did not make necessary findings supporting the modification of the child support order based upon earning capacity. Cal. Fam. Code §§ 3654, 4058.

3 Cases that cite this headnote

[13] Child Support

Obligor's income or financial condition

Trial court's finding that child support obligor failed to meet his burden to prove he lacked the ability and opportunity to keep his job and continue earning at the same level, in denying obligor's request to decrease his child support obligation upon his termination from his job, was supported by substantial evidence, including evidence that obligor's employer's gave obligor the opportunity to keep his job if he fully disclosed his improper conduct in diverting sales to a competitor, paid restitution for the business he diverted, and entered into a "last chance" employment agreement, and evidence that obligor admitted to diverting the sales. Cal. Fam. Code § 4058.

Cases that cite this headnote

[14] Child Support

Obligor's income or financial condition

Trial court's finding that child support obligor had the ability to perform the job earning the income to be imputed and the job was available, in increasing the child support obligation by imputing income to obligor at the level he had earned at his job when the court made its original support order, was supported by substantial evidence, including evidence that obligor's employer's gave obligor the opportunity to keep his job if he fully disclosed his improper conduct in diverting sales to a competitor, paid restitution for the business he diverted, and entered into a "last chance" employment agreement, and evidence that obligor admitted to diverting the sales. Cal. Fam. Code § 4058.

Cases that cite this headnote

[15] Child Support

Burden of proof

As the parent seeking to change the existing child support order by imputing income to obligor at the level he would have earned if he had kept his job, obligee bore the burden to show obligor had the ability and opportunity to remain at the job. Cal. Fam. Code § 4058.

Cases that cite this headnote

[16] Child Support

Burden of proof

As the parent seeking to change the existing child support order by imputing income to obligor at the level he would have earned if he had kept his job, obligee bore the burden to show obligor had the ability to perform the job earning the income to be imputed and that the job was available, but obligor bore the burden to show he could not secure the job despite reasonable efforts. Cal. Fam. Code § 4058.

Cases that cite this headnote

[17] Child Support

Obligor's income or financial condition

Trial court's finding that child support obligor failed to meet his burden to prove he lacked the ability to satisfy his employer's offer of a

"last chance" employment agreement by fully disclosing his improper conduct in diverting sales to a competitor and paying restitution, in increasing the child support obligation by imputing income to obligor at the level he would have earned if he had kept his job, was supported by substantial evidence, including evidence that obligor admitted to diverting the sales, and obligor's failure to provide any evidence showing he lacked the financial resources to pay restitution to employer. Cal. Fam. Code § 4058.

Cases that cite this headnote

[18] Child Support
Imputed income of obligor

Child Support
Imputed income of custodian

In calculating child support, a trial court has discretion to impute income based on a job the parent previously held depending on the circumstances under which the parent quit or otherwise left that job. Cal. Fam. Code § 4058(b).

Cases that cite this headnote

[19] Child Support
Voluntary unemployment or underemployment

Trial court acted within its discretion in imputing income to child support obligor after his termination from his job at the same level he had earned at the job when the court made its original support order, since obligor's termination could be deemed voluntary, where obligor diverted sales from his employer to a competitor to reduce his commission income and thereby reduce his child support obligation, and obligor refused to comply with employer's conditions for a "last chance" employment agreement after the employer discovered the misconduct. Cal. Fam. Code § 4058(b).

See 10 Witkin, Summary of Cal. Law (10th ed. 2005) Parent and Child, § 397.

Cases that cite this headnote

****451** Appeal from a judgment of the Superior Court of Orange County, Duane T. Neary, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed. (Super.Ct. No. 09D008768)

Attorneys and Law Firms

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****452** OPINION

ARONSON, J.

***1241** Appellant Charles D. McHugh filed an order to show cause asking the trial court to reduce his child support obligations because he lost his job as a commissioned salesman and his new job paid considerably less.[1] In opposing Charles's request, respondent Connie A. McHugh countered by asking the trial court to increase support because Charles lost his job for diverting business from his employer to his father's competing company to minimize his reported income and reduce his support obligations. Connie asked the court to increase her support based on Charles's income at the job he lost because Charles refused his employer's offer to retain him if he fully disclosed his misconduct and paid his employer restitution. The trial court denied Charles's motion to reduce the amount of child support and granted Connie's request to increase support by imputing income to Charles at the level he earned before engaging in his misconduct.

Family Code section 4058, subdivision (b), grants trial courts discretion to set child support based on a parent's earning capacity rather than ***1242** actual income if the court finds the parent has the ability and opportunity to earn income at the level to be imputed.[2] As explained below, this discretion includes imputing income to the parent based on earnings at a prior job, without evidence the parent has the current opportunity to earn at that same level, if the parent left or otherwise lost the job in a manner reflecting a voluntary and

deliberate divestiture of financial resources required to pay child support obligations, and imputing income at that level is in the child's best interests.

We affirm the trial court's order exercising its discretion to impute income under section 4058, subdivision (b), because substantial evidence supports the findings that (1) Charles had the ability and opportunity to keep his job; (2) his termination was a voluntary divestiture of resources required for child support obligations because of his misconduct in diverting business to his father's company to avoid his support obligations and deliberately failing to satisfy his employer's conditions for keeping his higher paying job; and (3) imputing income to Charles was in the child's best interests.

I

FACTS AND PROCEDURAL HISTORY

Charles and Connie wed in 1992 and have one child, who was born in 1996. The couple separated in September 2009, and Charles filed a petition to dissolve the marriage that same month. Almost immediately, Connie filed an order to show cause seeking temporary child and spousal support. In November 2009, the trial court granted Connie's request, ordering Charles to pay $2,227 in child support and $4,773 in spousal support each month. The court based its award on Charles's monthly income of $24,159 as a successful salesman for Amcor Packaging Distribution (Amcor), and Connie's lack of income as a stay-at-home mom.

In early 2010, Charles filed an order to show cause seeking to reduce the amount of temporary child and spousal support based on his reduced income. In his supporting ****453** declaration, Charles explained he suffered a drastic income reduction in December 2009 when his largest client decided not to renew its contract with Amcor. According to Charles, he was paid on commission, and the loss of that client cut his income nearly in half. Charles also argued Connie was a licensed attorney and the court should require her to find employment. In March 2011, the trial court granted Charles's request and reduced his monthly child support to $1,275 and his monthly spousal support to $2,840.

***1243** In August 2011, Connie and Charles each filed an application seeking to change the court's March 2011 ruling. Connie filed a motion to set aside the March 2011 order, while Charles filed another order to show cause seeking to further reduce his support obligations. In her motion, Connie argued the March 2011 order should be set aside because Charles misrepresented his income to the court. In his order to show cause, Charles argued he suffered another drastic reduction of income because Amcor fired him in April 2011, and his new job paid considerably less. In response, Connie asked the court to increase the temporary support by reinstating the original support order.

In November 2011, the trial court conducted an evidentiary hearing on Connie's set-aside motion, but it continued the hearing on the other requests. Thomas Sarnecki, Amcor's vice president of workplace relations and employment counsel, testified that Charles was one of Amcor's top salesmen, earning between $137,000 and $597,000 per year during the period 2003 to 2009. In 2009, Charles asked Amcor to help him reduce his income because he faced a bitter divorce and wanted to minimize his earnings. According to Sarnecki, Amcor told Charles it would reassign him to a lower paying position, but it rejected his other “more aggressive approach[es],” such as diverting some of his compensation. Charles therefore remained in the same position and his compensation arrangements did not change.

In the months following these discussions, Sarnecki testified Amcor noticed a significant drop in the sales Charles generated. Charles explained the decrease was due to the downturn in the economy and the lack of competitiveness in some of Amcor's bids. Sarnecki explained Amcor initially accepted Charles's explanation because of his past faithful service, but began an investigation after one of Charles's customers asked Amcor about products it recently had purchased and Amcor had no record of the transaction.

Amcor's investigators discovered Charles's father operated a competing business, Value Added Packaging & Printing, Inc. (Value Added), and the investigators suspected Charles had diverted some of Amcor's business to his father's business. The investigators also believed Charles used one of Amcor's other salesmen to close some of Charles's transactions, and then Charles and the other salesman would share the commission.

In March 2011, Sarnecki and other Amcor executives met with Charles to discuss the investigators' findings. During this meeting, Charles admitted he had done a lot of “ ‘stupid stuff’ ” in trying to reduce his income and settle his divorce, including diverting business to Value Added and entering into improper commission sharing agreements on at least three

accounts. Sarnecki further testified that Charles admitted what he did ***1244** " 'wasn't right,' " showed remorse for his actions, and wanted to "come clean" so he could keep his job.

Based on Charles's admissions and his many years of successful service, Amcor offered to retain Charles if he satisfied three conditions: (1) fully disclose ****454** his misconduct; (2) pay Amcor restitution for the business he diverted; and (3) agree to a "last chance" employment agreement. Sarnecki thought Charles would accept these conditions because he appeared remorseful, but Charles refused to pay restitution or disclose the business he diverted. Instead, he told Sarnecki and the other executives, " 'I can't tell you ... I know it was wrong ... You're going to get mad at me....' " When Charles refused to cooperate and agree to these conditions, Amcor terminated Charles's employment and filed a lawsuit against him, his father, and Value Added to recover the income it lost.

Charles testified to his version of the meetings with Sarnecki and Amcor's investigators. Charles admitted he made many of the statements Sarnecki attributed to him, but he testified those statements were not true. According to Charles, he made those admissions because Amcor's investigators told him he would have to come clean to keep his job.

In December 2011, the trial court denied Connie's set-aside motion. The court explained the only permissible ground for granting the motion would be if Charles defrauded the court by misrepresenting his income. The court found Charles attempted to divert business from Amcor, but Connie failed to show he diverted any particular business or the amount of Charles's actual income when the court made its March 2011 support order. Without evidence showing a specific income that differed from the court's earlier findings, the court concluded it could not grant Connie's motion.

In late 2012, the court conducted hearings on Charles's request to further reduce his support obligations and Connie's counterrequest to increase the amount of support. Charles and Connie stipulated the court would decide these requests based on the testimony it received in Connie's set-aside motion. In February 2013, the court denied Charles's request and granted Connie's: "The Court finds that [Charles] had the opportunity to continue his employment at AMCOR and that [Charles] was terminated as a result of his non-cooperation in the investigation into his own misconduct. The Court finds that his misconduct was part and parcel of his attempt to lower Child and Spousal Support. Therefore, the Court finds, termination from AMCOR is deemed an unwillingness to work. (*In re Marriage of Regnery* (1989) 214 Cal.App.3d 1367, 263 Cal.Rptr. 243) The Court finds that this order is in the best interest of the child. [¶] The Court's other findings are as indicated in the Dissomaster computer printout ... attached to this order. This Child Support order commences August 1, 2012."

***1245** The computer printout attached to the court's order reveals the court did not use current income at his new job, but imputed monthly income to Charles at the same level he earned at Amcor when the court made its original support order in November 2009, i.e., $24,159. The court also imputed monthly income to Connie in the amount of $8,333. Based on these findings, the court ordered Charles to pay monthly child support of $2,047, nearly an $800 per month increase from the March 2011 support order and just $180 less per month than the original November 2009 support order. The court's order did not specify an amount of spousal support. Charles timely appealed the court's February 2013 order.

II

DISCUSSION

A. *Governing Legal Principles on Child Support and Imputing Income*

[1] **[2]** California has adopted a "statewide uniform guideline" for determining ****455** child support according to a complex formula based on each parent's income and custodial time with the child. (§§ 4050, 4055; *In re Marriage of Smith* (2001) 90 Cal.App.4th 74, 80-81, 108 Cal.Rptr.2d 537 (*Smith*).) The child support amount the formula establishes is rebuttably presumed to be the correct amount, and the court may order a different amount only in limited circumstances and only after making certain findings. (§ 4057; *Smith*, at p. 81, 108 Cal.Rptr.2d 537.) Determining the amount of child support therefore is a highly regulated area of the law, and the only discretion the trial court has is the discretion conferred by statute or rule. [3] (*Smith*, at p. 81, 108 Cal.Rptr.2d 537.)

The Family Code grants the trial court discretion to impute income to a parent based on his or her "earning capacity." (§ 4058, subd. (b).) Specifically, section 4058, subdivision (b) states, "The court may, in its discretion, consider the earning

capacity of a parent in lieu of the parent's income, consistent with the best interests of the children." (*Ibid.*)

[3] Originally, "the exercise of this discretion was limited to situations where the parent was found to be deliberately shirking family responsibilities by refusing to seek or accept gainful employment. [Citations.] No such limitation ***1246** exists under the present scheme, however. [Citations.] 'While deliberate avoidance of family responsibilities is a significant factor in the decision to consider earning capacity [citation], the statute explicitly authorizes consideration of earning capacity in all cases,' consistent with the child's best interests. [Citations.]" (*Smith, supra,* 90 Cal.App.4th at p. 81, 108 Cal.Rptr.2d 537.)

[4] The Family Code does not define earning capacity, but its meaning has been established through case law. (*Eggers, supra,* 131 Cal.App.4th at p. 699, 32 Cal.Rptr.3d 292.) " 'Earning capacity is composed of ... *the ability to work,* including such factors as age, occupation, skills, education, health, background, work experience and qualifications ... and ... *an opportunity to work.* ...' [Citation.]" [4] (*Mendoza v. Ramos* (2010) 182 Cal.App.4th 680, 685, 105 Cal.Rptr.3d 853 (*Mendoza*).) "The 'opportunity to work' exists when there is substantial evidence of a reasonable 'likelihood that a party could, with reasonable effort, apply his or her education, skills and training to produce income.' [Citation.]" (*Smith, supra,* 90 Cal.App.4th at p. 82, 108 Cal.Rptr.2d 537.)

[5] **[6]** " 'When the ability to work or the opportunity to work is lacking, earning capacity is absent and application of the ****456** standard is inappropriate. When the payor is *unwilling* to pay and the other two factors are present, the court may apply the earnings capacity standard to deter the shirking of one's family responsibilities.' [Citation.]" (*Mendoza, supra,* 182 Cal.App.4th at p. 685, 105 Cal.Rptr.3d 853, original italics.) Accordingly, " ' "[t]he only limitations against imputing income to an unemployed or underemployed parent is where the parent in fact has *no* 'earning capacity' ... or relying on earning capacity would not be consistent with the children's best interest....' " [Citation.] In other words, '[*a*]*s long as ability and opportunity to earn exist,* ... the court has the discretion to consider earning capacity when consistent with the child or children's best interests....' [Citation.]" (*Vargas, supra,* 70 Cal.App.4th at p. 1126, 83 Cal.Rptr.2d 229, original italics.)

[7] On an application to modify support by imputing income to a parent based on earning capacity, the burden of proof as to ability and opportunity to earn imputed income changes depending on which parent--the payor or the payee--is seeking to change the status quo. For example, "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 ***1247** parent, as moving party, who bears the burden of showing a *lack* of ability and opportunity to earn income." (*Bardzik, supra,* 165 Cal.App.4th at p. 1304, 83 Cal.Rptr.3d 72, original italics; see *id.* at pp. 1308-1309, 83 Cal.Rptr.3d 72; *Eggers, supra,* 131 Cal.App.4th at p. 701, 32 Cal.Rptr.3d 292.) In contrast, when the payee parent seeks to increase the amount of court-ordered support by imputing to the payor parent a greater income than the court previously found, the payee parent, as the moving party, bears the burden of proof to show the payor parent *has* the ability and opportunity to earn that imputed income. (*Bardzik,* at p. 1294, 83 Cal.Rptr.3d 72.)

[8] The parent seeking to impute income must show that the other parent has the ability or qualifications to perform a job paying the income to be imputed and the opportunity to obtain that job, i.e., there is an available position. The parent seeking to impute income, however, does not bear the burden to show the other parent would have obtained employment if it had been sought. (*In re Marriage of LaBass & Munsee* (1997) 56 Cal.App.4th 1331, 1339, 66 Cal.Rptr.2d 393 (*LaBass & Munsee*); see *Bardzik, supra,* 165 Cal.App.4th at pp. 1305-1306, 83 Cal.Rptr.3d 72.)

For example, in *LaBass & Munsee,* the father sought to modify the existing support order by imputing a full-time teacher's salary to the mother even though she only worked as a part-time teacher. The father met his burden to show the mother's ability and opportunity to earn a full-time teaching salary by presenting evidence showing the mother had a teaching credential, the local school district had multiple openings for full-time teachers with the mother's background and experience, and the amount the district would pay a full-time teacher with the mother's level of education and experience. (*LaBass & Munsee, supra,* 56 Cal.App.4th at pp. 1335-1336, 66 Cal.Rptr.2d 393.) Based on this showing, the trial court imputed the full-time teaching salary to the mother. The appellate court rejected the mother's argument the award was based on nothing but "guesswork," explaining, "[The father] bore no burden to convince the court that [the mother] *would have* secured a full-time job had she applied. Rather, it was incumbent upon [the mother] to show that, despite

reasonable efforts, she could not secure employment despite her qualifications." ****457** (*Id.* at p. 1339, 66 Cal.Rptr.2d 393, original italics.)

[9] We review an order establishing or modifying child support based upon earning capacity for an abuse of discretion. (*In re Marriage of Berger* (2009) 170 Cal.App.4th 1070, 1079, 88 Cal.Rptr.3d 766 (*Berger*); *Vargas, supra,* 70 Cal.App.4th at p. 1126, 83 Cal.Rptr.2d 229.) "[W]e consider only 'whether the court's factual determinations are supported by substantial evidence and whether the court acted reasonably in exercising its discretion.' [Citation.] ... '[W]e do not substitute our own judgment for that of the trial court, but determine only if any judge reasonably could have made such an order.' " (*Berger,* at p. 1079, 88 Cal.Rptr.3d 766.)

***1248** B. *We Infer All Necessary Findings Supported by the Record Because Charles Failed to Request a Statement of Decision*

[10] When modifying a support order, the trial court must provide a statement of decision explaining its ruling *if requested* by either parent. (§ 3654; *In re Marriage of Sellers* (2003) 110 Cal.App.4th 1007, 1010, 2 Cal.Rptr.3d 293.) A statement of decision generally must provide the factual and legal basis for the trial court's decision as to each of the principal controverted issues. (Code Civ. Proc., § 632; see *Sellers,* at p. 1010, 2 Cal.Rptr.3d 293.)

[11] "Under the doctrine of 'implied findings,' when parties waive a statement of decision expressly or by not requesting one in a timely manner, appellate courts reviewing the appealed judgment must presume the trial court made all factual findings necessary to support the judgment for which there is substantial evidence." (*In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 549-550, fn. 11, 73 Cal.Rptr.2d 33 (*Condon*); see *Starr v. Starr* (2010) 189 Cal.App.4th 277, 287, 116 Cal.Rptr.3d 813; *In re Marriage of Cohn* (1998) 65 Cal.App.4th 923, 928, 76 Cal.Rptr.2d 866 (*Cohn*).) A party who does not request a statement of decision may not argue the trial court failed to make any finding required to support its decision. (*Ibid.*)

[12] Here, Charles waived any objection the trial court did not make necessary findings because he failed to ask the trial court for a statement of decision. We therefore imply all findings necessary to support the trial court's order denying Charles's request to reduce his support obligations and granting Connie's request to increase his support obligations. (*Cohn, supra,* 65 Cal.App.4th at p. 928, 76 Cal.Rptr.2d 866; see *Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1148, 125 Cal.Rptr.3d 765.)

Citing *In re Marriage of Askmo* (2000) 85 Cal.App.4th 1032, 1040, 102 Cal.Rptr.2d 662, Charles contends "a statement of decision [was not] required here" because an order on a motion does not require a statement of decision. He is mistaken. The trial court's order was not merely an order on a motion, but rather an order modifying a support order. Section 3654 therefore required a statement of decision and Charles's failure to request a statement requires us to invoke the implied findings doctrine.

Charles also contends the implied findings doctrine does not apply because the trial court's order adequately identified the legal basis for its ruling and the evidence it considered. To support this contention, Charles cites *In re Marriage of Fingert* (1990) 221 Cal.App.3d 1575, 1580, 271 Cal.Rptr. 389, and *In re Marriage of Seaman & Menjou* (1991) 1 Cal.App.4th 1489, 1494, fn. 3, 2 Cal.Rptr.2d 690. In *Fingert,* the Court of Appeal declined to ***1249** apply the implied findings doctrine because the appeal ****458** was based on a settled statement of facts, the trial court's decision, and the reasons for the trial court's decision. The *Fingert* court concluded the settled statement provided it with the necessary information to decide the appeal, but the court cited no authority establishing an exception to the implied findings doctrine for an appeal based on a settled statement. [5] (*Fingert,* at p. 1580, 271 Cal.Rptr. 389.) *Seaman & Menjou* followed *Fingert* without analysis. (*Seaman & Menjou,* at p. 1494, fn. 3, 2 Cal.Rptr.2d 690; see also *Condon, supra,* 62 Cal.App.4th at p. 549, fn. 11, 73 Cal.Rptr.2d 33 [following *Fingert* without analysis].)

None of these cases apply here because Charles does not base his appeal on a settled statement, but rather on the clerk's and reporter's transcripts he designated. Moreover, although the foregoing cases seek to create an exception to the implied findings doctrine, several respected treatises explain, "The apparent consensus is that appellant's express or implied waiver of a statement of decision on the appealed issues *unequivocally* invokes the doctrine of 'implied findings.' " (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2014) ¶ 15:103, pp. 15-23 to 15-24 (rev. # 1, 2012), original italics; see Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2014) ¶ 8:24, pp. 8-13 to 8-14; Friedman et al., Cal. Practice Guide: Landlord-Tenant (The Rutter Group 2014) ¶ 9:267, pp. 9-73

to 9-74.) We therefore follow the general rule and apply the implied findings doctrine.

C. *Charles Failed to Show He Was Entitled to a Reduction in His Support Obligations*

[13] Charles contends the trial court erred in denying his request to reduce his support obligations because there is no substantial evidence to support a finding he had the opportunity to keep his job at Amcor. Without evidence he could keep his Amcor job and continue earning at the same income level the court used to initially calculate his support, Charles contends the court erred in refusing to reduce his support obligations to an amount commensurate with his lower income. We disagree because Charles misconstrues the burden of proof on his request, and substantial evidence supports the trial court's ruling.

As the moving party seeking to modify the existing support order, Charles bore the burden to show not only that he lost his Amcor job, but also that he lacked the ability and opportunity to keep that job and continue earning at the same level. (*Bardzik, supra,* 165 Cal.App.4th at p. 1304, 83 Cal.Rptr.3d 72; *Eggers, supra,* 131 Cal.App.4th at p. 701, 32 Cal.Rptr.3d 292.) Here, it is undisputed Amcor fired Charles, but it also ***1250** is undisputed Amcor gave Charles the opportunity to keep his job if he satisfied three conditions: (1) fully disclosing all information about his improper conduct; (2) paying Amcor restitution for the business he diverted; and (3) entering into a last chance employment agreement with Amcor. To obtain an order reducing his support obligations it was Charles's burden to present evidence showing he could not satisfy these conditions, and therefore did not have the opportunity to keep his job.

On the disclosure condition, Charles contends the "only testimony on this point" was his testimony stating he was "unable to give [Amcor] what [it] wanted" and he "didn't have the information that they were looking for." Charles acknowledges ****459** Sarnecki testified Charles "avoided directly answering the question[s Amcor asked,] and said things such as, ' ... I can't tell you ... . I know it was wrong ... . You're going to get mad at me....' " According to Charles, this is not substantial evidence he "*had* the needed information." (Original italics.)

Charles, however, ignores Sarnecki's testimony that Charles admitted he (1) diverted business to Value Added; (2) entered into improper commission sharing agreements with another salesman on at least three accounts; (3) breached the trust Amcor placed in him; and (4) "what he did 'wasn't right.' " Charles also ignores Sarnecki's testimony that Amcor learned a customer recently had purchased Amcor products through Charles directly instead of through Amcor. This testimony constitutes substantial evidence supporting the reasonable inference Charles had the information Amcor sought and Charles's testimony to the contrary does not change that fact. (*Leung v. Verdugo Hills Hospital* (2012) 55 Cal.4th 291, 308, 145 Cal.Rptr.3d 553, 282 P.3d 1250 (*Leung*) ["in evaluating a claim of insufficiency of evidence, a reviewing court must resolve all conflicts in the evidence in favor of the prevailing party and must draw all reasonable inferences in support of the trial court's judgment"].) Moreover, Charles bore the burden to show he could not provide the information to Amcor, which required him to show he did not have the information *and* he could not obtain it. The evidence Charles cites does not satisfy this burden.

On the restitution condition, Charles faults Connie for failing to present evidence showing how much restitution Amcor demanded and evidence Charles had the financial ability to pay the amount demanded. In Charles's view, the absence of evidence on these points prevented the trial court from finding Charles could satisfy the restitution condition, and therefore the court erred in finding Charles had the opportunity to keep his job. But Charles bore the burden to show he could not satisfy this condition. (***1251** *Bardzik, supra,* 165 Cal.App.4th at p. 1304, 83 Cal.Rptr.3d 72; *Eggers, supra,* 131 Cal.App.4th at p. 701, 32 Cal.Rptr.3d 292.) The lack of evidence on this point is therefore fatal to Charles's challenge, not to the trial court's ruling. [6]

D. *Substantial Evidence Supports the Trial Court's Ruling Imputing Income to Charles*

Charles contends the trial court erred in granting Connie's request to increase his support obligations for three reasons. We separately address each of them.

1. Connie Established Charles Had the Ability and Opportunity to Keep His Job at Amcor

[14] Charles first contends the trial court erred in imputing income to him based on his Amcor earnings because Connie failed to satisfy her burden that Charles had the ability and opportunity to keep his job. According to Charles, Connie had to show not only that Amcor offered to allow Charles to keep his job, but also that he had the means to satisfy Amcor's conditions. Charles again misconstrues the applicable burden

of proof, and substantial evidence supports the trial court's implied finding Connie met her burden.

[15] ****460** As the parent seeking to change the existing support order by imputing income to Charles at the level he would have earned if he had kept his job at Amcor, Connie bore the burden to show Charles had the ability and opportunity to remain at Amcor. (*LaBass & Munsee, supra,* 56 Cal.App.4th at p. 1339, 66 Cal.Rptr.2d 393; see *Bardzik, supra,* 165 Cal.App.4th at pp. 1305-1306, 83 Cal.Rptr.3d 72.) Connie satisfied that burden by submitting substantial, undisputed evidence showing Charles excelled at that job for most of their 17-year marriage and Amcor offered to allow Charles to keep his job if he fully disclosed his misconduct, paid Amcor restitution for the business he diverted, and entered into a last chance employment agreement.

[16] As explained above, the parent seeking to impute income to the other parent need only show the other parent had the ability to perform the job earning the income to be imputed and the job was available. The parent to whom the income would be imputed bears the burden to show he or she could not secure the job despite reasonable efforts. (*LaBass & Munsee, supra,* 56 Cal.App.4th at p. 1339, 66 Cal.Rptr.2d 393; see *Bardzik, supra,* 165 Cal.App.4th at pp. 1305-1306, 83 Cal.Rptr.3d 72.) We explained the rationale for putting this burden on the ***1252** parent to whom the income would be imputed in *Bardzik:* "This rule is grounded in the commonsense proposition that you can lead someone to a want ad but you can't make them apply for the job.... Readers need only use a little imagination to think of all the ways that a parent with both ability to do a job and the opportunity to get it could subtly sabotage a job application or interview." (*Bardzik,* at p. 1305, 83 Cal.Rptr.3d 72.)

Here, it takes little imagination to think of the many ways Charles could sabotage Amcor's offer to keep his job if he satisfied Amcor's conditions. For example, as the trial court impliedly found, he could simply refuse to provide the information Amcor sought and refuse to pay restitution. Whether Charles could satisfy Amcor's conditions lay uniquely within his knowledge and control. It therefore is reasonable that Charles should bear the burden to show he could not satisfy the conditions despite reasonable efforts. (See *Bardzik, supra,* 165 Cal.App.4th at pp. 1305-1306, 83 Cal.Rptr.3d 72; *LaBass & Munsee, supra,* 56 Cal.App.4th at p. 1339, 66 Cal.Rptr.2d 393.)

[17] As explained above, substantial evidence supports the trial court's implied finding Charles could have provided the information Amcor requested, but refused to do so. As for the restitution condition, Charles failed to offer any evidence showing he lacked the financial resources to pay Amcor restitution. Accordingly, Charles failed to show he could not satisfy Amcor's conditions and substantial evidence supports the trial court's implied finding Charles had the ability and opportunity to keep his job.

2. The Trial Court Had Discretion to Impute Income to Charles Based on His Previous Earnings

Assuming he had the opportunity to remain with Amcor, Charles contends the trial court nonetheless erred in imputing income to him at the level he earned in November 2009 because Connie failed to show he had the *current* opportunity to earn the same income. According to Charles, the trial court could not impute income to him based on his November 2009 earnings without substantial evidence showing not only that he had the opportunity to keep his Amcor job, but also the present opportunity to earn the same income. ****461** Neither the law nor the facts support Charles's contentions.

[18] Under section 4058, subdivision (b), a trial court has discretion to impute income based on a job the parent previously held depending on the circumstances under which the parent quit or otherwise left that job. (*Eggers, supra,* 131 Cal.App.4th at p. 700, 32 Cal.Rptr.3d 292; *In re Marriage of Padilla* (1995) 38 Cal.App.4th 1212, 1219-1220, 45 Cal.Rptr.2d 555 (*Padilla*); *In re Marriage of Ilas* (1993) 12 Cal.App.4th 1630, 1638-1639, 16 Cal.Rptr.2d 345 (*Ilas*); *Regnery, supra,* 214 Cal.App.3d at pp. 1373-1376, 263 Cal.Rptr. 243.)

***1253** In *Padilla,* the father quit a well-paying job to start his own business shortly before a hearing to determine whether his support obligations should be increased based on the newly enacted statutory formula for determining child support. The court ordered the support to remain the same for six months to allow the father time to start his new business. At the end of that six-month period, the father had not paid any support, had not earned any income from the business, and produced no evidence to show the situation would improve. The trial court therefore increased the father's support obligations by imputing income to him based on his earnings at the job he left several months earlier. (*Padilla, supra,* 38 Cal.App.4th at pp. 1214-1215, 45 Cal.Rptr.2d 555.) We affirmed the trial court's exercise of its discretion because " ' "[a parent does] not have the right to divest himself [or

herself] of his [or her] earning ability at the expense of ... minor children." ' [Citations.]" (*Id.* at p. 1218, 45 Cal.Rptr.2d 555.) Instead, "a child support obligation ' "must be taken into account whenever an obligor wishes to pursue a different lifestyle or endeavor.... [It is] an overhead which must be paid first before any other expenses...." ' [Citations.]" (*Ibid.*)

Similarly, in *Ilas,* the trial court imputed income to a father based on his earnings from the job he left a year earlier to start medical school. (*Ilas, supra,* 12 Cal.App.4th at pp. 1633-1634, 16 Cal.Rptr.2d 345.) The Court of Appeal affirmed, explaining " '[the father] did not have the right to divest himself of his earning ability at the expense of [the mother] and his two minor children. [The father] may wish to undertake and pursue and continue to pursue his acquisition of a medical doctorate degree, but he must also continue to pay his child and spousal support.' " (*Id.* at p. 1639, 16 Cal.Rptr.2d 345; see *Regnery, supra,* 214 Cal.App.3d at pp. 1373-1376, 263 Cal.Rptr. 243 [parent quitting job and failing to find replacement employment for two years supported trial court's decision imputing income based on earnings at prior job].)

In *Eggers,* the parent's employer fired him for sending sexually inappropriate e-mails to a coworker. (*Eggers, supra,* 131 Cal.App.4th at p. 698, 32 Cal.Rptr.3d 292.) Although the parent did not quit his job to pursue other endeavors, the trial court nonetheless relied on *Padilla* and *Ilas* to impute earnings because the court viewed the termination as more "voluntary" than "involuntary". (*Id.* at pp. 700-701, 32 Cal.Rptr.3d 292.) We reversed because the parent's misconduct was not equivalent to voluntarily divesting himself of earning capacity required to pay child support, as in *Padilla* and *Ilas.* In reaching that conclusion, we acknowledged trial courts have the discretion to impute earnings from a prior job when a parent's conduct in quitting the job "reflect[s] a divestiture of resources required for child support obligations." We also recognized "[t]here may be situations where the supporting parent's ****462** conduct warrants considering a claimed involuntary termination of employment as actually voluntary for ***1254** purposes of determining the parent's earning capacity." (*Ibid.*) We concluded, however, the parent's conduct in *Eggers* did not rise to that level. (*Id.* at p. 701, 32 Cal.Rptr.3d 292.)

[19] Here, we conclude the evidence supports the trial court's decision to treat Charles's termination as voluntary and impute income to him at his November 2009 earnings level. Charles did not simply exercise poor judgment on a collateral matter that resulted in his termination; rather, he engaged in fraudulent misconduct with the intent to avoid his child support obligations and refused to accept Amcor's reasonable conditions that would have allowed him to keep his well-paying job despite his malfeasance. In deciding to impute income to Charles, the trial court found he had the opportunity to keep his job, Amcor fired him because he refused to cooperate with its investigation into his diversion of business and improper commission sharing agreements, his misconduct "was part and parcel of his attempt to lower Child and Spousal Support," and imputing income to Charles was in the child's best interests. Substantial evidence supports each of these findings.

Sarnecki testified Charles approached Amcor in early 2009 and asked for help in reducing his income because he would soon become embroiled in a bitter divorce. Amcor refused Charles's request to conceal some of his compensation from Connie, and in the months following that refusal Charles's sales volume dropped significantly. Charles eventually admitted to Sarnecki and other Amcor executives he had done a lot of " 'stupid stuff' " to reduce his income and try to settle his divorce, including diverting some of his Amcor customers to Value Added and entering into improper commission sharing agreements with another salesman on at least three accounts. Finally, Sarnecki testified Amcor terminated Charles when he failed to cooperate with the investigation into his misconduct and provide information about the business he diverted. Charles testified he made the foregoing statements to Sarnecki and other Amcor executives, but claimed his admissions were not true, explaining Amcor's investigators told him he had to make the statements if he wanted to keep his job. The trial court resolved this evidentiary conflict in Connie's favor, and we must defer to that implied finding. (*Leung, supra,* 55 Cal.4th at p. 308, 145 Cal.Rptr.3d 553, 282 P.3d 1250.)

Charles relies on several cases holding evidence of a current income opportunity is necessary to impute income, and evidence that a parent merely possesses the requisite skill and qualifications is not sufficient. (See, e.g., *Mendoza, supra,* 182 Cal.App.4th at pp. 685-686, 105 Cal.Rptr.3d 853; *Berger, supra,* 170 Cal.App.4th at pp. 1079-1080, 88 Cal.Rptr.3d 766; *Bardzik, supra,* 165 Cal.App.4th at pp. 1308-1309, 83 Cal.Rptr.3d 72; *Smith, supra,* 90 Cal.App.4th at pp. 82-83, 108 Cal.Rptr.2d 537; *Vargas, supra,* 70 Cal.App.4th at p. 1127, 83 Cal.Rptr.2d 229; *Cohn, supra,* 65 Cal.App.4th at pp. 929-931, 76 Cal.Rptr.2d 866.) None of these cases, however, involves a parent who engaged in intentional ***1255** misconduct to reduce his reported income and

support obligations, and then refused to cooperate with the employer when it nonetheless offered him the opportunity to keep his job despite his malfeasance.

The two cases Charles cites that resemble our case are *Berger* and *Bardzik* because they involved parents who voluntarily left jobs. In *Berger,* we affirmed the trial court's decision refusing to impute ****463** income to a father based on a well-paying job he held five years earlier because there was no evidence he had the present opportunity to earn the same income. There, the mother failed to argue the trial court had discretion to impute income from the father's previous job based on *Padilla*, *Ilas*, and *Eggers*. Moreover, the father quit his well-paying job to start a new business a year *before* the couple separated, and no evidence suggested he did so in anticipation of a divorce or to divest himself of resources he would later need to meet his child support obligations. (*Berger, supra,* 170 Cal.App.4th at pp. 1074-1075, 1079-1080, 88 Cal.Rptr.3d 766.)

Similarly, in *Bardzik,* we affirmed the trial court's decision refusing to impute income to a mother based on a job from which she had retired a year earlier because no evidence showed there were current opportunities for her to earn the same income. The father sought to impute income to the mother solely based on the salary she had earned before retirement because she had retired at the relatively young age of 42. The father, however, did not rely on *Padilla*, *Ilas*, and *Eggers*, which granted the trial court discretion to impute earnings from a prior job when the parent deliberately abandoned it, and no evidence showed the mother retired so she could reduce her child support payments. (*Bardzik, supra,* 165 Cal.App.4th at pp. 1296-1298, 1308-1309, 83 Cal.Rptr.3d 72.) Because *Berger* and *Bardzik* affirmed the trial court's exercise of its discretion and did not address the rule we apply here, neither case establishes the trial court erred by imputing income to Charles at the level he earned in November 2009.

Finally, Charles contends the reasons for his termination and his motivation for declining the opportunity to retain his job are irrelevant to the trial court's decision whether to impute income to him. To support this contention, Charles cites the following statement we made in *Padilla:* "A parent's motivation for reducing available income is irrelevant when the ability and opportunity to adequately and reasonably provide for the child are present." (*Padilla, supra,* 38 Cal.App.4th at p. 1218, 45 Cal.Rptr.2d 555.) Charles, however, takes this sentence out of context, ignores our later clarification in *Bardzik,* and ignores the proper role motivation may play in the earning capacity analysis.

In *Padilla,* we declared a trial court's authority to impute income based on earning capacity did not require a finding the parent acted in bad faith in ***1256** reducing or eliminating his or her income. (See *Padilla, supra,* 38 Cal.App.4th at pp. 1217-1218, 45 Cal.Rptr.2d 555.) In *Bardzik,* we explained this statement from *Padilla* was "exuberant dicta" and "[did not stand] for the blanket proposition that motivation is *per se* irrelevant" because "[a]n inflexible rule of per se irrelevance ... is inconsistent with Family Code section 4058, subdivision (b)'s treatment of earning capacity as a discretionary matter considering the best interests of the children." (*Bardzik, supra,* 165 Cal.App.4th at p. 1311, 83 Cal.Rptr.3d 72, original italics.) Other cases have explained section 4058, subdivision (b), explicitly authorizes a court to consider earning capacity in "'all cases,' consistent, with the child's best interests," regardless whether the parent acted in bad faith, but deliberate avoidance of family responsibilities remains a " 'significant factor' " in deciding whether to consider earning capacity in lieu of actual income. (*Smith, supra,* 90 Cal.App.4th at p. 81, 108 Cal.Rptr.2d 537; *Ilas, supra,* 12 Cal.App.4th at pp. 1638-1639, 16 Cal.Rptr.2d 345.) Accordingly, the trial court properly considered Charles's declared intent to reduce ****464** his income in determining whether to impute income based on his November 2009 earnings level.

3. The Trial Court's Denial of Connie's Motion to Set Aside Did Not Bar Her Counter request to Increase Support [**]

III

DISPOSITION

The order is affirmed. Connie shall recover her costs on appeal.

WE CONCUR:

MOORE, ACTING P.J.

THOMPSON, J.

All Citations

231 Cal.App.4th 1238, 180 Cal.Rptr.3d 448, 14 Cal. Daily Op. Serv. 13,462, 2014 Daily Journal D.A.R. 15,841

Footnotes

* Pursuant to California Rules of Court, rules 8.1005(b) and 8.1110, this opinion is certified for publication with the exception of part II.D.3.

1 For clarity, "we refer to the parties by their first names, as a convenience to the reader. We do not intend this informality to reflect a lack of respect. [Citation.]" (*In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1513, fn. 2, 47 Cal.Rptr.3d 183.)

2 All statutory references are to the Family Code unless otherwise stated.

3 Although Charles's order to show cause sought to reduce both his child and spousal support obligations and Connie's counterrequest sought to increase both Charles's child and spousal support, the parties' briefs only address the child support order. Accordingly, "[a]lthough the rules pertaining to the imputation of income for purposes of spousal and child support may differ, ... we consider any issue that may pertain to this distinction as waived for purposes of this appeal." (*In re Marriage of Eggers* (2005) 131 Cal.App.4th 695, 699, 32 Cal.Rptr.3d 292 (*Eggers*).)

4 As originally established in *In re Marriage of Regnery* (1989) 214 Cal.App.3d 1367, 263 Cal.Rptr. 243 (*Regnery*), this earning capacity standard included a third prong, "the willingness to work exemplified through good faith efforts, due diligence and meaningful attempts to secure employment." (*Id.* at pp. 1372-1373, 263 Cal.Rptr. 243.) "Later courts, recognizing ... the ... willingness to work [element] should be taken for granted, recast *Regnery* 's three-prong test as a simple two-prong test: ability and opportunity." (*In re Marriage of Bardzik* (2008) 165 Cal.App.4th 1291, 1302, 83 Cal.Rptr.3d 72 (*Bardzik*); *State of Oregon v. Vargas* (1999) 70 Cal.App.4th 1123, 1126, 83 Cal.Rptr.2d 229 (*Vargas*).)

5 California Rules of Court, rule 8.137 allows an appellant to appeal based on a settled statement of the trial court proceedings in lieu of a reporter's and clerk's transcripts.

6 We do not address the third condition Amcor imposed on Charles keeping his job--entering into a last chance employment agreement--because Charles's failure to show he could not satisfy the first two conditions renders this moot.

** See footnote, *ante*. page 1238.