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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re Marriage of GAYLE M. and ANTHONY E. GABRIEL.	B250134 (Los Angeles County Super. Ct. No. ND056012)
GAYLE M. GABRIEL, Appellant, v. ANTHONY E. GABRIEL, Respondent.	

APPEAL from an order of the Superior Court of Los Angeles County, John Chemeleski, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed with directions.

Law Offices of Michael Leight, Michael Leight and John Gloger for Appellant.

Stabile & Cowhig, John S. Cowhig; Snell & Wilmer, Richard A. Derevan and Jing Hua for Respondent.

In this family law matter, Gayle M. Gabriel appeals from an order modifying child support in favor of Anthony E. Gabriel.[1] Gayle contends that the order must be reversed because the family law court applied an incorrect legal standard and Anthony failed to demonstrate a change of circumstances justifying a modification of child support. We conclude that the family law court applied the correct legal standard and acted within its discretion in determining that Anthony demonstrated a change of circumstances but only insofar as his bonus and stock option income exceeded the $3 million amount set forth in Exhibit A attached to and incorporated into the judgment on reserved issues. We find that setting the maximum custody obligation at a figure less than that required by Exhibit A was an abuse of discretion and therefore reverse the modification order.

FACTUAL AND PROCEDURAL BACKGROUND[2]

A. *The Parties*

Gayle and Anthony were married on July 11, 1998 and had two daughters, Katina (born August 2000) and Kristin (born August 2002). Gayle and Anthony separated on August 30, 2006, and Gayle petitioned for dissolution of marriage on September 20, 2006. Anthony filed a response in October 2006. The parties stipulated to a bifurcated trial on status, and the family law court entered judgment as to status only on June 25, 2009.

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1 As is customary in family law cases, we use first names for purposes of clarity. No disrespect is intended. (*In re Marriage of Schu* (2014) 231 Cal.App.4th 394, 396, fn. 1; *In re Marriage of Williamson* (2014) 226 Cal.App.4th 1303, 1307, fn. 1.)

2 Portions of the factual and procedural background are based on materials from the prior appeal in this case *In re Marriage of Gabriel* (Sep. 19, 2012, B227496) (nonpub. opn.). (See Cal. Rules of Court, rule 8.147(b) [all or parts of record on a prior appeal in the same case may be incorporated by reference in the pending appeal].)

Gayle and Anthony both have medical degrees. While working as a physician, Anthony earned a masters in business administration from UCLA and was recruited to work for DaVita, a publicly traded health care company.

Gayle and Anthony's "marital standard of living was upper class and very comfortable." Their joint tax returns for 2004, 2005 and 2006 reflected adjusted gross income of $711,688, $2,052,094 and $3,090,260, respectively. Their monthly expenses for the year immediately preceding the date of separation averaged $16,553 per month, and they had about $500,000 in savings and unexercised stock options. Much of the parties' income, particularly stock options, came from Anthony's position as an executive with DaVita. Gayle worked for part of the marriage and stopped working completely in 2007.

During the marriage, the parties lived in a 2,400 square foot home just steps from the beach in Long Beach. Their monthly loan payment was $3,600 a month. Before separating, the parties entered into a contract to purchase a $3.5 million home in Newport Beach. Due to their separation, the purchase was not completed, and they forfeited $125,000 of their $150,000 down payment.

Gayle and the children continued to live in the family residence in Long Beach from the date of separation until June 2007, when the home was sold and Gayle purchased a new home in San Clemente for $2.2 million. Gayle's $1.2 million down payment consisted of $500,000 she received as her share of the proceeds from the sale of the family residence and $700,000 in proceeds from the exercise of community stock options.

Upon separation, Anthony moved into his parents' home and later into an apartment. His monthly expenses totaled $10,000, including $3,300 for housing.

B. *Judgment on Reserved Issues*

A trial on reserved issues, as well as Gayle's order to show cause for child support, spousal support and attorneys' fees, took place on December 19, 2008 and April 17, 2009. During trial, Gayle asked the family law court to consider Anthony's actual

income since 2003 and to "include the value of stock options awarded to Anthony" when computing child support. In her trial brief, Gayle maintained that Anthony should pay monthly child support in amounts between $17,351 and $27,286, depending upon assumptions concerning Gayle's and Anthony's future income.

Anthony, on the other hand, asked for a guideline child support order and proposed "that any child support amount be calculated based on his salary and bonus amounts and then a percentage be applied to any stock option income he receives or is eligible to receive when the options become exercisable." Anthony represented that the substantial majority of his past income resulted from the exercise of stock options with a significant amount of equity. He maintained, however, that "the options presently remaining and vested have little comparable equity" and that his income would be substantially less than prior years if the remaining options were exercised. Anthony did not ask the court to set a maximum ceiling on the amount of child support to be paid.

On July 19, 2010, the family law court issued a statement of decision and entered judgment on reserved issues. Among the many issues resolved, and the only one relevant to this appeal, was child support. In calculating child support, the court imputed annual income of $180,000 to Gayle, who had voluntarily stopped working as a physician. The court also found that Anthony had "gross monthly earnings from salary and bonuses of $37,896" and had the children 35 percent of the time.

In its statement of decision, albeit in the section devoted to a discussion of permanent spousal support, which the family law court ultimately did not award, the court noted that Anthony's 2008 income "declined because of the declining price of Da[V]ita stock. His total income for 2009 appears to be limited to his base salary plus the bonus plus any stock options he may be awarded. Based on the evidence presented at trial, the options he now holds will have little value because of the current trading price of the stock. Thus, it appears unlikely that [Anthony's] ability to pay will be much beyond that provided by his base salary and bonus paid earlier this year. In the event the price of Da[V]ita stock increases so that his options have value, such income can be

include[d] via order pursuant to *In re Marriage of Ostler & Smith* (1990) 223 Cal.App.3d 33."

In the judgment on reserved issues, the family law court ordered Anthony to pay Gayle "for the support and maintenance of the minor children, the sum of $3,175.00[3] per month . . . commencing January 1, 2009, and continuing . . . until the child for whom support is payable, dies; marries; is emancipated; until further order of Court; or as to an unmarried child who has attained the age of 18 years old, is a full-time high school student, and who is not self-supporting until the time the child completes the 12th grade or attains the age of 19 years old, whichever occurs first."

The family law court further ordered, in paragraph 22 of the Attachment to Judgment, that "[c]ommencing January 1, 2009, child support shall be augmented by a percentage of any bonus or exercisable stock option received by [Anthony] (and not awarded to [Gayle]) in excess of $454,752.00 [the amount of his then annual compensation]. Said percentage shall be determined pursuant to Exhibit "A" attached hereto and incorporated by this reference." (Bold omitted.) Exhibit A was a chart entitled "Father Annual Bonus Wages Report," (Bonus Chart) setting forth the additional amount of child support to be paid depending on the amount of Anthony's additional income starting at $50,000 up to $3 million dollars in $50,000 increments. The Bonus Chart provided for a decreasing percentage to be paid as the amount of Anthony's additional income increased. According to the last entry in the Bonus Chart, Anthony would be required to pay Gail $291,917 in addition to the base amount if he received a $3 million bonus or the equivalent value in exercisable stock options.

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3 The factual support for this child support obligation is reflected in a DissoMaster Report attached to the Statement of Decision. This amount represents the guideline amount for 2009 based solely on Anthony's monthly salary of $37,896.

"DissoMaster is a computer software program widely used by courts to set child support . . . ." (*Namikas v. Miller* (2014) 225 Cal.App.4th 1574, 1578, fn. 4; accord, *In re Marriage of Williams* (2007) 150 Cal.App.4th 1221, 1227, fn. 5 ["DissoMaster is a privately developed computer program used to calculate guideline child support under the algebraic formula required by [Fam.Code, §] 4055"].)

In that portion of the judgment on reserved issues pertaining to spousal support, the family law court reiterated that "[i]n 2008 [Anthony's] income declined because of the declining stock price of DaVita. His total income for 2009 appears to be limited to his base salary, plus bonus plus stock options he may be awarded. The options [Anthony] now holds will have very little value because of the current trading price of the stock." The court further stated it was unlikely that Anthony's "ability to pay will be much beyond that provided by his base salary and bonus paid earlier in 2009."

On September 16, 2010, Gail filed a notice of appeal from the judgment on reserved issues[4]; Anthony did not appeal.

C. *Anthony Seeks Modification of Child Support*

While Gayle's appeal from the judgment on reserved issues was pending, on August 24, 2011 Anthony filed a request for an order to show cause asking the court to modify the July 19, 2010 child support order and "to set [a] maximum amount of child support that does not exceed the children's needs." In his supporting declaration, Anthony contended that the amount of child support he paid exceeded his daughters' needs. He asked the family law court to cap his child support payments at $8,000 per month. Anthony's ability to pay child support was not an issue.

As explained by his counsel, Anthony did not seek to change the base amount of child support even though his monthly income had decreased. He only sought a cap on the additional amount he was obligated to pay which was calculated as a percentage of bonus and stock options received.

In his declaration in support of his order to show case, Anthony stated: "At time of the trial [on reserved issues] there was no need to place a cap on the child support . . .

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[4] In her first appeal, Gayle only challenged the family law court's imputation of $180,000 to her as earning capacity and its failure to require Anthony to obtain a life insurance policy benefitting their daughters. We affirmed the judgment on reserved issues on September 19, 2012 in a unpublished opinion. (*In re Marriage of Gabriel*, B227496.)

because all options were under water with a very bleak outlook for the future. To determine that the options would again be 'in the money' was highly speculative." He continued: "Since the entry of our Judgment and mostly for year 2010, the stock of DaVita, Inc. (my employer) has increased substantially. As a result, for year 2010 I paid [Gayle] the sum of $223,974.14 (or an average of $18,664.00 per month) just from the stock options that had vested in that year. I paid this amount to [Gayle] in February 2011 even though I did not cash out all the options. This amount was in addition to the $3,175.00 per month I paid on my 'base' income as ordered. This totaled another $38,100.00 for year 2010. In all, I paid to [Gayle] for child support of our two young daughters (ages 10 and 8), the amount of $262,074.14 (or an average of $21,839.51 each month). Indeed, this meets all of [Gayle's] stated expenses set forth in her last Income and Expense Declaration dated September 17, 2008 . . . for not only our two daughters, but also for her, her new husband (then [fiancé]) and his two children." (Bold omitted.)

According to his income and expense declaration (Income Declaration) dated September 28, 2011, Anthony, who was 42, was earning a salary of $33,333 per month from DaVita, along with monthly stock plan awards of $120,420. Anthony was living with his girlfriend, Basak Ertan, whose monthly salary was $20,000. Their monthly expenses totaled $13,665.

In his Income Declaration dated October 30, 2012, Anthony, then 44 years of age, listed his monthly salary from DaVita at $33,333. In addition, he received monthly stock plan awards of $359,773. This equated to monthly income of $393,106 and yearly income of $4,717,272. Anthony continued to live with Basak, now his wife, whose salary was $15,000 per month. Their total monthly expenses were $20,607. Anthony listed his assets as $2,470,000 in cash and savings, $500,000 in stocks, bonds and other assets and other real and personal property valued at $1,500,000.

Anthony's March 28, 2013 Income Declaration revealed that he had a new employer, Radiology Partners, Inc., and earned $20,833 a month. Basak continued to earn $15,000 per month, and their monthly expenses continued to be $20,607. Anthony

listed his assets as $5,300,000 in cash and savings, $1,300,000 in stocks, bonds and other assets and other real and personal property valued at $2,000,000.

Gayle opposed Anthony's order to show cause. She challenged Anthony's "efforts to change the order that he requested at the trial of this case." Gayle also raised evidentiary objections and sought attorney's fees.

D. *Hearing on the OSC and Family Law Court's Ruling*

The family law court held an evidentiary hearing on Anthony's motion to modify child support on March 29, May 23, and May 29, 2013, at which both Gayle and Anthony testified. The court also considered a number of declarations and exhibits submitted by the parties. Anthony testified that after paying Gayle $223,000 in additional child support in 2011 for 2010 based on his stock options, he decided to seek a modification of his child support obligations by asking the family law court to place a cap on the amount he would have to pay. After making this decision, Anthony withheld the additional percentage-based child support payments for 2011 and 2012 from Gayle but deposited the amounts owed into an account.

Anthony further testified that in 2012 he received $13 million in compensation from salary and stock options. In addition, Anthony no longer worked for DaVita. DaVita had asked him to step down from his position with the company. Anthony left DaVita in February 2013 on good terms. Within 30 days after leaving DaVita, Anthony fully exercised all remaining stock options that he had.

Anthony also related that in October 2010, he and his then fiancé moved into a $2.95 million residence in Manhattan Beach located three blocks from the beach. When they decided to purchase the property, they decided that Basak would take title to the property in her own name. Anthony loaned Basak $800,000 for the down payment and paid her an amount for rent. Following their marriage in August 2012, they paid the monthly loan payment out of a joint account.

On May 29, 2013 the family law court orally ruled on the modification request, and ordered Anthony's counsel to prepare a formal order. On December 11, 2013, the

family law court issued its written findings and order after hearing. The court found that Anthony "began earning amounts much greater than even the [Bonus C]hart in the Judgment went up to" and that "[t]here is evidence that supports the court[']s determination that an amount of support, even under that [Bonus C]hart and certainly beyond that chart, is in excess of the needs of these children." The court further found that there had been a change of circumstances necessitating a modification of the prior child support order and capped Anthony's child support obligation at $12,000 per month.

In its written findings, the court noted: "The issue here is whether there is some point the court should determine that the amount under the schedule that has been established would exceed the needs of the children considering the Family Code[5] section 4053 factors and other factors that are mentioned that both parents are mutually responsible for the support of their children, that each parent should pay for the support of the children according to his or her ability, children should share in the standard of living of both parents, the child support may, therefore, appropriately improve the standards of the living of the custodial household to improve the lives of the children, and that it is presumed that the parent having primary physical responsibility for the children contributes a significant portion of available resources for the support of the children."

In determining that a cap was appropriate, the court took into consideration Gayle's most recent Income Declaration, which listed her actual monthly household expenses as a little under $25,000, her husband's monthly income of $6,500,[6] and the court's prior determination that Gayle had the ability to earn $15,000 per month.

After arriving at a cap of $12,000 per month, the court stated: "Accepting some of [Anthony's] argument as to what should be considered as these children's needs, also considering that there may be other additional amounts that need to be paid that would

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5 All subsequent statutory references are to the Family Code.

6 By the time of the ruling on the requested modification, Gayle had remarried and given birth to twin boys. Her surname is now Kookootsedes. Her new husband's children from a previous marriage also reside part time with Gayle and her husband.

raise the level of the other children in the home, although it is raising the level because it considers the expenses of the other parties in the home, it is not appropriate for the court to order all those expenses to be borne by [Anthony]." The court then rejected Anthony's argument that "the court should discount the needs of the children by some percentage because of the fact he is also supporting the children in the home for some percentage of the time."

The court ordered that the provisions for child support set forth in the judgment on reserved issues filed on July 19, 2010 remain in full force and effect except as modified. Specifically, the court ordered: "[Anthony] shall continue paying the base child support of $3,175.00 per month as ordered in the Judgment of Dissolution filed on July 19, 2010 as well as the percentage on income as set forth in Paragraph 22 and Exhibit A (as referenced in paragraph 22) of the Judgment of Dissolution, with the exception that the amount of child support [Anthony] is ordered to pay to [Gayle] for both minor children under the terms of the Judgment of Dissolution shall not exceed $12,000.00 per month on average, or $144,000.00 per year, commencing September 1, 2011 and continuing each month thereafter until the child for whom support is payable, dies; marries; is emancipated; until further order of Court; or as to an unmarried child who has attained the age of 18 years old, is a full-time high school student, and who is not self-supporting until the time the child completes the 12th grade or attains the age of 19 years old, whichever occurs first." The court also ordered Anthony to contribute $23,000 towards Gayle's attorneys' fees and costs.

Gayle appealed.[7]

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[7] Gayle filed her notice of appeal on July 15, 2013, after the family law court's oral ruling on the modification request, but prior to the court's issuance of its findings and order after hearing on December 11, 2013. Pursuant to California Rules of Court, rule 8.104(d) and (e), we treat the notice of appeal as having been filed immediately after the family law court issued its written findings and order.

DISCUSSION

A. *Standard of Review*

"'"[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.]' [Citation.] [¶] However, '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.]' [Citation.]" (*In re Marriage of Sorge* (2012) 202 Cal.App.4th 626, 640, quoting *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 282-283.)

"In conducting our review for an abuse of discretion, we determine 'whether the court's factual determinations are supported by substantial evidence and whether the court acted reasonably in exercising its discretion.' [Citation.] We do not substitute our own judgment for that of the trial court, but determine only if any judge reasonably could have made such an order. [Citation.]" (*In re Marriage of Bodo* (2011) 198 Cal.App.4th 373, 384.)[8]

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[8] We reject Gayle's assertion that this case presents a question of law subject to de novo review. In *In re Marriage of Bodo*, *supra*, 198 Cal.App.4th 373, on which Gayle relies to support her assertion, the reviewing court was called upon to determine whether the father's "requested modification required a 'material' change in circumstances or a

B. ***Overview of Applicable Law***

1. *Statewide Uniform Guideline for Determining Child Support*

"'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. (See . . . §§ 4050-4076.) "The guideline seeks to place the interests of children as the state's top priority." (§ 4053, subd. (e).) In setting guideline support, the courts are required to adhere to certain principles, including these: "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." (§ 4053, subd. (a).) "Each parent should pay for the support of the children according to his or her ability." (§ 4053, 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." (§ 4053, subd. (f).)' [Citation.]" (*In re Marriage of Sorge*, *supra*, 202 Cal.App.4th at p. 640, quoting *In re Marriage of Cheriton, supra,* 92 Cal.App.4th at p. 283; *In re Marriage of Cryer* (2011) 198 Cal.App.4th 1039, 1048.)

The statewide uniform guideline governs all child support determinations, whether pendent lite or permanent, including a request for modification of an existing child support order. (*In re Marriage of Williams*, *supra*, 150 Cal.App.4th at p. 1227, fn. 6; *In re Marriage of Laudeman* (2001) 92 Cal.App.4th 1009, 1013.) It determines child support "according to a complex [algebraic] formula based on each parent's income and custodial time with the child. (§§ 4050, 4055 . . . .)" (*In re Marriage of McHugh* (2014) 231 Cal.App.4th 1238, 1245.)

"The guideline is intended to be presumptively correct in all cases, and only under special circumstances should child support orders fall below the child support mandated

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'substantial' change in circumstances, and whether there is any difference between the two." (*Id*. at p. 384.) Because this issue was a legal one, the standard of review was de novo. (*Ibid*.) In this case, the question is a factual one, namely, whether Anthony demonstrated a change in circumstance warranting a modification of his child support obligation. Accordingly, we apply the abuse of discretion standard of review.

by the guideline formula." (§ 4053, subd. (k); see also § 4057, subd. (a) ["[t]he amount of child support established by the formula provided in subdivision (a) of Section 4055 is presumed to be the correct amount of child support to be ordered"].) 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 certain enumerated factors are found to apply. (§ 4057, subd. (b).) One of the factors allowing the amount of child support to vary from the guideline is when "[t]he parent being ordered to pay child support has an extraordinarily high income and the amount determined under the formula would exceed the needs of the children." (§ 4057, subd. (b)(3).)

2. *Ascertaining the Needs of a Child*

"What constitutes reasonable needs for a child varies with the circumstances of the parties." (*In re Marriage of Chandler* (1997) 60 Cal.App.4th 124, 129.) "[I]n the case of wealthy parents . . . the well-established principle [is] that the 'child's need is measured by the parents' current station in life.' [Citations.]" (*In re Marriage of Cheriton, supra*, 92 Cal.App.4th at p. 293; accord, *In re Marriage of Cryer*, *supra*, 198 Cal.App.4th at p. 1050; *In re Marriage of Hubner* (2001) 94 Cal.App.4th 175, 187 [a child """"is entitled to be supported in a style and condition consonant with the position in society of its parents""""].) Accordingly, when a child has a wealthy parent, he or she "'is entitled to, and therefore "needs" something more than the bare necessities of life.' [Citation.]" (*In re Marriage of Cheriton*, *supra*, at p. 293; *In re Marriage of Cryer*, *supra*, at p. 1050; *In re Marriage of Chandler*, *supra*, 60 Cal.App.4th at p. 129 ["the duty to support a child covers more than the mere necessities of life if the parent can afford to pay more"]; *Johnson v. Superior Court* (1998) 66 Cal.App.4th 68, 72.) "[A] parent's 'ability' to support a child may depend upon whether the supporting parent is merely rich or is very rich, and 'this discrepancy can affect the [trial court's determination as to the] child's needs.' [Citation.]" (*In re Marriage of Hubner*, *supra*, 94 Cal.App.4th at p. 187.)

3. *Modification of Child Support Order*

With certain exceptions inapplicable to this case, a support order is subject to modification or termination at any time the family law court deems necessary. (§ 3651, subd. (a).) Typically, the family law court will only modify a child support order if there has been a material or substantial change of circumstances. (*In re Marriage of Rosenfeld & Gross* (2014) 225 Cal.App.4th 478, 490; *In re Marriage of Freitas* (2012) 209 Cal.App.4th 1059, 1062, fn. 2, 1068; *In re Marriage of Bodo*, *supra*, 198 Cal.App.4th at p. 392 ["a 'material' change in circumstances is the same as a 'substantial' change in circumstances for the purpose of modifying child support"].) "'[T]he reason for the change of circumstances rule is to preclude relitigation of the same facts' and to bring finality to determinations concerning financial support. [Citations.]" (*In re Marriage of Rosenfeld & Gross*, *supra*, 225 Cal.App.4th at p. 490; accord, *In re Marriage of Stanton* (2010) 190 Cal.App.4th 547, 553-554.)

"The statutory procedures for modification of a child support order 'require a party to introduce admissible evidence of changed circumstances as a necessary predicate for modification.' [Citations.]" (*In re Marriage of Williams*, *supra*, 150 Cal.App.4th at p. 1234; accord, *In re Marriage of Leonard* (2004) 119 Cal.App.4th 546, 556.) Therefore, "[t]he party seeking the modification bears the burden of showing that circumstances have changed such that modification is warranted." (*In re Marriage of Cryer*, *supra*, 198 Cal.App.4th at p. 1054.)

C. *Analysis*

1. *Anthony Has Not Waived His Right To Seek Modification of the Child Support Order*

Preliminarily, we address Gayle's contention that Anthony waived the right to seek a cap on the child support obligations he proposed to the court because he did not do so at the trial on reserved issues or on appeal from the judgment on reserved issues. This argument is mistaken. As previously stated, subject to exceptions that do not apply in this case, a child support order is subject to modification at any time the family law court

deems necessary. (§ 3651, subd. (a).) A child support obligation is "court-imposed" regardless of whether the parties reached an agreement or stipulated as to the amount of child support. (*Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 947; *In re Marriage of Alter* (2009) 171 Cal.App.4th 718, 728-729.) The obligation is no less "court-imposed" because it was proposed by the supporting parent. Therefore, the fact that Anthony advocated for the original support order imposed by the court did not in any way preclude the family law court from modifying that order. Nor did it preclude Anthony from attempting to demonstrate a change in circumstances justifying the imposition of a cap on his monthly child support obligation.

2. *The Court Applied the Correct Legal Standard*

Gayle contends that the family law court applied the wrong legal standard in ruling on Anthony's modification request. She argues that the court erroneously focused only on the basic "needs" of the children without taking into consideration Anthony's considerable wealth and current financial situation. The record belies this contention. During argument, when Gayle's counsel argued, "the standard is not just meeting the minimum needs of these children," the family law court replied, "No. I don't think that I mentioned anything about minimum or basic needs. Talking about needs according to the station in life and circumstances of the parties."[9] In its findings and order, the court listed the factors pertinent to its decision including the fact that "children should share in the standard of living of both parents."

Gayle also contends that the family law court applied the wrong standard because as a parent's income substantially increases, so should the child support payments. Gayle cites no authority for the proposition that child support must increase without limitation as long as the supporting parent's income continues to increase. Here, the family law

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[9] In light of our conclusion, we need not reach the merits of Anthony's assertion that Gayle is foreclosed from arguing the family law court applied the wrong standard because she failed to request a statement of decision.

court identified the issue before it as whether Anthony demonstrated that applying the existing formula to his income would result in an amount of child support that exceeded the needs of his daughters, warranting the imposition of a maximum limit or cap on his monthly support obligation. (See § 4057, subd. (b)(3).)

3. *The Court Did Not Abuse Its Discretion in Finding a Change in Circumstances*

In its judgment on reserved issues, the family law court stated that Anthony's income had declined because the price of DaVita stock had declined. The court further stated that it appeared that Anthony's income for 2009 would be limited to his base salary, bonus and stock options, and it was unlikely that Anthony would be able to pay "much beyond that provided by his base salary and bonus paid earlier in 2009."

After the judgment on reserved issues was issued, the price of DaVita stock increased substantially. Anthony's Income Declaration dated October 30, 2012, revealed monthly income of $393,106, consisting of $33,333 in salary and $359,773 in stock plan awards, totaling $4,717,272 in yearly income. Of that total income, bonus or stock options were $4,317,276, an amount above the highest entry in the Bonus Chart. At the hearing on the order to show cause, Anthony testified that he received $13 million in compensation in 2012, from option exercises and salary. According to documentation provided by Anthony from his former employer DaVita, as of December 22, 2012, year to date income from stock plan awards exceeded $12 million. Thus, rather than remaining at 2009 levels, Anthony's income from bonus and option awards soared.

The family law court found the fact that applying the formula to Anthony's increased income would result in child support exceeding the needs of the children constituted a change in circumstances justifying the imposition of a cap on his child support obligation. Gayle does not dispute that the price of DaVita stock rose and that Anthony's income increased as a result. She contends, however, that this increase did not constitute a change in condition because the judgment on reserved issues anticipated and provided for the possibility that the options would increase in value.

We agree that the judgment on reserved issues anticipated and provided for the possibility that the options and bonuses would increase in value, up to the amount of $3 million. "Circumstances accounted for in the previous order cannot constitute a change of circumstances." (*In re Marriage of Lautsbaugh* (1999) 72 Cal.App.4th 1131, 1133; accord, *In re Marriage of Khera & Sameer* (2012) 206 Cal.App.4th 1467, 1476 [same].) However, nothing in the judgment or Bonus Chart dictates how the child support obligation should be determined if Anthony's additional income from bonus and stock options exceeds $3 million. We therefore find it was well within the family court's discretion to determine that there had been a change of circumstances once Anthony's bonus and stock income exceeded $3 million. We also find it was not an abuse of discretion to determine that a limitation should be set on Anthony's overall child custody obligation. (*In re Marriage of Kerr* (1999) 77 Cal.App.4th 87 (*Kerr*).)

While we find that the amount of the cap established by the family law court was improper, as discussed further below, we agree with the family law court's determination that Anthony's child support obligation should not exceed the children's needs. A court must properly consider whether a child support order exceeds the needs of the children when the supporting parent is a high earner. (*Kerr*, *supra*, 77 Cal.App.4th at p. 97.) In *Kerr*, husband and wife separated after 20 years of marriage. (*Id*. at p. 90.) During the marriage, in addition to salary, husband received yearly stock options resulting in substantial additional income, "which the parties used to enhance their standard of living." (*Id.* at p. 91, fn. omitted.)

Following a hearing on wife's request to modify an agreed upon spousal and child support order, the *Kerr* court ordered husband to pay a set amount in monthly spousal and child support. In addition, the court found that without an award of child and spousal support from future stock options, the monthly support awards would not meet the parties' marital standard of living. Consequently, the court determined that wife also was entitled to 40 percent of husband's future stock option income as spousal and child support until both children reached the age of majority at which time wife would receive 25 percent of the option income as spousal support. On appeal, husband objected to the

court's percentage award in part on the ground that it was not based on the children's needs. (*Kerr, supra*, 77 Cal.App.4th at pp. 91-92.)

With regard to child support, the *Kerr* court observed: "[A]s we previously expressed with respect to spousal support, the percentage of option income represents an extremely high dollar amount, given the enormous increase in [the] stock value. Applying the guideline formula under these circumstances is inappropriate without a finding that the amount ordered would not exceed the children's needs." (*Kerr, supra*, 77 Cal.App.4th at p. 97.) The court further directed that "[o]n remand, the court must determine the children's needs in light of both parents' abilities and standards of living. [Citation.] Given the court's broad discretion in ordering child support [citation], a percentage award based on the realized income from the exercise of stock options would be permissible, as long as the court sets a maximum amount that would not exceed the children's needs." (*Ibid*., fn. omitted.)

That *Kerr* involved an appeal from the initial child support order is a procedural distinction without import. *Kerr* establishes that when the supporting parent is a high earner—i.e., when the guideline support calculated on the parent's income exceeds the needs of the children according to their station in life—it is appropriate for the court to set a maximum amount that does not exceed the children's needs. (*Kerr, supra*, 77 Cal.App.4th at p. 97.)

4. *The Court Abused Its Discretion in Setting the Amount of the Cap*

Although it was appropriate for the family law court to set a limitation on Anthony's child support obligations, in doing so the family law court needed to consider that the existing judgment contemplated that Anthony would be obligated to pay $330,020 in annual total child support if Anthony's bonus was $3 million. That figure equates to approximately $27,502 per month. Anthony did not present evidence showing there was any change of circumstance justifying a reduction of his obligation to $12,000 per month or any amount below that contemplated in the judgment on reserved issues. We find the family law court abused its discretion in fixing the maximum child support

obligation at an amount less than the maximum provided for in the Bonus Chart, i.e., $27,502 per month.[10] We therefore reverse the order setting the maximum child support award at $12,000 per month and remand for further proceedings consistent with this opinion.

[10] Because we reverse the family law court's order, we need not address Gayle's challenge to evidentiary rulings of the family law court.

DISPOSITION

The order is reversed and the matter is remanded to the family law court with directions to set Anthony's maximum child support obligation at no less than $27,502 per month and to conduct further proceedings consistent with this opinion, including determination of past child support owed to Gayle. Gayle is awarded costs on appeal.

STROBEL, J.*

We concur:

PERLUSS, P. J.

SEGAL, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.