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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| NINA H.,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>MARCUS M.,<br><br>Defendant and Respondent. | B276217<br><br>Los Angeles County<br>Super. Ct. No. LF004463 |

APPEAL from a postjudgment order of the Superior Court of Los Angeles County, Virginia Keeny, Judge. Affirmed.

Langlois Family Law, Joseph A. Langlois, Linaja M. Murray and Lauren A. Meinhardt for Plaintiff and Appellant.

Lipton and Margolin, Hugh A. Lipton and Brian G. Magruder for Defendant and Respondent.

## INTRODUCTION

This family law proceeding began 10 years ago when appellant Nina H. filed a petition against respondent Marcus M. to establish his parental relationship over their son. The parties agreed to custody and visitation, but disputed the amount of child support. The issue of child support was tried more than five years later on December 19, 2013. The trial court announced its findings at the end of the trial that day and ordered respondent to pay appellant child support arrearages from October 2011 through December 2013 and prospective child support beginning January 2014, and to pay appellant's attorney $15,000 in attorney fees as a sanction. The trial court ordered appellant to submit a judgment within 90 days, but made its orders effective immediately. Less than three months later, respondent filed a "request for order" to modify the amounts of child support and attorney fees the trial court had ordered on the ground the orders were based on an incorrect calculation of his income. Judgment was entered April 25, 2014.

Nearly two more years went by before the trial court was able to take evidence and rule on respondent's request. On April 29, 2016, the trial court essentially reversed itself, finding its December 2013 orders were not based on respondent's true net income. It ordered *appellant* to pay respondent child support arrearages from October 2011 through December 2013 and to pay respondent child support retroactive to 2014 and prospectively. The trial court also reduced the attorney fees award from $15,000 to $5,000.

Appellant appeals from this decision. Essentially, she contends: (1) respondent's request failed to meet the procedural and substantive requirements for a motion for reconsideration or

a motion to set aside the trial court's orders under sections 1008 and 473 of the Code of Civil Procedure; (2) the trial court lacked authority to modify its child support orders retroactively; and (3) the trial court erred in reducing its attorney fees award.

We conclude the trial court had inherent authority to treat respondent's request as a motion for relief under section 473, subdivision (b) of the Code of Civil Procedure (section 473(b)). Because appellant failed to provide an adequate record, we must infer the trial court was not precluded from modifying child support arrearages retroactively based on the parties' earlier stipulation. As a result, we conclude the trial court did not abuse its discretion when it modified the April 2014 judgment to recalculate its child support and attorney fees orders. Finding substantial evidence supports those new calculations, we affirm the trial court's April 2016 decision.

## FACTS AND PROCEDURAL BACKGROUND

The underlying facts are largely undisputed as respondent adopted appellant's statement of facts, portions of which we incorporate below. We limit our description to those facts bearing on the relevant issues of child support and attorney fees. This proceeding began in June 2008 when appellant filed a petition to establish parental relationship naming respondent as the father of their son, then three and one-half years old. After an intervening dependency proceeding and several continuances, a trial was held on December 19, 2013, on the issues of child support and attorney fees.

### 1. *December 19, 2013 trial*

At the December 2013 trial, appellant was represented by counsel but respondent was not. The morning of trial, respondent requested a continuance to retain an attorney, but

the trial court denied his request, explaining he had known of the trial date for many months and also had failed to appear at the trial readiness conference.

Before trial, appellant filed a motion in limine to preclude respondent from introducing evidence at trial that he failed to produce in discovery. In support of the motion, appellant's counsel declared respondent failed to appear for his deposition and to produce records relating to his business and personal finances, first requested in 2012. The court also had ordered respondent to produce documents and appear for his deposition.

Respondent opposed the motion in limine at the trial, essentially arguing he did not have time to attend the deposition and did not believe he was obligated to produce receipts and other documents demonstrating his income and expenses. Respondent owns a small family restaurant that he runs primarily as a cash business. He admitted to taking expenses out of the business. Respondent stated appellant had obtained all of his bank records by subpoena, and he believed he had no other documents to provide. The trial court found good cause to grant the motion in limine, citing "strong evidence of a pattern of disregarding document requests by the respondent and failure to comply with reasonable discovery." The trial court, however, permitted respondent to testify "to understand a little bit more clearly what the court can about [respondent's] financial situation." Despite granting the motion, the trial court also reserved its authority to "decide what evidence it [would] receive from respondent."

**2. *Trial court's findings***

At the end of the December 2013 trial, the court found respondent had self-employment income of $7,133 per month and

other nontaxable income of $5,000 per month. At the trial, respondent offered little proof of his income and was unable to provide tax returns for 2011 and 2012 because he had not yet filed his returns for those years. The trial court based its income findings on respondent's admissions, his March 2013 credit application to lease a car listing his income as $20,000 a month, appellant's analysis of respondent's bank records showing deposits of approximately $15,000 a month, and appellant's analysis of expenses based on the bank records. The trial court found respondent's income and expense declaration, filed that morning, unsupported, incomplete, and not credible. The trial exhibits are not included in the record.

The trial court ordered respondent to pay appellant "guideline"[1] child support in the following amounts: $1,001 per month for the period October 2011 through December 2013, for a total of $26,026 in arrears (payable at $750 per month); and $1,010 per month beginning January 1, 2014. The trial court also ordered respondent to pay $15,000 in attorney fees (payable at $1,000 per month) to appellant's attorney as a sanction under section 271 of the Family Code based on respondent's failure to comply with discovery and the court's orders. Thus, beginning January 1, 2014, respondent was ordered to pay a total of $2,760 a month in child support arrears, child support, and attorney

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[1] "Guideline" support refers to support calculated based on California's mandatory statutory guidelines. (See Fam. Code, §§ 4050-4076.) Absent special circumstances not applicable here, courts must calculate child support under these guidelines by applying the mathematical formula contained in Family Code section 4055 to the parents' incomes. (*In re Marriage of Bodo* (2011) 198 Cal.App.4th 373, 385-386.) See discussion, *post*.

fees. The trial court ordered appellant to prepare and submit a judgment within 90 days, but made its order "effective immediately."

**3. *Respondent's request for order***

Respondent retained counsel and, on March 13, 2014, filed his "Request for Order" (RFO) on the mandatory Judicial Council form asking the trial court to modify the amount of child support and to reduce the attorney fees it had ordered him to pay. Specifically, the form stated respondent sought to modify the existing child support order filed December 19, 2013, ordering payment of $1,060 per month,[2] and to reduce the $15,000 attorney fees order and $1,000 monthly attorney fees repayment amount. In his declaration attached to the RFO, respondent averred the December order used an inaccurate amount for his monthly income to calculate child support. Respondent declared his true net monthly income could support neither the ordered monthly child support nor attorney fees payments. The declaration purportedly attached as exhibits respondent's 2011 and 2012 tax returns, his December 19, 2013 income and expense declaration, a 2013 profit and loss statement for his restaurant prepared by his accountant, and the restaurant's last 12 months of bank statements. These exhibits also are not part of the appellate record.

Respondent also declared that he did not object to appellant's request to subpoena the restaurant's bank records and that he would bring three years of bank statements to the

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[2] We assume respondent meant to write "$1,010 per month" rather than "$1,060." (His declaration mistakenly states he owed $1,060, rather than $1,010, per month beginning January 2014.)

hearing. Respondent's new counsel argued in an attached memorandum of points and authorities that these exhibits and the bank records demonstrated "there has been a material change of circumstances in [respondent's] income" warranting a reduction of child support. Counsel also argued this evidence demonstrated that the ordered $15,000 attorney fees award and monthly payment amount was "not reasonably calculated based on [r]espondent's income," and that no "disparity of income" existed between the parties under Family Code section 2030 entitling appellant to attorney fees.

Appellant filed a responsive declaration to the RFO, also on the required Judicial Council form. Appellant objected to retroactive modification of the court's December 2013 orders and to prospective modification of the orders pending respondent's "substantial compliance" with the trial court's December orders, including his payment of child support arrearages from October 2011 through December 2013. Appellant requested an evidentiary hearing on respondent's request to modify the trial court's orders after he substantially complied with the December orders.

Appellant also requested additional attorney fees to defend the RFO, enforcement of the December 2013 orders, and entry of a paternity judgment from the December 2013 trial. Appellant's counsel argued the request to modify the December child support and attorney fees orders retroactively was improper and should have been filed as a motion for reconsideration under Code of Civil Procedure section 1008, as a motion to set aside the judgment under Family Code sections 2120 through 2129, or as an appeal.

### 4. *Initial hearing on respondent's RFO*

At the initial April 25, 2014 hearing on respondent's RFO, respondent's counsel agreed to the proposed judgment that appellant's counsel had prepared reflecting the trial court's December 19, 2013 orders. At the parties' request, the trial court signed and entered the judgment that same day. Both counsel also agreed on the record that respondent was seeking only prospective modification of the court's December child support orders, "so that [respondent], in essence, . . . withdr[ew] . . . the request for retroactive modification of support and fees." The trial court noted its concerns with its December 2013 findings about respondent's monthly income. In response to appellant's counsel's request for additional funds from respondent for a forensic accountant, the court stated, "You know, I'm concerned . . . that . . . [respondent] didn't really understand the proceedings, or what his obligations were, and he may or may not be a very astute businessman. The answers he gave me [at the December 2013 trial] have created an impression of more income and resources in the business than there really is. May be there, it may not be."

The trial court denied appellant's request, but explained, "[I]t may not be [your] burden . . . to conduct massive discovery. [Respondent] has to persuade the court, and right now the court is not persuaded based on his testimony that he didn't have [t]his additional money. So the only way [respondent is] going to persuade the court is by total disclosure of his books and [respondent], . . . in some way or another justifying that he doesn't have this money; because right now he is in the position of the court having found that he has a lot of cash coming in that he is not distributing."

The trial court then continued respondent's RFO for a further evidentiary hearing and directed the parties to engage in cooperative discovery. It emphasized respondent had the burden "to convince the court that his income is other than what [the court] found it to be." The trial court also explained respondent would need fully to disclose "all of this information," including "his two bank accounts or the cash register receipts." The trial court confirmed all issues were reserved except as the parties had stipulated "to relief prior to March 13, 2014."

**5. *Evidentiary hearing on respondent's RFO***

After the April 2014 hearing, the parties further continued the matter and filed various motions, including appellant's motion to compel further discovery responses. The trial court granted that motion and ordered respondent to produce documents and pay $1,400 in attorney fees as a discovery sanction.

The evidentiary hearing on the RFO and appellant's related motion to enforce the orders in the April 2014 judgment (among other motions not before us) ultimately was conducted on July 13, 2015 and February 9, 2016. The July 13, 2015 reporter's transcript is not part of the appellate record. That hearing apparently focused on custody issues, but the trial court did receive some evidence on respondent's finances.

At the February 9 hearing, the trial court heard testimony from both parties about their income and admitted into evidence, among other documents, respondent's personal and business bank records, his 2015 restaurant financial overview statements, appellant's analysis of deposits made into respondent's accounts, respondent's 2014 first quarter tax return, his Costco warehouse 2014 purchases for the restaurant, respondent's March 2013 car

purchase documentation, the parties' income and expense declarations, and the exhibits attached to the RFO, including respondent's tax returns. None of the exhibits admitted into evidence are part of the record on appeal.

At the end of the hearing, the trial court deemed the issue of finances submitted and permitted the parties to file closing briefs by March 30, 2016. If the parties filed closing briefs, they are not part of the record.

**6. *The trial court's April 29, 2016 statement of decision***

On April 29, 2016, the trial court issued a 27-page proposed statement of decision on the issues of child support and custody, which would become its final statement of decision unless either party served objections within 15 days. The trial court described the December 2013 proceedings and noted that respondent "as a self-represented person and one lacking in any business sophistication, was not very capable of explaining the ongoing expenses of his business, nor the *net* proceeds from the business."

The trial court also described respondent's March 2014 RFO. It deemed the RFO as "in effect a request for reconsideration based on new evidence," and considered the RFO to "[a]lternatively . . . [seek] a modification of the court's orders, prospectively." The trial court found respondent's RFO was a timely motion for reconsideration of its December 2013 orders under Code of Civil Procedure section 1008 or a motion to set aside under section 473(b). Before stating its ruling, the trial court noted, "while the court was frustrated with respondent's failure to follow court orders relating to custody, his lack of recognition of the child's special needs, and his failure to cooperate in getting the child to reunify with the mother, those issues . . . do not create funds for support where there are

none. . . . [T]he court does not help the child or improve the custody situation by imposing an unfair and unjust support order on either parent."

Based on the evidence and testimony presented at the hearing, the trial court found that during the period October 2011 through December 2013 respondent was making $3,500 a month based on his November 2011 income and expense declaration. The trial court found appellant's monthly income was the same as it previously found in December 2013 at $3,554. Based on those figures and the parties' 50/50 child custody arrangement during that period, the trial court concluded that the guideline support amount should have been $36 a month, now payable by appellant to respondent. It calculated the amount of arrears to the time of the December 2013 trial, now owed by appellant to respondent, totaled $936, to be paid at the rate of $50 per month.

The trial court also found respondent's monthly income beginning January 2014 was $2,000, and appellant's was $1,709 in 2014 and $1,604 beginning in 2015. Based on those new figures, the trial court determined the guideline support amount for 2014 should have been $23 per month and $8 per month beginning in 2015, payable by appellant to respondent.

The trial court also reduced to $5,000 the $15,000 attorney fees sanction it imposed on respondent under Family Code section 271 in December 2013. It concluded the $15,000 sanction was "unreasonable in light of respondent's actual financial position." The trial court's orders were to take effect immediately. Appellant filed no objections to the proposed statement of decision.

Appellant filed her notice of appeal on July 13, 2016, 60 days from the expiration of the 15-day period before the trial

court's April 29, 2016 proposed statement of decision became its final statement of decision (May 14, 2016). Her appeal is limited to the trial court's award of child support and attorney fees. Appellant elected to use an appellant's appendix under California Rules of Court, rule 8.124, rather than a clerk's transcript for the record on appeal.

## DISCUSSION

Appellant principally contends the trial court exceeded its jurisdiction or acted without authority in issuing its April 29, 2016 decision that modified its April 25, 2014 judgment. Although the trial court did not have jurisdiction to consider the RFO as a motion for reconsideration, it was not precluded as a matter of law from considering respondent's RFO as a premature motion for relief from judgment under section 473(b) and did not abuse its discretion in doing so. Based on the record before us, we must presume the trial court was not precluded from modifying child support and attorney fees retroactively despite the parties' earlier stipulation in April 2014 to limit the RFO to prospective relief. Because substantial evidence supports the trial court's revised calculations of child support and attorney fees, we affirm.

### 1. *Preliminary procedural issues raised by respondent*

We first address respondent's contention that appellant's appeal is time barred or, alternatively, that she waived her right to challenge the trial court's April 29, 2016 decision.

#### a. *The appeal is timely*

Respondent contends appellant's appeal is untimely because it was filed more than 60 days after the trial court's filing of its "Proposed Statement of Decision After Evidentiary Hearing." After the February 9, 2016 evidentiary hearing, the

trial court filed its proposed statement on April 29, 2016. The proposed statement provides it "will be the Statement of Decision on these issues unless within fifteen (15) days either party files and serves objections as provided by Rule 3.1590(g)." Contrary to respondent's argument, the trial court's tentative decision did not become its *final* statement of decision until a party filed objections to it or the 15-day period within which to file objections expired. (Cal. Rules of Court, rule 3.1590(c)(1) & (g).) The proposed statement concludes, "If no objections are received, this Statement of Decision shall become the final Judgment of the Court on these issues." The parties did not file objections. Therefore, the proposed statement became the trial court's final statement of decision after the expiration of the objection period—15 days later on May 14, 2016.

Moreover, neither the court clerk nor the parties ever served and/or filed a "Notice of Entry" of either the proposed statement or a minute order reflecting the statement of decision was final. Rule 8.104 of the California Rules of Court provides a notice of appeal must be filed: "60 days after the superior court clerk serves on the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a file-endorsed copy of the judgment, showing the date either was served"; "60 days after the party filing the notice of appeal" does so; or "180 days after entry of judgment." The clerk was directed to mail a copy of the proposed statement, which it did, but nothing in the record reflects that the clerk or either party served a "Notice of Entry" of the decision or the judgment. Accordingly, appellant's notice of appeal filed on July 13, 2016, was not late.

The trial court's proposed statement also stated the court would "prepare and send a Minute Order to both parties when

this Statement of Decision is final." No minute order or entry of judgment is reflected in the record. The trial court clearly intended its statement of decision to be the final judgment of the court, however. Accordingly, we exercise our discretion to treat the final statement of decision as appealable. (*Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 901 [statement of decision may be treated as appealable when it "constitute[s] the court's final decision on the merits" and no formal order or judgment follows].)

b. *Appellant did not waive her right to challenge the trial court's statement of decision*

Respondent also contends appellant waived her right to challenge the statement of decision because she did not file any objections to it. Although we conclude below that appellant's failure to object to any lack of findings or ambiguities in the statement of decision requires us to imply findings in favor of the decision, appellant did not waive her right to appeal from that decision.

Respondent's reliance on *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130 to support *this* contention is misplaced. In that case, the appellant argued on appeal that the trial court's statement of decision failed to decide certain issues. (*Id.* at p. 1132.) The California Supreme Court concluded the appellant waived his objection to any errors in the statement of decision because the appellant never objected in the trial court that the statement of decision was deficient. (*Ibid.*) In other words, the appellant in *Arceneaux* never objected to the lack of findings in the statement of decision and, thus, could not on appeal contend the trial court should have made findings on a particular issue.

Here, appellant contends the trial court's substantive decision, rather than the expression of that decision, is incorrect. She opposed respondent's RFO in writing and at the evidentiary hearing; the trial court rejected her arguments. Indeed, the statement of decision refers to appellant's objections. She did not need to make these same arguments again through an objection under California Rules of Court, rule 3.1590(g) to preserve her right on appeal to argue the trial court's *substantiv*e decision was wrong.

**2. *The trial court had authority to modify its child support and attorney fees orders incorporated in the April 2014 judgment***

Appellant contends the trial court's April 2014 judgment must be reinstated because the trial court lacked jurisdiction to revise it based on respondent's RFO.[3] We conclude the trial court had authority to consider respondent's request.

a. *The trial court has authority to modify its child support orders under the Family Code*

The Family Code permits a trial court to modify or terminate a child support order "at any time as the court determines to be necessary." (Fam. Code, § 3651, subd. (a).) "For decades, the courts of this state have held that they retain

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[3] Appellant does not contest the trial court's "prospective" child support order. Given appellant's position that the April 2014 judgment must be reinstated, we cannot determine whether appellant's reference to "prospective" support relates to child support payments from the date of respondent's RFO—March 2014 onward—or from the date of the court's April 2016 statement of decision onward. We presume appellant is referring to the later date.

jurisdiction over support orders even after a judgment . . . has become final and is no longer appealable." (*In re Marriage of Armato* (2001) 88 Cal.App.4th 1030, 1039.) Thus, the court here had jurisdiction to modify its child support orders in April 2016 even though judgment had been entered two years earlier. (*Id.* at p. 1040; Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2018) ¶ 17:2.) A request to modify child support under the Family Code, therefore, is not an impermissible collateral attack on the judgment, as appellant contends.

But, the trial court's authority to modify its child support orders under the Family Code is not unlimited. Subject to exceptions not applicable here, the Family Code expressly prohibits the court from modifying or terminating a support order "as to an amount that accrued before the date of the filing of the notice of motion or order to show cause to modify or terminate." (Fam. Code, § 3651, subd. (c)(1); see also § 3603.) In other words, the trial court has discretion to make an order modifying child support retroactively, but only "to the date of the filing of the notice of motion or order to show cause to modify or terminate, or to any subsequent date." (*Id*., § 3653, subd. (a).)

"A court order modifying support retroactive to any time period *before* the filing date of a modification would thus violate the governing statutory scheme. Such an act, moreover, would be in excess of the court's jurisdiction." (*Stover v. Bruntz* (2017) 12 Cal.App.5th 19, 26.) Accordingly, when a parent seeks to modify child support *under the Family Code*, the court is statutorily prohibited from modifying or forgiving child support arrearages incurred before a request for modification is filed. (See *In re Marriage of Tavares* (2007) 151 Cal.App.4th 620, 625-626.)

Therefore, a parent who contends the child support amount ordered is too high is limited to seeking prospective modification under the Family Code, or, where the facts warrant it, timely moving for reconsideration, moving for relief from the order or judgment, or filing an appeal from the order or judgment.

b. *The trial court had inherent authority to treat the RFO as a premature motion for relief from judgment, but not as a motion for reconsideration*

Here, respondent's RFO sought to "modify" the December 2013 child support and attorney fees orders. Under the Family Code provisions discussed above, the trial court was without jurisdiction to modify its child support orders as to amounts accrued before the date the RFO was filed—March 13, 2014. The trial court, however, treated respondent's RFO as a motion for reconsideration under Code of Civil Procedure section 1008 or as a premature motion for relief from the judgment incorporating those orders under section 473(b).

As appellant argues, the trial court was without jurisdiction to grant respondent's purported motion for reconsideration because judgment had been entered.[4] (See *Safeco Ins. Co. v. Architectural Facades Unlimited, Inc.* (2005) 134

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[4] We asked the parties for supplemental briefing on the question of whether the trial court was precluded from reconsidering its December 19, 2013 orders under Code of Civil Procedure section 1008 because judgment had been entered on April 25, 2014. Appellant and respondent each filed supplemental letter briefs addressing the issue on May 29, 2018. At oral argument, respondent conceded the trial court was without jurisdiction to treat the RFO as a motion for reconsideration.

Cal.App.4th 1477, 1482 [trial court lost jurisdiction to consider pending motion for reconsideration "[a]s soon as" it entered judgment]; *APRI Ins. Co. v. Superior Court* (1999) 76 Cal.App.4th 176, 182 [trial court was without power to grant reconsideration once it entered judgment despite pending motion for reconsideration]; *Magallanes v. Superior* Court (1985) 167 Cal.App.3d 878, 882 [explaining trial court had the power to reconsider an interim ruling "so long as no final judgment had been entered"]).[5]

The trial court, however, did have inherent authority to treat respondent's RFO as a motion for relief under section 473(b). " 'The proposition that a trial court may construe a motion bearing one label as a different type of motion is one that has existed for many decades. "The nature of a motion is determined by the nature of the relief sought, not by the label attached to it." ' " (*Austin v. Los Angeles Unified School District* (2016) 244 Cal.App.4th 918, 930 (*Austin*) [trial court within authority to consider "motion for reconsideration" of summary judgment as motion for relief under section 473(b)].) The court,

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[5] We do not find the trial court denied respondent's RFO by implication, however, when it entered judgment on April 25, 2014, as appellant suggests in her supplemental letter brief, citing *Ramon v. Aerospace Corp.* (1996) 50 Cal.App.4th 1233, 1237-1238 (explaining the entry of judgment "had the effect of denying . . . by implication" an earlier filed, pending motion for reconsideration). Entry of judgment did not prevent the trial court from considering respondent's RFO as a request to modify child support under the Family Code, as we have said, or as a motion for relief under section 473(b), as we discuss, *post*.

therefore, could consider the RFO as a motion for relief under section 473(b) although respondent did not call it that.

*c. Appellant has not demonstrated prejudice from any procedural defects in respondent's RFO construed as a motion for relief under section 473(b)*

Appellant contends that the RFO construed as a section 473(b) motion was procedurally defective as a matter of law on several grounds, primarily that: the RFO did not include the required proposed pleading, respondent did not properly serve appellant with notice he was seeking relief under section 473(b), and the RFO did not assert or demonstrate excusable mistake or inadvertence.

Section 473(b) permits the court to "relieve a party . . . from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." A party seeking discretionary relief under section 473(b) must file the motion within six months of the judgment or order and must attach the answer or other pleading the party proposes to file. (*Ibid*.)

i. *Appellant received sufficient notice of the nature of respondent's motion*

Here, respondent's purported motion for relief was timely filed as required under section 473(b). Respondent filed his RFO within six months of the trial court's December 19, 2013 oral orders and more than a month *before* the judgment incorporating those orders was entered. In construing respondent's RFO as a motion brought under section 473(b), the trial court had the authority to deem respondent's RFO filed after the April 25, 2014 judgment was entered, particularly given that, on the same day the trial court signed the judgment, it continued the hearing on

the RFO. Thus, the trial court had jurisdiction to consider the motion. (*Austin, supra*, 244 Cal.App.4th at p. 928 [trial court lacks jurisdiction to grant relief under section 473(b) once six-month time limitation has lapsed].)

Appellant argues respondent's failure to attach a proposed pleading or answer to his RFO as required by section 473(b) is fatal, but as he was not seeking relief from a default there would not have been a pleading or answer to submit. (8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 180, p. 781 [statutory requirement of attaching proposed pleading "is directed to situations where a judgment or order was entered by default . . . and an exception has been recognized where the default of the moving party consists of failure to take a step that does not require a pleading"].)

Finally, appellant has not demonstrated she was prejudiced by any lack of official notice. The RFO was properly filed and served. It gave appellant notice of respondent's intent to seek review of his child support obligation and a reduction in his attorney fees payments. Appellant even objected to the RFO on the ground it should have been brought as a motion to set aside (although under a different statute). The RFO also purportedly attached the evidence on which respondent based his request. And, at the April 2014 hearing, the parties *agreed* to set the RFO for an evidentiary hearing after further discovery had been completed with full knowledge the trial court had just signed the judgment.

Accordingly, as of April 2014 appellant was on notice that an evidentiary hearing on respondent's RFO would be held in the future at which the trial court would consider evidence of respondent's income to determine if it was less than the trial

court had found in December 2013. At the April 2014 hearing, as we have said, the trial court stated: "[Respondent] has to persuade the court, and right now the court is not persuaded based on his testimony that he didn't have [t]his additional money. So the only way [respondent is] going to persuade the court is by total disclosure of his books and [respondent], . . . in some way or another justifying that he doesn't have this money." Appellant then fully participated in that hearing almost two years later.[6] She had the opportunity to present evidence and cross-examine respondent.[7] Appellant, therefore, has not met her burden to demonstrate prejudicial error on this ground.

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[6] Additionally, the record does not include any transcripts of hearings that occurred or papers filed by the parties between April 25, 2014 and February 9, 2016. According to the trial court's statement of decision, in October 2014 appellant filed a motion to enforce the April 2014 judgment and respondent filed an opposition to it, as well as an additional request for order to modify child custody, support and equity credits. The parties also appeared before the court for various hearings in April, June, and July 2015. Because the record is incomplete, we do not know what may have been said in the parties' papers or by the parties or court at these hearings regarding respondent's RFO being treated as a section 473(b) motion.

[7] At oral argument appellant's counsel argued that, had appellant known the trial court was considering modifying its child support orders retroactively, appellant would have had a forensic accountant examine respondent's financial records and called the expert as a witness. At the April 2014 hearing, however, the trial court denied appellant's request for an order requiring respondent to pay for such a forensic accountant. See fn. 14 and discussion, *post*.

ii. *Respondent's declaration provides sufficient notice of mistake, inadvertence, or excusable neglect*

Appellant also contends the trial court could not treat the RFO as a motion under section 473(b) on the ground respondent "offered no proof of mistake, inadvertence, surprise or excusable neglect in his affidavit or declaration to support relieving him from the April 2014 [j]udgment."

Respondent did not affirmatively state he made a mistake of fact about his income or that he inadvertently failed to present evidence of his business expenses in his declaration filed with his RFO, but the trial court reasonably could infer from his declaration that he had. For example, respondent declared he believed the trial court "used a monthly amount for [his] income that [was] not accurate" when it calculated his child support obligation. He declared his income was lower than that found at the December 2013 trial and included evidence of his income that the trial court determined had not existed at the time of the hearing. Respondent declared his attached 2012 tax return showed a monthly income of $1,497 and his December 19, 2013 income and expense declaration stated his monthly gross income as $2,431. He also attached a 2013 profit and loss statement for his restaurant prepared by his accountant and declared it "[did not] support . . . a $1,060 [*sic*] per month child support order." Likewise, he declared his attached 2011 tax return "[did not] support a $1,060 [*sic*] child support order."

"The requirement a moving party specify the grounds for his or her motion, as set forth in Code of Civil Procedure section 1010, is intended to provide both the adverse party and the court with an adequate opportunity to address the issues presented."

(*Austin, supra*, 244 Cal.App.4th at p. 930.) Respondent's declaration fulfilled this purpose. Appellant and the trial court reasonably could understand respondent contended he mistakenly or through inadvertence or excusable neglect had not prepared and presented the evidence attached to and described in his declaration at the December 2013 trial, resulting in an erroneous calculation of his income.

Thus, we conclude the trial court had authority to consider the RFO as a motion brought under section 473(b). We therefore consider whether the trial court abused its discretion when it recalculated its child support and attorney fees orders in the April 2014 judgment.

### 3. *On this record, we cannot find the trial court abused its discretion when it modified the April 2014 judgment's child support and attorney fees orders*

"The trial court has discretion under section 473(b) on a showing of 'mistake, inadvertence, surprise or excusable neglect' to grant relief from a judgment, dismissal or other order based on its evaluation of the nature of the mistake or error alleged and the justification proffered for the conduct that occurred." (*Austin, supra*, 244 Cal.App.4th at p. 928.) The trial court's discretion to grant relief under section 473(b) is broad. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 256 [explaining " 'the provisions of section 473 . . . are to be liberally construed and sound policy favors the determination of actions on their merits.' "].) Thus, we will not disturb a trial court's ruling granting relief under section 473(b) unless it " 'exceeds[s] the bounds of reason.' " (*Minick v. City of Petaluma* (2016) 3 Cal.App.5th 15, 24 (*Minick*).) " 'In reviewing the evidence in support of a . . . section 473 motion, we extend all legitimate and

reasonable inferences to uphold the judgment.' " (*H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1368.) "Moreover, the trial court may rely on its own review of the record in determining the existence of excusable neglect." (*Minick,* at pp. 24-25.)

a. *The trial court's finding of mistake or inadvertence was not an abuse of discretion*

Here, the trial court found respondent was entitled to relief under section 473(b) based on his mistake and inadvertence. "A 'mistake' justifying relief may be either a mistake of fact or a mistake of law. 'A mistake of fact exists when a person understands the facts to be other than they are.' " (*H.D. Arnaiz, Ltd. v. County of San Joaquin, supra*, 96 Cal.App.4th at p. 1368 [affirming order vacating voluntary dismissal under section 473(b) based on mistake of fact where plaintiff mistakenly believed defendant would cooperate with its development project if it dismissed the case].)

After reviewing the transcript of the December 2013 trial, the trial court concluded, "respondent had little understanding what was being asked of him, made multiple mistakes about what was being asked or what evidence he should offer, and inadvertently failed to adequately explain the expenses which were being charged against his gross receipts at the restaurant. These findings become abundantly clear when compared to the evidence presented at the further evidentiary hearings in 2015 and 2016. Relief is therefore warranted . . . under [s]ection 473(b)."

Appellant contends respondent's shortcomings in representing himself at the December 2013 trial and his failure to produce documents do not constitute a "mistake" or

"inadvertence" under section 473(b). A self-represented party's mere failure to represent himself adequately does not constitute grounds for discretionary relief under section 473(b). (See *Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1264 [affirming order denying pro. per. litigant's section 473(b) motion based on his "mistake in assuming that he could competently represent himself at trial"].) "In other words, when a litigant accepts the risks of proceeding without counsel, he or she is stuck with the outcome, and has no greater opportunity to cast off an unfavorable judgment than he or she would if represented by counsel." (*Burnete*, at p. 1267.)

The trial court did not find respondent's mistake or inadvertence was due solely to his belief he could adequately represent himself, however. Rather, we can infer the trial court read respondent's motion as one based on his mistake or inadvertence in failing to present particular evidence, some of which did not exist at the time of the trial, to demonstrate his business's true income after expenses. (Cf. *Austin, supra*, 244 Cal.App.4th at pp. 925-926, 931 [finding plaintiff had made "at least a prima facie case for excusable neglect or mistake" for relief from summary judgment where her attorney's withdrawal and failure to conduct discovery were part of the trial court's record and plaintiff's declaration provided evidence supporting plaintiff's position in response to the summary judgment].)

It was the evidence respondent presented in his declaration discussed above,[8] in addition to respondent's apparent

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[8] At the December 19, 2013 trial, respondent testified he had not yet prepared his 2011, 2012, or 2013 tax returns. He did submit the December 19, 2013 income and expense declaration that day; the trial court found it was not credible. The documents

misunderstanding of the need to present evidence of the net proceeds from the business, rather than his gross business receipts, that the trial court found demonstrated respondent's mistake or inadvertence. Thus, we do not find the trial court granted respondent relief based merely on his self-represented status or a lack of competence, but on what the trial court perceived to be a true mistake of fact as to what he was being asked to prove in terms of his income and expenses from his business.

The trial court's review of the record and evidence here is similar to the trial court's assessment of a section 473(b) motion in *Minick*. There, the Court of Appeal held the trial court did not abuse its discretion in granting plaintiff relief from summary judgment under section 473(b) for mistake, inadvertence, and excusable neglect due to his attorney's "feeble lawyering" resulting from failing to appreciate the effect his illness had on his capabilities. (*Minick, supra*, 3 Cal.App.5th at p. 28.) In support of the 473(b) motion, the attorney declared he did not realize at the time that his medical condition had impaired his ability to exercise proper judgment in opposing the summary judgment motion. (*Minick,* at pp. 20-21.) He also submitted evidence that would have led the trial court to deny the motion for summary judgment had it had the evidence originally. (*Id.* at

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referenced in respondent's declaration are not part of the record. Thus, we cannot tell what amounts are stated for respondent's income in those documents other than what respondent declared they stated. We presume the trial court reviewed the documents and concluded they reflected net income in an amount less than what the evidence showed in December 2013. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

pp. 21, 28.) At the hearing on the motion, the trial court explained that it had granted the summary judgment "despite harboring reservations that something was amiss" with appellant's attorney during the proceeding. (*Id.* at pp. 23-24, 28.) The defendant in that case had argued the case was one of professional negligence. The court of appeal agreed that might be "one reading of the record," but that was "not the reading the trial court adopted." (*Id.* at p. 28.)

Although here respondent was not impaired, the trial court's reading of the record and its factual findings concerning respondent's mistake and inadvertence are similar to those made by the court in *Minick*. The trial court there did not find the attorney's neglect was excusable as a failure of professional skill, but because of his mistake in recognizing his own impairment. (*Minick, supra*, 3 Cal.App.5th at p. 28.) The trial court here also did not find respondent's mistake or inadvertence was merely a misunderstanding of the law as a pro. per. litigant, but a mistake of fact as to what the court was asking him—the income he received from his business rather than its gross receipts—and related inadvertence in failing to explain his business expenses.

The trial court's interpretation of the reasons for respondent's failures is supported by respondent's own comments at the December 19, 2013 trial. For example, after the trial court asked respondent to complete an income and expense declaration to "give[ ] the court an opportunity to know in a coherent and concise manner what you claim your expense to be, et cetera," respondent answered, "I don't seem to understand how this works out because for me it's—I pull just basically what is left from the business, not even all of it. I just pay my rent and this and that. So is that what's going on there? Because they

[appellant and her counsel] seem to see there is a bunch of money thrown around just to pass out, and that is obviously why we're here, because of the business." The trial court, having read the trial transcript, reasonably could infer a statement like this demonstrated respondent's mistake as to what he was being asked by the court, just as the trial court in *Minick* could find the attorney's very poor opposition papers supported the attorney's declaration he was incapacitated. (*Minick*, *supra*, 3 Cal.App.5th at pp. 22-23, 28.)

The trial court here, like that in *Minick*, also voiced its concern that a mistake had occurred at the initial April 2014 hearing on respondent's RFO: "In looking at [respondent's] profit and loss statements, they seemed odd to me. I don't think they really reflect the payroll. . . . And [there is] no line for payroll and investment." The trial court continued: "I'm concerned . . . that because he didn't really understand the proceedings, or what his obligations were, and he may or may not be a very astute businessman. The answers he gave me have created an impression of more income and resources in the business than there really is. May be there, it may not be." The court repeated its concern at the beginning of the February 2016 hearing: "I made the rulings [in December 2013] that I thought were appropriate, but as I was making them I wasn't persuaded that there was a shred of documents presented that supported either party's position."

On this record, drawing all inferences in favor of the trial court's decision, we cannot say the trial court "exceeded the bounds of reason" in granting respondent relief under section 473(b). We recognize, as appellant asserts, one reading of the record is that respondent was simply mistaken as to how the

rules of evidence worked and represented himself poorly. In the words of the Court of Appeal in *Minick*, "we might agree, but that is not the reading the trial court adopted." (*Minick, supra*, 3 Cal.App.5th at p. 28.) From its reading of the record, the trial court could conclude within its discretion that respondent's mistake and inadvertence were genuine and remediable under section 473(b).

b. *On this record the trial court did not abuse its discretion in modifying child support and attorney fees retroactively to October 2011*

Appellant also contends we must reverse the trial court's April 2016 decision because, even if the trial court could consider the RFO as a motion for relief under section 473(b), it could not modify the retroactive child support as a matter of law under the parties' stipulation to limit the RFO to prospective child support modification.

i. *The parties' stipulation that the RFO did not seek modification of child support or attorney fees owed prior to March 2014*

At the April 25, 2014 hearing, appellant's counsel, the trial court, and respondent's new counsel engaged in the following exchange:

> "[Appellant's counsel]: We've agreed that respondent would remit his RFO to prospective child support only modification so that he's, in essence, it's a withdrawal of the request for retroactive modification of support and fees. . . . We've agreed to set up an evidentiary hearing on the prospective request for child support and attorney fees."

"The Court [to respondent's counsel]: Does that accurately state your agreement about how to move forward at this time?

"[Respondent's counsel]: Yes, your Honor."

The trial court then continued the RFO "for a further evidentiary hearing" and "reserve[d] retroactivity to March 13, 2014." At the end of the hearing, it confirmed "[a]ll issues are reserved . . . [e]xcept as stipulated to relief prior to March 13, 2014." The trial court, therefore, acknowledged the parties' stipulation that respondent's RFO sought to modify the child support orders—incorporated in the judgment the trial court signed that day—as they related to payment of prospective child support only, not as they related to the $26,026 in arrears that the trial court ordered respondent owed from October 2011.

Respondent did not at the time, and does not now, deny he entered into that stipulation. Rather, he *concedes* he stipulated to pursue only prospective modification of child support. He also confirmed the parties understood "prospective modification" to mean that respondent "would not seek modification of child support or attorney fees going back farther than March 13, 2014." The stipulation, therefore, was binding on the parties. (See *Linder v. Cooley* (1963) 216 Cal.App.2d 390, 395 [acknowledging prior cases' recognition that "if the party admits making the verbal stipulation, it is as binding upon him as if it had been entered in the minutes"]; cf. *Kapusta v. Gale Corp.* (E.D.Cal. 2006) 457 F.Supp.2d 1051, 1060 [comparing written stipulation to settlement agreement where parties' unfortunate choices in agreement cannot be " 'unilaterally undone by a court' "].)

The trial court's statement of decision, however, does not mention the parties' stipulation. We do not know if the omission

was purposeful based on a prior ruling or abandonment of the stipulation by the parties, or if the omission was accidental. Nor—based on the record before us—does appellant appear to have objected to the omission.

"After the trial court issues a statement of decision, as in this case, Code of Civil Procedure section 634 requires a party to 'state any objection [[s]he may have] to the statement in order to avoid an implied finding on appeal in favor of the prevailing party.' " (*In re Marriage of Furie* (2017) 16 Cal.App.5th 816, 827.) "If the party challenging the statement of decision fails to bring omissions or ambiguities in it to the trial court's attention, then, under . . . section 634, the appellate court will infer the trial court made implied factual findings favorable to the prevailing party on all issues necessary to support the judgment, including the omitted or ambiguously resolved issues." (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 59-60.) "The appellate court then reviews the implied factual findings under the substantial evidence standard." (*Id.* at p. 60.)

Here, as we have said, the trial court deemed its tentative decision its "Proposed Statement of Decision" under California Rules of Court, rule 3.1590(c)(1). That rule permits the trial court to state its tentative decision is its proposed statement of decision, "subject to a party's objection under (g)." Subsection (g) in turn permits a party to object to a proposed statement of decision within 15 days of its service. Although neither party requested the statement of decision, the doctrine of implied findings applies. Appellant bases her appeal in part on the existence of the parties' stipulation to limit respondent's RFO to modify child support and attorney fees after its filing date. But, because she did not object to the omission of the stipulation from

the statement of decision within 15 days of its service, we must infer the trial court impliedly found the stipulation was waived or otherwise no longer in effect if substantial evidence supports that finding. We now turn to our review of that implied finding for substantial evidence.

ii. *The record is inadequate to determine if substantial evidence supports an implied finding that the stipulation was waived or otherwise no longer in effect*

As we have said, respondent admits to entering into the stipulation, but he contends it "was not in operation or effect" based on appellant's counsel's conduct at the February 9, 2016 hearing. Respondent contends appellant's counsel's introduction of respondent's pre-March 2014 financial records, failure to object to his testimony about pre-March 2014 income, and failure to object to the trial court's statement that it was charged with considering respondent's request to modify or set aside the judgment, demonstrates appellant "was not operating under the understanding that [r]espondent was only requesting a prospective modification of child support and fees."

Although we do not agree appellant's conduct at the February 2016 hearing necessarily demonstrates she no longer considered the stipulation in effect, the lack of an adequate record requires us to infer substantial evidence supports the trial court's implied finding that it was not.

At the outset of the February 2016 hearing, appellant's counsel outlined the issues before the trial court as including "respondent's request to modify child support—retroactive child support from April 2014 to present, and prospective child support along with child custody issues." As the hearing was almost two

years after respondent filed his RFO, the modification of child support from its filing date to the date of the hearing was "retroactive."

Also, contrary to respondent's assertions, counsel did object to both the introduction of respondent's new evidence and the trial court's reconsideration of the judgment. Counsel objected to respondent's production of evidence of his financial status that he did not produce in response to discovery before the December 2013 trial; that was the subject of appellant's motion in limine the trial court had granted.[9]

Although appellant did not specifically cite respondent's stipulation to limit his RFO, when the trial court stated, "I think that what I am charged to do is to consider the request to modify or set aside the judgment, and then make determinations about what support should be up until the current time and going forward," appellant's counsel responded, "It is not our position, your Honor." And, when the trial court stated it needed to "sort out support . . . and arrears . . . . I do have to sort this out back to the time of the judgment," appellant's counsel again responded, "We disagree." These statements imply appellant believed the parties' stipulation was in effect.[10]

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[9] She also objected to the admission of respondent's March 2011 bank statement on relevance grounds. We note the trial court also was unsure about its relevance "since it is so late and so distant in time," but admitted it as possibly helping the court "understand[ ] historical purchases for the restaurant."

[10] We also do not find appellant's introduction of respondent's pre-March 2014 financial records into evidence or lack of objection to respondent's introduction of his records from the first quarter of 2014 necessarily demonstrates an abandonment of the

Conversely, respondent's counsel added that his position from "the beginning" was "that the orders were not accurate as to income." In his opening statement he also asserted, "The court made an error when it used that [$25,000] gross figure to calculate child support, child support arrears and attorney's fees." Counsel's statements imply respondent believed that the issue of arrears—the child support owed from October 2011 through December 2013—remained viable for the trial court's consideration.

Our record, however, is incomplete. Apparently, the parties introduced evidence of respondent's financial records from December 18, 2013 through January 2014 and financial receipts for a part of 2015 at a hearing on July 13, 2015. The transcript of that hearing is not part of the record on appeal. In its statement of decision, the trial court noted the July 2015 hearing focused on

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stipulation. Although some of the financial records concerned respondent's income before March 2014, those records would have been relevant to demonstrate whether his income had changed since the December 2013 trial to warrant a modification of the child support and attorney fees payments under the Family Code. (See, e.g., *In re Marriage of Williams* (2007) 150 Cal.App.4th 1221, 1234 [parent seeking modification of a child support order must " 'introduce admissible evidence of changed circumstances as a necessary predicate for modification' "].) Further, at the December 2013 trial, the court considered respondent's income listed on his March 2013 loan application in determining his income. The parties understandably would revisit that application when arguing whether respondent's income had changed since the trial court's original orders were made in December 2013.

child custody issues, but acknowledged the court also received some evidence from respondent on his finances then.

At the July 2015 hearing, the trial court also ordered appellant to prepare an order after hearing. At the February 2016 hearing, appellant's counsel presented to the court that proposed order with transcript references reflecting rulings the court had made in July. Neither the trial court's order nor the transcript references to its rulings are part of the record. We do not know what the trial court ordered or whether the parties' stipulation was discussed at the July 2015 hearing.

Moreover, at the end of the February 2016 hearing, the parties agreed to file closing briefs by March 30, 2016. The statement of decision states the trial court considered the parties' closing briefs; we presume they were filed. Those briefs are not included in the record, however. Thus, we also do not know if appellant invoked the parties' stipulation or if she objected to the trial court's reconsideration or revision of its April 2014 judgment in her closing brief. Nor do we know if respondent's closing brief discussed the inapplicability of the stipulation.

The trial court's statement of decision also appears to decide various other motions and requests for orders not included in our record. For example, appellant's October 2, 2014 motion to enforce the April 2014 judgment and respondent's October 31, 2014 request for order to modify child custody, support and equity credits also were continued to the July 13, 2015 hearing.

The most fundamental rule of appellate review is that the judgment or order challenged on appeal is presumed to be correct, and "it is the appellant's burden to affirmatively demonstrate error." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) "All intendments and presumptions are indulged to support it on

matters as to which the record is silent, and error must be affirmatively shown." (*Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 564.) To overcome this presumption, an appellant must provide a record that allows for meaningful review of the challenged order. (*Ibid.*) If the record does not include all of the evidence and materials the trial court relied on in making its determination, we will not find error. (*Haywood v. Superior Court* (2000) 77 Cal.App.4th 949, 955.) Rather, we will infer substantial evidence supports all of the court's findings. (*Ibid.*)

Because the record is inadequate, we infer substantial evidence supports the trial court's implied finding that the parties' stipulation to limit modification of child support and attorney fees to March 2014 was no longer in effect. Accordingly, the trial court did not abuse its discretion when it retroactively modified child support and attorney fees.

c. *The trial court's new child support calculations were not an abuse of discretion*

Having concluded the trial court could revise its April 2014 judgment to modify the amount of child support awarded, we consider whether the court abused its discretion in setting the amount as ordered in its April 2016 decision.

i. *Standard of review and applicable law*

"A trial court's award concerning child support is reviewed for abuse of discretion." (*In re Marriage of Leonard* (2004) 119 Cal.App.4th 546, 555.) In 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." (*In re Marriage of de Guigne* (2002) 97 Cal.App.4th 1353, 1360.)

"To the extent [appellant] "challenges the trial court's factual findings, our review follows established principles concerning the existence of substantial evidence in support of the findings. On review for substantial evidence, we examine the evidence in the light most favorable to the prevailing party and give that party the benefit of every reasonable inference. [Citation.] We accept all evidence favorable to the prevailing party as true and discard contrary evidence. [Citation.]" (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1151.) " 'We do not reweigh the evidence or reconsider credibility determinations. [Citation.]' " (*In re Marriage of Calcaterra and Badakhsh* (2005) 132 Cal.App.4th 28, 34.) Nor do we "substitute our own judgment for that of the trial court, but determine only if any judge reasonably could have made such an order." (*In re Marriage of Bodo, supra,* 198 Cal.App.4th at p. 384.)

California has established a mandatory, statewide uniform guideline to determine court-ordered child support. (See Fam. Code, §§ 4050-4076.) "[T]he uniform guideline statutes require that, in determining the appropriate amount of child support (whether pendente lite, permanent, or on a request for modification of an existing order), all California courts must adhere to the guideline formula." (*In re Marriage of Laudeman* (2001) 92 Cal.App.4th 1009, 1013.) Family Code section 4055 sets out the mathematical formula to be applied to parents' incomes. (§ 4055, subds. (a), (b).) Because section 4055 "involves, literally, an algebraic formula," trial courts may use a computer program called DissoMaster to make the guideline child support calculation. (*In re Marriage of Schulze* (1997) 60 Cal.App.4th 519, 523-524, fn. 2.) The guideline amount of child support is

presumptively correct. (*In re Marriage of de Guigne, supra*, 97 Cal.App.4th at p. 1359.)

Generally, a material change of circumstances must exist for the court to modify a child support order. (*In re Marriage of Usher* (2016) 6 Cal.App.5th 347, 357.) Here, however, the trial court modified its child support orders included in the April 2014 judgment based on respondent's mistake or inadvertence under section 473(b). As we have concluded the trial court did not abuse its discretion in finding mistake or inadvertence, we now need consider only whether substantial evidence supports the new support orders.

ii. *Substantial evidence supports the trial court's child support orders*

Based on the evidence respondent presented with his RFO and at the February 2016 evidentiary hearing, the trial court found respondent met his burden to demonstrate his monthly income was substantially lower than the amount on which the court had calculated its original child support order. Substantial evidence supports the trial court's conclusions regarding the parties' incomes.

The trial court considered and weighed the evidence presented by both parties. It considered respondent's 2014 personal and business bank statements, including summaries prepared by appellant of deposits made into respondent's checking and business accounts in 2014.[11] The trial court also

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[11] The trial court did not admit appellant's own analysis of whether respondent's expenses were personal or not as lacking foundation. The court noted, however, that it "closely reviewed [appellant's summaries of deposits]."

considered respondent's financial overviews of his restaurant for part of 2015 and early 2016, his quarterly tax return for the first quarter of 2014, his 2014 Costco purchases for the restaurant, his 2012 tax return, and his income and expense declaration dated October 2014. It considered appellant's May 28, 2015 and July 2, 2015 income and expense declarations, including her net profits from her personal trainer business and work as a certified nurse's assistant.

After considering the evidence of respondent's personal and business bank records, including appellant's summaries, and testimony regarding respondent's business expenses, the trial court rejected appellant's contention that respondent "was taking a lot of money out of the company and putting it into his personal bank accounts." Rather, the trial court concluded respondent "was depositing very little cash into his accounts and taking nearly all of it out for a gym membership, some food and supermarket purchases and a few larger payments (later explained to be rent)."

Ultimately, the trial court concluded respondent's monthly self-employment income based on his November 2011 income and expense declaration was $3,500 per month for the period October 2011 through the end of 2013.[12] The trial court also concluded

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[12] The trial court recognized that during this period of time, respondent had not installed an accounting system at his business and "his accounting methods were lax, to say the least." It also noted respondent gave only his last month of income in the income and expense declaration he filed at the December 2013 trial. As a result, the trial court found "it appropriate, given his failure to produce better evidence for this period (2011 to 2013), to hold [respondent] to the admission in his Income and Expense Declaration filed on November 22, 2011."

that from January 2014 to the present, respondent's income was $2,000 per month. The trial court found no evidence to modify its original finding that appellant was making $3,554 in self-employment earnings during the period October 2011 through the end of 2013. It concluded, however, that appellant's monthly income was $1,709 for 2014 and $1,604 for 2015 to the present.

In determining the parties' incomes, the trial court carefully weighed the evidence and rejected appellant's contention that the bank records demonstrated respondent had taken large amounts of cash out of the business. We do not reweigh the evidence and must accept as true the evidence in favor of respondent, the prevailing party. Thus, we find substantial evidence supports the trial court's new findings regarding the parties' monthly incomes.[13]

The trial court then concluded that, based on these new income figures, the guideline support for the period October 2011 through December 2013 should have been $36 per month payable by appellant to respondent, totaling $936 in arrears; for 2014, $23 per month payable by appellant to respondent; and for 2015 to the present, $8 per month payable by appellant to respondent. The trial court attached and incorporated a copy of its DissoMaster calculations to its statement of decision.

The trial court's Family Code section 4055 guideline calculation of child support based on the parties' incomes, using

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[13] As we have said, none of the trial exhibits are included in the record. We therefore rely on the reporter's transcript and the trial court's statement of decision in assessing the evidence. (See *Ritschel v. City of Fountain Valley* (2006) 137 Cal.App.4th 107, 122 ["the appellant must prepare a record that adequately establishes the trial court committed prejudicial error"].)

the approved DissoMaster software, is presumptively correct. (Fam. Code, § 4057, subd. (a); *In re Marriage of de Guigne*, *supra*, 97 Cal.App.4th at p. 1359; *In re Marriage of Schulze, supra*, 60 Cal.App.4th at pp. 523-524, fn. 2.) Appellant has not presented any evidence to rebut that presumption.

Accordingly, we find the trial court did not abuse its discretion in calculating its child support orders as described in its April 2016 statement of decision.

d. *Appellant had an opportunity to be heard and present evidence*

We also find the trial court did not preclude appellant from presenting evidence or testifying on her own behalf as she seems to imply. Appellant primarily contests the trial court's refusal to allow her to testify as to her personal analysis of respondent's expenses reflected in his bank statements without a forensic accountant.[14] The trial court ruled appellant's analysis lacked foundation, but made clear appellant could argue about the expenses, explaining, "You can still make the arguments . . . . I think you can point to all of the pieces, but [appellant] can't serve as your expert and she has no personal knowledge of most of this." We find no error in the trial court's exclusion of appellant's analysis. (Evid. Code, § 702 [witness must have personal knowledge of matter].) Further, appellant suffered no prejudice. Her counsel had the opportunity to cross-examine respondent

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[14] At the April 2014 hearing, appellant asked the court to order respondent to pay for a forensic accountant to examine his financial records. The trial court denied the request, in part to avoid a situation where, in trying to determine respondent's income, only the accountant would be paid, leaving nothing to pay child support.

about his expenses and appellant was not limited in arguing their significance.

Appellant also objected to the introduction of evidence not available to her at the December 2013 trial and excluded by the motion in limine the trial court granted at that time. In June 2015, the trial court also granted appellant's motion in limine to exclude evidence that respondent did not produce in response to appellant's third request for production of records.

The trial court did not abuse its discretion in admitting evidence not produced before the December 2013 trial at the February 2016 evidentiary hearing. It found that most of the documents attached to respondent's RFO did not exist at the time of the December 2013 trial. (Bank records from 2013 existed, but appellant had subpoenaed those for the trial.) Further, appellant received all of the documents attached to respondent's RFO almost two years before the February 2016 hearing.

As to evidence subject to the June 2015 motion in limine, the trial court found respondent's 2015 and 2016 financial overviews of the restaurant were not subject to appellant's motion in limine because they were created after appellant's discovery requests. The trial court admitted some evidence over appellant's objection and acknowledged respondent produced it late. The trial court explained, "[U]ltimately I think it is critical that I try to receive all evidence about . . . what this business is actually making and spending in order to make a proper order." We acknowledge respondent repeatedly failed to comply with appellant's discovery requests and the trial court's related orders, but we cannot fault the court for doing its job. In any event, appellant had a full opportunity to cross-examine respondent. Accordingly, we find appellant was not prejudiced even if some of

the documents admitted were subject to the December 2013 or June 2015 motions in limine.

e. *The trial court did not abuse its discretion when it reduced its Family Code section 271 attorney fees award to $5,000*

"We review an award of attorney fees and costs under section 271 for abuse of discretion. . . . '[W]e will overturn such an order only if, considering all of the evidence viewed most favorably in its support and indulging all reasonable inferences in its favor, no judge could reasonably make the order. [Citations.]' [Citation.] We review any factual findings made in connection with the award under the substantial evidence standard." (*In re Marriage of Fong* (2011) 193 Cal.App.4th 278, 291.)

Family Code section 271 authorizes the court to award attorney fees based on a party's conduct as a sanction. (§ 271, subd. (a).) The court may not, however, impose an attorney fees award under section 271 "that imposes an unreasonable financial burden on the party against whom the sanction is imposed." (*Ibid.*) Family Code section 270 also generally limits the trial court's ability to order attorney fees, stating: "If a court orders a party to pay attorney's fees or costs under *this code*, the court shall first determine that the party has or is reasonably likely to have the ability to pay." (Italics added.) Thus, the Legislature has made clear its intent that in family law proceedings attorney fees should be awarded only against those parties able to afford their payment.

The trial court awarded attorney fees to appellant as a sanction against respondent under Family Code section 271 based on respondent's conduct in connection with the court's

determination of its child support orders. Having set aside its original findings as to respondent's income, we cannot say the trial court abused its discretion in ordering respondent to pay appellant $5,000 in attorney fees, rather than $15,000.

The trial court was prohibited by statute from imposing an attorney fees award against respondent that would impose "an unreasonable financial burden" on him. In reducing its original Family Code section 271 award, the trial court concluded a $15,000 sanction was "unreasonable in light of respondent's actual financial position." As we have discussed, substantial evidence presented at the evidentiary hearing on respondent's RFO supported the court's findings regarding the parties' incomes, including that respondent's gross monthly income was $3,500 per month from October 2011 to December 2013—the period during which respondent engaged in the conduct giving rise to the sanction. Substantial evidence, therefore, supports the trial court's finding that a $15,000 attorney fees sanction would impose an unreasonable financial burden on respondent based on his income.

Appellant does not contest the trial court's finding that $15,000 was an unreasonable financial burden. Rather, she argues the trial court was without authority to reconsider the sanction and, assuming it were able to consider respondent's request to modify the attorney fees award, the court erred under the doctrine of disentitlement in reducing the fees award. Appellant bases the application of this doctrine on respondent's repeated refusal to abide by the trial court's orders and his failure to make any effort to date to pay any of the child support or attorney fees ordered in December 2013.

The trial court rejected appellant's argument, finding this was "not the case where a parent has long flaunted valid support orders. Here respondent moved promptly to set aside support orders which were not consistent with the parties' actual financial situation." The court admonished, "[Appellant's] counsel apparently wants to assign respondent to a debtor's prison from which he could never escape[ ]. Equitable principles should not be invoked to consign a parent to such a fate." The trial court also noted that, given the child had lived with the father half of the time—and full-time for 14 months—during the proceedings, the court was "hard pressed to see how driving the father into financial ruin assists the child, who is living with him and completely dependent on him for food and shelter."

Although we do not condone respondent's conduct, we do not find the trial court abused its discretion in declining to apply the doctrine of disentitlement.

## DISPOSITION

The trial court's April 29, 2016 order is affirmed. The parties shall bear their own costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EGERTON, J.

We concur:

LAVIN, Acting P. J.

KALRA, 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.