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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

GHADA AHMED, Plaintiff and Respondent, v. KARIM SLATE, Defendant and Appellant.	B277147 (Los Angeles County Super. Ct. No. BD514755)

APPEAL from an order of the Superior Court of Los Angeles County. Michael E. Whitaker, Judge. Affirmed.

Angela D. Robinson, for Defendant and Appellant.

Douglas J. Wolf, for Plaintiff and Respondent.

* * * * * *

As part of a dissolution judgment, husband was ordered to pay spousal and child support to his former wife and two teenage daughters. Husband subsequently retired to pursue his side business, and petitioned the family court for a reduction of his support obligations. The family court reduced his obligations, but not as much as husband wanted. Husband now appeals on several grounds. We conclude that he suffered no prejudicial error, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Ghana Ahmed (wife) and Karim Slate (husband) married in 1994, and separated in 2009. They have two daughters—Kiarra (born 1995) and Triana (born 1997). During their marriage, husband worked as a firefighter and helicopter pilot for the Orange County Fire Department (fire department) and, on the side, as a helicopter pilot for his own company; wife was a homemaker.

II. Procedural Background

A. Dissolution and Support Orders in 2011

Wife filed for dissolution of the marriage.

In May 2011, the family court entered a dissolution judgment based upon a written stipulation signed by husband and wife. Under the terms of the stipulated judgment: (1) husband agreed to pay monthly spousal support of $2,000 until wife remarried, until he or wife died, or "until further order of the court"; (2) husband agreed to pay monthly "base child support" under the statutory formula set forth in the Family Code—namely $1,137 for Kiarra and $1,896 for Triana—"until [each] child graduates from college or is not a full-time college student"; and (3) husband agreed to pay an additional monthly

stipend of $750 for each daughter for "school related activities, sports and social activities" until each daughter's "graduation from high school."

B. Husband's Motion to Modify Support

On January 10, 2014, husband filed a "request for order" asking the family court to reduce his spousal and child support obligations due to changed circumstances—namely, his retirement from the fire department in October 2013. Specifically, husband asked the family court to (1) reduce his monthly spousal support obligation, (2) reduce his monthly child support obligation, and (3) reduce the monthly educational stipend. Husband provided documents indicating that his monthly income had gone from $13,147 at the time of the 2011 dissolution judgment (based on his combined salary from the fire department and his side business) to $4,500 (based on his retirement benefits and his side business salary).

C. Termination of Kiarra's Educational Stipend

In February 2014, while husband's request was still pending, the family court terminated the $750 monthly stipend for Kiarra, as it had expired under the terms of the dissolution judgment (because Kiarra had graduated from high school).

D. Ruling on Husband's Request

Following evidentiary hearings, the family court partially granted husband's request.

The family court first found that father's income had decreased; however, instead of using husband's reported actual monthly income of $4,500, the court imputed to husband a monthly income of $10,387 because husband "voluntarily left his employment with the [fire department] knowing full well that he [was] not able to make [his spousal and child support] obligations

at that point." The court calculated the $10,387 imputed income as the sum of husband's income when employed by the fire department minus overtime pay that was discontinued for all firefighters after 2011 (that is, $9,333 per month) and the average of his side business income (that is, $1,054 per month).

Because this monthly income was less than the $13,147 income in effect at the time of the 2011 dissolution judgment, the family court found materially changed circumstances and reduced husband's spousal and child support obligations. Specifically, the court reduced his spousal support obligation to $1,500 per month; reduced his child support for Triana to $1,516, the statutory guideline amount; reduced his child support for Kiarra to $842, which was *below* the statutory guideline amount; and confirmed that the $750 educational stipend had been terminated for Kiarra in February 2014.

After the family court entered an order memorializing its findings in June 2016, husband filed this timely appeal.

DISCUSSION

In this appeal, husband argues that the family court erred in (1) not issuing a statement of decision, (2) imputing income to him (rather than relying on his actual income), (3) departing from the statutory guideline amount of child support for Kiarra without making the findings required by Family Code sections 4056 and 4057,[1] and (4) reducing spousal support without considering the factors set forth in section 4320. We review orders modifying child and spousal support for an abuse of discretion. (*In re Marriage of Usher* (2016) 6 Cal.App.5th 347,

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1 All further statutory references are to the Family Code unless otherwise indicated.

357 [child support]; *In re Marriage of Minkin* (2017) 11 Cal.App.5th 939, 957 [spousal support].)

Wife contends that we need not reach any of these issues because (1) the appeal is moot in light of husband's subsequent reemployment by the fire department, and (2) husband's appeal is barred by the doctrine of unclean hands in light of husband's refusal to pay many of his support obligations while this appeal has been pending. We reject wife's mootness contention because wife has not supplied any evidence or judicially noticeable facts to support her assertion of husband's reemployment by the fire department and because how we decide the issues in this appeal will in any event determine the amount of arrearages husband owes. We reject wife's unclean hands argument because she did not raise it below. (*Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 355, fn. 10.)

I. Statement of Decision

Husband asserts that he is automatically entitled to reversal because the family court did not issue a statement of decision when ruling on his request to modify support. Whether a statement of decision was required and is statutorily sufficient is a question of statutory interpretation, and thus one we review de novo. (Accord, *In re Marriage of Left* (2012) 208 Cal.App.4th 1137, 1145 (*Left*).)

There is some ambiguity as to whether a statement of decision is *ever* required when a trial court rules on a postjudgment request to modify spousal support. Some cases, citing Code of Civil Procedure section 632, hold that a statement of decision is not required unless there was a "trial" and postjudgment requests for modification do not qualify because they at most follow an evidentiary hearing, but not a "trial."

(E.g., *In re Marriage of Fong* (2011) 193 Cal.App.4th 278, 294; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1294.) On the other hand, section 3654 provides that "[a]t the request of either party, an order modifying, terminating, or setting aside a support order shall include a statement of decision," and does so notwithstanding the fact that all such requests are postjudgment and thus do not involve "trials." (§ 3654; *In re Marriage of Shimkus* (2016) 244 Cal.App.4th 1262, 1278-1279 (*Shimkus*) [so noting].)

However, we need not reconcile these seemingly inconsistent mandates because husband is not entitled to reversal for two reasons.

First, husband is not entitled to any statement of decision because his request for one was untimely. Husband first mentioned a statement of decision *after* the parties had argued the case and after the family court had orally issued the bulk of its decision, but just before the court took a brief recess to read one additional case and to allow the parties to comment on that case. Although the hearings on husband's case took place over more than one day, he has not sustained his burden of showing that the hearings took more than eight hours over those days. (*In re Marriage of Garcia* (2017) 13 Cal.App.5th 1334, 1344 [appellant "has the burden of establishing prejudicial error"].) As such, he was required to request a statement of decision "prior to the submission of the matter for decision." (Code Civ. Proc., § 632.) Husband's request came after submission. (See *In re Marriage of Gray* (2002) 103 Cal.App.4th 974, 977 [request for statement of decision following issuance of tentative opinion; untimely]; see generally Cal. Rules of Court, rule 2.900 [case is "submitted" on the earlier of (1) the date the court orders the

matter submitted, or (2) the later of the date the final paper is due or the date argument is heard].)

Second, the family court issued a legally sufficient statement of decision. A statement of decision is adequate if the court "explain[s] the factual and legal basis for its decision as to each of the principal controverted issues at trial." (Code Civ. Proc., § 632.) It is enough if the statement "dispose[s] of all basic issues and fairly disclose[s] the court's determination as to ultimate facts and material issues in the case" (*Duarte Nursery, Inc. v. California Grape Rootstock Improvement Com.* (2015) 239 Cal.App.4th 1000, 1012); the statement need not "respond point by point to issues posed in [the] request for a statement of decision" (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1314, fn. 12). Where the hearings took less than eight hours, an oral statement of decision will suffice. (Code Civ. Proc., § 632.) Here, the family court issued an extensive statement from the bench that thoroughly discussed and resolved all of the issues presented in husband's request, made factual findings, and applied the pertinent statutes and cases to those findings. Husband's arguments, discussed below, that the court did not make required factual findings under certain statutes does not mean that the court failed to issue a statement of decision (cf. *Espinoza v. Calva* (2008) 169 Cal.App.4th 1393, 1397-1398 [no statement of decision]) or that its statement was deficient under Code of Civil Procedure section 632; husband's statute-specific arguments attack the sufficiency of the court's findings *under those statutes*, and we will address them in that context.

II. Imputing Income

In fixing the amount of spousal and child support to be paid following the dissolution of a marriage, a family court generally looks to a spouse's "current"—that is, his actual—"earnings." (*In re Marriage of Sinks* (1988) 204 Cal.App.3d 586, 592; § 4058, subd. (a).) However, the court has the "discretion" to instead "consider the earning capacity of a parent in lieu of the parent's income" if doing so is "consistent with the best interests of the children." (§ 4058, subd. (b); *In re Marriage of Lim & Carrasco* (2013) 214 Cal.App.4th 768, 775.) Income imputed on the basis of a spouse's earning capacity is a function of his (1) "ability to work" and (2) "opportunity to work." (*In re Marriage of McHugh* (2014) 231 Cal.App.4th 1238, 1246 (*McHugh*); *In re Marriage of Bardzik* (2008) 165 Cal.App.4th 1291, 1302.) A spouse's "ability to work" turns on "'"such factors as age, occupation, skills, education, health, background, work experience and qualifications,"'" while "opportunity to work" evaluates whether there is a "'reasonable "likelihood that [the spouse] could, with reasonable effort, apply his or her education, skills and training to produce income."'" (*McHugh*, at p. 1246.)

Husband contends that the family court erred in calculating the reduced amounts of spousal and child support on the basis of *imputed* income rather than his *actual* income. In particular, he asserts that imputation of his income (1) impermissibly "chills" his statutory right to retire from his firefighting career at the "usual" retirement age of 55, in violation of *In re Marriage of Reynolds* (1998) 63 Cal.App.4th 1373 (*Reynolds*); (2) did not take into consideration the best interests of his children; (3) lacks sufficient evidence of his ability and opportunity to work; and (4) was done without sufficient notice.

We review a family court's decision to impute income for an abuse of discretion. (*McHugh*, *supra*, 231 Cal.App.4th at p. 1247.) To the extent husband attacks the family court's legal conclusions, our review is de novo; to the extent he attacks its factual findings, we review for substantial evidence, viewing the evidence in the light most favorable to those findings. (*In re Marriage of Schopfer* (2010) 186 Cal.App.4th 524, 529.)

We consider each of husband's arguments in turn.

Husband is correct that the "usual" retirement age for a firefighter is 55. (*Shimkus*, *supra*, 244 Cal.App.4th at p. 1276; Gov. Code, § 21363, subd. (a); Cal. Code Regs., tit. 2, § 586.1, subd. (a)(2)(C).) He is also correct that *Reynolds* provides that a spouse "may [not] be compelled to work after the usual retirement age of 65," at least in the absence of continued "potential earning capacity." (*Reynolds*, *supra*, 63 Cal.App.4th at pp. 1378-1379.) In this case, however, the family court did not "chill" husband's right to retire by compelling him to continue working past the age of 65, or to work for the fire department after the usual retirement age of 55 for firefighters. Instead, the court found that husband voluntarily retired from the fire department to pursue his side business full time, and imputed to him an income commensurate with the devotion of his full time to that endeavor. This is permissible: Because children's interests are a "top priority" (§ 4053, subds. (e)), and the payment of appropriate support is a parent's primary obligation (§ 4053, subds. (a) & (d)), "a child support obligation '"must be taken into account whenever an obligor wishes to pursue a different lifestyle or endeavor. . . . [It is] an overhead which must be paid first before any other expenses."'" (*In re Marriage of Padilla* (1995) 38 Cal.App.4th 1212, 1218; accord, *In re Marriage of Ilas* (1993)

12 Cal.App.4th 1633, 1639 [court correctly imputed earning capacity based on job father quit to attend medical school].)

The family court considered the best interests of the children when deciding to impute income. The court expressly found that Kiarra and Triana were full-time students who were entirely dependent upon husband for financial support, a dependency grounded in part in husband's voluntary agreement to provide support until they finished college. Although the family court did not utter the words "best interests of the children" in conjunction with its analysis, this omission is of no consequence because the court's analysis considered those interests and was, for that reason, sufficient. Husband seeks to back away from his voluntary agreement to continue financial support for the children until they complete college, citing his unrepresented status at the time he made the agreement; however, the Family Code recognizes a "parent's ability to agree to provide additional support" over and above what is statutorily required (§ 3901, subd. (b)), and husband cites no evidence that his decision to agree to this additional support was unknowing or coerced.

Sufficient evidence supported the family court's decision to rely on husband's earning capacity. Ample evidence supported the court's findings that husband had both the ability and opportunity to earn the $10,387 in monthly income imputed to him. There was ample evidence of husband's ability to fly a helicopter because he was licensed as a helicopter pilot and flight instructor; had worked as a pilot for both the fire department and his side business; and had no serious health problems. There was also ample evidence of husband's opportunity to earn a living as a pilot. Husband's side business reported income between

$85,000 and $100,000 in 2013 and 2014, and for part of this time he was still only working for the side business part time. Husband also testified that he had several future job opportunities and anticipated little problem getting further work. Husband asserts that there was no evidence he might get rehired by the fire department, and that the court never found that he had deliberately retired in order to avoid his support obligations. Neither assertion casts doubt upon the sufficiency of the evidence. Although the family court looked in part to husband's fire department income in fixing the *amount* of income to impute, the court did not premise its imputed income upon husband's reemployment by the fire department; rather, the court relied upon his general skills as a pilot and his ability to earn comparable income through his side business or other similar means. And proof of deliberate evasion is no longer required. (*Brothers v. Kern* (2007) 154 Cal.App.4th 126, 135; *In re Marriage of Destein* (2001) 91 Cal.App.4th 1385, 1391-1392.)

Husband also had sufficient notice that his earning capacity might become an issue. Wife's declaration in opposition to husband's request specifically detailed how husband continues to have the ability and opportunity to work notwithstanding his retirement, which are the sine qua non of imputed income. Further, husband does not include in the record on appeal the transcripts from the earlier hearings, making it impossible for us to know precisely when *the family court* first raised the issue of imputation of income. The record before us indicates husband was on notice. (Cf. *In re Marriage of Schmir* (2005) 134 Cal.App.4th 43, 54 [error to terminate spousal support without giving spouse "reasonable advance notice and opportunity to secure employment"].)

III. Departure from Guideline Support Amount

Family courts are presumptively required to fix the amount of child support using a "statewide uniform guideline" formula set forth in section 4055. (§ 4057, subd. (a); *Y.R. v. A.F.* (2017) 9 Cal.App.5th 974, 983 (*Y.R.*).) As pertinent here, a family court may impose a different support amount only if "[a]pplication of the formula would be unjust or inappropriate due to special circumstances in the particular case" (§§ 4057, subd. (b)(5) & 4052), and only if it states "in writing or on the record" (1) "[t]he amount of support that would have been ordered under the guideline formula," (2) "[t]he reasons the amount of support ordered differs from the guideline formula amount," and (3) "[t]he reasons the amount of support ordered is consistent with the best interests of the children" (§ 4056, subd. (a); *In re Marriage of Brinkman* (2003) 111 Cal.App.4th 1281, 1292-1293). The family court's statement must be express, but the absence of such a statement is harmless if the requisite analysis is "discernable from the record" or "implicit in other findings." (*Y.R.*, at pp. 985-986; *Rojas v. Mitchell* (1996) 50 Cal.App.4th 1445, 1450.)

Husband argues that the family court did not make the findings required by section 4056 when it set a child support obligation for Kiarra below the guideline amount.

As a threshold matter, we do not see how father is aggrieved by this omission given that the persons affected by a sub-guideline amount—Kiarra (and, by extension, mother)—have not appealed. (See *In re K.C.* (2011) 52 Cal.4th 231, 236 ["only a person aggrieved by a decision may appeal"].) At oral argument husband argued that he was aggrieved because he should not have had to pay *any* support for Kiarra under the guideline amounts because she is now an adult. This argument overlooks

husband's prior agreement to pay support for Kiarra beyond her age of majority, presumably at the guideline amount.

In any event, the family court set a non-guideline amount, explaining that the income level it was imputing to father was less than his actual income in 2011 underlying the initial support amount; that the court was therefore "reducing [the support amount] by a percentage of the reduced income"; and that this new amount was $842. The court did not spell out the exact percent reduction, but it is discernable: Husband's income dropped by 21 percent (from $13,147 to $10,387) and the court dropped Kiarra's support by 26 percent (from $1,137 to $842). Again, the additional reduction (26 percent over 21 percent) redounds to husband's benefit, not his detriment.

From these findings, the requisite statutory findings are "discernable from the record" or otherwise "implicit" in the family court's "other findings." The court explained why it was dropping the amount (namely, to account for husband's reduced income), and why it was in Kiarra's best interest (and hence appropriate) to drop her amount of monthly support in a proportional manner (namely, because Kiarra still needed the support but that her dependency on that support at the age of 20 was arguably "unreasonable"). The court's failure to calculate a guideline amount is of no moment because it can be calculated under section 4055 and was not, in any event, being applied. Husband argues that the court did not specify which of the "special circumstances" under subdivision (b)(5) of section 4057 it was relying upon, but the statutorily enumerated circumstances are illustrative—not exhaustive (§ 4057, subd. (b)(5) ["[t]hese special circumstances include, but not are limited to"]), so the failure to pick one of those factors is of no consequence.

In sum, while the family court's findings in this regard were not ideal, they do not constitute reversible error.

IV. Findings Support Reduction in Spousal Support

In fixing the amount of spousal support, a family court is obligated to consider the factors set forth in section 4320. (*Left*, *supra*, 208 Cal.App.4th at p. 1150.) Husband asserts that the family court did not consider these factors when reducing his support for wife from $2,000 down to $1,500. He is incorrect. The family court diligently marched through the various section 4320 factors, and found them applicable to both child and spousal support. To the extent husband argues that the court's analysis is defective because it improperly imputed income or chilled his right to retire, we have rejected those arguments; they provide no basis for upsetting the family court's ruling.

DISPOSITION

We affirm the order modifying the spousal and child support orders. Wife is entitled to her costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
CHAVEZ

_____, J.*
GOODMAN

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