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CERTIFIED FOR PARTIAL PUBLICATION[*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of DANIEL E. and SHELLEY A. HENRY.	
DANIEL E. HENRY, Respondent, v. SHELLEY A. REISSMUELLER, Appellant.	G033727 (Super. Ct. No. 93D02869) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Richard G. Vogl, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed in part, reversed in part, and remanded with directions. Request to augment the record on appeal. Granted. Motion for sanctions and/or fees in lieu of sanctions. Denied.

Law Offices of Brian G. Saylin and Brian G. Saylin for Appellant.

Law Offices of Jeffrey W. Doeringer and Jeffrey W. Doeringer for Respondent.

[*] Pursuant to California Rules of Court, rules 976(c) and 976.1, this opinion is certified for publication with the exception of parts II through VII of the Discussion.

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INTRODUCTION

Following the dissolution of her marriage to Daniel E. Henry, Shelley A. Reissmueller was ordered in October 2000 to pay child support to Henry for their two teenaged sons. Reissmueller became pregnant in December 2002, and developed complications during the pregnancy that caused her to be disabled from work. She therefore sought modification of the child support order because of her reduced income.

Reissmueller's medical complications continued after the birth of her baby; she continued receiving disability payments and ultimately went on unemployment because her employer could not keep her position open.

In January 2004, the trial court entered an order modifying Reissmueller's child support obligation, although not to Reissmueller's benefit. One of the teenaged sons of Henry and Reissmueller had turned 18 years of age, so the support order no longer applied to him. Reissmueller's support payment for the other son increased from $500 per month to $735 per month. On appeal, Reissmueller challenges the court's order on a number of grounds.

We reverse and remand for recalculation of the child support payment. The court erred in calculating Reissmueller's income because her share of the increased equity value in a residence is not income within the meaning of Family Code section 4058. (All further statutory references are to the Family Code, unless otherwise specified.) We must therefore reverse the order modifying Reissmueller's child support obligation, and remand the matter for the trial court to recalculate the proper amount of that obligation due from January 1, 2004 to May 11, 2004. The trial court shall determine how best to ensure any overpayment or underpayment by Reissmueller to Henry is to be corrected.

In all other respects, the court's order was correct. The court's findings regarding Henry's income were supported by substantial evidence; the court did not abuse its discretion in refusing to make the modification order retroactive or in denying Reissmueller's requests for income deductions; and the record does not support a claim of gender bias by the court.

Henry seeks his attorney fees on appeal as a sanction against Reissmueller for filing a frivolous appeal. We deny that request.

STATEMENT OF FACTS

Henry and Reissmueller were married on November 19, 1983, and had two sons, Scott and Shane. Henry filed for dissolution of the marriage on March 30, 1993. On October 26, 2000, the court entered a stipulated order (1) granting the parties joint legal custody of the children, (2) granting Henry primary physical custody of the children, and (3) requiring Reissmueller to pay $500 per month for each child, for a total of $1,000 in monthly child support.

On April 30, 2003, Reissmueller filed an order to show cause for modification of the child support order. Reissmueller declared she was pregnant and medical complications from her pregnancy caused her to become disabled from working in medical sales. Reissmueller's baby was born on July 15, 2003.

On June 11, 2003, Henry filed an order to show cause and affidavit for contempt, due to Reissmueller's failure to make several child support payments. The contempt proceeding was dismissed when Reissmueller deposited the disputed sums into the client trust account of Henry's attorney. Henry and Reissmueller's older son, Scott, turned 18 years of age on July 3, 2003.

On December 18, 2003, the parties stipulated that Reissmueller's modification request could proceed on the parties' written submissions, rather than through live testimony. (*Reifler v. Superior Court* (1974) 39 Cal.App.3d 479.)

The court issued a tentative decision on December 30, 2003. On January 8, 2004, the court entered findings and an order after hearing (the January 8 Order) consistent with the tentative decision. The court's findings, as relevant to the issues on appeal, were as follows: (1) the children spent 80 percent of their time with Henry, and 20 percent with Reissmueller; (2) Henry's net monthly income was $6,461; (3) Reissmueller's gross monthly income was $8,000; (4) there were no grounds for making the modified child support order retroactive to the date Reissmueller filed her request for modification; (5) Reissmueller's infant child did not justify a hardship deduction for the support of her two other children; (6) Reissmueller was entitled to an income deduction of $260 monthly for health insurance costs, not a deduction of $600 monthly for the temporary costs of COBRA[1] coverage; (7) the appropriate monthly child support for Shane, the younger son, was $735, based on the DissoMaster;[2] and (8) the modified child support amount was effective January 1, 2004.

Reissmueller moved for a new trial, arguing each of the grounds she now asserts on appeal. The trial court denied the motion for a new trial. Reissmueller filed a notice of appeal from the January 8 Order.

DISCUSSION

In considering the modification of a child support order, "[o]ur review is limited to determining whether the court's factual determinations are supported by substantial evidence and whether the court acted reasonably in exercising its discretion.

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[1] The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) mandates that certain employees and their dependents be offered the option of paying premiums to continue medical coverage for a limited time period after the termination of coverage under a group health plan. (29 U.S.C. §§ 1161-1167; 42 U.S.C. §§ 300bb-1 through 300bb-8.)

[2] "The DissoMaster is one of two privately developed computer programs used to calculate guideline child support as required by section 4055, which involves, literally, an algebraic formula." (*In re Marriage of Schulze* (1997) 60 Cal.App.4th 519, 523, fn. 2.)

[Citation.] We do not substitute our judgment for that of the trial court, but confine ourselves to determining whether any judge could have reasonably made the challenged order. [Citation.]" (*In re Marriage of de Guigne* (2002) 97 Cal.App.4th 1353, 1360.) "[A] determination regarding a request for modification of a child support order will be affirmed unless the trial court abused its discretion, and it will be reversed only if prejudicial error is found from examining the record below. [Citations.]" (*In re Marriage of Leonard* (2004) 119 Cal.App.4th 546, 555.)

I.

THE TRIAL COURT'S FINDINGS OF REISSMUELLER'S INCOME WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

As we shall explain, the trial court's findings regarding Reissmueller's income were not supported by substantial evidence. At the time the trial court considered Reissmueller's request for modification, Reissmueller had no wages, since her employer had been unable to keep her job open during her disability leave. In 2002, she had earned approximately $8,147 per month. In 2003, Reissmueller earned $6,441 per month from January through April; $3,825 per month from May through September 9; and $2,446 per month from September 9 through December 15. This income was comprised of wages and disability benefits. Reissmueller also expected to receive $370 per week in unemployment benefits beginning December 15.

The court found Reissmueller had suffered a temporary reduction in income. "In this matter, [Reissmueller] has had a reduction in income. It would seem that the reduction is not permanent. She got pregnant. She exhibited a disability. Her job was exonerated." Reissmueller argues these findings show the court was punishing her for getting pregnant. We disagree. The quote from the January 8 order merely sets out the steps leading to Reissmueller's reduction in income: Reissmueller became pregnant; she then became disabled from work as a result of complications during and

after the pregnancy; and Reissmueller's employer was unable to hold her position open after her leave had been exhausted.

The court made additional findings that Reissmueller "is highly skilled in a sought-after profession: nursing," she "expects to be re-employed," and she was "currently receiving 'unemployment benefits' . . . and is seeking employment. Nurses find jobs quickly." There was substantial evidence for each of these findings in the record, and Reissmueller does not argue to the contrary.

The court also found Reissmueller's residence appreciated in value by $240,000 between April 2003 and December 2003, and half of this increase in value belonged to Reissmueller, because the house was jointly owned with her current husband. This half interest calculates to approximately $13,000 per month during that time period. The trial court found Reissmueller's gross income to be $8,000 per month. In its order denying the new trial motion, the court explained its determination of Reissmueller's income as follows: "The court was asked by [Reissmueller] to lower the child support because she had become unable to be employed for a period of time and she argued that without 'income' she had no capacity to pay. This court rejected that argument as the court found that pursuant to the definition of 'income' (as contained in Family Code [section] 4058) [Reissmueller] had sufficient income to support her children. The court compared a newly filed income and expense declaration with an older one and discovered that [Reissmueller] had some $240,000 increase in her real estate investment. [¶] The court could thus have found that [Reissmueller] had an 'income' of $120,000 in the earlier nine months. Rather than apply to [Reissmueller] a monthly average of $13,000 monthly income, the court exercised its discretion and found her income to be only an earlier earned wage sum of $8,000 monthly. Surely, it cannot be said that every court would have ruled as this court has, but it also cannot be said that none would have."

In calculating child support, income is broadly defined. (*In re Marriage of Dacumos* (1999) 76 Cal.App.4th 150, 154.) The controlling statute provides in part:

"The annual gross income of each parent means income from whatever source derived . . . and includes, but is not limited to, the following: [¶] (1) Income such as commissions, salaries, royalties, wages, bonuses, rents, dividends, pensions, interest, trust income, annuities, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, social security benefits, and spousal support actually received from a person not a party to the proceeding to establish a child support order under this article. [¶] (2) Income from the proprietorship of a business, such as gross receipts from the business reduced by expenditures required for the operation of the business." (§ 4058, subd. (a).)

Here, the court found the increase in the value of Reissmueller's house was income. Henry argues *In re Marriage of Destein* (2001) 91 Cal.App.4th 1385 supports this finding. We disagree. In *In re Marriage of Destein, supra,* 91 Cal.App.4th at page 1396, the trial court imputed to the parent paying child support the rate of return of that parent's separate investment property, which was not income producing, and the appellate court found no abuse of discretion. "Nothing in Family Code section 4058, subdivision (b), suggests that the court's discretion to charge a reasonable rate of return to an investment asset depends on an income-producing history. A parent's primary obligation is to support his or her children according to the parent's station in life and ability to pay. [Citation.] The only statutory limitation on the court's discretion to apply the earning capacity doctrine to investment assets is the best interests of the child. [Citation.]" (*Id.* at p. 1394.)

In re Marriage of Destein, supra, 91 Cal.App.4th 1385 is not applicable in this case, however. There, the property was investment property, not the parent's residence. (*Id.* at p. 1389.) Further, the income imputed from the real property was the estimated rate of return on the property as an investment. (*Id.* at pp. 1397-1398.) The appellate court specifically noted, "Patricia has never sought to impute a rate of return to Joseph's equity in his home. Thus the question of what circumstances might justify a

trial court's decision to do so is not before us." (*Id.* at p. 1390, fn. 3.) No case cited by Henry or that we have found in our independent research holds the increase in the equity value of a parent's residence constitutes income or earning capacity for purposes of calculating child support under section 4058.

In *Mejia v. Reed* (2003) 31 Cal.4th 657, 662, during his marriage the husband fathered a child with another woman. The husband and the wife later divorced. (*Ibid.*) As part of the marital settlement agreement, the husband transferred to the wife his entire interest in their jointly held real estate, and the wife transferred to the husband her share of the husband's medical practice. (*Ibid.*) The plaintiff (the mother of the husband's child) argued the marital settlement agreement was a fraudulent transfer which rendered the husband insolvent, preventing him from meeting his financial obligations to the plaintiff's child. (*Ibid.*)

The California Supreme Court concluded the provisions of the Uniform Fraudulent Transfer Act (UFTA) apply to marital settlement agreements. (*Mejia v. Reed, supra,* 31 Cal.4th at p. 669.) The court held, "Although the UFTA recognizes an unmatured contingent claim as a debt [citation], child support claims present a special case. Support payments usually are paid from present earnings, not liquidation of preexisting assets. The amount of payments owed is computed on the basis of monthly disposable income. [Citation.] This figure is generally based on actual earnings, although the trial court has discretion to consider earning capacity instead of actual income [citation], and child support payments may be changed, in some cases retroactively, if there is a change in actual earnings or earning capacity. [Citations.] [¶] Assets at the time of dissolution play little part in the computation of child support. They may enter indirectly into the calculation in two ways: (1) In assessing earning capacity, a trial court may take into account the earnings from invested assets [citation]; and (2) a court may deem assets a 'special circumstance' [citation] that may justify a departure from the guideline figure for support payments [citation]. But these are exceptional

situations; the child support obligation is based primarily on actual earnings and earning capacity." (*Id.* at pp. 670-671, fn. omitted.) *Mejia v. Reed* supports our conclusion that the trial court could not use the unrealized gain on Reissmueller's residence as income for purposes of calculating child support.

Although the language of section 4058 is expansive, it is not limitless. Every type of income specified by section 4058, subdivisions (a) and (b) is money actually received by the support-paying parent, not merely the appreciation in value of their assets. Indeed, the statute uses the word "derived." If the Legislature had intended that the unrealized increase in the value of an asset should be considered income, it would have said so. Section 4058's "but is not limited to" language does not reach so far as to include the increase in equity of a parent's residence, forcing the parent to sell or refinance the home in order to make court-ordered support payments.

The January 8 Order cannot be affirmed on the ground the $8,000 income amount evidences Reissmueller's earning capacity. The January 8 Order reads, "The evidence is that [Reissmueller] has been clearly capable of earning $8,000 monthly, and so supposes that her new employment will bring her similar income." In its order denying the motion for a new trial, however, the court made clear its finding of Reissmueller's income was based on the increase in the value of her house, rather than her earning capacity. The court did not include any of the necessary findings to support an "earning capacity" calculation under section 4058, subdivision (b).[3] As the party arguing Reissmueller's earning capacity should be used, Henry bore the burden of

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[3] "The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children." (§ 4058, subd. (b).) """Earning capacity is composed of (1) the ability to work, including such factors as age, occupation, skills, education, health, background, work experience and qualifications; (2) the willingness to work exemplified through good faith efforts, due diligence and meaningful attempts to secure employment; and (3) an opportunity to work which means an employer who is willing to hire."""" (*In re Marriage of LaBass & Munsee* (1997) 56 Cal.App.4th at 1331, 1337-1338.)

offering evidence of Reissmueller's job qualifications, salary payable, and job opportunities. (*In re Marriage of LaBass & Munsee, supra,* 56 Cal.App.4th 1331, 1338-1339.) The record on appeal shows that Henry failed to meet this burden.

Annual gross income includes not only wages, but also unemployment insurance benefits and disability insurance benefits. (§ 4058, subd. (a).) In 2003, Reissmueller's annual gross income included all of these. The trial court should have used Reissmueller's actual income to determine the income amount for the DissoMaster calculation. On remand, the trial court shall determine the appropriate amount of Reissmueller's income as of December 30, 2003, and use that income to rerun the DissoMaster to determine the correct amount of Reissmueller's child support payment from January 1, 2004 to May 11, 2004. After May 11, the court's later modification order will be in effect.

Reissmueller also argues the January 8 Order should be reversed because it was effective January 1, 2004, and there was no evidence she would be reemployed that soon. Reissmueller does not argue that making the child support modification immediately effective was in and of itself improper. Because we have directed the trial court to recalculate the child support payment with reference to Reissmueller's income as of December 30, 2003, there is no error in making the modified payment effective January 1, 2004.

At oral argument, Reissmueller's counsel referred to two previously uncited cases, neither of which is directly applicable here. In *In re Marriage of Romero* (2002) 99 Cal.App.4th 1436, 1439, the husband requested a modification of the spousal support order due to his change in income as a result of a disability. The trial court concluded the husband's reduction in income was a material change in circumstances, but denied the husband's request because the husband's new wife's income was used to pay at least a part of the husband's monthly expenses. (*Ibid.*) The Court of Appeal concluded that in determining the appropriate support order the trial court could not consider either the new

wife's income or her expenses. (*Id.* at p. 1445.) Here, the trial court excluded Reissmueller's new husband's income and his share of the equity in the residence in determining Reissmueller's income.

In *In re Marriage of Riddle* (Jan. 14, 2005, G033414) __ Cal.App.4th __ [2005 Cal.App. Lexis 58], another panel of this court concluded the trial court abused its discretion by selecting too short a period for calculating the husband's income in setting support. The trial court considered the husband's income only for two months, which this court determined was "so small a sliver of time to figure income that the determination essentially becomes arbitrary." (*Id.* at p. __ [2005 Cal.App. Lexis 58 at p. *14].) Under *In re Marriage of Riddle*, past earnings may only be used to determine a support order when they are a reasonable predictor of future earnings. (*Id.* at p. __ [2005 Cal.App. Lexis 58 at pp. *14-*15].) This court also concluded the support order could not be justified on the basis of imputed income. (*Id.* at p. __ [2005 Cal.App. Lexis 58 at p. *20].) The opinion distinguishes *In re Marriage of Destein, supra,* 91 Cal.App.4th 1385, as we have above, because in that case the support-paying spouse "had sizable separate but illiquid holdings in real estate from which a return could be imputed in order to ascertain income." (*In re Marriage of Riddle, supra,* at p. __ [2005 Cal.App. Lexis 58 at p. *20].)

II.

SUBSTANTIAL EVIDENCE SUPPORTED THE TRIAL COURT'S FINDINGS OF HENRY'S NET INCOME.

Reissmueller argues there was no substantial evidence for the trial court's findings of the amount of Henry's net income. Henry's income and expense declaration filed December 29, 2003, claims a net monthly income of $2,254, and monthly expenses of $6,461.46. His tax return for 2002 shows a total income of $33,897, and an adjusted gross income of $29,159. Income and expense declarations can be sufficient evidence of

current income. (*In re Marriage of Rosen* (2002) 105 Cal.App.4th 808, 824.) The gross income stated under penalty of perjury on a recent tax return is deemed the presumptively correct income for computing child support. (*In re Marriage of Loh* (2001) 93 Cal.App.4th 325, 332.) The trial court, however, found Henry's net monthly income to be $6,461, the amount of his claimed monthly expenses.

A court may base a support order on the parent's lifestyle. (§ 4053, subd. (f); *In re Marriage of de Guigne, supra,* 97 Cal.App.4th 1353 [child support ordered in amount greater than actual income affirmed on appeal because it was consistent with parent's lifestyle].) The inference by the court that Henry's net income must be equal to the amount of his expenses is a """product of logic and reason""" that """rest[s] on the evidence""" and can support the court's finding of Henry's net income. (*Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1328.)

The trial court chose to give little or no weight to Henry's tax returns and income declaration, and instead made a finding that Henry's net monthly income was higher than either of those sources indicated. If the court erred in rejecting those generally accepted methods of proving income, the error was in Reissmueller's favor, and she suffered no prejudice as a result of that error. (*In re Marriage of Leonard, supra,* 119 Cal.App.4th at p. 555.)

Reissmueller argues that the December 29, 2003 income and expense declaration cannot be the basis for the court's finding of Henry's income because the court found the declaration not credible. The court found Henry's June 11, 2003 income and expense declaration "not believable." The court did not find the December 29 declaration not believable or not credible.

Reissmueller's expert submitted a declaration in which he concluded Henry must earn $12,000 a month before taxes to maintain his current lifestyle. Reissmueller argues the court improperly ignored that conclusion. The court did not ignore the expert's declaration; in its order denying the motion for a new trial, the court specifically

referred to the expert's declaration. The court, however, chose not to give that declaration as much weight as Henry's declared expenses. It is the trial court's province to decide what weight to give the evidence.

III.

THE TRIAL COURT DID NOT ERR IN REFUSING TO MAKE THE JANUARY 8 ORDER RETROACTIVE.

Reissmueller challenges the trial court's refusal to make the January 8 Order retroactive. (Reissmueller does not address the seeming inconsistency between this argument and her argument that the court erred by making the January 8 Order effective too soon.)

Section 3653 addresses retroactivity of orders modifying child support: "(a) An order modifying or terminating a support order may be made retroactive 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, except as provided in subdivision (b) or by federal law (42 U.S.C. Sec. 666(a)(9)). [¶] (b) If an order modifying or terminating a support order is entered due to the unemployment of either the support obligor or the support obligee, the order shall be made retroactive to the later of the date of the service on the opposing party of the notice of motion or order to show cause to modify or terminate or the date of unemployment, subject to the notice requirements of federal law (42 U.S.C. Sec. 666(a)(9)), unless the court finds good cause not to make the order retroactive and states its reasons on the record."[4]

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[4] The first reported case to interpret section 3653, subdivision (b) is *In re Marriage of Leonard, supra,* 119 Cal.App.4th at page 557: "The statute does not define the circumstances under which the court may find good cause to deny retroactivity. Further, the parties cite no cases – and we are aware of none – that either discuss section 3653[, subdivision](b) generally or analyze the statute's 'good cause' requirement for nonretroactivity."

Reissmueller argues section 3653, subdivision (b) applies, and the court failed to make any findings of good cause for not making the order retroactive. Section 3653, subdivision (b) does not apply, however, because Reissmueller was not unemployed, at least not until after December 15, 2003. The information Reissmueller presented to the court in support of her modification request showed medical complications during and after her pregnancy caused her to be disabled and unable to work. Reissmueller, however, continued to receive her salary or disability benefits through December 15, 2003. To the extent Reissmueller was actually unemployed as of December 15, 2003, because she had lost her job and was no longer receiving state disability benefits, any error in failing to make the order retroactive or failing to make good cause findings was not prejudicial. (*In re Marriage of Leonard, supra,* 119 Cal.App.4th at p. 555.) The total time to which any error applied was two weeks.

Whether to make a child support modification order retroactive in a situation other than because of a parent's unemployment is a matter for the trial court's discretion. (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 299-300.) The court must consider the children's needs, not the supporting parent's situation. (*Id.* at p. 300.) Here, we cannot say the court abused its discretion by determining the January 8 Order should not be made retroactive.

In any event, Reissmueller suffered no prejudice. The January 8 Order increases the amount Reissmueller is to pay for her son Shane. The court's refusal to make the January 8 Order retroactive actually saved Reissmueller money.[5] (*In re Marriage of Leonard, supra,* 119 Cal.App.4th at p. 555.)

[5] The older son, Scott, turned 18 years of age on July 3, 2003. The original child support order was to continue "until the child marries, dies, is emancipated, reaches age 19, or reaches age 18 and is not a full-time high school student, whichever occurs first." There is nothing in the record showing Scott was still a high school student after July 3, 2003. In a declaration, Reissmueller's counsel stated that Scott "became an adult" on July 3, 2003, and thereafter only Shane "was the subject of support." We infer the court found Reissmueller's obligation to pay support for Scott ended in July 2003.

IV.

THE TRIAL COURT DID NOT ERR IN THE AMOUNT OF HEALTH INSURANCE COSTS DEDUCTED FROM REISSMUELLER'S INCOME.

Health insurance or health plan premiums for the parent and any children he or she supports are deducted from income in calculating child support. (§ 4059, subd. (d).) When Reissmueller originally filed her request for modification, she was paying $258 per month for health care coverage. By the time the trial court issued the January 8 Order, Reissmueller was paying $607.70 per month for COBRA continuation coverage. Reissmueller therefore sought to increase her allowable income deduction from $260 to $608. The trial court rejected this request because the increase due to COBRA was temporary. "[Reissmueller] indicates that her monthly insurance for health coverage is based upon COBRA and is in excess of $600 monthly. An earlier income and expense declaration indicated these costs at only $260. [¶] As the COBRA costs are temporary only the court will give consideration to the health costs for [Reissmueller] at $260 monthly."

Reissmueller argues the trial court improperly speculated that she would immediately become employed and her cost for health insurance coverage with that new employer would be $260.

The brief submitted by Reissmueller's counsel in support of the modification request stated that as of December 18, 2003, Reissmueller was no longer disabled and was "now . . . engaged in actively pursuing employment." The trial court's finding that Reissmueller would soon obtain employment was not based on speculation, but rather on Reissmueller's counsel's submissions. Similarly, the court's finding that Reissmueller's health insurance costs would be $260 per month was based on the amount she was actually paying while employed. That was not speculative.

Reissmueller also argues the trial court erred by failing to comply with section 3766, subdivision (b): "If the obligor has made a selection of health coverage

prior to the issuance of the court order, the selection shall not be superseded unless the child to be enrolled in the plan will not be provided benefits or coverage where the child resides or the court order specifically directs other health coverage." This statute has no application here. The January 8 Order did not supersede the selection of a health care plan; it set the amount of the allowable deduction for health insurance costs at a lower amount than that requested by Reissmueller.

V.

THE TRIAL COURT DID NOT ERR IN DENYING REISSMUELLER'S HARDSHIP REQUEST.

Reissmueller argues the trial court erred by failing to permit her to take a hardship income deduction in connection with the birth of her new child. Regarding the hardship deduction, the January 8 Order reads: "Here a reduction from the income of [Reissmueller] must also be considered due to her purported hardship of having a new child to support. Pursuant to California Family Code § 4071, only certain deductions are permitted. The statutory hardships include all costs when (a) they entail *extraordinary* health expenses and uninsured catastrophic losses; (b) they entail other children *for whom the parent has an obligation* (but not in excess [of] the support for the child subject to the order). California Family Code § 4070 provides that 'extreme financial hardship' must arise from those costs. [¶] A hardship deduction is discretionary and not to be allowed except in the most unusual of circumstances. No hardship is permitted unless there is evidence to support the request. [Citation.] Where a court grants a hardship which is not supported by the law and the facts, the appellate courts have reversed the judgment. [Citations.] The Legislature has recognized that in the proper case it is proper to reduce an existing child support payment if it is necessary to alleviate the payor's extreme financial hardship occasioned by the birth of new children. [Citations.] [¶] In this case, however, the original order for [Reissmuller] to pay $1,000 monthly in child support was

based upon her income of $5,715 (and her new spouse at $3,000 makes a total of $8,715) whereas now the income of [Reissmueller]'s new spouse i[s] $6,000 plus her future income may well surpass $14,000 monthly. [¶] Any requested 'hardship' for [Reissmueller], as she has a new child, is denied."

Whether to grant a hardship deduction is discretionary. (*In re Marriage of Whealon* (1997) 53 Cal.App.4th 132, 145; *In re Marriage of Paulin* (1996) 46 Cal.App.4th 1378, 1381.) "[T]he determination of whether the criteria are present to permit application of a hardship deduction is reviewed for substantial evidence." (*In re Marriage of Carlsen* (1996) 50 Cal.App.4th 212, 215.)

In this case, there was no evidence before the trial court that could justify a hardship deduction for Reissmueller. She did not even request a hardship deduction in any of the income and expense declarations filed in connection with her request for modification of the child support order. The only request for a hardship deduction was made in Reissmueller's counsel's supplemental declaration filed December 23, 2003, which states, "On July 1[5], 2003, a child was born to . . . Reissmueller. Since Mrs. Reissmueller's income was so reduced by this time, it is appropriate that a hardship deduction be made for the baby." There is nothing in the appellate record that would provide a basis for determining whether a hardship deduction was appropriate or what the amount of any such deduction should be. (*In re Marriage of Carlsen, supra,* 50 Cal.App.4th at p. 218.)

The granting of a hardship deduction is not automatic on the birth of a child, contrary to Reissmueller's argument. (*In re Marriage of Paulin, supra,* 46 Cal.App.4th at p. 1383.) "If the minimum basic living expenses of other-relationship resident dependent minors were to be considered as a matter of course, they would have been included among the standard deductions in section 4059. Thus, the Legislature has limited the deduction for hardship to the unusual situation, such as where the custodial parent does not receive any support for these children or the reasonable minimum living

expenses are unusually high in the context of the family's income. [Citation.]" (*In re Marriage of Carlsen, supra,* 50 Cal.App.4th 212, 217, fn. 5.)

In *In re Marriage of Paulin, supra,* 46 Cal.App.4th at pages 1382-1383, the appellate court affirmed a hardship deduction granted by the trial court, where the birth of twins to the father making child support payments for his two other minor children meant he was now supporting four rather than two children. The father's support payment for the first two children was reduced from $1,511 to $1,338 per month, a change of $173 per month. (*Id.* at p. 1382.) In the present case, Reissmueller was never obligated to support more than two children, since Scott turned 18 years of age just before Reissmueller's baby was born. We conclude the trial court did not abuse its discretion in denying the hardship deduction.

Reissmueller also argues the trial court erred by considering her current spouse's income in denying the hardship deduction. "[I]t is perfectly reasonable to take into account the fact that a new spouse may be earning income in determining the hardship deduction for the expenses of a child of that spouse." (*In re Marriage of Whealon, supra,* 53 Cal.App.4th at p. 145.) In *In re Marriage of Whealon*, the appellate court concluded the trial court did not abuse its discretion in granting the father a one-half hardship deduction for the new child of his second marriage. (*Ibid.*) We therefore reject Reissmueller's argument.

VI.

THE JANUARY 8 ORDER WAS NOT THE PRODUCT OF GENDER BIAS.

Reissmueller also argues the January 8 Order must be reversed because it is "'so replete with gender bias.'" (*In re Marriage of Iverson* (1992) 11 Cal.App.4th 1495, 1497.) The fact the trial court mentioned Reissmueller's pregnancy does not create an appearance of gender bias. Reissmueller sought a reduction in her child support payments because she had become temporarily unemployed due to a disability. The

disability was a direct result of her pregnancy. Reissmueller's request for a hardship deduction based on the birth of her new child also required mention of the pregnancy for context. We discern nothing in the January 8 Order that evidences the type of sexism or gender bias of which Reissmueller complains. At oral argument, Reissmueller's counsel was unable to identify anything specific in the appellate record, other than the fact the relief sought was not granted to Reissmueller, as evidence of gender bias.

VII.

HENRY'S REQUEST FOR SANCTIONS ON APPEAL AND REQUEST TO AUGMENT THE RECORD ON APPEAL

Finally, Henry requests an award of sanctions, asserting Reissmueller's appeal is "totally without merit and is brought in bad faith for purposes of vexation and annoyance and harassment." In part, Henry supports his request with Reissmueller's later order to show cause for modification of the child support order, and asks that we augment the record on appeal with the court's findings and order after hearing on that order to show cause. Reissmueller filed no opposition to the request to augment. Having concluded Henry's request is appropriate, we order the record on appeal augmented with the findings and order after hearing filed May 11, 2004 in the Orange County Superior Court, a copy of which was attached as exhibit A to Henry's request to augment the record.

We will find an appeal to be frivolous only "when it is prosecuted for an improper motive – to harass the respondent or delay the effect of an adverse judgment – or when it indisputably has no merit – when any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) Reissmueller correctly argues the trial court used an improper income amount in calculating her child support payments. Her appeal is not frivolous. We therefore deny the request for sanctions.

DISPOSITION

The order is affirmed in part and reversed in part. The matter is remanded with directions to the trial court to calculate Reissmueller's income as of December 30, 2003 based on her wages, disability insurance benefits, and unemployment insurance benefits, not based on the increased value of her house. The trial court is further directed to use Reissmueller's income as of December 30, 2003 in the DissoMaster to calculate the proper child support payment, which should have been in place from January 1, 2004 to May 11, 2004. The trial court shall take reasonable steps to ensure any overpayment or underpayment by Reissmueller to Henry during that time period is corrected. In the interests of justice, because each party succeeded on at least one of the issues on appeal, neither party is to recover costs on appeal.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.