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Income loss doesn't always justify reduced support

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In *In re Marriage of McHugh*, 2014 DJDAR 15841 (Cal. App. 4th Dist. Nov. 26, 2014), the trial court's imputation of income from former employment was upheld after finding Mr. McHugh (Charles) engaged in deliberate misconduct, which he compounded by refusing to provide restitution, disclose his misconduct and enter into a "last chance" employment agreement, leading to his loss of employment.

Ms. McHugh (Connie) obtained a temporary spousal support and

child support order in 2009 based on Charles' monthly income of \$24,159 as a successful salesman for Amcor Packing Distribution and Connie's lack of income as a stay at home mother. In early 2010, Charles sought to reduce support based upon the loss of his largest client, claiming the loss of commission cut Charles' income nearly in half. The court agreed to reduce his support obligations.

Amcor fired Charles in early 2011. Charles found a new job, but it paid considerably less. By August, both parties had filed competing applications concerning support: Charles to reduce and Connie to reinstate the original support. Charles asked the court to increase his support because Charles lost his job for intentionally diverting Amcor clients to his father's business.

Thomas Sarnecki, an Amcor vice president, testified that Charles had been one of Amcor's top salesmen between 2003 and 2009. In 2009, Charles asked Amcor to help him reduce his income due to his divorce. Amcor agreed to assign him a lower paying position, but rejected Charles' request for a more aggressive approach towards minimizing Charles' earnings, such as diverting some of Charles' compensation. Sarnecki testified that in the months following Amcor's refusal to divert some of Charles' income, there was a significant drop in the amount of Charles' sales and initially Amcor accepted Charles' explanation of the downturn in the economy and Amcor's lack of competitiveness.

After one of Charles' clients asked Amcor about products it recently purchased, for which transaction Amcor could not find a record, Amcor began an investigation. Amcor's investigators discovered that Charles' father operated a competing business. Sarnecki and other Amcor executives confronted Charles about it, and Charles admitted to diverting Amcor clients to his father's business to reduce his income.

Amcor offered Charles an opportunity to retain his job if he

disclosed his misconduct and paid restitution. Despite acknowledging that he had done some "stupid stuff," Charles refused, and he was fired.

In early 2012, the trial court denied Charles' request to decrease support, and granted Connie's request to impute the same income Charles was earning back in 2009.

A party ... cannot decrease his or her support obligation on the basis of the loss of employment if the party's deliberate and deceitful actions led to the loss of employment

Upholding the trial court's decision, the Court of Appeal noted that Family Code Section 4058(b) grants trial courts discretion to set child support based on a parent's earning capacity rather than actual income if the court finds the parent has the ability and opportunity to earn income at the level to be imputed. Section 4058(b) grants the trial court discretion when imputing income to a parent based on his or her "earning capacity"; the court may "consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children."

The *McHugh* court affirmed the trial court "because substantial evidence support[ed] the findings that (1) Charles had the ability and opportunity to keep his job; (2) his termination was a voluntary divestiture of resources required for child support obligations because of his misconduct in

diverting business to his father's company to avoid his support obligations and deliberately failing to satisfy his employer's conditions for keeping his higher paying job; and (3) imputing income to Charles was in the child's best interests."

Charles had to show not only that he lost his Amcor job, but also that he lacked the ability and opportunity to keep that job and continue earning at the same level. See *In re Marriage of Bardzik*, 165 Cal. App. 4th 1291, 1304 (2008), holding that the payor parent seeking to reduce his support obligation must show a lack of ability and a lack of opportunity to earn an income, and *In re Marriage of Eggers*, 131 Cal. App. 4th 695, 701 (2005), holding that earning capacity is composed of, among other criteria, the ability to work and the opportunity to work.

It was undisputed Amcor gave Charles the opportunity to keep his job if he satisfied three conditions: (1) fully disclosing all information about his improper conduct; (2) paying Amcor restitution for the business he diverted; and (3) entering into a last chance employment agreement with Amcor. The *McHugh* court found Sarnecki's testimony indicated Charles could have disclosed the misconduct he admitted, and Charles failed show he could not pay the restitution requested.

The Court of Appeal dismissed cases Charles cited, holding that evidence of a current income opportunity is necessary to impute income because none involved a parent who engaged in intentional misconduct. Charles' failure to secure a downward modification of support due to the loss of his job is like the man who kills his parents, and then unsuccessfully requests the court's pity because he is now an orphan. It was Charles' *intentional* attempt to hide his income available for support, and his refusal to disclose his misconduct or pay restitution to his employer that led the Court of Appeal to show no mercy.

McHugh reaffirms that a party who owes child support cannot decrease his or her support obligation on the basis of the loss of employment if the party's deliberate and deceitful actions led to the loss of employment, especially as in Charles' case, when he had the opportunity to "come clean" and keep his job.

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