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PERSPECTIVE

## 60 percent income drop not enough to lower child support obligations

By Brandon Rose

Sometimes, even a 60 percent drop in income is just not enough to warrant a reduction in child support obligations. In *In re Marriage of Usher*, 6 Cal. App. 5th 347 (2016), the 2nd District Court of Appeal held that substantial evidence did not support the trial court's finding that Kinka Usher's monthly income falling from approximately \$350,000 to \$140,141 was a material change justifying a reduction in child support from the stipulated amount of \$17,500 per month.

Kinka and Frederique Usher had one son together, Roman. Kinka was a successful director and producer who owned a production company. During marriage, he earned approximately \$350,000 per month and owned substantial investments and real and personal property.

In 2009, the Ushers stipulated to a dissolution of marriage. The stipulation stated that Kinka was a "high earner" within the meaning of Family Code Section 4057(b) (3). According to Kinka, however, business for his production company decreased "significantly" in 2013. That year, he shuttered his production company and began working as an employee for another company. He later filed a request to reduce his child support payments, claiming his monthly income had decreased from \$350,000 per month to \$70,106 per month.

Frederique pointed to Kinka's

over \$67 million in assets and claimed that "conservatively invested," Kinka's assets could generate income at a rate of 4.5 percent. Combined with his employment income, this could provide Kinka with a monthly cash flow of \$260,826.

The trial court, however, calculated Kinka's combined employment income and imputed income from assets to be \$140,141 per month — lower than her calculation but higher than his — and reduced child support to \$9,842 per month, plus a percentage of income earned above \$1,681,692 per year ( $\$140,141 \times 12$ ).

Frederique argued that Kinka failed to show a material change in circumstances. The 2nd District agreed, noting that a trial court abuses its discretion in modifying support absent "substantial evidence of a material change of circumstances."

The appellate court rejected Kinka's argument that a reduction in income "standing alone" may warrant modification. Relying on *Marriage of McCann*, 41 Cal. App. 4th 978 (1996), the court said that in determining whether a material change has occurred, the focus is generally on whether the change resulted in (1) "a reduction or increase in the supporting spouse's ability to pay" or (2) "an increase or decrease in the supported [party's] needs."

Kinka failed to meet his burden because he presented no evidence of a substantial change in his ability to pay the stipulated child support amount. On the contrary, the

evidence showed that he could continue paying support without "materially impact[ing] his net worth" or suffering a "cutback in his own lifestyle."

Furthermore, Kinka failed to show that Roman's needs had decreased, and the uncontested evidence showed that reducing support would lower Roman's standard of living by requiring him to move. The appellate court looked to *Marriage of Cryer*, 198 Cal. App. 4th 1039 (2011), which found that a child's "spending time with his father in an opulent abode and time with his mother in a low-rent apartment" conflicts with the principles of the child support statutes.

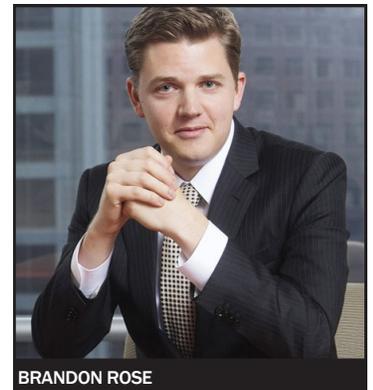
The appellate court also rejected the trial court's imputation of income as "inadequate." Although the trial court purportedly based its imputation of a 1 percent rate of return on Kinka's returns over the previous five years, the appellate court found no evidence that Kinka's portfolio had returned only 1 percent. Moreover, even if evidence of such returns had been presented, the appellate court found the 1 percent rate of return to be "unreasonably low," given the alternative investment strategy proposed by Frederique that contemplated higher returns, while also satisfying Kinka's desire to follow a conservative investment strategy.

*Marriage of Usher* teaches that a decrease in income alone may not be sufficient to show a change of circumstances, even where the change is dramatic, at least in

cases involving high earners. Further, where imputation of income is an issue, Usher suggests that appellate courts may carefully scrutinize the reasonableness of the rate of return applied by the lower court.

In modification proceedings, supporting spouses should present evidence showing how a change has affected their ability to pay, has changed their lifestyle, or has decreased the needs of a child or supported spouse. If an imputed rate of return on assets is at issue, it may not be enough to show evidence of past returns. Working in conjunction with an accounting expert, supporting spouses should present evidence establishing a clear, reasonable basis for their proposed rate of return, sufficient to justify a reduction in support payments.

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