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## COVID-19 and Modifying Support

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Governments, institutions, and communities in the United States and around the world are grappling with the impact of COVID-19. The pandemic is confronting every level of the U.S. economy with unprecedented challenge. Today we stand in a new economic environment, one where the norms of the business world have been suspended. When the dust settles and we look back at the COVID-19 outbreak and the global economic shut down that followed, it will likely go down as a major event in earth's economic, political and public health history.

As a result of COVID-19, unemployment is almost certainly at its highest level since the Great Depression. Jesse Rothstein, director of Berkeley's Institute for Research on Labor and Employment says, "We're definitely headed to something much deeper than the Great Recession, and comparable to Great Depression in depth." So how does this affect our clients, and management of California Family Law cases?

### **A Change in Circumstances**

Support paying parties may want to file for modification of support. But does COVID-19 constitute a change in circumstances? Not necessarily. While many have been detrimentally affected by COVID-19 and the government imposed stay at home orders, there may be others whose work has not ceased. Further, there may be certain essential workers whose workloads have increased since the pandemic. In order to make a colorable argument, the party requesting a modification would likely have to demonstrate to a judicial officer that a significant economic change in circumstances has occurred for them – not just the economy as a whole.

This poses a curious problem set because income available for support is typically based upon the most recent 12-month average. However, for many seeking modifications, the most recent 12-month period of time would not yet accurately reflect the post-COVID-19 economic environment and, therefore, may not accurately reflect income available moving forward.

## Quantifying Loss of Income

One potential solution could be adjusting historic income available figures for losses of income streams such as major clients, contracts, reductions in recurring orders, and/or shutdowns of segments of a business. In so doing, the calculation of income available for support would use the historic 12 months as a starting point, then non-recurring income streams would be adjusted out, leaving only the recurring income.

Documentation that can demonstrate the loss of these income streams is important to corroborate the litigant's testimony. Moreover, a forensic accountant or economist may be helpful in introducing testimony and evidence so long as it supplies the kind of facts or data that experts in the field "reasonably rely" on in forming an opinion. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993) ; Fed. R. Evid. 703.

Another potential solution would be to use a shorter period of time that is more reflective of future income streams. *In re Marriage of Riddle* (2005) 125 CA4th 1075, at 1083, indicates that facts may dictate a longer or shorter period of analysis when computing income available for support. Using a shorter period of time could capture the losses that have occurred over the last several months and serve as the basis for arguing lower than historical income levels.

In addition to qualifying income, the support ordered must accurately reflect the prospective earnings of the parties at the time the determination of support is made [*County of Placer v. Andrade* (1997) 55 Cal.App.4<sup>th</sup> 1393, 1396] and the court cannot engage in speculation, its order must reflect the present facts and circumstances, based on evidence in the record and inferences reasonably drawn therefrom at the time of the hearing. [*Marriage of Prietsch & Calhoun* (1987) 190 Cal.App.3d 645, 656; *Marriage of Baker* (1992) 3 Cal.App.4<sup>th</sup> 491, 498]

## Preserving Retroactivity

We know that modifications of support are ordinarily retroactive to the date of filing for the request to modify. As such, time is of the essence when it comes to preserving retroactivity for support modifications. Those seeking modifications should file their requests with the courts sooner rather than later. Due to COVID-19, many courts are temporarily closed for hearings, and for filing of modification requests. As a result, on April 20, 2020, the Judicial Council issued Emergency Order allowing modification or termination of child, spousal, partner or family support to become effective at the date that the appropriate request is mailed or "served" on the other party even if filed later.

But be careful solely adhering to Emergency Order 13 by just mailing an RFO re modification of support and then not filing the RFO. Emergency Order 13 makes is clear that that provision of that order are "Except as provided in Family Code section 3653(b)." Section 3653(b) states that its provision "subject to the notice requirements of federal law (42 U.S.C. Sec. 666(a)(9))." 42.U.S.C. Sec. 666 relies upon the federal requirement in 42 U.S.C. Sec. 654(20)(A) which states that a State plan for child and spousal support must provide that the

State laws to improve child support enforcement effectiveness when stating the procedures may permit modification “with respect to any period during which there is pending a petition for modification” and only when notice has been given.

Although Emergency Order 13 does not have a requirement for filing the RFO when service is made, that emergency order specifically excepts Family Code section 3653(b). Section 3653(b) requires a pending RFO as does Section 3653(a). Emergency Order 13 also states, “Nothing in this rule restricts the court’s discretion to order a later effective date” which is consistent to Section 3653(b)’s statement that permits discretion to order retroactivity if “the court finds good cause not to make the order retroactive and states its reasons on the record.” This is also consistent with *In re Marriage of Cryer* (2011) 198 Cal.App.4<sup>th</sup> 1039, 1052 where the Court denied retroactivity due to the “unjust and unreasonable financial burden” citing *In re Marriage of Leonard* (2004) 119 Cal.App.4<sup>th</sup> 546, 560-561, “finding good cause for denial of retroactive unemployment-based modification when retroactivity would harm children and parent had ability to bear financial burden.” (*In re Marriage of Cryer, supra*, at Page 1052)

Another issue of retroactivity which is not addressed by Emergency Order 13 is how long should one wait to file the RFO. There are some counties that are not permitting any filings due to Covid-19 closure but other counties, such as Los Angeles County, are still accepting filings. In those counties in which there is nothing to prevent a filing of an RFO and to meet the requirements of Family Code Section 3653, filings should be made, if possible, on the same date as service. In closed counties, while there is no statement of how long to wait to file the RFO after reopening, since retroactivity will be discretionary with the court, it would be best to file the RFO as soon as reasonably possible.

Lastly, please note that Emergency Order 13 applies to “all requests to modify or terminate child, spousal, partner, or family support.” The emergency order does not apply to *pendente lite* or initial or orders for support.

## **Notice Requirements**

On April 17, 2020, Emergency Order 12 was issued requiring electronic service on an attorney who represents a party and on self-represented parties who agree *in writing* to electronic service. This is perhaps a welcomed change in position from *Lasalle v. Vogel* (2019) 36 Cal.App.5<sup>th</sup> 127, 137-138 when the court stated the emails is not reliable and noted that “Between the ease of mistaken address on the sender's end and the arcane vagaries of spam filters on the recipient's end, email is ill-suited for a communication on which a million dollar lawsuit may hinge. [footnote] A busy calendar, an overfull in-box, a careless autocorrect, even a clumsy keystroke resulting in a “delete” command can result in a speedy communication being merely a failed one.”

This emergency order has a sunset of “90 days after the Governor declares that the state of emergency related to the COVID-19 pandemic is lifted, or until amended or repealed by the Judicial Council.” Considering the wide use of emails by lawyers in today’s technological world, perhaps there will be a change in law forthcoming or the email requirement will not be quickly repealed by the Judicial Council after the Covid-19

orders are lifted.

### **Amount and Duration of Order**

As noted above, any order modifying support must accurately reflect the earnings of the parties. If a supporting spouse is laid off and is earning no income during the Covid-19 crisis, he is entitled to a modification of support. However, while the prior reference to *In re Marriage of Cryer* and *In re Marriage of Leonard* concerned retroactivity, the underlying concern of how the Covid-19 virus has affected both parties must also consider the economic circumstances of the parties and the effects on the minor children. The court's consideration on this issue may be affected by whether there are liquid assets to help supplement living expenses which can later be repaid even though liquid assets are not income normally used to determine support (see, e.g., Family Code Section 4058).

For example, if the modification order sought is *pendente lite* and there are sufficient liquid assets in a community bank account(s) to fund support during the crisis, those funds can be advanced from that account to pay support so the supported party and children are not harmed. If the Court determines that the payee spouse is entitled to relief, that can be considered in the ultimate division of community property. If the modification is post-judgment, again liquid assets could be considered with a payback provision once the pandemic is over. Each situation must be viewed separately and the Court's should have discretion for relief without prejudicing the rights of the parties based upon the laws that are now in effect and are implemented when there is no pandemic.

With regard to the duration of the order, as noted above, the emergency orders have a sunset of 90 days after the state of emergency due to Covid-19 is lifted. The City of Los Angeles has utilized the same period in enacting Los Angeles City Ordinance 186585 which precludes evictions, interest and late charges for nonpayment of rent until 90 days after the local emergency is ended by the mayor. Perhaps a modification order can be fashioned to last until 90 days after the state of emergency is lifted or some other period depending upon the circumstances of the parties, and then the prior support award would be reinstated. While the courts cannot engage in speculation as noted above, the courts do not need to be further burdened when jobs are restored to have supported spouses seeking relief from these temporary orders after the crisis has ended. To do so could potentially leave supported spouses and children without support for a longer period of time.

### **CONCLUSION**

These are unusual times like never seen before and hopefully never to be seen again. The negative effects of COVID-19 are far reaching and substantial. Nestled in the womb of adversity are the seeds of opportunity and growth. With perspective and creativity, there lies the opportunities to use our skills and expertise in assisting litigants through the family courts, even now.