THE PRACTITIONER | MITCHELL A. JACOBS AND HOWARD K. BLISS

Highlights of Important Changes in the 1994 Family Code

FAMILY LAW:
Practitioners should be especially aware of certain changes in support and disclosure obligations.

Last year's adoption of the Family Code brought with it some important changes. Following is a brief overview of the effect of some of these changes on child and spousal support and inter spousal disclosure obligations.

Child Support

1. **Exclusion of New Mate Income.** Under section 4057.5, courts may no longer consider the income of a parent's new mate or spouse. However, there is a loophole that could overtake the rule if the courts do not intervene: the court may consider new mate or spouse income in an "extraordinary case where excluding that income would lead to extreme and severe hardship to any child subject to the child support award." Although the statute states that "[f]or purposes of this section, an extraordinary case may include a parent voluntarily or intentionally quitting work or reducing income," it seems clear this is not the only situation the Legislature intended courts to consider.

In fact, the statute requires the court to make four determinations before permitting discovery of the new mate's income, according to Adams and Sevitch, 17 Cal.Fam.L.Rep. (No.12) at 5948: (1) Is the case "extraordinary?" (2) Will excluding the income cause the child "extreme and severe hardship"? (3) Will including the income result in "extreme and severe hardship" to any other child whom the payor supports? (4) Will including the income result in "extreme and severe hardship" to any child supported by the new mate whose income is in question? "If the answers are 'yes,' 'yes,' 'no,' and 'no,' the court may then consider the income."

The meaning of "extreme and severe hardship" is particularly unclear. Since a parent is obligated to support a minor child according to "the parent's circumstances and station in life" (Fam. Code section 4053(a)), one could argue that the emotional "trauma" suffered by a child who witnesses or experiences vast discrepancies between the child's standard of living and that of the non-custodial parent, whose standard of living has increased after a new marriage, qualifies as "extreme and severe hardship."

Suppose, for example, there are two minor children of the old marriage, one residing with each parent. Each child may have started out living modestly in an apartment complex. The payor parent, whose income does not change, marries a wealthy person, and parent, child and new spouse take up residence in the new spouse's substantial home. Such a situation may or may not be "extraordinary" in your practice but it would seem to impose "severe hardship," at least psychologically, on the child subject to the existing child support order whose supporting parent and sibling are suddenly enjoying a greatly increased standard of living compared to the child's own. A court considering the best interests of the child could label this situation "extraordinary" and permit consideration of the new mate's income, or at least proceed with its analysis of the issue. Given the statute's terms and the one guiding example, a court could justifiably go either way.

Other considerations regarding third party or new mate discovery result from the holdings in *Harris v. Superior Court*, 3 Cal.App.4th 661 (1992) (wife not allowed discovery of former husband's cohabitant's finances) and *Schnabel v. Superior Court*, 5 Cal.4th 704 (1993) (wife entitled to records of corporation in which community had interest to extent husband had same rights). While reaching different results in different contexts, these courts make clear the court's obligation, even absent section 4057.5, to balance a third party's right to privacy against the litigant's need for information.

Another ambiguity, at section 4057.5(c) is the statement that "[i]f any portion of the income of either parent's subsequent spouse or nonmarital partner is allowed to be considered pursuant to this section, discovery for purposes of determining income shall be *based on* W2 and 1099 income tax forms, except where the court determines that application would be unjust or inappropriate" (emphasis added). Does this language also permit discovery of accountants' work papers, partnership agreements and brokerage account statements underlying the two forms?

One way the new mate income will apparently remain a factor is in the child support calculation formula itself. One element of the formula is total net income (the TN factor). Section 4059(a), in setting forth expenses that are deductible from gross income to arrive at the net disposable income of each parent, includes deductions from gross state and federal income that "shall bear an accurate relationship to the tax status of the parties (that is, single, married, married filing separately, or head of household) and number of dependents. State and federal income taxes shall be those actually payable (not necessarily those currently withheld) after considering appropriate filing status, all available exclusions, deductions, and credits." Thus, to the extent the existence of a new mate alters a parent's tax liability, that new mate appears to be still a factor in determining support.

A conflict may arise when a former spouse's tax returns are sought. Family Code section 4057.5 may exclude consideration, and, to a large extent, discovery of new mate income. Nonetheless, when a former spouse and new mate file joint returns, this issue may become problematic. For example, even assuming the new mate is entitled to redact those portions of the return reflecting his or her income, it is not clear how one could allocate — or verify the allocation of — income derived from investments, such as dividends and interest.

It is worth noting that this section, at 4057.5(e), concludes by stating that the "enactment of this section constitutes cause to bring an action for modification of a child support order entered prior to" the section's operative date.

Family Code section 4069 also states that "[t]he establishment of the statewide uniform guideline constitutes a change of circumstances." Experts seem uncertain as to whether each of the mandated periodic reviews and amendments of the guidelines results in a separate changed circumstance for modification purposes.

2. **Other changes to calculations and presumptions.** Among the several changes, a few points are worth noting:

Guideline calculation: Section 4052 makes clear that the statewide uniform guideline formula yields the presumptively correct allocation of child support and that a court "may depart from the guideline only in special circumstances" as provided by the Family Code. Section 4057 repeats the section 4052 presumption and also sets forth the factors a court may find sufficient to rebut the formula's presumption. Section 4057(b) now requires a court to state the findings section 4056(a) requires when the presumption is being rebutted.

Section 4055(b)(1)(B) supplements its predecessor section's statement by specifying that the K factor in the child support formula means "the amount of *both parents'* income to be allocated to child support" (emphasis added). The section also changed the K factor multipliers and corresponding income levels in the child support guideline calculation.

That calculation, set forth in section

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"parent" under the Act. First, the court acknowledged that the appellant assumed all the responsibilities of a parent and that she was a de facto parent to the children. To establish that as a de facto parent she should be awarded custody of the children, however, the appellant was required to establish by clear and convincing evidence that parental custody is detrimental to the children. The court stated that "the courts and our legislature have chosen to place paramount importance upon the relationship between the natural or adoptive parent and the child," and the court was not willing to deviate from that standard. 228 Cal.App.3d at 837. Second, the concept of in loco parentis was found not to provide a nonparent the rights afforded a parent. Third, the court rejected the appellant's argument that the respondent should be estopped from denying the parent-child relationships established by the appellant. Finally, the appellant urged the court to expand the definition of parent to include those who act as "functional parents." The court, however, refused to permit nonparents to "acquire the rights of a parent, and then face years of unraveling the complex practical, social, and constitutional ramifications of this expansion of the definition of parent." 228 Cal.App.3d at 841. Thus, the court affirmed the trial court's ruling that the appellant could not maintain her action because she was not a "parent" under the Uniform Parentage Act.

The rule with respect to visitation differs if the "nonparent" joins a divorce action of the divorcing parents. Since an action is pending in which visitation is adjudicated, third parties need not establish that they are "parents." In *In re Marriage of Gayden*, 229 Cal.App.3d 1510 (1991), the respondent, a woman, lived for a period of time with the father and claimed to have developed a parental relationship with the child. The respondent visited with the child until the natural parents objected. Approximately one year after the natural parents' marriage was dissolved and custody granted to the father, the respondent joined the divorce action seeking visitation with the child.

The appellate court reversed the trial court's granting of visitation rights, establishing the following rule: "Where the parents are unified in opposition, visitation must not be allowed unless it is clearly and convincingly shown that denial of visitation would be detrimental to the child ... As strong as the rights of such [biologic or adoptive] parents must be, there may be instances in which a child would be significantly harmed by completely terminating his or her relationship with a person who has (1) lived with the child for a substantial portion of the child's life; (2) been regularly involved in providing day-to-day care, nurturance and guidance for the child appropriate to the child's stage of development; and, (3) been permitted by a biologic parent to assume a parental role. The needs of the child, which are the most important consideration, may sometimes require that a visitation award be made to such a 'de facto parent.'" 229 Cal.App.3d at 1520-22.

The court added that the trial court erroneously based its decision to grant visitation solely on a finding that visitation was in the best interest of the child and "did not question the parents' fitness to raise their child, indulged no presumption that the wishes of the parents be complied with and made no finding that awarding visitation rights to [the respondent] was necessary to avert harm to the child." 229 Cal.App.3d at 1520.

Family Code section 3100 provides that "in the discretion of the court, reasonable visitation may be granted to any other person [in addition to a parent] having an interest in the welfare of the child." This statute, however, does not itself provide a basis for an action.

Thus, unless it is harmful for the child to be in the natural or adoptive parent's custody, under current California law, custody or visitation will not be granted to a nonmarried partner of the natural or adoptive parent. In limited circumstances, custody or visitation can be granted to a nonparent if there is a pending dissolution or other action which otherwise gives the court jurisdiction over custody or visitation.

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