

CONTINUING JURISDICTION EQUALS PENDING LITIGATION IN FAMILY LAW

By Mitchell A. Jacobs and Valerie C. West*

Although certainly not enacted with post-dissolution disputes in mind, *Armato v. Stewart* [citation] has affirmed the application of Code of Civil Procedure section 664.6 as one method to promote the simple and expedient resolution of disputes that arise after the dissolution of marriage. As explained in *Armato*, Civil Procedure section 664.6 is an inexpensive and expeditious method to give teeth to privately negotiated settlements of post-judgment disputes.

But to get there *Armato* had to find that continuing jurisdiction under the Family Code is the equivalent of pending litigation as used in the 664.6. Section 664.6 provides:

If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the

settlement.

Enacted in 1981, Section 664.6 "created a summary, expedited procedure to enforce settlement agreements when certain requirements that decrease the likelihood of misunderstandings are met." (*Levy v. Superior Court* (1995) 10 Cal. 4th 578, 584-585.) The only requirements are that the agreement must be sufficiently definite to enable courts to give it enforcement (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal. App. 4th 793, 810- 812.) and the parties must have personally agreed in writing. (*Davidson v. Superior Court* (City of Mendota) (1999) 70 Cal. 4th 514, 528 and *Fresno v. Maroot* (1987) 189 Cal. App. 3rd 755, 761.

Armato found section 664.6 perfectly suited to implement the preference expressed by the Legislature, the Judicial Counsel, and the courts for simple and expedited proceedings to modify child support orders. In *Armato*, several years after entry of judgment, the parties executed an agreement to increase child support paid by Husband to Wife. Husband complied with the agreement for almost a year and then notified Wife he would only continue to pay the amount originally ordered in the dissolution judgment.

Nine months later Wife moved to enforce the agreement pursuant to section 664.6. Husband, an attorney and the drafter of the original agreement, challenged the court's jurisdiction

to enforce the agreement on the grounds that no litigation "was pending" between the parties at the time they executed the agreement, and therefore 664.6 did not apply. Husband argued that Wife could only enforce the agreement by a separate action for breach of contract. The trial court accepted Wife's argument, enforced the agreement and ordered Husband to pay the increased support according to the terms of the agreement.

Armato affirmed the trial court and emphatically endorsed the use of 664.6 in post dissolution disputes. *Armato* explained that "litigation" would be "pending" between the parties as long as the court's jurisdiction to award child support continued. The court acknowledged that the meaning of "pending" may vary from one context to another, but noted that the California Supreme Court has made clear for decades that: the phrase 'when an action for divorce is pending,' embrace[s] many diverse proceedings growing out of the divorce action and *arising after entry of the final decree.*" (*Lerner v. Superior Court*) (1952) 38 Cal. 2d 676, 685 italics added.)

In *Lerner* the Supreme Court ordered a Husband to pay Wife's attorney fees in the context of a writ of prohibition that arose out of a custody dispute. The Husband resisted the attorney fee request on the ground that the statute contemplated fees only during the pendency of a divorce. But in *Lerner* there was a divorce related proceeding actually in progress.

The significance of *Armato* is that even in the absence of any ongoing proceeding, as the term is usually used and understood, such as a post judgment motion to modify support, there is "litigation pending" between the parties to a dissolution as long as the court has jurisdiction to modify support. Therefore privately negotiated agreements will be enforceable by a section 664.6 motion.

The opportunity to take advantage of 664.6 in post dissolution disputes is likely to arise, much as it did in *Armato*, where parties have negotiated a signed modification agreement in the absence of a formal motion to modify support, and sometime later one party reneges. Use of 664.6 will be critical in those particular instances when enforcement of the agreement will have a substantial financial impact. In *Armato*, Husband had agreed to a \$2,500 per month increase in support and had failed to pay for nine months before Wife filed her motion. Without the benefit of the court's willingness to imply "pending litigation" on the basis of its continuing jurisdiction, section 664.6 would not have offered a remedy for Wife. Instead, her only remedy to get the benefit of the bargain from the privately negotiated agreement would have been an action to enforce the contract.

So far so good. The trial court enforced the terms of the agreement and ordered Husband to pay the increase in support retroactive to the time failed to comply with the agreement.

In a footnote the court noted that it had not addressed Husband's contention, raised for the first time at oral argument, that the trial court erred in making the modification of support effective according the terms of the agreement, and thus effectively ordering a modification retroactive for the nine month period before Wife filed her motion to enforce the modification.

If continuing jurisdiction of the family court to modify support equals the pendency of an action, then the terms of section 664.6 should make an agreement that is enforceable by the court, fully enforceable according to its terms, and not simply dating back to the date on which a motion pursuant to 664.6 is filed. If continuing jurisdiction equals pending litigation then as long as the court has "continuing jurisdiction" it can enforce privately negotiated modification agreements. Simply put, as *Armato* informs Code of Civil Procedure section 1049 that defines an action as pending from its commencement until its final determination upon appeal or until the time for appeal has expired---does not apply to child support proceedings.

But *Armato* goes further. "...while the statutory duty to support a child generally terminates upon the age of majority (see Fam. Code section 3901, subd. (A) "[nothing in [the statute] limits a parents's ability to agree to provide additional support or the court's power to inquire whether an

agreement to provide additional support has been made." Thus, an agreement in writing to provide support beyond the statutory termination date, may presumably be enforced pursuant to 664.6, since the statute gives the court jurisdiction to enforce such agreements generally. Whether defenses such as laches will be available will have to wait for another day.

For those who may be wondering if *Armato* reduced child support issues to a simple matter of private contracts, be assured it did not. *Armato* took pains to explain that it was not saying that "a trial court must blindly enforce any type of child support agreement signed by the parties after judgment." Agreements found to compromise the parents' statutory obligations or to divest the court of jurisdiction over the question will continue to be void as against public policy. (*In re Marriage of Lusby* (1998) 64 Cal. App. 4th 459, 469.)

As if to underscore the point, the *Armato* court explicitly held that Husband's desire to force Wife to bring a separate action to enforce their agreement so that he could counter claim for business losses he attributed to Wife and offset them against his child support obligation was an attempt at an end-run around established family law principles that bar an offset of business debts. While not expressing a view as to whether Husband's offset would have been permitted in a separate action, the court explained that this was just one reason, among others, why child support modifications should be heard in the family

law action in which the original support obligation was imposed.

Although child support modification was the subject of the agreement enforced in *Armato*, there is no reason section 664.6 enforcement procedures should not be equally available in cases of private agreements to modify spousal support or other aspects of a dissolution judgment as long as the court's "continuing jurisdiction" over the subject matter of the agreement can be established.

*Mitchell A. Jacobs, a certified family law specialist in Los Angeles, limits his practice to marital dissolution and other family law matters. Valerie C. West, an attorney with the Law Offices of Mitchell A. Jacobs, also practices in the area of family law.