Support Payments, It's a Question of Time

In re Marriage of Kacik 2009 DJDAR 16365 is a case of first impression in which the Court of Appeal analyzed "How much time can elapse before *is* becomes *was*?" when deciding whether a supported party must make the showing of a 'change of circumstances' in order to obtain an increase in spousal support payments once child support payments terminate.

Although the Court of Appeal does not answer the question precisely, family law practitioners are given the guideline that "is" does not become "was" for at least a few months, but if more than a year has passed since child support payments ended, the client better be prepared to saddle the horse and jump over the 'changed circumstances' fence before an increase in spousal support payments will be ordered.

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Currently in family law cases, the trial court orders payment of child support by one parent to another based upon the statewide uniform guidelines - a complex algebraic formula that necessitates the use of computer software. (Family Code Section 4055). In contrast, the payment of spousal support is based upon the judicial officer's consideration of a variety of factors, including the age and health of the parties, their earning ability, the length of their marriage and each party's needs based upon the marital lifestyle. (Family Code Section 4320). It is a well-known fact that two households cannot live as cheaply as one in that after child support payment is made, there is insufficient income remaining to pay an amount of spousal support that truly reflects the marital lifestyle and the supported party's needs. In other words, due to the amount of child support that must be paid, the spousal support order is less than it would be. Otherwise, if the parties had no children, the child support payment would be subsidizing the spousal support payment.

Of course, the law also provides that either parent may seek a modification of a spousal support order, either up or down, but the moving party much show a material change of circumstances as the basis for the modification. The trial court must also once again consider the "factors" enumerated in Family Code Section 4320. (*In re Marriage of Dietz* 2009 DJDAR 11403). It seems logical that once child support payments terminate pursuant to Family Code Section 3901 (when the child marries, completes 12th grade or reaches age 19), the supported spouse will suffer a "material" change of circumstances with the loss of payment of child support since the spousal support order was less that necessary to meet the party's needs. But prior to the enactment of Family Code Section 4326, case law prohibited a court from considering the termination of child support as the required change of circumstances to warrant modification of a spousal support order. (*In re Marriage of Lautsbaugh* (1999) 72 Cal.App.4th 1131).

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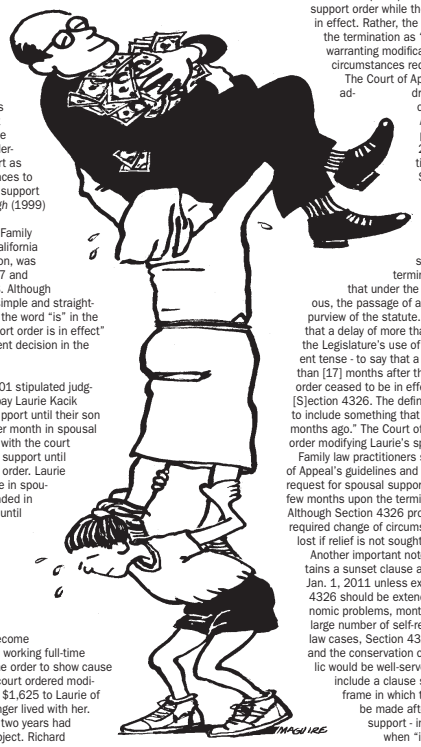
Section 4326, proposed by the Family Law Section of the State Bar of California to overturn the *Lautsbaugh* decision, was adopted by the Legislature in 2007 and became effective on Jan. 1, 2008. Although the statute appears to be short, simple and straightforward, the present tense use of the word "is" in the clause "if a companion child support order is in effect" resulted in an appeal and the recent decision in the *Kacik* case.



In *this* case, pursuant to a 2001 stipulated judgment, Richard Kacik was to pay Laurie Kacik $1,125 per month in child support until their son turned 18 and pay $1,625 per month in spousal support until Feb. 15, 2008, with the court retaining jurisdiction over spousal support until death, remarriage or further court order. Laurie took no action to seek an increase in spousal support when child support ended in August 2006, instead she waited until the termination date of Feb. 15, 2008, before filing her order to show cause for a modification of spousal support to $2,000 per month. Laurie based her request for an increase in spousal support on the fact that "In August 2006, child support for our son terminated" and her inability to become self-supporting, although she was working full-time earning $15.00 per hour. When the order to show cause was heard in July 2008, the trial court ordered modified spousal support payments of $1,625 to Laurie of $1,625 because Their child no longer lived with her. The trial court acknowledged that two years had passed, but then changed the subject. Richard appealed.

In analyzing Section 4326 and its language "if a companion child support order *is* in effect," the Court of Appeal reasoned that the Legislature did not intend that the supported spouse must file the modification request *prior* to the termination of the child support order while the child support order was still in effect. Rather, the Legislature intended to treat the termination as "the" change of circumstances warranting modification with no other change of circumstances required to be shown.

The Court of Appeal in the *Kacik* case then addressed whether Laurie's act of waiting 17 months, from August 2006 when child support terminated until February 2008 before seeking modification, fell under the purview of Section 4326. The Court of Appeal reasoned that the statute should be broadly construed to implement its purpose - to allow for the modification of spousal support generally upon the termination of child support - and that under the rule of general contemporaneous, the passage of a few months falls within the purview of the statute. But the Court of Appeal held that a delay of more than a year "would do violence to the Legislature's use of the phrase *'is* in effect' - present tense - to say that a modification proceeding more than [17] months after the companion child support order ceased to be in effect was within the purview of [S]ection 4326. The definition if 'is' cannot be stretched to include something that became past tense seventeen months ago." The Court of Appeal thus reversed the order modifying Laurie's spousal support.

Family law practitioners should take heed of the Court of Appeal's guidelines and advise clients not to delay a request for spousal support modification by more than a few months upon the termination of a child support order. Although Section 4326 provides an easy basis for the required change of circumstances, the advantage will be lost if relief is not sought quickly.

Another important note is that Section 4326 contains a sunset clause and is set to be repealed on Jan. 1, 2011 unless extended by statute. Section 4326 should be extended. With the current economic problems, monthly closure of courtrooms, and large number of self-represented parties in family law cases, Section 4326 promotes judicial efficiency and the conservation of court resources. But the public would be well-served if the Legislature were to include a clause setting forth the required time frame in which the modification request must be made after the termination of child support - in other words - spell out clearly when "is" becomes "was."

Letters to the Editor

Insurance Carriers' Bad Faith Conduct Is Cause of Increased Litigation

I read your compilation, "*2010 Predictions*" (Dec. 31) with interest, and was especially taken with the "Insurance" prediction of Peter H. Klee. Klee says that because of the "crash" of our economy, he expects a continued increase in lawsuits against the insurance industry. Klee's only uncertainty is whether the increase in such lawsuits is purely the result of the economy making individuals "desperate [for] cash," or what he views as the "relaxed" standing requirements under Business and Professions Code Section 17200.

Seriously? I've represented people [Klee would call them "plaintiffs with fraudulent claims"] for over 28 years. In every instance of economic downturn, I see an increase of inquiries from potential clients who have been treated in an unfair and dismissive manner by insurance carriers - the same carriers who are scrambling to recoup as much of their lost investment dollars as possible by denying claims in bad faith. Ever hear of, for example, AIG, Mr. Klee?

I admit that some of the potential client calls I get are from misguided people, or even those individuals who seek to defraud their carrier. I turn those cases down. I'll further agree that some "frauds" cases don't get rejected by their counsel, and are litigated. And sometimes the "defrauder" seems to prevail. That is part of the price we pay for a fair society in which individuals have rights.

Will Mr. Klee admit that a substantial proportion (in my experience, the vast majority; but I don't want push it) of the increased litigation against the insurance industry in our current economy is the result of the illegal bad faith conduct of the insurance carriers?

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Prosecutors and Defense Attorneys Carry Bias Into Judicial Office

Although generally I enjoyed the article "*Down the Middle*" (Dec. 30) on Judge Ronald H. Roseas taken aback by: "Even after 23 years in the Los Angeles Public Defender's office, lawyers said Superior Court Judge Ronald Rose is as impartial as they come." "For an ex-public defender, Rose is uncommonly fair-minded and even-handed on the bench."

The tone of amazement that one could be a deputy public defender and then become a fair-minded jurist is bewildering. When writing profiles of judges who are former prosecutors, does one say, "Despite having been a deputy district attorney for 20 years, Smith is able to be fair to defendants?"

No, of course not. Yet prosecutors are on the other end of the spectrum, and presumably would carry just as much bias into the judicial office as would a defense attorney. In fact, some prosecutors are off the deep end in thinking every defendant is Attila the Hun and should get the maximum, while others look at each case individually. So it is with defense lawyers: some are "true believers" who never met a guilty or unredeemable defendant, and others see each case individually.

Republican governors with a law-and-order emphasis have reigned for 22 of the last 24 years, and voters cast ballots for the ballot designation "Deputy District Attorney" virtually every time a judicial election is contested. Thus we have a bench chock-full of prosecutors and almost no deputy public defenders, so being a prosecutor-turned-judge has become the norm. Nevertheless, the same logic prevails: a reasonable and thoughtful advocate can make the transition to being a neutral fairly easily, whether deputy district attorney or deputy public defender, if he or she has the requisite skills, personality, temperament and values. It really doesn't matter which side of the table you've been sitting on until then.

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