

Modification of Spousal Support: Taking Party Expectations Into Account

By Mitchell A. Jacobs and Navid Moshtael

Given the current state of the economy, it is not surprising that payors of spousal support are going to court and requesting termination or modification of their spousal support order based on a change in their economic circumstances. It is well established that a party seeking modification of a permanent spousal support order must first show a material change of circumstances since the last order, and assuming this burden is met, then the trial court examines all factors of Family Code Section 4320. Is it enough for the payor to show a material reduction in his income since the last order to meet the "material change of circumstances" requirement? What if the spouse receiving support opposes the payor's request and argues that there has been no "material change of circumstances" because the parties expected at the time of the support order for the payor's income to decrease? What if the spouse further argues that she expected to maintain the marital standard of living after the parties separated? How are the expectations of a party at the time of the support order relevant to termination or modification of support?

In re Marriage of Dietz addresses the above issues: In 1999, the parties entered into a stipulated judgment that divided their community property, including their retirement accounts. The husband agreed to pay the wife spousal support until the death of either party, the wife's remarriage, or by further order of the court. In dividing the retirement accounts, the stipulated judgment stated each party would retain "any increases or decreases in value...related to market conditions." The judgment also stated "[t]he support in this case was based upon [wife]'s having no income, and [husband] having income in the sum of \$87,721.00 per month."

Thereafter, in 2007, the husband sought a court order terminating or in the alternative reducing his spousal support obligation. The trial court ruled there was a showing of material change of circumstances because the wife had reached an age at which she could access her retirement accounts without penalty and she had realized appreciation from securities she owned. The court ordered the husband's monthly spousal support obligation be reduced.

What if the spouse receiving support opposes the payor's request and argues that there has been no 'material change of circumstances' because the parties expected at the time of the support order for the payor's income to decrease?

The wife appealed, arguing that the trial court erred by reducing the husband's monthly spousal support obligation because he had not met his burden to show that there had been a "material change of circumstances" since the 1999 stipulated support order to warrant such a reduction. The husband took the position that the trial court appropriately found that there had been a material change of circumstances based on the accessibility and value of the wife's retirement accounts and also based on an analysis of Family Code Section 4320 factors.

The appellate court agreed with the wife and reversed the trial court. It found that the trial court erred by concluding that accessibility to and the increased value of the retirement accounts awarded to the wife in the stipulated judgment constituted a material change of circumstances justifying a decrease monthly spousal support. In determining whether there had been a material change of circumstances, the court examined the parties' intent and reasonable expectations as expressed in the underlying agreement, and reviewed the trial court's considerations set forth in Family Code Section 4320. It stated the reasonable expectations of the parties at the time of the agreement did not support a finding of material change of circumstances based on the accessibility to and increased value of the retirement accounts awarded to the wife. The court found that the stipulated judgment expressly awarded the husband and wife equal shares of the retirement accounts and any increase in their values, and that "necessarily included...the parties' reasonable expectations that they both would reach the age at which they could access such accounts without penalty." The court also found that the stipulated judgment in no way suggested the parties expected that modification of support would be based on the parties'



community property assets divided in the judgment.

The appellate court also determined that the record did not contain evidence supporting any factor of Family Code Section 4320, showing that a material change of circumstances had occurred to warrant depriving the wife of the benefit of the bargain she made with the husband in their stipulated judgment. It found that the trial court should have looked to all considerations of Section 4320. Concluding that a material change of circumstances had occurred based only on these assets, and the accessibility and appreciation of such assets, was not appropriate.

Thus, to the extent a permanent spousal support order is rooted in the parties' stipulation or marital settlement agreement, to establish a material change of circumstances, the payor must show that the reasonable expectations of the parties at the time they agreed to the support

order and all considerations set forth in Family Code Section 4320 are consistent with the payor's request for termination or reduction of support.

So what is a lawyer involved in an action to modify or terminate a permanent and stipulated spousal support order to do? The lawyer should determine the intent and reasonable expectations of parties by looking at the language of the stipulated judgment or marital settlement agreement. If the lawyer represents the spouse seeking a modification or termination, perhaps the lawyer will argue that the stipulated judgment specifically gives the wife a *Gavron* warning and by its terms provides that it was the expectation of the parties for the wife to become self supporting, which the wife has failed to do and as such a modification or termination is appropriate. If the lawyer represents the opposing spouse, the lawyer may argue there is no material change of circumstances since the last order because the basis upon which the moving party is relying upon to modify is inconsistent with the reasonable expectations of the parties.

The lawyer must also be prepared to argue all Family Code Section 4320 factors in conjunction with the court's determination of whether a material change of circumstances has occurred. While it continues to be true that the modification of spousal support involves a two-step process (the moving party must show a material change of circumstances since the last order and then, the trial court examines Section 4320 factors in determining whether the modify support), *In re Marriage of Dietz* establishes that the Section 4320 factors are relevant and not divorced from the determination of whether material change of circumstances has occurred.



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Food Trucks and Franchising: A Recipe for Success?

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aires to operate coveted airport locations because of the opportunity to create brand awareness and to introduce their concepts to travelling consumers from other markets. The hope is that these consumers will patronize the restaurant when it reaches their market. An airport experience may also create demand for the concept in new markets. On a more local scale, food trucks can create brand awareness of a restaurant concept by bringing the concept to the consumer. The experience can also entice the customer to dine at the restaurant itself to experience a more extensive menu.

Untapped revenue opportunities are also appealing. A franchisee can boost earnings by reaching customers who would not necessarily patronize the restaurant itself. Because most franchisors receive royalty payments from franchisees based on a percentage of gross revenues, any increase in the franchisee's business benefits the franchisor as well. Moreover, producing specially designed trucks themselves and selling them to franchisees can be another revenue source for franchisors. Even if the franchisor does not sell the trucks to the franchisees itself, it may receive license fees from designated suppliers who sell to the franchisees.

But with these opportunities for increased revenues come legal concerns. Franchise agreements are typically long term contracts of five, 10, even 20 years. So the franchisee may be operating under a contract that does not address new developments like the operation of food trucks. By its nature though, franchising must be able to respond to new developments in distribution. The Internet, social media and other forms of electronic communication are examples of developments that were not contemplated when many franchise contracts were signed.

Typically, franchisors try to draft flexibility into these long-term franchise agreements, in part by providing that the franchisor reserves all rights not granted to the franchisee. Territorial protection is a case in point. A franchisee may think he or she has bargained for territorial protection, but the protection is likely to be drafted in terms of restrictions on the placement of additional retail units in the franchisee's territory. Further, many of these clauses now exempt non-traditional locations — airports, arenas, convention centers, casinos, museums, grocery stores, hospitals, corporate cafeterias and military bases — from the exclusivity grant. This is because the customers in those locations are in closed environments and would be unlikely to leave the location to patronize a franchised unit outside of that environment. But the territorial rights clause is unlikely to mention a development as new as the food truck. In some cases, the franchise agreement may grant the franchisee no territorial rights at all. Does this mean that the franchisor can operate a food truck in the franchisee's territory, or perhaps worse, franchise a third party to do so?

Courts and arbitrators have struggled with these issues before, most recently with the Internet. Typically, franchisee counsel will invoke the implied covenant of good faith and fair dealing to impose a reasonableness standard to evaluate a franchisor's actions. Meanwhile, franchisor



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The Kogi BBQ truck near the campus of UCLA.

counsel continually strive to draft clear, unambiguous provisions that will preserve the franchisor's control over new developments. Another tool is the operations manual, which is provided to the franchisee and which the franchisee is required to follow. The operations manual is a living document that the franchisor can modify periodically to respond to changes in the business. Typically, though, it cannot change the fundamental terms of the franchise agreement itself.

Even in cases where no territory is granted, franchisors have often responded to these types of issues by forming expansion committees and conducting impact studies before deciding to grant a franchise for a neighboring location. They are likely to employ similar approaches to mobile units like food trucks.

Part of the appeal of incorporating food trucks into restaurant operations is the element of creativity that the food truck has. Nimble to respond to customer demand, the food truck also represents an opportunity to participate in temporary events — state and county fairs, 10K runs and relay marathons, swap meets and charity events. Even more spontaneously, a truck can be dispatched to a location where a crowd has assembled: Westwood following a UCLA basketball game, a nightclub where a crowd has gathered, or outside a film festival. If the franchisor sets up a dispatch system to allocate these opportunities among franchisees in a geographic area, is this imposing an additional element of control that may affect the independent contractor status of the franchisee? As farfetched as it sounds, this is a hot button issue in some non-food franchise systems involving dispatching and other methods of work allocation by franchisors.

As time goes on the food truck movement will either spread in popularity throughout urban centers, or flicker out as a temporary fad. If its popularity continues and grows, franchise systems are likely to seize this new opportunity, and incorporate trucks as an ancillary distribution

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