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HIGHLIGHTS

CHILD CUSTODY

- Eighth Circuit Affirms Denial of Return Based on Mature Child Exception (see Page 6)

SPOUSAL SUPPORT

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Modification of Child Support

Reduction in Extremely Wealthy Father's Income Was Not Material Change in Circumstances Warranting Modification of Child Support

*By Carol Rothstein, Esq.**

In *In re Marriage of Usher* (Case No. B263721; Ct. App., 2d Dist., Div. 4. 12/2/16) — Cal. App. 5th —, — Cal. Rptr. 3d —, 2016 Cal. App. LEXIS 1050, the Second District Court of Appeal held that substantial evidence did not support the trial court's finding that there had been a material change in the father's circumstances, requiring a reduction in his child support obligation. Although the father's income had fallen by 80 percent since the stipulated judgment setting support, his extreme wealth meant that he still had the ability to pay the agreed-upon support.

In the opinion by Justice Manella (Willhite, Acting P. J., Collins, J., concurring), the Second District further held that the trial court imputed an unreasonably low rate of return to the father's more than $65 million in assets. Even if the one percent rate of return chosen by the trial court had been supported by evidence, which it was not, the father could not avoid his child support obligation by underutilizing his income-producing assets.

Facts and Procedure. The parties married in 2006, just before the birth of their child, and separated in 2008. Father was a successful director and producer during the marriage, earning approximately $4.25 million per year, and owned substantial assets.

The October 2009 stipulated judgment of dissolution required Father to pay $12,500 per month in child support, increasing to $17,500 in June 2010, when Mother and child moved out of Father's

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with his position that "the reduction in his income, standing alone, constituted a sufficient change in circumstances to warrant a reduction in child support."

Perhaps the nugget to be taken from this case is the holding that "it is clear from the evidence presented by appellant and not disputed by respondent that the reduced support will result in a reduction in Roman's standard of living." This places the emphasis where it should be: on the child's reasonable needs given the parents' standard of living and the ability of the payor to meet those needs.

Commentary

Stacy D. Phillips and Erica Swensson

You represent a payor spouse who pays child support pursuant to a stipulated judgment. Post-judgment, he experiences an 80% drop in his monthly income. Objectively, you have a significant change of circumstances warranting a downward modification of support, correct?

Not so fast.

Marriage of Usher adds another layer to the case law on modification of child support for high income earners. A hefty reduction in income alone may not be sufficient to cross the "significant change in material circumstances" modification threshold.

Father, the payor spouse in *Usher*, had a significant decrease in actual monthly income. The trial court agreed that the decline constituted a significant change in circumstances and granted Father's request for a downward modification. There was no finding that Father was willfully un- or under-employed.

The Court of Appeal rejected the lower court's analysis of Father's income available to pay support. Rather than look at his actual income in isolation, the Court of Appeal took a holistic approach to his entire financial picture when determining whether or not there had been a significant change in circumstances. The Court of Appeal found that the trial court's failure to inquire beyond Father's actual income was a ground for reversal because the reduction in actual income was not a change in circumstance in light of Father's extreme wealth. Put another way, his drop in income was more than off-set by the income that could be generated from his investments or liquid assets.

The appellate court leaned heavily on *Marriage of Cheriton* and that court's emphasis that the California support guideline "seeks to place the interests of children as the state's top priority." The child's need for support was put before the father's stated need for conservative investment or possible future liquidity.

Because the court approached its analysis by putting the needs of the child first, it opined that in order for Father to obtain a downward modification of support, he would need to show a decrease in the needs of the child. This threshold will likely be difficult to prove.

Finally, the appellate court rejected the trial court's determination that it would be reasonable to impute a 1% rate of return to the bulk of Father's assets. The appeals court found there was no substantial evidence supporting this figure, particularly given Father's failure to present any evidence of his average return on his assets. This should be a warning to practitioners against over-reaching with the testimony of their forensic accountants.

While advocates representing a client like the Father in *Usher* may be tempted to promise a child support modification based on a significant change in income, they are cautioned not to be myopic about the sources of income that the court may use. This is especially true when the advocate is representing a high income earner with significant assets and the parties have stipulated to below-guideline child support.

From a practical standpoint, *Marriage of Usher* may be a signal that courts are going to intrude further on how a payor spouse is expected to manage his or her finances in favor of the strong public policy to put a child's financial needs before those of either parent. It is notable that the Court of Appeal presupposed that Father's real estate holdings, with the exception of his primary residence, would be liquidated and added the imagined net proceeds to the corpus of assets capable of producing income in order to justify its finding that no change of circumstances had occurred. While trial courts may do this in their cases as a matter of course, the rule has been applied inconsistently, with some courts holding

back a primary residence and others deducting more than one. Hopefully the decision in *Usher* will promote more consistency in this practice.

Commentary

Marshall S. Zolla

Who would not wish to be from wealth exempt,

Since riches point to misery and contempt?

— *Shakespeare, Timon of Athens, IV.II.31*

Mr. Usher, a successful director and producer, suffered a significant decline in his monthly earnings. However, he still owned substantial assets, including cash, investment funds and real and personal property. He sought to reduce his child support obligation due to his claimed change of circumstances. The trial judge accepted his position and reduced his child support payments from $17,550 to $9,843 per month, only to have the Court of Appeal reverse. Sorry, Mr. Usher, better brush up on your Shakespeare. The holding stated that in light of Respondent's overall wealth, the reduction in his employment income did not materially impair his ability to pay the agreed upon child support.

The discussion about imputation of income, the proper rate of return, and whether it is proper for a court to second-guess the composition of an investment portfolio is instructive, without being a definitive guide. The two forensics presented different opinions as to reasonable rates of return, and differing returns on a different mix of capital investments. There was a significant gap in the evidence presented by Mr. Usher's expert, who failed to present any evidence of what respondent's investments had actually produced, rather than various projections and alternatives. Mr. Usher presented no evidence that his reduction in salary rendered him unable to pay the existing child support amount. The trial court's reliance upon a one percent imputed return on his investment portfolio was reversed as being unreasonably low and not supported by substantial evidence.

The Court of Appeal's discussion of under-utilization of income-producing assets yielding a lower than commercially reasonable rate of return (i.e., second-guessing an obligor's investment strategy) relied on *In re Marriage of Dacumos* (1999) 76 Cal. App. 4th 150; *In re Marriage of Destein* (2001) 91 Cal. App. 4th 1385; *In re Marriage of Berger* (2009) 170 Cal. App. 4th 1070; and *In re Marriage of Sorge* (2012) 202 Cal. App. 4th 626. One can readily discern from the language and tone of Justice Manella's opinion that the court was not buying Mr. Usher's pitch for a reduction of support. The battle of experts as to investment mix and projected rates of imputed income presents a fresh guide for what type of evidence needs to be established in these high-earner, high wealth, support cases.

References: California Family Law Practice and Procedure, 2nd ed., §§ 41.04 (legislative intent and principles behind child support guideline), 41.07[2][e][i] (consideration of earning capacity for purposes of child support), 41.08 (stipulation to child support amount), 42.23 (modification of stipulated child support order), 42.24 (modification of child support based on change in parent's ability to pay).

CHILD CUSTODY

Hague Convention

Eighth Circuit Affirms Denial of Return Based on Mature Child Exception

Custodio v. Torres
(No. 16-1268; U.S. Ct. App. 8th Cir. 12/2/16)
— F. 3d —, 2016 U.S. App. LEXIS 21517
By Kelly, Circuit Judge (Wollman, Arnold, Circuit Judges, concurring)

In a case of first impression, the Eighth Circuit Court of Appeals held that a district court's finding that a mature child objected to being returned to Peru under the Hague Convention on Civil Aspects of International Child Abduction ("the Convention") was subject to clear error review, and that the district court did not abuse its discretion in denying the father's petition for return based solely on the child's objections. The fact that the child's objections were relevant to