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HIGHLIGHTS

ATTORNEYS

- In *Point of View*, Kathryn Kirkland explains how a little planning can help attorneys avoid risks associated with failing to obtain a transcript of contested proceedings and failing to inform clients that a dependent spouse’s health insurance coverage will be cancelled upon legal separation (see Page 230)

CHILD CUSTODY

- Court Erred in Granting 50 Percent Timeshare to Parent Who Failed to Rebut Presumption against Awarding Custody to Parent Who Committed Domestic Violence (see Page 231)
- Fifth Circuit Affirms Denial of Return Petition when Parents Shared Intent to Abandon Venezuela as Children’s Habitual Residence but Did Not Share Intent to Raise Children in United States (see Page 233)

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- Wife Required to Pay Share of Liability Arising from Third-Party’s Post-Dissolution Action to Rescind Agreement to Purchase Community Business (see Page 236)
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Modification of Child Support

Parents May Not Contract Around Change of Circumstances Rule for Modification of Child Support

By Carol Rothstein, Esq.*

In *In re Marriage of Cohen* (Case No. G052058; Ct. App., 4th Dist., Div. 3. 9/7/16, ord. pub. 10/3/16) — Cal. App. 5th —, — Cal. Rptr. 3d —, 2016 Cal. App. LEXIS 823, the Fourth District Court of Appeal held that parents could not contract around the change of circumstances rule for modification of child support by stipulating that if modification were sought, the court would review the issue of child support “de novo.” Accordingly, a father who stipulated to pay child support in an amount higher than that required by the child support guidelines was not entitled to a downward modification to the guidelines amount, absent a showing of changed circumstances.

In the opinion by Justice Bedsworth (O’Leary, P. J., Thompson, J., concurring), the Fourth District also held that the trial court was not required to consider the father’s monthly income averaged over the calendar year to determine whether his income had decreased. Because the father’s income fluctuated, the court had discretion to choose a “fair and representative” time period, as it had done.

Facts and Procedure. Lauralin and Richard had four children, all of whom had significant disabilities. In 2011, the couple entered into a stipulated judgment for dissolution. The stipulated judgment recited that Richard’s income in March 2011 was \$70,166 per month and provided for child support payments of more than \$17,000 per month, which was higher than required by the statutory child support guidelines [*see* Fam. Code § 4055 et seq.]. The judgment also included the following provision: “The allocations of support as set forth above are without prejudice to either party. In the event

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In advancing this argument, Richard relied on two cases: *In re Marriage of Catalano* (1988) 204 Cal. App. 3d 543 and *In re Marriage of Thomas* (1981) 120 Cal. App. 3d 33. The appeals court found *Catalano* unpersuasive, reasoning that any language in *Catalano* that supported Richard's position was mere dicta, because the court increased the child support obligation based on the husband's dramatically increased income. In *Thomas*, however, the husband obtained a reduction in child support without alleging or proving any change in circumstances. Because there was apparently no record of the court's findings of the parties' financial circumstances at the time the original judgment was made, the appellate court reasoned that "the modification proceeding was the 'first time' the 'proper amount' of child support was litigated" and the trial court could modify the support order based solely on current evidence. The *Thomas* court relied on *Moore v. Moore* (1969) 274 Cal. App. 2d 698, 703 for the proposition that a court may modify a child support order without a showing of changes circumstances, when the original support order was based on the parents' stipulation.

The appellate court in the instant case disagreed with *Thomas*, stating that *Moore* does not stand for the proposition that in cases in which the parties stipulated to an amount of support, the court may modify support without a showing of changed circumstances. Instead, *Moore*, like other cases, allows courts to override a stipulated support order to *increase* support to the guidelines amount to assure that the children are being provided with adequate support.

Change of Circumstances Rule Based on Doctrine of Res Judicata. The appeals court explained that the doctrine of res judicata is the reason for the change of circumstances rule, which means that parties cannot alter a support award based on the circumstances existing when the decree was entered. Richard's reading of the "de novo" clause "would reduce family law orders and judgments to mere temporary placeholders in contravention of res judicata."

Commentary

Stacy D. Phillips and Erica A. Swenson

Marriage of Cohen stands for two important propositions.

First, there is no bright line rule prescribing the time period courts are required to consider for a spouse with fluctuating income. The court is not limited to considering the payor spouse's income for the calendar year, but has broad discretion to designate a "fair and representative" period.

Second, parties cannot contract around the change of circumstances requirement for a modification of support. The "animating principle" behind the change of circumstances rule is the doctrine of res judicata, which protects parties and the courts from spouses eager to re-litigate their judgments.

It is commonplace for family law practitioners to recommend that clients settle their cases rather than engage in contested litigation. There are many benefits that we highlight to our clients when discussing settlement, such as a streamlined process, greater control over the outcome and terms of the final agreement, avoidance of expensive formal discovery, and ability to contract for terms a sitting judge would not be empowered to make. Perhaps you have found yourself reasoning with a client that a settlement (as opposed to litigation) gives you the opportunity to be creative with the terms of your final agreement. For example, your client could negotiate a buy-out of support in a marriage of greater than 10-years length, whereas the court would have no power to make such an order. As long as it is legal, adults with capacity are free to enter into any contractual terms they choose.

Or are they? Here, the parties attempted to contract around the "change of circumstances" requirement for modification of support. The parties' marital settlement agreement contained a clause that any subsequent request to modify support should be reviewed "de novo by the court." In his request for modification of child and spousal support, Husband argued that this language should be interpreted to obviate the requirement that he show a change of circumstances as a condition precedent to modification. The court rejected Husband's approach, explaining that there are certain constraints imposed by law that override contractual language. The *Cohen* court highlights res judicata as one such legal principle, thereby negating the parties' contractual intent to skirt the requirement of changed circumstances for a modification of support.

Family law practitioners may have become somewhat unused to thinking about *res judicata* because of the court's ongoing jurisdiction over issues of child support, child custody, and sometimes spousal support. As pointed out by the *Cohen* court, this ongoing jurisdiction is generally rare in non-family law cases, which generally involve finite issues that can be dispatched in a single litigation. In contrast, the ever-developing fact patterns in family law cases affect how we think of a case, how we conduct our discovery, and how we counsel our clients.

Res judicata is somewhat at odds with the reality of family law. The *Cohen* court explains that the change of circumstances requirement is an acknowledgement of the unique ongoing nature of family law issues. The change of circumstances rule endeavors to protect the judicial process and the parties from falling victim to serial litigation. Thus, the parties are not permitted to contract around this requirement. The court quoted the 1933 holding of *Snyder v. Snyder*, which originated the change of circumstances rule: "The parties had their day in court . . . and it cannot be supposed that it was intended that the court should sit in review of its own decrees, or that the same or some succeeding chancellor presiding in the same court should, after the lapse of indefinite time, have power to reverse, alter or modify a decree for alimony upon the facts existing at the time of its entry" [*Snyder v. Snyder* (1933) 219 Cal. 80, 81 (emphasis added)].

Cohen is an extension of *Marriage of Laudeman* (2001) 92 Cal. App. 4th 1009, which similarly held that a divorced father who agreed to above-guideline child support was not entitled to a reduction to the guideline amount absent a showing of changed circumstances. This holding acknowledges that there are many factors that go into a global settlement agreement. The parties undoubtedly made compromises before reaching a final agreement. To request an immediate reduction of a single term to a carefully crafted global agreement would rob one party of the benefit of their bargain. Put another way, a party cannot have the benefit of the bargain without accepting the burden of that same bargain.

In conclusion, *Cohen* urges the family law attorney to respect the well-settled "change of circumstance" requirement when crafting our final agreements.

Commentary

Marshall S. Zolla

This new case is instructive, and perhaps somewhat frightening. Instructive because it provides us with a drafting lesson, which can benefit all family law practitioners. Frightening, because "[w]ho knows what evil lurks" in our closed files? (The Shadow Knows, to paraphrase an old radio show familiar to those of a certain age).

In *Cohen*, an executive husband earning \$1.9 million per year agreed, after a 16-year marriage and four kids, to a stipulated divorce judgment providing for above guideline child and spousal support. He later sought a downward modification to support at the guideline level. The stipulated judgment contained a provision that any future modification would be reviewed not by the usual change of circumstance standard, but on a *de novo* basis. The Court of Appeal held that the clause was invalid and unenforceable.

Parties, or attorneys drafting agreements, cannot contract around the change of circumstance rule. Allowing drafters to circumvent the change of circumstance rule would reduce family law orders and judgments to mere temporary placeholders, in contravention of the doctrine of *res judicata*. Footnote 14 of the *Cohen* opinion reminds us of another drafting tip, explained in *In re Marriage of Bodo* (2011) 198 Cal. App. 4th 373, with respect to the difference between a "material" change of circumstance as distinct from a "substantial" change of circumstance.

Let's not forget the other instructive segment of the *Cohen* opinion: our ongoing collective colloquy with our forensics about the proper time period to use for the calculation of support. *Cohen* gives us an updated judicial view of *In re Marriage of Riddle* (2005) 125 Cal. App. 4th 1075 and how fluctuating income should be treated for calculation of support. Reviewing *Riddle*, *In re Marriage of Mosley* (2008) 165 Cal. App. 4th 1375, and *In re Marriage of Rosen (Rosen)* (2002) 105 Cal. App. 4th 808, this case boils down the law to simply suggest that the exercise of discretion as to the relevant time period must be "fair and representative." Here, amortization over two years was held to be the most reasonable way of treating the husband's 2014 signing bonus.

Footnote 12 provides another practice reminder: the *Riddle* court's point was that statutes, including