

# Child support non-payment and the coronavirus

By Nathalie E.A. Paluch

In the two weeks since Gov. Gavin Newsom issued California's stay-at-home order, more than 1 million California residents have filed for unemployment. Millions more are likely to be out of work in the weeks to come, as California fights to get its coronavirus outbreak under control. All of these millions are or will be dealing with a sudden loss of income. Among these millions scrambling to figure out how to make ends meet are thousands who find themselves in uncharted territory: parents who must pay or who expect to receive court-ordered child support payments. Coronavirus has left these parents without easy access to relief from the courts because many of California's courts are closed.

For any parent paying — or receiving — child support, sudden unemployment presents a serious financial change that requires im-

mediate action. Swift action is necessary because "an order modifying or terminating a support order may [only] be made retroactive to the date of the filing of the notice of motion or order to show cause to modify or termination." Family Code Section 3653. There are no exceptions to this rule. Family Code Section 3651(a) and (c)(1). Thus, a parent who waits to file a motion forfeits potentially substantial retroactive changes to support for the entire period preceding the date of filing.

To avoid this forfeiture, the best practice is for parents to file a request for order to modify child support immediately after suffering unemployment or a loss in income. But under the current circumstances, that is easier said than done: Stay-at-home orders make client meetings more difficult, many tasks that used to take seconds or minutes can now take hours, and court access is

significantly more restricted than it was just weeks ago.

Nevertheless, parents and their lawyers should not be dissuaded. Although the courts in certain counties — including Trinity and Yuba counties — appear to be closed for all purposes, that is not true throughout the state. For instance, in Los Angeles County all 38 superior courts still allow filing directly at the courthouses, subject to some minor limitations on a case-by-case basis. Consequently, to the extent it is possible, parents and family law practitioners should continue to file RFOs as soon as reasonably possible.

In the event an RFO can be filed, court closures and scheduling changes are likely to lead to a significant delay between filing and hearing dates. That is because all courts that are still in operation have designated requests for relief on financial issues, such as a request for modifi-

cation of child support, as "non-essential." Thus, support RFOs probably will not be heard until court operations return to normal.

Consequently, once a motion has been filed to preserve retroactivity, practitioners must help their clients determine how much child support, if any, should be paid until their RFOs can be heard by the court. Unfortunately, in many cases parents will be forced to pay less than they are supposed to.

This can be a distressing situation. As family law practitioners are undoubtedly aware, the failure to timely pay a child support order is prima facie evidence of a contempt of court. Code of Civil Procedure Section 1209.5. A parent who fails to pay support on time in the amounts required will be in willful violation of a court order.

Despite this apparently precarious situation, all is not lost. There are several defenses available to parents under the current circumstances. For example, inability to pay is an affirmative defense to a contempt citation for failure to pay a support order. Because it is an affirmative defense, it must be proven

by the citee at the time of the contempt hearing. Additionally, parents may be able to request dismissal of contempt citations in the interests of justice. Penal Code Section 1385. While such dismissals are not common, it is possible that courts will see that the exceptional disruption caused by coronavirus necessitates exceptional leniency in these matters.

If an RFO cannot be filed because a parent's matter is pending in a county in which the courts are not accepting filings that is completely closed and is not accepting filings, there may be an argument that simply preparing and serving your RFO on the other side would be grounds to modify or terminate support to an earlier date because of the parent's inability to file.

Under Family Code Section 3653(b), if a court modifies or terminates a support order because of a party's unemployment, the court must make its order retroactive to the date of filing unless it finds good cause to deny retroactivity and specifies its reasons. *Marriage of Leonard*, 119 Cal. App. 4th 546 (2004). However, a closer reading

suggests that this statute may provide parties additional relief in these unprecedented times. Specifically, it provides that if a party is seeking to modify or terminate support due to unemployment the court is mandated to make support retroactive "to the later of the date of the service on the opposing party of the notice of motion or the date of unemployment." Thus, once again, it is imperative that the RFO be prepared and served (even if it cannot be filed) as soon as reasonably possible. ■

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