

Tab 9:

Modifying Support Orders After Suffering a Reduction in Income

Presenters

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Modifying Child Support Orders After a Reduction in Income

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When should a parent seek modification of a child support order?

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- Loss of employment
- Mandatory reduction in income (furloughs, loss or reduction in bonus income)
- Change in custodial time share
- Incarceration
- Active duty military deployment
- Informal agreement made by parties to change child support order

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When is a parent permitted to seek modification of a child support order?

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- "...a support order may be modified or terminated at **any time** as the court determines to be **necessary**." FC §3651(a).
- A judgment is never a "final" adjudication of the extent of the parents' obligation to support their children.
In re Marriage of Armato (2001) 88 CA4th 1030, 1042.

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Effect of Stipulation by the Parties

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- A trial court always has the power to modify an existing child support order upward or downward, regardless of the parties contrary marital settlement agreement. *In re Marriage of Alter* (2009) 171 Cal. App. 4th 718.
- Agreements and stipulations to restrict the court's authority to modify child support are per se unenforceable. *In re Marriage of Cheriton* (2001) 92 CA4th 269, 294.
- Stipulation to submit future modification of child support to binding arbitration void as against public policy. *In re Marriage Berezna & Heminger* (2003) 110 CA4th 1062, 1069-1070.

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Material Change in Circumstances Required

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- Generally, a material change in circumstances since the most recent order must be shown to modify an order for child support. *Philbin v. Philbin* (1971) 19 CA3d 115, 119.
- Rule is the same whether motion is made pendent lite or permanent. *In re Marriage of Williams* (2007) 150 CA4th 1221, 1234.
- Burden of proof is on moving party. *In re Marriage of Bardzik* (2008) 165 CA4th 1291, 1303-1304.

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Exceptions to the Rule

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- If the parties to a stipulated agreement stipulate to a child support order below the amount established by the statewide uniform guideline, no change in circumstances need be demonstrated to obtain a modification of the child support order to the applicable guideline level or above. FC §4065(d).

(But if stipulated order is at or above guideline, change in circumstances is required.)
In re Marriage of Williams (2007) 150 CA4th 1221, 1235.

- Order entered before July 1, 1992:
Establishment of the statewide uniform guideline constitutes a change of circumstances. FC §4069

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Exceptions to the Rule, ctd.

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- Due to a change in guideline made after court order was entered, the applicability of current standards yields a different result. *In re Marriage of Bardzik* (2008) 165 CA4th 1291, 1303-1304.

Example: Order entered before January 1, 1994
Enactment of FC §4057.5 made it impermissible to consider the income of a parent's "subsequent spouse or non-marital partner" as a factor rebutting the presumptively correct formula amount of support except in specified "extraordinary cases."

(But may use new spouse income for determination of actual tax liability if filing jointly.) FC §4059(a).

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What Constitutes a "Change in Circumstances" ?

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- Income change from regular predictable periodic earnings to reduced periodic earnings and the uncertain possibility of a large year end bonus. *In re Marriage of Mosley* (2008) 165 CA4th 1375.
- Non-custodial parent's increased wealth due to a \$1 million inheritance. *County of Kern v. Castle* (1999) 75 CA4th 1442, 1454-1455.
- Hardship suffered as a result of 1) extraordinary health care expenses, 2) uninsured catastrophic loss, 3) birth or adoption of new children from another marriage or relationship. FC §4059(g), 4070, 4071.
- Active duty military and deployment. FC §3651(c)(2).

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What Constitutes a "Change in Circumstances" ?, ctd.

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- **Earning capacity** if in the best interests of the children FC §4058(b).
 - Not limited to "bad faith" avoidance of child support obligations, court may have discretion to impute earning capacity income to an unemployed or underemployed parent as long as the parent has a measurable earning capacity (ability and opportunity). *In re Marriage of Hinman*(1997) 55 CA4th 988, 998.
 - Earning capacity based on income-producing or nonincome-producing assets:
 - Rental properties. *Marriage of Dacumos* (1999) 76 CA4th 150, 155
 - Nonincome-producing real estate. *Marriage of Destein* (2001) 91 CA4th 1385, 1393-1396.
 - But compare :
 - Unliquidated stock received for equity on sale of business not income for child support purposes but court has discretion to impute reasonable rate of return therefrom. *Marriage of Pearlstein* (2006) 137 CA4th 1361, 1375.
 - Error to impute rate of return on obligor parent's home equity in determining income for formula child support. *Marriage of Williams* (2007) 150 CA4th 1221, 1244.

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What Constitutes a "Change in Circumstances" ?, ctd.

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- **Burden of proof re: imputed income**
 - 1) when paying parent seeks modification downward due to loss of income, that parent has the burden of proving that they lack ability or opportunity
 - 2) when receiving parent seeks modification upward, that parent has the burden of proving that the paying parent has the ability and opportunity to earn. *In re Marriage of Bardzik* (2008) 165 CA4th 1291, 1304-1305, 1308.

What Constitutes a "Change in Circumstances" ?, ctd.

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- **Third party income or contributions to paying parent**
 - New spouse or non-marital partner income. FC §4057.5 (only if moving party meets burden of proof that extreme and severe hardship to child) *Marriage of Loh* (2001) 93 CA4th 325, 337.
 - Court can consider recurring gifts. *In re Marriage of Alter* (2009)171 Cal.App.4th 718

What Constitutes a "Change in Circumstances" ?, ctd.

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- **Passage of time** can be a changed circumstance warranting greater child support due to cost of living increase and the fact that it cost more to raise a child as *In re Marriage of Cheriton* (2001) 92 CA4th 269, 300.
- **Change in time share percentage** on the theory that child care expenses will rise with increased time share and the other parent will realize savings as a result of decreased timeshare. *In re Marriage of Matthews* (1980) 101 CA3d 811, 819.
- **Visitation Travel Expenses**
FC §4062(b)(2) Discretionary Add-on for travel expenses for visitation.
Common in a move away case. Trial courts have discretion to minimize loss of non-custodial parent's contact by allocating transportation expenses to the custodial parent. *In re Marriage of Burgess* (1996) 13 CA4th 25, 40.

What is **not** a "Change in Circumstances" ?

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- **Interference with Visitation**
Not basis for modification. FC §3556. "The existence or enforcement of a duty of support of a minor child is not affected by a failure or refusal by the custodial parent to implement any rights as to custody or visitation granted by a court to the non-custodial parent. Proper remedy would be a motion for change in custody.
- **Creditor Obligations Affecting Ability to Pay**
 - Child support must be paid first before any other creditors. FC §4011
 - Cannot get a reduction in support because voluntary debt repayments have reduced the ability to pay. *In re Marriage of Kirk* (1990) 217 CA3d 597, 607-608. (court erred in reducing H's child support obligation on account of his contractual diversion of earnings to repay debt to employer.

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Retroactivity of Child Support Order

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- "a support order may not be modified or terminated as to an amount that accrued before the date of the filing of the notice of motion or order to show cause to modify or terminate." FC §3651 (c)(1).
- "An order modifying or terminating a support order may be made retroactive to the date of the filing of the notice of motion or order to show cause to modify or terminate, or to any subsequent date..." FC § 3653(a).
 - Retroactivity as Applied to Unemployment:
"order shall be made retroactive to the later of the date of the service on the opposing party of the notice of motion or order to show cause to modify or terminate or the date of unemployment...unless the court finds good cause not to make the order retroactive and states its reasons on the record. FC § 3653(b).
 - Discretionary:
Court properly denied retroactive modification to unemployed parent when parent had other financial resources and children's needs made retroactivity unfair. *Marriage of Leonard* (2004) 119 CA4th 546.

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- **Repayment of Amounts Paid by Obligor**
"If an order decreasing or terminating a support order is entered retroactively... the support obligor may be entitled to, and the support obligee may be ordered to repay... any amounts previously paid by the support obligor pursuant to the prior order that are in excess of the amounts due pursuant to the retroactive order. The court may order that the repayment by the support obligee shall be made over any period of time and in any manner, including, but not limited to, by an offset against future support payments or wage assignment, as the court deems just and responsible. In determining whether to order a repayment, and in establishing the terms of repayment, the court shall consider the following factors:
 - 1) The amount to be repaid.
 - 2) The duration of the support order prior to modification or termination.
 - 3) The financial impact on the support obligee of any particular method of repayment such as an offset against future support payments or wage assignment.
 - 4) Any other facts or circumstances that the court deems relevant. FC § 3653(d)

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- **Court Lacks Authority to Forgive Arrearages**
 - Trial court's reduction of child support arrearages and interest due on arrearages were impermissible retroactive modifications within the meaning of FC §3651(c). *In re Marriage of Perez* (1995) 35 Cal. App. 4th 77.
 - A trial court lacks equitable power to forgive child support arrearages that accrued when the petitioner was incarcerated. *County of Santa Clara v. Wilson* (2003) 111 Cal. App. 4th 1324.
 - Trial court improperly held that by accepting former husband's payment of lesser amounts, former wife waived her right to collect the full amount of support due under judgment of dissolution. *In re Marriage of Hamer* (2000) 81 Cal. App. 4th 712.
 - An agreement between the parties to forgive a portion of support arrearages is unenforceable when it does not resolve any bona fide disputes between the parties. *In re Marriage of Sabine and Toshio M.* (2007) 153 Cal. App. 4th 1203.

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Retroactivity of Child Support Order, ctd.

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- **But:**
 - **Satisfaction of arrearages**

The trial court may determine that nothing is owed on arrearages accrued while the supported child was living with the paying parent. This is not considered an improper "retroactive modification" of arrears because the arrearages are deemed satisfied by the direct provision for the child's needs during the applicable time period. *In re Marriage of Trainotti* (1989) 212 CA3d 1072, 1074-1075; *Jackson v. Jackson* (1975) 51 CA3d 363, 367-368.
 - **Discretion to enforce**

Court cannot change arrearages, but has some equitable discretion concerning enforcement of the judgment or order. The court may determine whether and to what extent the original support order should be enforced by execution or otherwise. *County of Santa Clara v. Wilson* (2003) 111 CA4th 1324, 1326.

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Attorney's Fees and Costs

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- "Except as against a governmental agency, an order modifying, terminating, or setting aside a support order may include an award of attorney's fees and court costs to the prevailing party." FC §3652.
- Don't forget to request fees and costs in moving papers and include a *Keech* declaration.

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Attorney's Fees and Costs

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Modifying Child Support Orders After a Reduction in Income

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PROCEDURE FOR OBTAINING A MODIFICATION & REVIEW OF APPLICABLE JUDICIAL COUNCIL FORMS

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Discovery

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- Because of the required showing of change in circumstances, collecting information pertaining to the relative financial situation of the parties is essential in presenting your case.
- Prior to Judgment - All discovery tools are available.

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Discovery (Post Judgment w/out Motion)

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- After Entry of Judgment – Discovery is governed by statute.
- FC §3660 et seq. :
 - Purpose: designed to permit inexpensive discovery of facts before the commencement of a proceeding for modification or termination of an order for child, family, or spousal support(FC §3660)

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Discovery (FC §3660 et seq.)

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- Other methods of discovery - No other means of discovery are permitted without filing a motion. (FC §3662.)
 - Should you desire to avail yourself of additional discovery i.e., deposition, demand for production of documents, or subpoenas – file a motion and set the hearing with sufficient time to conduct discovery.
- How often - Not more than once per year. (FC §3663.)

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Discovery (FC §3660 et seq.)

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- When request for I & E can be made - Any time following judgment of dissolution or legal separation that provides for payment of child or family support. (FC §3664.)
 - At any time following a judgment of dissolution of marriage or legal separation of the parties, or a determination of paternity, that provides for payment of support, either the party ordered to pay support or the party to whom support was ordered to be paid or that party's assignee, without leave of court, may serve a request on the other party for the production of a completed current income and expense declaration in the form adopted by the Judicial Council. FC§3664
- How to serve - By mail, return receipt requested, to last known address of party to be served, or by personal service. (FC§3664 (e).)

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Discovery (FC §3660 *et seq.*)

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- What may be requested - Either party may request the other to produce a completed current Income and Expense Declaration (I&E). (FC §3664.) Copies of prior year's state and federal returns must be attached. (FC §3665.)

NOTE: F.C. §3665 is a variation from the requirement of Los Angeles County Court Rules 14.9 requiring the party to bring tax returns to the hearing. (see Form FL-396 Request for Production of an Income and Expense Declaration after Judgment.)

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Remedies

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- What if party fails to comply?
 - Request Information from Employer (FC §3664 (b), FL – 397)
 - Request sanctions against party (FC §3667)

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Remedies

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Request Information from Employer (FL-397)

- Voluntary compliance
- Party may issue

"If there is no response within 35 days of service of the request or if the responsive income and expense declaration is incomplete as to any wage information, including the attachment of pay stubs and income tax returns, the requesting party may serve a request on the employer of the other party for information limited to the income and benefits provided to the party in the form adopted by the Judicial Council (FL-397). The employer may require the requesting party to pay the reasonable costs of copying this information for the requesting party. The date specified in the request served on the employer for the production of income and benefit information shall not be less than 15 days from the date this request is issued." (FC §3664 (b).)

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Remedies

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- Sanctions for failure to comply - If the court finds the I&E incomplete, inaccurate, missing prior year's federal and state personal income tax returns, or not submitted in good faith, *it may order sanctions against responding party in the form of payment of all costs of the motion, including filing fee and costs of depositions and subpoenas necessary to obtain complete and accurate information.* (FC §3667.)
 - NOTE the permissive language in the statute - so plead your case! Statute also provides for payment of all costs of the motion. Also keep in mind FC §271.

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New Mate Discovery

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New Mate Discovery

- "If any portion of the income of either parent's subsequent spouse or nonmarital partner is allowed to be considered pursuant to this section, discovery for the purposes of determining income shall be based on W2 and 1099 income tax forms, except where the court determines that application would be unjust or inappropriate. (FC §4057.5)
- In preparing for [the motion to modify child support], it is proper to make inquiry by discovery proceedings concerning both separate and community property of the wife arising from her second marriage." *Chapin v. Super. Ct.* (Chapin) (1966) 239 Cal.App.2d 851, 859
 - NOTE: Court's order appeared to be tailored to permitting questions "relative to the ownership by [wife] of community and separate property by reason of her second marriage..." (Id. at p. 859.) It did not appear to permit a wholesale fishing expedition in H#2's s/p assets and income.

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How to Proceed

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OSC or Notice of Motion?

- Since both parties were subject to the court's jurisdiction in the underlying action, the party seeking a modification may proceed either by OSC or Notice of Motion (CRC 5.118).

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Where to File

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Proper Court

- Modification proceedings must ordinarily be commenced in the court where the underlying order or judgment was rendered.

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Preparing for Modification Request

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- Review the Court order you are seeking to modify. Form FL-310 requires you to state the date the order was filed and what the order specified.
- Review I&E declarations (form FL-150) on file with the court
- Collect documentation from client - all evidence of income and child related expenses: day care receipts, medical costs, other approved costs, cancelled checks.
- Review parties' tax returns (redact SSN, when lodging with court)

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Preparing for Modification Request

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- Run guideline support calculation (See California Department of Child Support Services - *California Guideline Child Support Calculator, User Guide*)
 - DissoMaster

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Preparation of Forms

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- FL – 301: Notice of Motion or FL-300: Order to Show Cause, and
- FL- 310: Application for Order and Supporting Declaration, or
- FL-390: Notice of Motion and Motion for Simplified Modification of Order for Child, Spousal, or Family Support.
- FL-320: Responsive Declaration

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Preparation of Forms (Declarations)

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- **FACTS IN SUPPORT (Form FL-310, Item 10).** State with sufficient specificity how the circumstances have materially changed since the last order was issued. *Philbin v. Philbin* (1971) 19 CA3d 115, 119.
- **Exception to Showing Change of Circumstances:** When seeking to modify a child support order that is below guideline.

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Preparation of Forms (Declarations)

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Declarations (FL-310, Item 10 & FL-320, Item 9)

- Carefully drafted declarations are crucial - trial courts have broad discretion to decide a modification request solely on the supporting and responsive declarations without oral testimony.
 - *Best practice is to treat your supporting or responsive declaration as your only chance to be heard on the issue.*

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Preparation of Forms (Declarations)

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Memorandum of Points and Authorities

A supporting memorandum ordinarily is required only if requested by the court on a case by case basis (CRC 5.118(a)). It is good practice to file P&As when seeking unique relief:

- Deviation from guideline
- Imputation of income
- Denial of retroactivity
- Attorney's fees

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Preparation of Forms (Declarations)

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Burden of Proof

- Understand who bears the burden of proof and/or what you need to establish.
- The burden of proof is (almost) always on the moving party to show sufficient facts to establish the change of circumstances that justifies a modification.

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Preparation of Forms (Declarations)

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Burden of Proof – Cont'd

- Thus, if the payor seeks to impute income to the payee, pursuant to FC §4058(b), the payor bears the burden of proof on imputation. If the payee seeks to impute income to the payor, the payee bears the burden of proof. The parent seeking to impute income will bear the burden of proof of showing ability and opportunity to earn. *In re Marriage of Bardzik* (2008) 165 Cal.App.4th 1291, 83 Cal.Rptr.3d 72
- When a payor parent loses his or her employment and moves the court for a downward modification of support based upon a change in circumstance, that parent will bear the burden of demonstrating lack of ability and opportunity to earn income. *Marriage of Leonard* (2004) 119 CA4th 546, 14 CR3d 482.

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Preparation of Forms

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Income and Expense Declaration (Form FL-150)

- **Income and Expense Declaration must be completely filled out & served with moving papers.**
 - *Must be accompanied by copies of the last two months pay stubs.*
 - See *Los Angeles County Court Rules 14.9* which states that you must bring copies of *last two year tax returns to court*, and all loan application made within the last two years.

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Preparation of Forms

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Los Angeles County Court Rules 14.9

- All blanks on Financial Declarations, as defined by the California Rules of Court, must be completely filled in. If a previously filed Financial Declaration is claimed to be "current," a copy must be attached to the moving or responding papers.
- In addition to the schedules and pay stubs required to be attached to the Income and Expense Declaration, parties must bring copies of State and Federal Income Tax Returns (including all supporting schedules) and all loan applications (whether or not the loan was granted) for the last two years.

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Preparation of Forms

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Complete Form FL-310, Item 5 & FL-150, Section 15 re Attorney's Fees

- Except as against a governmental agency, an order modifying, terminating, or setting aside a support order may include an award of attorney's fees and court costs to the prevailing party. FC §3652

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Service

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Prior to Entry of Judgment

- You must serve the other party, or if she/he is represented, you must serve the attorney of record, copies of your filed court forms at least 16 court days before the hearing. Add 5 calendar days if you serve by mail within California. CCP §1005
- You must also serve blank copies of:
 - Form FL-320, Responsive Declaration to Order to Show Cause or Notice of Motion and Form FL-150, Income and Expense Declaration
 - Do not forget to serve CSSD if the case involves public assistance or otherwise required.

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Service

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After the Entry of Judgment

- After entry of a judgment of dissolution of marriage, nullity of marriage, legal separation of the parties, or paternity, or after a permanent order in any other proceeding in which there was at issue the visitation, custody, or support of a child, no modification of the judgment or order, and no subsequent order in the proceedings, is valid unless any prior notice otherwise required to be given to a party to the proceeding is served, in the same manner as the notice is otherwise permitted by law to be served, upon the party. For the purposes of this section, service upon the attorney of record is not sufficient. FC §215
- NOTES: FC §215 does not require that post judgment motions be served in the same manner as the initial service of the Summons and Petition, e.g., by personal service. Service may be accomplished by any of the methods authorized by CCP §1010 et seq., e.g., by mail. The usual proof of service requirements apply.

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At the Hearing

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- The trial court has discretion to allow or disallow live testimony at a motion/order to show cause hearing. *In re Marriage of Biderman* (1992) 5 Cal.App.4th 409, 412, *In re Marriage of Fogarty & Rasbeary* (2000) 78 Cal.App.4th 1353, *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 605-606.
- The rationale for this rule is one born of necessity given the staggering number of cases that family law judicial officers must decide daily. (See, *County of Alameda v. Moore* (1995) 33 Cal.App.4th 1422, disapproved on other grounds, *Elkins v. Super. Ct.*, (2007) 41 Cal.4th at p. 1361, n.15; *Lammers v. Super. Ct. (Lammers)* (2000) 83 Cal.App.4th 1309, 1318-1319.

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At the Hearing

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- CRC 5.118(f) The court may grant or deny the relief solely on the basis of the application and responses and any accompanying memorandum of points and authorities.
- A party seeking to present live testimony in the face of judicial opposition must be certain to preserve his/her record by making a detailed offer of proof as to the substance of the proffered testimony, as well as explaining why it was not presented in advance by way of declaration. *In re Marriage of Fogarty & Rasbeary*, (2000) 78 Cal.App.4th at 1358, n.3.
- But just because live testimony may not be automatically required does not mean it may not be an abuse of discretion to refuse it if the peculiar facts of a given case require it. *Alan S., Jr. v. Super. Ct. (Mary T.)* (2009) 172 Cal.App.4th 238, 91 Cal.Rptr.3d 241

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At the Hearing

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What to Bring:

- Bring copies of State and Federal Income Tax Returns (including all supporting schedules) and all loan applications (whether or not the loan was granted) for the last two years.
- FL-195, Income Withholding for Support
 - Take a form to the hearing with all available information filled in, except the amount of support and the arrears sections.
- Copies of all pleadings filed with the court.

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After the Hearing

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- FL-340, Preparation of Findings and Order After Hearing. Refer to *Los Angeles County Court Rules* 14.11.
- FL-195, Income Withholding for Support. If the judge did not sign at the hearing, send the form to the court along with the *Findings and Order After Hearing*.
- FL-342, Child Support Information and Order Attachment
- FL-192, Notice of Rights and Responsibilities
- FL-191, Child Support Case Registry Form required to be submitted by both parties within 10 days of change.

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Modifying Support Orders After a Loss in Income

Hypothetical #1

Moving party=payor Dad;

Dad is a corporate CPA and earns \$120,000 per year. Mom is employed at the California Department of Motor Vehicles and is forced to take 2 mandatory furlough days per month reducing her salary by 10% (\$40,000 down to \$36,000). The judgment requires Dad to pay CS at \$2,418 per month. The parties' two children are now spending equal time with both parents due to an informal agreement made between them. The judgment of dissolution states that Mother has 70% custodial time and Father has 30% custodial time. Currently, the parents alternate weeks and Dad puts the kids in daycare for 3 hours each weekday during his custodial time. He spends \$500 per month on daycare. Mom has no need for daycare because she lives with the maternal grandmother who babysits for free. Mom has been paying for their son to play football, which costs \$100 per month and for the daughter to take horseback riding lessons, which costs \$150 per month.

Modifying Support Orders After a Loss in Income

Hypothetical #2

Moving party=Dad recipient;

Dad received a pendente lite (temporary) support order during a dissolution case. Six months later, he files a motion to modify. Parties have one child. Mom is an attorney making \$250,000 per year. Dad is a real estate agent who previously earned on average \$150,000 per year, but has not closed a deal within the last six months and claims that he now earns \$0. Dad's parents are giving him \$2,500 per month to pay for his living expenses. Before he went into real estate he worked as a college professor. He has a Masters Degree in Psychology. Dad has 70% custodial time and Mom has 30% custodial time, which remains unchanged.