

# Change of Plans

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With the downturn in financial markets, the crisis in the housing market and rising unemployment in California, every lawyer practicing family law should anticipate inquiries from potential, current or former clients about seeking modification of child support and spousal support due to changed financial circumstances. Two recent Court of Appeal decisions from the 4th District, Division 3, provide valuable guidance for family law attorneys on how to prevail on this issue.

Both cases involve post-judgment proceedings for modification of support payments. The cases remind us that if one parent seeks to modify an existing order and have income imputed to the other parent, the parent asking for the change in the status quo bears the burden of proof to show that the other parent has the ability and the opportunity to earn an income.

*In re Marriage of Bardzik*, 2008 DJDAR 11667, involved a father who shared 50/50 custody with the mother of their two sons, one who was an adopted special needs child. In 2000, when the last operative child support order was made, both parents worked as deputy sheriffs and made about the same income, so the child support was set at zero. But the special needs son, Kevin, had some behavioral problems, was expelled and the father had primary custody of the boy. In April 2006, the mother filed an order to show cause to change the custody to ratify the reality of the father's primary custody of Kevin, while custody of the other son would remain 50/50. The mother also asked for guideline child support. The father filed his own order in June 2006, also asking to formally change physical custody of Kevin to him, and asking that the \$1,000 per month adoption assistance money from the state be paid to him. The court set the hearings on both orders for the same date in August 2006.

The father asserted that income should be imputed to the mother at her pre-retirement ability to earn because she had not given any reasons, health or otherwise, for her early retirement other than her desire to be a stay-at-home mother. The father asked that the mother should be imputed with \$7,235 per month — her pre-retirement income — and that she should pay child support of \$742 per month him since custody of Kevin had changed, the mother showed her income at \$2,577, her

retirement pay.

At the hearing, the mother testified she had recently retired after 20 years because her new family (she was remarried with two more sons) was suffering from the extreme stress of her work in the maximum-security part of a jail, including midnight shifts. She was constantly sick. This was the only evidence the father presented in support of his request for imputation of income to the mother. The trial court asked if there were any other witnesses, but there were none. The trial court found the father's evidence lacking and advised him that the court would not "impute income without further evidence that [the mother had] the ability to earn what she earned before." The trial court's support order required that father pay the mother \$388 per month despite the fact his custody time share was now greater than hers.

The father appealed on the grounds that the trial court was obligated to impute income to the mother based on her early retirement. The Court of Appeal's decision pointed out to the father that he had not met his burden of proof to show the mother's ability and opportunity to earn an income to support the order he sought. The Court of Appeal noted "Conspicuously absent are the sorts of things that helped

parents seeking imputation to carry their burden," for example, "the imputee's resume, want ads for persons with the credentials of the potential imputee, opinion testimony (e.g., from a professional job counselor) that a person with the imputee's credentials could readily secure a job with a given employer (or set of employers), or pay scales correlating ability and opportunity with the income to be imputed. Nor was there any vocational examination. What there was — merely the fact of retirement and previous income — was not sufficient, and thus the trial court's order denying imputation was clearly correct."

If the *Bardzik* case illustrates how easily a party can fail to meet the burden for imputation of income, the case of *In re Marriage of Mosley* 165 Cal.App.4th 1375 (2008), filed only three weeks later, shows how substantial evidence can be presented to warrant imputation of income upon a showing of change of circumstances.

In *Mosley*, the parties had five children. Both parents were licensed attorneys practicing law, but after the children were born, the mother stayed home to raise them and the family lived off the father's income as a real estate partner at a large firm. The 2002 judgment based support on the father's



monthly income of \$32,175 before taxes. In January 2006, the father filed an order to modify child and spousal support. His firm had phased out its real estate practice and he was terminated. He accepted an in-house position with a homebuilder that paid a fraction of his former income as a base salary with the possibility of a substantial year-end bonus. The father's new take-home pay was \$10,000 to \$11,000 per month, but because the last support order of 2003 was based on his previous income, he was paying over \$10,000 per month in support. He was forced to borrow money each month in order to pay his own living expenses in hope that his year-end bonus that would enable him to pay off his debt.

In support of his request to decrease support, the father provided copies of his current paystubs showing his regular base pay of \$205,000 annually with take-home pay of about \$10,375. His support obligation totaled \$10,047 per month, leaving him without income to pay his own living expenses. He also argued that income should be imputed to the mother because a vocational examination report reflected that she should be able to earn at least \$78,000 per year if she worked only six hours per day, or substantially more if she worked full time. The father also stated his custody time-share had increased from 20 percent in 2003 to 38 percent when he filed his order.

The mother argued that the father's 2005 income actually exceeded his 2002 income, which formed the basis of the support order, so there was no change in circumstances for a reduction in support. Although it was factually true that the father had greater income in 2005, the reason was because he had received his \$205,000 base salary, plus a onetime signing bonus, and a \$257,000 discretionary bonus, plus distributions and an equity payout from his former law firm. The trial court agreed with the mother, and denied the father's request for relief, finding no change in circumstances to warrant a reduction in support.

The court rejected the father's request to impute income to the mother, stating

that there "was 'a total lack of evidence'" that the her return to work would be in the best interests of the children, and that the father had failed to show "that a job was actually available" to the mother. The father appealed, and the Court of Appeal reversed and remanded.

The Court of Appeal first addressed the issue of "changed circumstances" and found that the trial court erred in fixating on the fact that the father's 2005 income was greater than the 2002 judgment figure. Neither party disagreed that the father's current salary was only \$205,000 and although he might be eligible for a bonus of up to 150 percent, he might also get zero, because the bonus is completely discretionary.

The Court of Appeal also pointed out that the record contained only one year of income history for the father's job with the home builder and the fact that he received a six-figure bonus that one year is not a good predictor of whether such a large bonus is likely to reoccur.

The Court of Appeal held that it was a miscarriage of justice and "exceeded the bounds of reason to require [the father] to pay nearly 100 percent of his take-home pay in support payments, on the assumption, based on only a one-year history with the homebuilder, that he would continue to receive a six-figure bonus each subsequent year," forcing him to borrow for his living expenses.

The Court of Appeal also held that the trial court erred in refusing to impute income to the mother. The trial court failed to consider all the evidence when evaluating the best interests of the children should the mother return to work. The father testified that if the mother contributed to the children's support, he could spend more time with the children himself because he would not have to spend so much time at work trying to maximize his bonus. The Court of Appeal agreed that "the best interests of the children are promoted when parents [reduce their work hours] so as to spend more time with their children." The mother also complained that she and the

children were not living according to the marital standard, and the Court of Appeal held that any income she could provide would only increase the level of support available to the children and promote their best interests.

The father had also provided the trial court with a vocational examination summary showing that the mother had substantial earning capacity as an attorney. He also provided the testimony of the vocational expert, who had prepared the summary and who had interviewed the mother as part of the process. The expert testified that the mother had an earning capacity of \$95,000 to start, although it might take 26 weeks for her to find a position, and she could earn \$16 to \$20 per hour as a paralegal.

The Court of Appeal held that it was not the father's burden to convince the trial court that the mother would have secured a job had she applied. The Court of Appeal also instructed that on remand, the trial court must also consider the state public policy goal that supported spouses ultimately become self-supporting.

In summary, the party seeking to impute income in an order for modification of support bears the burden of proof to show that the other party has the ability and opportunity to earn an income.

Evidence should include at a minimum the imputee's resume, want ads for people with the credentials of the imputee, a vocational examination and expert witness testimony about job availability and pay scales for a person with the imputee's credentials. The *Bardzik* and *Mosley* cases are must reading for family law practitioners and provide valuable guidance on how to best present a client's case when seeking to impute income to the supported party in a post-judgment order for modification of support.

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