

PERMANENT SPOUSAL SUPPORT

OUTLINE

- I. **Permanent Support Must Be Based on Family Code Section 4320 Factors**
 - A. "In ordering spousal support...the court shall consider all of the following circumstances[.]" and the record must show that each factor was considered.
 - a. Substantial Justice Requires Weighing of Relevant 4320 Factors.
 - i. *Marriage of Smith* (1990) 225 Cal.App.3d 469
 - ii. *Marriage of Cheriton* (2001) 92 Cal.App.4th 269.
 - B. Court Cannot Base a Permanent Spousal Support Order on a Computer Program.
 - a. *Marriage of Burlini* (1993) 143 Cal.App.3rd 65 (distinguishing temporary spousal support from permanent spousal support); *Marriage of Olson* (1993) 14 Cal.App.4th 1 (reversible error to use computer program to calculate temporary support); *Marriage of Schulze* (1997) 60 Cal.App.4th 519 (same).
 - b. Unless parties stipulate, court cannot simply adopt earlier temporary order without first analyzing 4320 Factors.
 - c. Amount and Duration of

Temporary Spousal Support
Can Be Considered

- i. *Marriage of Schulze, supra; Marriage of Zywiciel* (2000) 83 Cal.App.4th 1078.

C. Amount of support should be set after considering division of community property *In re Marriage of McNaughton* (1983) 145 Cal.App.3d 845

D. No Change of Circumstances Required to make Initial Permanent Spousal Support Order (even if prior Temporary Order)

II. Marital Standard of Living is the Touchstone of Section 4320

A. Court Must Make a Finding Re Marital Standard of Living (consider terms used in order: may be upsetting, e.g., middle class/lower class vs. "working class" or "modest")

a. Marital Standard of Living is General Station in Life Enjoyed by the Parties During Marriage.

- i. *Marriage of Smith, supra.*

b. Generally, But Not Always, Based on Expenditures.

- i. Cost of home, cars, vacations, etc.
- ii. But court must look at the totality of the circumstances.

- 1. *Marriage of Weinstein* (1990) 4 Cal.App.4th 555

iii. Did they live beyond their means because one party worked

excessive hours?

- iv. Mathematical computation of actual family income and expenses less Husband's expenses affirmed.

- 1. *Marriage of Cheriton, supra*

B. Marital Standard of Living Becomes Less Important Over Time

- a. *Marriage of Rising* (1999) 76 Cal.App.4th 472; *Marriage of Smith, supra*.

C. Marital Standard of Living May Include:

- a. Savings and Investment –
 - i. *Marriage of Kerr* (1999) 77 Cal.App.4th 87; *Marriage of Drapeau* (2001) 93 Cal.App.4th 1086;
- b. College for Adult Children
 - i. *Marriage of Paul* (1985) 173 Cal.App.3d 913; *Marriage of Siegel* (1985) 26 Cal.App.3d 88 – court may take into account the supporting spouse's expenditures for college for parties' children in setting spousal support.
 - ii. *Marriage of Serna* (2000) 85 Cal.App.4th 482 – court cannot.

D. In Determining Marital Standard of Living Court May Consider -

- a. Liquidation of Assets Used to Support Lifestyle

- i. *Marriage of De Guigne* (2002) 97 Cal.App.4th 1353
 - b. Savings
 - i. *Marriage of Cheriton, supra.*
 - c. Artificially depressed MSOL to allow one party to obtain professional degree *IRMO Watt* (1989) 214 Cal.App.3d 340
- E. In Determining Martial Standard of Living Court May Not Consider -
 - a. Debt Incurred to Support Lifestyle
 - i. *Marriage of Smith, supra.; Marriage of Weinstein, supra*

III. Earning Capacity

- A. Section 4320(a)
- B. Court Must Consider the Marketable Skill of the Supported Spouse Under Family Code Section 4320(a)(1)
 - a. The Supported Spouse's Need for Education, Training, or Retraining in Order to Acquire Marketable Skills that will Result in a Material Increase in Income.
 - i. Section 4320(a)(1)
 - ii. *Marriage of Watt* (1989) 214 Cal.App.3d 340
 - b. The Supported Spouse's Devotion to Domestic Duties
 - i. Section 4320(a)(2)
 - ii. *Marriage of Cheriton, supra.*
 - c. The Supported Spouse's Contribution to the Supporting Spouse's Education, Career, or

License

- i. Section 4320(b)
- ii. *Marriage of Ostler & Smith* (1990) 223 Cal.App.3d 33.
- iii. Generally, career contribution issues arise in long term marriages. *Marriage of Morrison* (1978) 20 Cal.3d 437
- iv. But not always. *Marriage of Sullivan* (1984) 37 Cal.3d 762 (Contribution to medical education must be considered even though marriage was just under 10 years. Entire marriage was devoted to H's medical education and training).
- v. May also be a factor for how long party receives spousal support

C. Court Must Consider Earning Capacity of Supporting Spouse, Too.

- a. Section 4320(c)
- b. Generally Based on His or Her Income
 - i. *IRMO Kochan* (2011) 193 CA4th 420: The family law court abuses its discretion when it bases an order for spousal support on a finding that a spouse's present earnings from long-term employment can be

increased by taking a retirement, and returning to work in an available, but different, position.

- c. No Specific Statutory Definition of Income for Spousal Support.
- D. To Determine the Earning Capacity of Either Party, Experts may be Retained with the Parties sharing the Costs or the Higher Earner can Pay
 - a. EC 730 expert re: income and cash flow available for support
 - b. FC 4331(a) vocational evaluation
- E. Generally Child Support Cases Re Determining Income Apply.
- F. But Court May Not Treat Income for Spousal Support and Income for Child Support the Same.
 - a. *Marriage of Blazer* (2009) 176 Cal.App.4th 1438
 - i. Court excluded from income fund used by husband to capitalize and vertically integrate his business.
 - b. *Marriage of Dietz* (2009) 176 Cal.App.4th 387
 - i. Income from assets awarded to supported spouse properly excluded from consideration on motion to modify spousal support.

IV. The Needs of the Parties Based on the Marital Standard of Living

A. Section 4320(d)

B. Ask Whether Each Spouse's Earning Capacity Plus Their Share of Marital Assets Is Sufficient to Achieve the Marital Standard of Living?

V. Assets and Obligations, Including Separate Property, of Each Spouse

- A. Section 4320(e)
- B. Includes Marital Assets Divided by Court or Parties in Judgment
- C. Includes Separate Property Assets of Each Spouse.
 - a. *Marriage of Terry* (2000) 80 Cal.App.4th 921
- D. Family Code section 4322 – if there are no minor children, and a party has or acquires a separate estate sufficient for that party's support, no spousal support required.
- E. Spouse May Not Purposefully Deplete Assets In Order to Continue to Receive Support
 - a. Court May Impute 10 year T bill rate of return on assets.
 - i. *Marriage of Ackerman* (2006) 146 Cal.App.4th 191
- F. Court Must Consider All Obligations Including Child Support.
- G. Possible Inconsistency in Treatment of Assets for First Permanent Spousal Support Order and Modification.
 - a. *Marriage of White, (1987)* 192 Cal.App.3d 1022
 - i. Income from pension awarded to supporting spouse deemed available for support (unless *White* waiver in Judgment)

- b. *Marriage of Dietz* (2009)
176 Cal.App.4th 387
 - i. Imputation of withdrawals from IRA that could be made without penalty deemed NOT available for support.

VI. Duration of Marriage

- A. Section 4320(f)
- B. Duration of marriage influences:
 - a. Need for support
 - b. Amount of support
 - c. Duration of order
- C. Post-dissolution support is awarded for as long as necessary for the supported spouse to become self-supporting – section 4320(l).
 - a. In short-term marriage, reasonable amount of time to become self-supporting is half the length of the marriage.
 - b. But it's not a bright line rule.
 - i. *Marriage of Huntington* (1992)
10nCal.App.4th 1513,
24 months of spousal support on a 42 month marriage with disparate assets affirmed
- D. Long-term marriage is 10 years under section 4320(l)
 - a. Generally, in a long-term marriage, court should not terminate jurisdiction to award spousal support
 - TIP:** Can set at zero to keep jurisdiction
 - i. *Marriage of Bukaty*

(1986) 180
Cal.App.3d 143, no
tacking of two marital
periods

- b. Although duration of marriage is important factor in addressing the duration of support, court should not base its decision solely on duration. It must consider all of the 4320 factors
 - i. *Marriage of Prietsch & Calhoun* (1987) 190 Cal.Ap.3d 645.
 - ii. *IRMO Chapman* (1987) 191 Cal.App.3rd 1308, when a trial court determines the amount and duration of spousal support it is not foreclosed from considering the length of, and orders flowing out of, a previous marriage between the same parties

VII. The Supported Party's Ability to Be Gainfully Employed Considering Best Interests of the Children

- A. Section 4320(g)
- B. Needs of Children Must Be Place Ahead of Gainful Employment for Supported Spouse.
- C. Age of Children Critical Factor in Determining Time Needed for and Ability of Supported Parent to Obtain Education and Training.
- D. Spouse Who Devoted Self to Raising Children Entitled to Spousal Support
 - a. *Marriage of Rosan* (1972) 24 Cal.App.3d 885 (not unreasonable for supported

spouse to defer seeking employment or training after separation because she had custody of two children, including one whose behavioral or emotional problems had required her to terminate her schooling and employment during the marriage).

- E. Supported Spouse's Need to Care for Adult Child Still Obtaining Child Support May Be Relevant
 - a. *Marriage of Drake* (1997) 53 Cal.App.4th 1139.

VIII. Age and Health of the Parties

- A. Section 4320(h)
- B. Support Cannot Be Based on Age and Health Alone
 - a. *Marriage of Wilson* (1988) 201 Cal.App.3d 913 – Spousal support can terminate after 58 months in marriage of almost 6 years even though 46 year old supporting spouse had the earning capacity to continue making support payments and 48 year old spouse was permanently disabled.
- C. Cases Support Various Views of Age
 - a. *Marriage of Dietz, supra* -
 - b. *Marriage of Reynolds* (1998) 63 Cal.App.4th 1373
- D. Cases Support Various Views of Health
 - a. *Marriage of Wilson, supra*
 - b. *Marriage of Heistermann* (1991) 234 Cal.App.3d 1195
 - c. *Marriage of Christie* (1994) 28 Cal.App.4th 849

- IX. History of Domestic Violence**
- A. Sections 4320(i) and 4320(m)
a. *Marriage of MacManus*(2010) 182 Cal.App.4th 330
- B. Section 4320 (i) - "Documented evidence of any history of domestic violence" including consideration of:
a. emotional distress resulting from domestic violence by the supporting party and
b. any history of violence against the supporting party or a child of one of the parties.
- C. Under section 4320(m) – Criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of spousal support in accordance with 4324.5 and 4325.
- D. Under section 4325, where there is a criminal conviction for domestic violence within 5 years prior to the filing of the dissolution or any time thereafter, there is a rebuttable presumption affecting the burden of proof that no award of either temporary or permanent spousal support to the abusive spouse shall be made.
a. Statute limiting use of misdemeanor no contest plea as admission did not bar use of ex-wife's misdemeanor domestic violence conviction to trigger presumption against spousal support [*RMO Priem* (2013) 214 CA4th 505]
b. Documented history of convicted spouse also being

a victim of domestic violence perpetrated by the other spouse may be considered in rebutting the presumption.

c. Presumption can be rebutted by a preponderance of the evidence.

E. Under section 4324.5, where there is a criminal conviction for a violent sexual felony and dissolution is filed within 5 years following conviction and anytime served in custody or on probation or parole

a. Spousal Support to the convicted party is prohibited

b. If economic circumstances warrant, attorney fees to be paid from community and in no circumstances should the convicted party's fees be paid from the injured party's separate property.

c. The date of separation is the date of the incident or earlier if circumstances warrant.

d. Injured party gets 100% of the community property interest in their own retirement.

F. Under section 4324, spouse convicted of attempted murder of the other spouse, no spousal support can be ordered for injured spouse. (This section has not been changed but is no longer referenced in section 4320.)

X. Tax Consequences of Support

A. Section 4320(j)

B. Spousal support is income to the

supported spouse.

- C. Spousal support is deductible from the supporting spouse's income.
NOTE: B & C may not apply if the parties reside in the same household
- D. You may use a computer program like Dissomaster to determine the tax consequences of your order.
- E. Court has discretion to make a family support order.
- F. There are ways for the court to make support nontaxable under federal law.
- G. Check federal law regarding tax consequences for same sex domestic partners

XI. The Balance of the Hardships to Each Party

- A. Section 4320(k)
- B. No Cases on This Factor
 - a. Reasoning of Court in *Marriage of Leni* (2006) 144 Cal.App.4th 1087 might be utilized. (Community funds expended to support a spouse's ailing parent were properly expended for community purposes.)
 - b. Cases addressing balancing the hardships for attorney's fees may be applicable.
 - i. *Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238
 - ii. *Marriage of Tharp* (2010) 188 Cal.App.4th 1295
- C. Section 4321(b) May Apply
 - a. Court may deny support out of the separate property of the "other party" if that party has custody of the children

and is supporting them.

D. Section 4324 - No spousal support to party convicted of attempted murder of other party

XII. Duration of Support

A. Family Code Section 4320(l)

a. The goal that the supported party shall be self-supporting within a reasonable period of time.
Long Term – Open ended
Short Term – Half the length of the marriage

B. Court Must Warn Parties That Support May Terminate.

a. *Marriage of Gavron* (1988)
203 Cal.App.3d 705

C. Supported Spouse Must Understand Court's Expectations Regarding Her/His Ability to Become Self-Supporting

a. *Marriage of Schmir* (2005)
134 Cal.App.4th 43

D. Court Has Broad Discretion to Fix the Duration of Support

a. *Marriage of Morrison, supra.*
b. *Marriage of Epstein* (1979)
24 Cal.3d 76
c. *Marriage of Smith, supra.*

E. Generally Court Has Discretion to Retain Jurisdiction Over Support

a. *Marriage of Beck* (1997) 57 Cal.App.4th 341
b. But may be abuse of discretion in short term marriage.

i. *Marriage of Hebring*
(1989) 207 Cal.App.3d 1260.

F. Must Be Rational Basis for Court's Decision to Terminate Support on a Date Certain – Evidence must show

- a. Supported spouse will be self-supporting
 - b. Supported spouse has failed to take steps to become self-supporting, or
 - c. Supported spouse has mismanaged estate
- G. State reasons on the record.
- a. *Marriage of Christie, supra.*

**XIII. Stepping Down Support –
Richmond Orders**

- A. Court in Permanent Support Order provides for a Reduction in Support After a Fixed Period of Time or Sets Support at Zero with Either Termination or Retention of Jurisdiction
 - a. *Marriage of Richmond* (1980) 105 Cal.App.3d 352
 - b. *Marriage of Prietsch & Calhoun* (1987) 190 Cal.App.3d 645
 - c. *Marriage of Shaughnessy* (2006) 139 Cal.App.4th 1225
- B. Court Must Justify the Step-Down by Articulating a Reasonable Basis for the Decision Based on the Specific Facts of the Case. (Must have evidence)
 - a. *Marriage of Drapeau* (2001) 93 Cal.App.4th 1086
 - b. *Marriage of Aninger* (1990) 220 Cal.App.3d 230
 - c. *Marriage of Paul* (1985) 173 Cal.App.3d 913
- C. If Court is Going to Issue a *Richmond* Order Must Give Adequate Notice to Supported Spouse
 - a. *Marriage of Gavron, supra.*
 - b. *Marriage of Schmir, supra.*
- D. Court Should Always Articulate the Factors That Justify the Reduction

a. *Marriage of West* (2007)
152 Cal.App.4th 240

b. *Marriage of Hoffmeister*
(1987) 191 Cal.App.3d 351

E. Terminating Jurisdiction Must Be Separately Justified on the Record

F. *IRMO Baker* (1992) 3 Cal.App.4th 491: the trial court did not abuse its discretion in refusing to fix a termination date or a future stepdown in the amount of spousal support, in view of its findings that during the marriage the wife was not expected to and did not work outside the home due to the life-style of the parties and the trial court's statement of decision appropriately demonstrated that a modification or termination of the order would be proper when economic conditions improved and the wife's real estate employment produced sufficient income.

G. *IRMO Khera & Sameer* (2012) 206 CA4th 1467: Supported party in a Richmond order must show changed circumstances such as "unrealized expectations" that warrants an extension of support, but a voluntary decision to pursue a doctoral degree rather than going to work full time is not a change in circumstances that warrants an extension of support.

XIV. Last Factor – 4320(n) – Be Just

XV. Modification of Permanent Support Order

A. Court Has Broad Discretion to Modify a Support Order

a. *Marriage of Kupinger* (1975)
48 CA 3d 628

B. Motion May Be Filed By Either Party But Moving Party Must Show Material Change of Circumstances

- a. *Marriage of Gavron, supra.*; *IRMO McCann* (1996) 41 CAth 978
- b. "Circumstances" Are Section 4320 Factors
 - i. *Marriage of Sammut* (1980) 103 Cal.App.3d 557
- c. Change of Circumstances Requirement Applies to Court Orders and MSAs.
 - i. *Marriage of Hentz* (1976) 57 Cal.App.3d 899; *IRMO West* (2007) 152 CA4th 240; *IRMO Kacik* (2009) 179 CA4th 410
 - ii. *IRMO Hibbard* (2013) 212 CA4th 1007 - A trial court's discretion to modify a spousal support order is constrained by the terms of the marital settlement agreement, and the court may not simply reevaluate the spousal support award.
- d. Once Court Finds Change of Circumstances, Court Must Re-Evaluate Section 4320 Factors
 - i. Cannot reconsider circumstances that have not changed since the prior order. *IRMO Farrell* (1985) 171 CA3d 695.
- e. For upward modification,

must show prior order insufficient to meet needs of supported spouse based on the marital standard of living or that reasonable cost of satisfying needs has increased.

- i. *Marriage of Smith*, (1990) 225 CA3d 469.

C. Order Must Be Based on Evidence Not Mere Hope or Speculative Expectations

- a. *Marriage of Rosan, supra.*
- b. *Marriage of Richmond, supra.*

D. Terms of Marital Settlement Agreement Must Be Given Effect.

- a. *Marriage of Aninger, supra.*
- b. Court can take extrinsic evidence on meaning of parties' agreement.
 - i. *Marriage of Paul, supra.*

- c. Trial court is bound to give effect to the intent and reasonable expectations of the parties as expressed in the agreement. *IRMO Deitz* (2009) 176 CA 4th 387.

- d. Includes provisions regarding termination of support and/or jurisdiction and whether support is or is not modifiable

E. Court Can Consider:

- a. Supported Spouse Imprudently Investing or Squandering Assets.
 - i. *Marriage of West, supra.*
- b. Decision to Abandon a Career
 - i. *Marriage of West, supra.*

- c. Failure to Become Self-Supporting
 - i. *Marriage of Shaughnessy, supra*
- F. Loss of Child Support May Be a Change of Circumstances
 - a. Family Code section 4326 (repealed 1/1/2014)
 - b. Termination of Child Support within "expectations of original order" so NOT Change of Circumstances
IRMO Lautsbaugh (1999)72 CA 4th 1131
 - c. Pre Repeal of Family Code section 4326
 - i. Motion to modify Spousal Support Must Be Filed No Later Than 6 Months From the Date the Child Support Terminates
- G. Cohabitation
 - a. Section 4323
 - b. Cohabitation with a Person of the Opposite Sex, Creates a Rebuttable Presumption of Decreased Need for Support.
 - c. Cohabitation Does Not Require Holding Oneself Out to be Husband and Wife.
 - d. If Cohabitation Ceases, That May Be a Material Change of Circumstance.

XVI. Termination of Jurisdiction

- A. In Long-term Marriage, Reservation of Jurisdiction is the Norm.
 - a. Burden of Proof is on Party Seeking to Terminate
- B. Abuse of Discretion to Terminate

Jurisdiction Absent Clear Factual Basis

- a. *Marriage of Baker* (1992) 3 Cal.App.4th 491
- b. *Marriage of Richmond, supra.*

- C. Termination of Jurisdiction Disfavored Absent Evidence, not Speculation, of Ability to be Self-Supporting on Date of Termination
 - a. *Marriage of Vomacka, supra*
- D. No Termination of Jurisdiction for Failure to Become Self-Supporting Without Gavron Warning
- E. Language regarding Terminating Jurisdiction must be Unambiguous or Jurisdiction is Retained.

XVII. Findings & Decision

- A. Make finding re MSL (FC § 4332).
- B. Make findings on each 4320 Factor either in writing or on the record.
- C. Modifications require consideration of all 4320 factors, not just the factors that have changed.
- D. Set amount and duration – duration Includes duration of jurisdiction even if order is zero.
- E. Statement of Decision mandatory if requested.