Dawn Gray Presents

The Fundamentals of Temporary Spousal Support

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The Goals Of This Course

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2. To discuss the purpose of temporary spousal support orders.

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4. To summarize and discuss the limitations on the court's ability to order temporary spousal support.

5. To discuss when orders for temporary spousal support can be modified, and the standard for modification.

6. To learn how temporary spousal support orders interact with post-separation community debt payments.

7. To discuss the impact of domestic violence convictions on temporary spousal support orders.

Some Questions We Will Answer

1. When are orders for temporary spousal support appropriate?

2. What facts might result in denial of a party's request for temporary spousal support?

3. Are temporary spousal support orders typically higher or lower than permanent spousal support orders?

4. What if the opposing spouse requests temporary spousal support but there are enough community funds for her to pay her own expenses?

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6. Can the court change the amount of temporary support ordered if it is not enough?

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The Fundamentals of Temporary Spousal Support

I. Statutory Authority for Temporary Spousal Support Awards

Family Code §3600 is the statutory authority for temporary spousal support awards. That section provides:

> During the pendency of any proceeding for dissolution of marriage or for legal separation of the parties or under Division 8 (commencing with Section 3000) (custody of children) or in any proceeding where there is at issue the support of a minor child or a child for whom support is authorized under Section 3901 or 3910, the court may order (a) either spouse to pay any amount that is necessary for the support of the other spouse, consistent with the requirements of subdivisions (i) and (m) of Section 4320 and Section 4325, or (b) either or both parents to pay any amount necessary for the support of the child, as the case may be.

II. The Purpose of Temporary Spousal Support

The purpose of temporary spousal support is to maintain the family's financial status quo as of the date of separation pending the division of the community estate and determination of more permanent support. "Temporary spousal support is utilized to maintain the living conditions and standards of the parties in as close to the status quo position as possible pending trial and the division of their assets and obligations." *Marriage of Burlini* (1983) 143 Cal.App.3d 65, 191 Cal.Rptr. 541.

> "A *pendente lite* order made pursuant to section 3600 is 'not an order made after or in conjunction with the determination of the [dissolution] action on its merits. [Citation.] Indeed its purpose [is] not to determine the merits at all but solely to preserve the family and the wife's separate property intact until the court eventually determine[s] the case on the merits.'" *Marriage of Askmo* (2000) 85

Cal.App.4th 1032, 1038, 102 Cal.Rptr.2d 662.

Because the purposes of temporary and permanent spousal support are different, and because of the increased costs of maintaining two households immediately after separation and while the parties are sorting out their financial issues, temporary spousal support orders will typically be higher than permanent spousal support orders. In *Marriage of Schulze* (1997) 60 Cal.App.4th 519, 525, 70 Cal.Rptr.2d 488, the Fourth District held that

> "(t)he purpose of temporary spousal support is to maintain the status quo as much as possible pending trial. (*In re Marriage of Olson* (1993) 14 Cal.App.4th 1, 5-6, fn. 3 [17 Cal.Rptr.2d 480]; *In re Marriage of Winter* (1992) 7 Cal.App.4th 1926, 1932 [10 Cal.Rptr.2d 225] ['temporary spousal support "is utilized to maintain the living conditions and standards of the parties in as close to the status quo position as possible pending trial and the division of their assets and obligations"'].) By contrast, permanent spousal support is supposed to reflect a complex variety of factors established by statute and legislatively committed to the trial judge's discretion….
>
> Furthermore, not only are the legal bases for the two kinds of support different, there is also a disparity in practice. Because dissolution of marriage is, in the mathematical sense, a negative-sum game where each party will not have the same access to the whole of the marital property he or she had during the marriage, permanent support orders will usually be lower than temporary orders."

A temporary spousal support order is made independently of any determination of property issues and the entitlement to permanent spousal support.

> "A temporary order is intended to allow the supported spouse and children to live in their 'accustomed manner' pending the ultimate disposition of the action. (*In re Marriage of Askmo* (2000) 85 Cal.App.4th 1032, 1038, 102 Cal.Rptr.2d 662.) 'The order is based on need and is not an adjudication of any of the issues in the litigation.' (*Ibid.*)" *Marriage of Gruen* (2011) 191 Cal.App.4th 627, 637, 120 Cal.Rptr.3d 184.

III. The Factors Relevant to Determining Temporary Support

Temporary spousal support is not determined by using the Family Code §4320's statutory factors that the court is required to consider when determining permanent support. The trial court has greater discretion in determining requests for temporary spousal support than requests for permanent spousal support.

> "Given the variety of purposes to be served by spousal support, it follows that the trial court must be invested with broad discretion in fashioning such awards. As we explained above, the court's discretion in setting permanent support is constrained by the enumerated statutory factors. By contrast, there are no explicit statutory standards governing temporary support." *Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 312, 111 Cal.Rptr.2d 755.

In making a temporary spousal support award, the trial court must consider only two things: one party's need for support and the other party's ability to pay it.

> "The trial court has discretion to award spousal support pending a final judgment in the dissolution proceeding. The amount of support lies within the trial court's sole discretion based on the needs of the parties and their ability to pay." *Marriage of Czapar* (1991) 232 Cal.App.3d 1308, 285 Cal.Rptr. 479.

"Awards of temporary spousal support rest within the broad discretion of the trial court and may be ordered in 'any amount' (§3600) subject only to the moving party's needs and the other party's ability to pay." *Marriage of Murray* (2002) 101 Cal.App.4th 581, 594, 124 Cal.Rptr.2d 342.

A. The burden of proof

As in any motion, the party seeking the award of temporary support bears the burden of proof of her need and the other spouse's ability to pay. "On the wife's application for such an award there must be a *prima facie* showing of three things: The existence of the marriage, the needs of the wife, and the ability of the husband to pay." *Sweeley v. Sweeley* (1946) 28 Cal.2d 389, 390, 170 P.2d 469. "Emma has met

all other requirements for an award of temporary spousal support and attorney fees. She demonstrated her need and Rodney's ability to pay." *Marriage of Stich* (1985) 169 Cal.App.3d 64, 74, 214 Cal.Rptr. 919.

B. "Need" for temporary spousal support purposes

"A supported spouse's need is an essential element in determining entitlement to support independent of the other spouse's ability to pay." *Marriage of Beust* (1994) 23 Cal.App.4th 24, 30, 28 Cal.Rptr.2d 201.

> "The manifest purposes of *pendente lite* allowances to a wife are to enable her to live in her accustomed manner pending the disposition of the action and to provide her with whatever is needed by her to litigate properly her side of the controversy. If she possesses independent means sufficient for these purposes the allowances should not be granted. However, she is not required first to impair the capital of her separate estate. ... **Thus, the general rule is that the propriety of *pendente lite* allowances to a wife turns primarily upon the sufficiency of her showing of need for them**." *Loeb v. Loeb* (1948) 84 Cal.App.2d 141, 144-45, 190 P.2d 246, 248 (citations omitted, emphasis added).

The establishment of "need" for temporary support purposes is generally shown by a disparity between available income and reasonable and necessary living expenses. That need can include discretionary income and funds for savings or investments. In *Marriage of Winter* (1992) 7 Cal.App.4th 1926, 10 Cal.Rptr.2d 225, the issue was temporary spousal support after a 22-year marriage. The parties stipulated to temporary support for 16 months. At the hearing the next year, W requested temporary support based on marital *income*, and H requested that the court base support on *expenses*, which were apparently much less than income.

> "Wife … submitted that 'in order to maintain the status quo of both parties pending the resolution of the entire dissolution action, the Court must consider the very substantial investment power that existed in a marriage that had an adjusted gross income of [$313,233]

> in 1989 but spent only [$31,500] on community living expenses. Wife's position is that she is absolutely entitled to continue the investment power that existed during the marriage pending the resolution of the property division.' Husband's trial brief requested an order for temporary support 'consistent with wife's standard of living and expenses during marriage, taking into account her passive income from community assets and her earnings.'"

The trial court ordered temporary support based on income, not expenses.

> "The court amplified its reasoning as follows: 'the supported spouse should have the same opportunity to have a certain portion of support payable to her that would allow her to continue the lifestyle that she had, at least on a temporary basis, of having some discretionary income for the purposes of investing, just as husband would have the right to utilize a portion of the money retained by him for investing, assuming he hasn't changed his particular lifestyle. Also, I think that does allow the parties a certain parity in terms of their ability to proceed with the litigation and complete the legal matters relating to the trial of the dissolution case. [¶] ... taking into account the fact that the parties during the marriage spent a portion of their money that they could have spent on themselves or taking trips in investing, I think that's part of the standard of living that the court wishes to allow."

H appealed, but the First District affirmed.

> "The order for temporary support in this case was designed to preserve the status quo between the parties, and Husband does not contend that it operates otherwise. The 'status quo' in this case, where the parties lived very modestly in comparison to their means, included substantial funds for saving and investment. Husband concedes that if this were a case where the parties had 'enjoyed an expensive lifestyle.... the Court could find that a just allowance would be one sufficient to enable the wife to continue enjoyment of luxuries which had become "necessities."' We agree with the trial court that a comparable allowance is equally appropriate here. We note that Husband does not contend that he cannot afford to pay the support ordered, and we fail to see why Wife should be deprived of her accustomed lifestyle just because it involved the purchase of stocks

and bonds rather than fur coats.

> We also perceive no problem with the trial court's use of standard guidelines, based solely on income, for temporary support. The use of such guidelines 'should be encouraged to help lawyers and litigants predict more accurately what temporary support order would be issued if the case proceeded to a contested hearing.... They promote consistency in the temporary orders issued in a department with a busy domestic relations motion calendar, and are especially valuable in achieving comparable orders under similar financial facts....' (*In re Marriage of Burlini, supra*, 143 Cal.App.3d at p. 69, 191 Cal.Rptr. 541.) We find no 'unusual facts or circumstances' that would preclude the use of the guidelines in this case. (*Id*. at p. 70, 191 Cal.Rptr. 541 [citing tax considerations and unusual expenses].) The parties here appear to have been 'unusually' frugal, but that does not militate against the use of guidelines to determine temporary support based on their relative incomes. Husband evidently has the means to make the payments specified by the guidelines, and those payments will preserve the status quo. If the parties were still together, then Wife would still be enjoying the benefit of Husband's substantially higher income." *Winter*, at 1932, 1933.

More recently, in *Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1329, 16 Cal.Rptr.3d 489, the Fourth District said that

> "(t)he court clearly stated it was basing its support order on maintaining the status quo, which is the benchmark for temporary spousal support. …
> …
> In addition, Alan's specific claims the total order of temporary child and spousal support was improper because it exceeded the family's needs and the status quo, and the court failed to properly discount the expenses at this time are without merit. Alan ignores the evidence in the record concerning the parties elaborate upper class lifestyle, which included substantial amounts of money to invest and save each year, and the fact that a court is not limited by a supported spouse's living expense needs when the parties' marital standard of living included savings and investments."

C. "Ability to pay" temporary spousal support

A spouse seeking a temporary spousal support award must at least make a *prima facie* case of the other spouse's ability to pay the requested amount. She can make that showing by presenting evidence of the parties' incomes, assets and their accustomed lifestyle.

> "… Ability to pay encompasses far more than the income of the spouse from whom temporary support is sought; investments and other assets may be used for both temporary spousal support and attorney fees *pendente lite*. (*Rosenthal v. Rosenthal* (1961) 197 Cal.App.2d 289, 299, 17 Cal.Rptr. 186; *In re Marriage of Stich* (1985) 169 Cal.App.3d 64, 74, 214 Cal.Rptr. 919.)
>
> In the instant case, the trial court made the specific and unequivocal finding that husband 'has the ability to pay' based on the 'extensive assets and non-salary income at his disposal' which 'have been placed by him in the control of others acting for his benefit [and] have a value in excess of $20,000,000." It was proper for the court to look to assets controlled by husband, other than income, as a basis for the award. The evidence supports the trial court's finding of husband's ability to pay." *Marriage of Dick* (1993) 15 Cal.App.4th 144, 159-60, 18 Cal.Rptr.2d 743 (some citations omitted).

Many factors go into the temporary spousal support mix.

> "Subject only to the general 'need' and 'the ability to pay,' the amount of a temporary spousal support award lies within the court's sound discretion, which will only be reversed on appeal on a showing of clear abuse of discretion. (*In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 594, 124 Cal.Rptr.2d 342.) 'Ability to pay encompasses far more than the income of the spouse from whom temporary support is sought; investments and other assets may be used for ... temporary spousal support.... [Citations.]' (*Dick, supra*, 15 Cal.App.4th at p. 159, 18 Cal.Rptr.2d 743.) Trial courts may properly look to the parties' accustomed marital lifestyle as the main basis for a temporary support order. (§ 3600; *Winter, supra*, 7 Cal.App.4th at p. 1932, 10 Cal.Rptr.2d 225.)

> Moreover, even if a court does not have its own local rules or guidelines that provide "standardized temporary spousal support schedules" that mark appropriate awards for spousal support based solely on the parties' incomes with adjustments for any child support, the use of such guidelines has been held to be a valuable tool in an aid to calculating temporary support. (*Winter, supra*, 7 Cal.App.4th at p. 1933, 10 Cal.Rptr.2d 225.) Further, even where standardized local schedules have exceeded a party's stated living expenses because he or she has cut back or is living frugally, courts have held the use of such guidelines for temporary spousal support proper to maintain the marital lifestyle." *Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1327-28, 16 Cal.Rptr.3d 489 (emphasis added).

As discussed in more detail below, however, this does not mean that a spouse in need of temporary spousal support must use her share of the community estate to support herself, where the other spouse has the ability to pay support from his income. The supporting spouse *cannot* satisfy his support obligation out of community funds, half of which belong to the support spouse. *Marriage of Williamson* (2014) 226 Cal.App.4th 1303, 172 Cal.Rptr.3d 699.

D. Is there a ceiling on temporary support awards?

If the purpose of temporary spousal support is to maintain the parties at the date of separation status quo, does that mean that the separation date status quo is the upward limit on any temporary spousal support award? In other words, can the court award temporary spousal support in an amount that will enable the supported spouse to live at a higher standard than she did as of the date of separation? Perhaps in some cases, but the date of separation status quo is a general measure, not a fixed ceiling.

> "The court is not restricted by any set of statutory guidelines in fixing a temporary spousal support amount. Rather, in exercising its broad discretion, the court may properly consider the 'big picture' concerning the parties assets and income available for support in light

> of the marriage standard of living." *Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1327, 16 Cal.Rptr.3d 489 (citation omitted).

The trial court has the authority to order sufficient support to maintain a level of discretionary income if that was the parties' situation as of separation. "(A) court is not limited by a supported spouse's living expense needs when the parties' marital standard of living included savings and investments." *Wittgrove*, at 1329.

IV. Imputing Income for Temporary Spousal Support Purposes

A trial court has the ability to use the ability to earn, rather than actual earnings, in determining temporary spousal support. However, this is a very discretionary determination, and the burden is on the spouse seeking to impute an earning capacity to the other spouse to demonstrate that imputation is appropriate. In *Marriage of Regnery* (1989) 214 Cal.App.3d 1367, 263 Cal.Rptr. 243, the Fourth District announced a three-part test for determining earning capacity:

> "Earning capacity is composed of (1) the ability to work including such factors as age, occupation, skills, education, health, background, work experience and qualifications; (2) the willingness to work exemplified through good faith efforts, due diligence and meaningful attempts to secure employment; and (3) an opportunity to work which means an employer who is willing to hire.
>
> ... When the ability to work or the opportunity to work is lacking, earning capacity is absent and application of the standard is inappropriate." *Regnery*, at 1372, 1373.

The court can use earning capacity in lieu of actual earnings, but that rarely will happen at an initial temporary spousal support hearing unless the parties have been separated for a lengthy period. If the status quo as of the date of separation was that one party was unemployed, particularly if he or she was caring for the parties' children, it is unlikely that the court would impute income; rather, it may order the unemployed party to seek work or engage in training aimed at re-entry

into the workforce. Where a party has not worked for some time, it also may be difficult for the party requesting imputation to meet his burden of showing both ability and opportunity to work. "Alan's assertions that … the temporary spousal amount is incorrect because the court failed to properly impute additional income to Perri fails because he did not present any competent evidence that Perri had both an ability and an opportunity to earn the attributed income he sought to impute to her." *Wittgrove, supra*, at 1329.

On the other hand, the court cannot require a party to work excessive hours to provide income or lower need for support purposes. Therefore, the court cannot impute income at a level consistent with an excessive work regimen. In *Marriage of Simpson* (1992) 4 Cal.4th 225, 14 Cal.Rptr.2d 411, H had worked two jobs during marriage to earn additional income, but lowered his work hours after separation. The trial court based support on H's earning capacity rather than his actual earnings at the time of trial, finding that he had "voluntary reduced his ability to earn during the proceedings which was unjustified and a purposeful reduction in his income to support the minor child and [W]." The California Supreme Court granted review, and unanimously reversed and remanded. It said that

> "(t)he issue we must determine in this case is whether, when a supporting spouse has worked an abnormally high number of hours during the marriage in order to increase the family's income, the trial court in determining the supporting spouse's 'earning capacity' should look to the income generated by the unusually rigorous work regimen or, instead, to the income which the supporting spouse would be capable of earning on the basis of a 'normal' (i.e., objectively reasonable) work schedule. As explained, we conclude that an award of support following dissolution of a marriage generally should not penalize for his or her efforts a supporting spouse who voluntarily has undertaken an extraordinary rigorous work regimen during the marriage, by locking that spouse into an excessively onerous work

schedule." *Simpson*, at 227, 228.

In *Marriage of Lim and Carrasco* (2013) 214 Cal.App.4th 768, 775, 154 Cal.Rptr.3d 179, H's main argument on appeal was "that the trial court erred in calculating temporary spousal support and child support on the basis of Lim's actual income as of November 28, 2011, when she began working an 80 percent schedule, rather than her greater earning capacity as a full-time law firm partner…." In affirming the trial court's order, the Sixth District said that

> "(w)e are not convinced by Carrasco's argument that the trial court abused its discretion in failing to impute income to Lim based on her earning capacity of $27,595.26 per month as a full-time law firm partner. The relevant authorities do not support the proposition that the supporting spouse's income must be based upon an earning capacity that has been demonstrated by an onerous, excessive work regimen.
> …
> The evidence showed that Lim's income remained high, at $22,076.00 per month, even working an 80 percent schedule as a law firm partner. There was nothing to suggest that Lim had divested herself of her earning capacity at the expense of Carrasco or their children. Further, Lim's evidence, as stated in her offer of proof, was that a reduced work schedule would allow her more time to care for her young children. The trial court did not err in finding that Lim's reduced work schedule was in the best interest of the children, since 'sometimes "the 'best interests of the children' are promoted when parents [reduce their work hours] so as to be able to spend more time with their children." [Citation.]' (*In re Marriage of Mosley* 165 Cal.App.4th 1375, 1390, 82 Cal.Rptr.3d 497); see also *In re Marriage of Bardzik* (2008) 165 Cal.App.4th 1291, 1312–1313, 83 Cal.Rptr.3d 72 [§4058 does not require 'squeeze-the-last-drop workaholism" from either parent].)
>
> Thus, we determine that Carrasco has not shown that the trial court abused its discretion when the court calculated Lim's temporary spousal support and child support obligations on the basis of her reduced income from her 80 percent work schedule, rather than her

> earning capacity as a full-time law firm partner with an extraordinary work regimen. The trial court's determination was not arbitrary or capricious and was consistent with the California Supreme Court's instruction in *Simpson* that earning capacity generally should be based upon an objectively reasonable work regimen at the time support is calculated." *Lim*, at 777, 778.

Also, when the issue is both child support and temporary spousal support payable to a custodial parent, imputation will be further complicated by the limitation on the court's discretion. It can only impute income to a parent where it finds that doing so is in the child's best interests, and it is rarely in a child's best interests to impute income to the recipient parent, because that will have the effect of lowering the overall amount of support available to the child.

In *Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 111 Cal.Rptr.2d 755, The Sixth District remanded for reconsideration of various orders regarding child and spousal support. Among them was the trial court's decision to impute income to W, the support recipient. The panel held that

> "no authority permits a court to impute earning capacity to a parent unless doing so is in the best interests of the children. In this case, the trial court made no express or implied finding that imputing earning capacity to [W] would be in the children's best interest. We find it difficult to image how the children's interests are served by doing so, since the imputation of earning capacity to [W] effectively reduces overall monetary support for the children." Emphasis added.

In Footnote 19, the *Cheriton* court cited two prior cases in which the courts had imputed income to a recipient parent but noted that in neither was there any explanation of "how the reduced support payment was in the best interests of the children."

In *Marriage of McHugh* (2014) 231 Cal.App.4th 1238, 180 Cal.Rptr.3d 448, H and W separated in 2009 and W brought a motion for temporary support orders, which the court entered. It ordered H to pay $2,227 in child support and $4,773 in spousal support, basing those figures on his monthly income of $24,159 as a salesman and W's lack of any earned income. In early 2010, H brought a motion requesting a support reduction claiming that his income, which was based entirely on commissions, had been drastically reduced. He also argued that the court should require W to find a job. The court granted the motion in March of 2011 and reduced his support payment to $1,275 in child support and $2,840 in spousal support.

Both parties brought modification motions in August of 2011. W asked the court to reinstate the 2009 order, presenting testimony from H's former employer's Vice President, who

> "explained Charles was one of Amcor's top salesmen earning between $137,000 and $597,000 per year during the period 2003 to 2009. In 2009, Charles asked Amcor to help him reduce his income because he was about to become embroiled in a bitter divorce and wanted to minimize his earnings. According to Sarnecki, Amcor told Charles it could reassign him to a lower paying position, but it would not cooperate with any of his other 'more aggressive approach[es],' such as diverting some of his compensation. Charles therefore remained in the same position and his compensation arrangements did not change.
>
> In the months following these discussions, Sarnecki testified Amcor noticed a significant drop in the amount of sales Charles generated. Charles explained the decrease was due to the downturn in the economy and the lack of competitiveness in some of Amcor's bids. Sarnecki explained Amcor initially believed Charles's explanation because of his past faithful service, but it began investigating him and his accounts after one of Charles's customers asked Amcor about the products it had purchased and Amcor's records showed the customer had not purchased anything in a couple of years.

> Sarnecki further testified Amcor's investigators discovered Charles's father operated a competing business, Value Added Packaging & Printing, Inc. (Value Added), and the investigators believed Charles had diverted some of Amcor's business to his father's business. The investigators also believed Charles used one of Amcor's other salesmen to close sales with some of Charles's customers, and then Charles and the other salesman would share the commission.
>
> In March 2011, Sarnecki and other Amcor executives met with Charles to discuss the investigators' findings. During this meeting, Charles admitted he had done a lot of ''stupid stuff'' in trying to reduce his income and settle his divorce, including diverting business to Value Added and entering into improper commission sharing agreements with another salesman on at least three accounts. Sarnecki further testified that Charles admitted what he did ''wasn't right,'' showed remorse for his actions, and wanted to 'come clean' so he could keep his job.
>
> Based on Charles's admissions and his many years of successful service, Amcor offered to retain Charles if he satisfied three conditions: (1) he fully disclosed all of his misconduct; (2) he paid Amcor restitution for the business he diverted; and (3) he agreed to a 'last chance' employment agreement. Sarnecki thought Charles would accept these conditions because he appeared remorseful, but Charles refused to pay restitution or disclose the business he diverted. Instead, he told Sarnecki and the other executives, ' . . . I can't tell you . . . I know it was wrong . . . You're going to get mad at me. . . .' When Charles refused to cooperate and agree to these conditions, Amcor terminated Charles's employment and filed a lawsuit against him, his father, and Value Added to recover the diverted income."

The trial court denied W's request to set aside the prior order and reinstate the 2009 support order, holding that the only ground upon which it could do that would be if H had misrepresented his income to the court. "Without evidence showing a specific income that differed from the court's earlier findings, the court concluded it could not grant Connie's motion." However, it held that H had the

opportunity to continue working for AMCOR if he had met its requirements, that he lost his job due to non-cooperation and

> "'that his misconduct was part and parcel of his attempt to lower Child and Spousal Support. Therefore, the Court finds, termination from AMCOR is deemed an unwillingness to work. (*In re Marriage of Regenery* (1989) 214 Cal. App. 3d 1367) The Court finds that this order is in the best interest of the child. [¶] The Court's other findings are as indicated in the Dissomaster computer printout . . . attached to this order. This Child Support order commences August 1, 2012.'"
>
> The computer printout attached to the court's order reveals the court did not use the amount of Charles's current income at his new job, but imputed monthly income to Charles at the same level he earned at Amcor when the court made its original support order in November 2009, i.e., $24,159. The court also imputed monthly income to Connie in the amount of $8,333. Based on these findings, the court ordered Charles to pay monthly child support of $2,047, nearly an $800 per month increase from the March 2011 support order and just $180 less per month than the original November 2009 support order. The court's order did not specify an amount of spousal support."

On H's appeal, the Fourth District affirmed, holding that the trial court properly imputed income to him. It discussed which party had the burden of proof of the elements of imputation, noting that "(t)he parent seeking to impute income must show that the other parent has the ability or qualifications to perform a job paying the income to be imputed and the opportunity to obtain that job, i.e., an available position. The parent seeking to impute income, however, does not bear the burden to show the other parent would have obtained the job if he or she applied."

The panel said that because H did not request a statement of decision, he "waived any objection the trial court did not make necessary findings" and that it therefore would "imply all findings necessary to support the trial court's order denying Charles's request to reduce his support obligations and granting Connie's request

to increase his support obligations." It said that

> "(a)s the moving party seeking to modify the existing support order, Charles bore the burden to show not only that he lost his Amcor job, but also that he lacked the ability and opportunity to keep that job and continue earning at the same level. (*Bardzik*, *supra*, 165 Cal.App.4th at p. 1304; *Eggers*, *supra*, 131 Cal.App.4th at p. 701.) Here, it is undisputed Amcor fired Charles, but it also is undisputed Amcor gave Charles the opportunity to keep his job if he satisfied three conditions: (1) fully disclosing all information about his improper conduct; (2) paying Amcor restitution for the business he diverted; and (3) entering into a last chance employment agreement with Amcor. Accordingly, to obtain an order reducing his support obligations it was Charles's burden to present evidence showing he could not satisfy these conditions, and therefore did not have the opportunity to keep his job."

It held that he had not met this burden. It also held that Connie had established that Charles had both the ability and the opportunity to keep his job at AMCOR; she had "satisfied that burden by submitting substantial, undisputed evidence showing Charles excelled at that job for most of their 17-year marriage and Amcor offered to allow Charles to keep his job if he fully disclosed his wrongdoings, paid Amcor restitution for the business he diverted, and entered into a last chance employment agreement." It then said that

> "(a)s explained above, the parent seeking to impute income to the other parent need only show the other parent had the ability to perform the job earning the income to be imputed and the job was available. The parent to whom the income would be imputed bears the burden to show he or she could not secure the job despite reasonable efforts. (*LaBass & Munsee*, *supra*, 56 Cal.App.4th at p. 1339; see *Bardzik*, *supra*, 165 Cal.App.4th at pp. 1305-1306.) We explained the rationale for putting this burden on the parent to whom the income would be imputed in *Bardzik*: 'This rule is grounded in the commonsense proposition that you can lead someone to a want ad but you can't make them apply for the job. . . . Readers need only use

> a little imagination to think of all the ways that a parent with both ability to do a job and the opportunity to get it could subtly sabotage a job application or interview.' (*Bardzik*, at p. 1305.)
>
> Here, it takes little imagination to think of the many ways Charles could sabotage Amcor's offer to allow him to keep his job if he satisfied Amcor's conditions. For example, as the trial court impliedly found, he could simply refuse to provide the information Amcor sought and refuse to pay restitution. Whether Charles could satisfy Amcor's conditions lay uniquely within his knowledge and control. It therefore is reasonable that Charles should bear the burden to show he could not satisfy the conditions despite reasonable efforts. (See *Bardzik*, *supra*, 165 Cal.App.4th at pp. 1305-1306; *LaBass & Munsee*, *supra*, 56 Cal.App.4th at p. 1339.)
>
> As explained above, substantial evidence supports the trial court's implied finding Charles could have provided the information Amcor requested, but refused to provide it. As for the restitution condition, Charles failed to provide any evidence showing he lacked the financial resources to pay Amcor restitution. Accordingly, Charles failed to show he could not satisfy Amcor's conditions and substantial evidence supports the trial court's implied finding Charles had the ability and opportunity to keep his job."

Finally, the panel held that the trial court had the discretion to impute income to Charles at the level of his former earnings without evidence that he currently could earn that amount.

> "Here, we conclude the evidence supports the trial court's decision to treat Charles's termination as voluntary and impute income to him at his November 2009 earnings level. Charles did not simply exercise poor judgment on a collateral matter that resulted in his termination; rather, he engaged in misconduct with the intent to avoid his child support obligations and refused to accept Amcor's reasonable conditions that would have allowed him to keep his well-paying job despite his malfeasance. In deciding to impute income to Charles, the trial court found he had the opportunity to keep his job, Amcor fired him because he refused to cooperate with its investigation into his diversion of business and improper commission sharing agreements,

> his misconduct 'was part and parcel of his attempt to lower Child and Spousal Support,' and imputing income to Charles was in the child's best interests. Substantial evidence supports each of these findings."

V. The Court Can Enter A Retroactive *Initial* Award

Although there are restrictions on retroactive modification of temporary spousal support awards (discussed below), the court has the authority to enter an initial temporary support award retroactively back to the date on which the initial pleading requesting support was filed. That means that if a party requested spousal support in the petition, the court can enter an initial award back to the filing date of the petition, regardless of when the initial request was filed.

That was the holding of *Marriage of Dick* (1993) 15 Cal.App.4th 144, 18 Cal.Rptr.2d 743. In that case, Wife filed the dissolution petition on October 26, 1988, requesting support and fees. She amended the petition on November 10, 1988, and served Husband by publication. Husband responded on July 27, 1989. The court bifurcated the issue of status, which delayed a decision on support. He filed an OSC on support issues on February 9, 1990, declaring that he had no monthly disposable income, and Wife responded with an OSC of her own, filed on March 8, 1990. Apparently, the temporary support issue never came to a hearing. After trial, which ended on December 10, 1990, the court awarded Wife $35,000 per month *pendente lite* spousal support retroactive to January 1, 1989. Husband appealed, but the Second District affirmed.

The panel held that then-current Civil Code §4358 (now, Family Code §3600) authorized an award of temporary support based on only a showing of need and ability to pay. Holding that substantial evidence supported the trial court's finding of Husband's ability to pay and Wife's need for support, it turned to the issue of

retroactivity, essentially holding that no law precluded what the trial court had done. It reasoned that

> "(t)he trial court determined that jurisdiction to award temporary spousal support existed from October 26, 1988, the date on which wife filed her petition for legal separation. In that petition she requested spousal support although she did not file her formal order to show cause until March 8, 1990. Husband contends that she was not entitled to temporary spousal support until the filing of the order to show cause. Husband also claims that the order was a mistake, but there was no mistake; the court intended precisely what the written order set forth, spousal support was to be retroactive to January 1, 1989, approximately two months after wife requested support in her petition for legal separation.
>
> In support of his argument husband cites us to Civil Code section 4801, subdivision (a), which governs permanent spousal support, rather than temporary spousal support. Section 4801, subdivision (a) provides in part: 'Any order for spousal support may be made retroactive to the date of filing of the notice of motion or order to show cause therefor, or to any subsequent date.' (Civ.Code, §4801, subd. (a).) Husband maintains that this language also encompasses temporary support orders made under Civil Code section 4357, even though that section is neither mentioned in section 4801, nor does similar language appear in section 4357.
>
> Awards of temporary spousal support do not serve the same purpose, nor are they governed by the same procedures, as awards for permanent spousal support. ... Moreover, it is an accepted rule of statutory construction that '[w]hen the Legislature "has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded. [Citations.]"' (*Pasadena Police Officers Assn. v. City Of Pasadena* (1990) 51 Cal.3d 564, 576, 273 Cal.Rptr. 584, 797 P.2d 608.) If the Legislature had wanted to limit the retroactivity of temporary spousal awards to the date on which the order to show cause was filed, as it had in section 4801, it could have expressly so provided, but since it did not, we will not imply such a limitation.

> Plainly inferable from husband's argument is a concession that the court could have made the temporary support award retroactive; his quarrel is with the date to which it was actually made retroactive. The trial court, in effect, found that jurisdiction to make the award commenced upon wife's filing of her petition for legal separation on October 26, 1988, but that 'through no fault of [wife], a conclusion to these temporary support hearings has been delayed until this date.' Except for his citation to Civil Code section 4801, husband fails to provide any authority for his contention that retroactivity is limited to the filing of the order to show cause. We therefore reject his argument." *Dick*, at 165, 166.

VI. Modifying Temporary Spousal Support Orders

A: The changed circumstances rule

There is some disagreement among appellate cases as to whether or not a party need show a change in circumstances to modify a temporary spousal support order. "(W)e assume for purposes of this decision that the changed circumstances rule generally applies to temporary spousal support orders, notwithstanding the conflicting case law on this issue." *Marriage of Freitas* (2012) 209 Cal.App.4th 1059, 1070 [147 Cal.Rptr.3d 453.

More recent cases impose the rule. "A change of circumstances is required for the modification of support orders, including temporary ones." *Marriage of Tong and Samson* (2011) 197 Cal.App.4th 23, 29, 127 Cal.Rptr.3d 857.

> "As a general rule, courts will not revise a child support order unless there has been a 'material change of circumstances.' This rule applies to any form of child support order—i.e., whether *pendente lite* or 'permanent.' " (Hogoboom & King, *supra*, ¶ 17:25, p. 17–10.) The majority view is that the same general rule applies to temporary spousal support. (*Id*., ¶ 17:139, pp. 1735 to 1736.)" *Marriage of Gruen* (2011) 191 Cal.App.4th 627, 638, 120 Cal.Rptr.3d 184.

In *Marriage of Murray* (2002) 101 Cal.App.4th 581, 124 Cal.Rptr.2d 342, the Fifth

District noted in Footnote 11 that that "there are several cases that hold no such showing is necessary." It cited *Sande v. Sande* (1969) 276 Cal.App.2d 324, 80 Cal.Rptr. 826, *Zinke v. Zinke* (1963) 212 Cal.App.2d 379, 28 Cal.Rptr. 7, and *Rosenthal v. Rosenthal* (1961) 197 Cal.App.2d 289, 17 Cal.Rptr. 186.) These authorities are certainly questionable given their holdings and the current trend to impose the change-of-circumstances requirement.

Sande specifically says that "(w)hile it is true, as urged by respondent, that without regard to the 'change in circumstances rule,' the court at any time during the pendency of an action may modify its order for support (*Zinke v. Zinke*, 212 Cal.App.2d 379, 383, 28 Cal.Rptr. 7, and cases cited by respondent), ***the instant case does not involve temporary support*** (§137.2, Civ.Code) but permanent alimony awarded by a final decree." *Sande*, at 329 (emphasis added). It is not authority for not imposing the changed circumstances rule for temporary spousal support motions.

In *Zinke,* H argued that the trial court erred in modifying temporary spousal support without a showing of changed circumstances, but the Second District said that there HAD been a change in circumstances. Citing *Rosenthal, supra*, the panel said that "(t)here was an adverse change in the wife's living conditions and circumstances as compared with circumstances and conditions at the time of the prior order. However, even had there not been an adverse change in her circumstances the order of modification might well be valid." *Zinke*, at 382.

In turn, *Rosenthal* also involved a change in circumstances. In affirming the trial court's support modification, the Second District said that

> "(t)he many cases which appellant cites to the effect that a showing of change of circumstances is a prerequisite to modification of a temporary award of alimony are not controlling in a case such as this one where the original order of allowance is expressly limited 'until further order of Court.' Even if those cases be deemed applicable, it seems evident that mere change in circumstances is enough and the sufficiency of such change is a question to be determined by the trial judge." *Rosenthal*, at 309.

These are the cases suggesting that no change of circumstances must be shown before a court can modify temporary spousal support.

B. <u>What are "changed circumstances?"</u>

Changed circumstances "means a reduction or increase in the supporting spouse's ability to pay and/or an increase or decrease in the supported spouse's needs. It includes all factors affecting need and the ability to pay." *Marriage of McCann* (1996) 41 Cal.App.4th 978, 982, 48 Cal.Rptr. 2d 864.

The moving party bears the burden of demonstrating a change of circumstances between the date the existing order was made and the date on which he or she filed the modification motion. "(W)hether a spousal support order should be modified is a matter within the sound discretion of the trial court, predicated upon a showing of a material change of circumstances since the last spousal support order. The moving party bears the burden of establishing a material change of circumstances since the last order was made in order to obtain modification of the spousal support order." *Marriage of Stephenson* (1995) 39 Cal.App.4th 71, 76, 77, 46 Cal.Rptr.2d 8 (citations omitted).

If the moving party fails to show a change in circumstances, the court must deny

the modification motion. In *Marriage of Biderman* (1992) 5 Cal.App.4th 409, 6 Cal.Rptr.2d 791, the Second District did just that. In doing so, it explained the rationale behind the change of circumstances requirement:

> "A motion for modification of spousal support may only be granted if there has been a material change of circumstances since the last order. Otherwise, dissolution cases would have no finality and unhappy former spouses could bring repeated actions for modification with no burden of showing a justification to change the order. Litigants 'are entitled to attempt, with some degree of certainly, to reorder their finances and life style [sic] in reliance upon the finality of the decree.' Absent a change of circumstances, a motion for modification is nothing more than an impermissible collateral attack on a prior final order." *Biderman*, at 412, 413.

If a prior order was insufficient to meet the moving party's needs, the payor party's increased ability to pay can constitute a sufficient change in circumstances.

> "Contrary to appellant's contention, it is established that an increase in the husband's ability to pay may be considered a change in the circumstances of the respective parties sufficient, if there is also a showing of need, to justify an increased spousal award. 'The change of circumstances which authorizes a court to modify a support order means a change in the circumstances of the respective parties, i.e., a reduction or increase in the husband's ability to pay and/*or* an increase or decrease of the wife's needs.' (*In re Marriage of Cobb* (1977) 68 Cal.App.3d 855, 860–861, 137 Cal.Rptr. 670, italics added.)" *Marriage of Hoffmeister* (1984) 161 Cal.App.3d 1163, 1173, 208 Cal.Rptr. 345.

On the other hand, the payor's loss of a job or other drastic reduction in income can justify modification or termination of temporary spousal support. However, the payor must bring a motion requesting the reduction.

> "Richard provided a declaration, stating that he was unemployed and actively looking for a new job. We fail to see what additional evidence the family court expected Richard to offer.

> But because in his OSC Richard did not seek relief on the ground that he was unemployed, the court was not required to consider this ground." *Marriage of Tong and Samson* (2011) 197 Cal.App.4th 23, 30, 127 Cal.Rptr.3d 857.

C: Limits on retroactive modification

Unlike an *initial* order for temporary support, there are limits on how far back a court can order a *modification* of a temporary spousal support order. Family Code §3603 provides, as to temporary support, that "(a)n order made pursuant to this chapter may be modified or terminated at any time except 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." In addition, Family Code §3653(a) states, in relevant part, that "(a)n 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, except as provided ... by federal law (42 U.S.C. Sec. 666(a)(9))."

Similarly, Family Code §3651(c)(1) states in relevant part that "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." Family Code §3650 defines "support order" for this purpose as including child, family and spousal support orders. Under these sections, a court may not retroactively modify a spousal support order to a date prior to that on which the party seeking the modification filed the motion. Until at least that date or a later date set by the court, the support order remains in effect and enforceable, and the court may make no order changing it. *Marriage of Everett* (1990) 220 Cal.App.3d 846, 269 Cal.Rptr. 917; *Keck v. Keck* (1933) 219 Cal. 316, 26 P.2d 300.

Once a party files a modification motion, the court has jurisdiction to enter the resulting modification back to the filing date no matter how long it takes for the matter to get to hearing. However, just because the court has the *discretion* to modify a temporary support order back to the date of filing of the motion, it does not have to do so.

On the other hand, a refusal to modify temporary support retroactively can be an abuse of discretion. In *Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 111 Cal.Rptr.2d 755, the Sixth District reversed a trial court's order refusing to modify temporary spousal support retroactive to the date on which Wife filed her motion requesting it. H had "substantial wealth," and W did not. She and the parties' children moved into a small rental home when the parties separated and they stipulated to child support and temporary spousal support. On her later modification motion, the trial court increased temporary support but refused to make it retroactive to the date of filing. The panel said that this was an abuse of discretion. Here is its reasoning:

> "Iris claims the court erred in refusing to modify support retroactive to March 1997, when she first filed her modification motion.
>
> As we explained in our discussion of child support, the trial court has explicit statutory discretion to modify support retroactively. '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, except as provided in subdivision (b) or by federal law.' (§ 3653, subd. (a).)
> …
> Given the variety of purposes to be served by spousal support, it follows that the trial court must be invested with broad discretion in fashioning such awards. As we explained above, the court's discretion in setting permanent support is constrained by the enumerated

statutory factors. By contrast, there are no explicit statutory standards governing temporary support. Nor are there explicit statutory standards controlling decisions about retroactivity. **Absent statutory direction, the trial court's exercise of its discretion regarding retroactivity of temporary support must be guided by two overriding concerns: the supported spouse's need and the supporting spouse's ability to pay. In short, 'the trial court should tailor its award on the basis of the equitable rights of the parties in light of their economic needs and abilities' during the period for which a retroactive increase is sought.** (*In re Marriage of Jacobs, supra*, 126 Cal.App.3d at p. 836, 179 Cal.Rptr. 169 [trial court abused its discretion in refusing to modify spousal support retroactively following remittitur in first appeal].)

In this case, the court apparently recognized that Iris required $2,000 in monthly support from David in order to meet her reasonable needs. Yet she was receiving only $689 from him each month in temporary support, a shortfall of more than $1,300 monthly. The court had discretion to alleviate this shortfall by increasing spousal support retroactive to March 1997, the date of Iris's modification motion. It did not do so. Nor did the court articulate the reasons for its decision not to do so.

We might infer that the court's decision to limit retroactivity was based on Iris's 1997 exercise of options and sale of stock, which provided her with an infusion of funds that year. We decline to indulge that inference here, however, for two reasons. First, the evidence in the record shows that Iris did not exercise her options until December of 1997. Nor did the parties agree to their property division until December 1997. **Second, and more importantly, such an inference runs counter to the principle that a supported party should not be compelled to invade principal assets to provide for his or her own reasonable support, where the supporting party is able to pay.**

On this record, both David's ability to pay and Iris's need for support in 1997 seem evident. Despite that, the trial court refused to modify spousal support retroactive to the date of Iris's motion in March 1997. Nor did it explain its reasons for doing so. In the absence of articulated reasons, we cannot ascertain whether the court exercised

> its discretion along legal lines, with due consideration for the parties' respective economic needs and abilities during the entire period for which modification was sought. We therefore remand the question of retroactivity of spousal support to the trial court for its reconsideration.
> …
> On the question of retroactivity of temporary spousal support, the trial court shall reconsider its order in light of David's ability to pay and Iris's need for support in 1997." *Cheriton*, at 311-313, 320 (emphasis added, some citations omitted).

D. <u>The court cannot reserve jurisdiction to retroactively modify support</u>

Orders for temporary spousal support are considered final orders and are immediately appealable. *Marriage of Skelley* (1976) 18 Cal.3d 365, 134 Cal.Rptr. 197; *Marriage of Gruen* (2011) 191 Cal.App.4th 627, 637, 120 Cal.Rptr.3d 184. Because they are final orders, the trial court cannot leave them open-ended by reserving jurisdiction to modify the ordered amount at a later hearing. Several recent cases have discussed this issue.

In *Gruen*, H filed a motion for initial support orders. The court made a temporary order at the hearing pending the forensic's analysis of H's income, and continued the hearing date. At that hearing, H asked the court to take the matter off calendar and simply continue the existing order, which it did. The forensic never really finished, and two years later, W filed a motion to enforce the original support orders, with which H was not complying.

At the hearing, the trial court retroactively modified the "temporary" support orders that it had made before H asked the court to take the motion off calendar. W appealed, and the Fourth District reversed. It held that because H had simply withdrawn the motion with no conditions, "(t)he retroactive modification of the

August 1, 2008 support order exceeds the court's jurisdiction." It then criticized the court for its *sua sponte* retention of jurisdiction, saying that "(t)he court's view that it could always retain jurisdiction to retroactively modify a temporary order was mistaken."

Limited and specific reservation to revisit the support amount pending receipt of further information is permitted. In *Marriage of Freitas* (2012) 209 Cal.App.4th 1059, 147 Cal.Rptr.3d 453, the Fourth District reversed a trial court that followed *Gruen* and refused to retroactively reassess W's income for two months as it had previously held it would do. The panel distinguished *Gruen* on the basis that "(t)he trial court's original child and spousal support awards in this case were not fully dispositive of the rights of the parties with respect to the amount of support to be awarded for September and October 2010, and therefore did not constitute final support orders as to those months." It also held that "trial court erred in concluding that *Gruen* precluded it from reconsidering Christine's income for these months because, unlike in *Gruen*, the trial court in this case specifically reserved jurisdiction to make such a determination…." The *Freitas* panel also distinguished Gruen in that "in this case, the trial court specifically reserved jurisdiction over Kevin's August 2010 OSC seeking child and spousal support at the October 2010 spousal support hearing, and at no time did Kevin take his August 2010 OSC off calendar."

VII. The Obligation to Make Reasonable Efforts at Self-Support

Every supported spouse has an obligation to make reasonable efforts at self-support. That obligation exists from separation up to the time of trial. The court can consider evidence of a spouse's failure to do so when modifying temporary support and when ultimately entering a long term spousal support order.

> "(W)e observe that there is authority for the proposition that a trial court may consider as a circumstance affecting the amount of spousal support to be awarded whether the supported spouse has made adequate effort to find suitable employment between the time of the separation and the time of trial.
> ...
> ... (A)bsent evidence of the wife's refusal to prepare herself for and seek employment in a reasonable time, it was an abuse of discretion to award to Wife only $400 per month for her support.
> ...
> It may be inferred from the express reference in Civil Code, section 4801(a) to the factor of the supported spouse's ability to engage in gainful employment that the supported spouse is to be encouraged to seek such employment. This, however, has long been the policy of the law. ... When evidence exists that the party to be supported has unreasonably delayed or refused to seek employment consistent with her or his ability, of course, that factor may be taken into consideration by the trial court in fixing the amount of support in the first instance or in modification proceedings." *Marriage of Rosan* (1972) 24 Cal.App.3d 885, 893, 895, 896, 101 Cal.Rptr. 295 (citations omitted).

VIII. The Right to Spousal Support and the Right to Share In the Community Estate are Separate Issues

Must a spouse support herself from her share of the community estate? No. The general rule is that a spouse need not invade capital assets to support herself if the other spouse has sufficient income to pay support. The two issues are not intertwined; one spouse has the same right as the other to share in the community estate, and support issues are determined independently of that right.

The law draws a careful distinction between the right to the free enjoyment of assets received as part of a division of community property, which the party owns outright, and the statutory entitlement to spousal support. The right to spousal support is in addition to this division, based on utterly different policy considerations and enforceable regardless of the amount of property each receives

in the division. This court may not mix support and property rights, both parties own an equal share of the community estate, and the court cannot penalize one spouse for receiving her own property, i.e., her share of the community estate, by lowering support.

Cases on this issue primarily involve permanent spousal support; see, e.g., In *Marriage of Kuppinger* (1975) 48 Cal.App.3d 628, 120 Cal. Rptr. 654; *Marriage of Chala* (1979) 92 Cal.App.3d 996, 155 Cal.Rptr. 605; *Marriage of Kennedy* (1987) 193 Cal.App.3d 1633, 239 Cal.Rptr. 151; In *Marriage of Martin* (1991) 229 Cal.App.3d 1196, 280 Cal.Rptr. 565. The rule was summarized in *Marriage of Cheriton* (2001) 92 Cal. App. 4th 269, 313, 111 Cal.Rptr.2d 755, in which the Sixth District said that

> "(w)e might infer that the court's decision to limit retroactivity was based on Iris's 1997 exercise of options and sale of stock, which provided her with an infusion of funds that year. We decline to indulge that inference here, however, for two reasons. First, the evidence in the record shows that Iris did not exercise her options until December of 1997. Nor did the parties agree to their property division until December 1997. Second, and more importantly, **such an inference runs counter to the principle that a supported party should not be compelled to invade principal assets to provide for his or her own reasonable support, where the supporting party is able to pay.**" *Cheriton*, at 313 (emphasis added).

In *Marriage of Williamson* (2014) 226 Cal.App.4th 1303, 172 Cal.Rptr.3d 699, the Second District reversed a trial court's order essentially charging the community for H's temporary spousal support payments. The trial court had ordered H to pay $5,000 per month in child support and $5,000 per month in temporary spousal support. After the parties sold the former family residence and placed the proceeds in a blocked account, H requested that he be permitted to pay support from the proceeds. "The parties agreed to deduct the September and October 2010 support payments from that account and to charge them to Frederick as an early

distribution of his share of community assets," and the court ordered that "the payments for support 'shall be paid from the parties' blocked account ... until that account is exhausted.'" At trial, after finding that the house was community property,

> "the trial court ordered the sale proceeds to 'be divided equally' after reimbursing Frederick for his $339,798 separate property contribution toward its purchase. The judgment provided the temporary support payments were to be paid from the general community funds in the blocked account, rather than from Frederick's share. Mary Kate argues this provision retroactively reduced Frederick's *pendente lite* support obligation by 50 percent, impermissibly requiring her to pay half of her own support. Frederick responds it was appropriate to charge the community because the order did not expressly require deduction of the payments from his share of the blocked account. We agree with Mary Kate.
> …
> When the trial court initially allowed Frederick to make temporary monthly support payments of $10,000 from the blocked account, it appropriately charged those payments to Frederick 'as and for a pre-trial distribution of *his portion* of the community estate.' (Italics added.) The judgment similarly should have allocated *all* temporary support payments to Frederick's share of the estate. Frederick cites no authority suggesting his support obligation should be charged equally to the parties' community property shares. '"... It makes no more sense to reduce wife's spousal support because she received her rightful share of the community property than it would to increase wife's spousal support because husband received his rightful share of the community property. ..."' (*In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 398–399, 97 Cal.Rptr.3d 616.) We conclude the trial court exceeded its jurisdiction by retroactively modifying the final temporary support order to reduce Frederick's support obligation. We modify the judgment to correct this error." *Williamson*, at 1317-18 (some citations omitted).

IX. Temporary Spousal Support And Payment Of Community Debt

Issues of temporary spousal support are intertwined with issues of post-

separation payments on community debts. Where one spouse uses post-separation (i.e., separate property) income to pay a community debt, the paying spouse can request reimbursement from the community. However, if the spouse paying the debt had a support obligation to the other spouse, the court can offset the support obligation with the other spouse's obligation to contribute to the debt.

A. ***Marriage of Epstein***

In *Marriage of Epstein* (1979) 24 Cal.3d 76, 154 Cal.Rptr. 413, the California Supreme Court approved earlier case law holding that a party who made post-separation payments to preserve a community obligation was entitled to reimbursement (called "*Epstein* credits") under limited circumstances. In that case, the parties separated after an 18-year marriage. W had not worked during the marriage; H was a psychiatrist. After separation, he paid voluntary support to W, but he and the parties' son remained in the family home and "made all the mortgage, insurance, and tax payments on the home. Wife maintains that because of this arrangement she never sought an order for support *pendente lite*."

At trial, H sought reimbursement from the community for his payments on the community obligations on the home. In a case of first impression, the court held that the gift presumption that applies during marriage when a spouse uses separate property to pay community expenses should not apply after separation. (For more on the gift presumption, see Dawn Gray Presents: *Fundamentals of Credits and Reimbursements*). The Supreme Court adopted language from the opinion in *Marriage of Smith* (1978) 79 Cal.App.3d 725, 145 Cal.Rptr. 205, which had held that the no-reimbursement rule did not apply to post-separation payments. Here is what it said:

"'(w)e are persuaded the rule disallowing reimbursement in the absence of an agreement for reimbursement should not apply and that, as a general rule, a spouse who, after separation of the parties, uses earnings or other separate funds to pay preexisting community obligations should be reimbursed therefor out of the community property upon dissolution. However, there are a number of situations in which reimbursement is inappropriate, so reimbursement should not be ordered automatically.

Reimbursement should not be ordered if payment was made under circumstances in which it would have been unreasonable to expect reimbursement, for example, where there was an agreement between the parties the payment would not be reimbursed or where the paying spouse truly intended the payment to constitute a gift or, generally, where the payment was made on account of a debt for the acquisition or preservation of an asset the paying spouse was using and the amount paid was not substantially in excess of the value of the use.

Likewise, reimbursement should not be ordered where the payment on account of a preexisting community obligation constituted in reality a discharge of the paying spouse's duty to support the other spouse or a dependent child of the parties. Both spouses have a duty to support their dependent children. Similarly, the spouses owe to each other mutual duties of support. Following separation, the preferred source for payment of support is the separate property of the supporting spouse that would have been community property if the spouses were not separated. Payment of a debt, of course, may constitute payment of spousal or child support.'" *Epstein*, at 84, 85 (emphasis added, citations omitted).

B. Post-*Epstein* cases on reimbursements and payments of debts as support

In *Marriage of Chala* (1979) 92 Cal.App.3d 996, 155 Cal.Rptr. 605, decided a few weeks after *Epstein*,

"(a)fter dividing $28,773 (mostly cash) of community assets equally, the court found that there remained $19,971.10 in community liabilities. It then created a plan requiring husband to pay all of these liabilities, but labelled one-half of the payments to wife as spousal support. Wife seems to be satisfied with the order, but husband is not.

> He claims the order was merely a device to make him pay all of the community debts of the parties, which is contrary to California's Family Law Act, Civil Code section 4800 et seq., and current California case law."

The Second District panel noted that it is within the trial court's discretion "in appropriate cases to include in spousal support orders a provision that the payments, or portions thereof, may be paid to third parties for overdue or future debts."

> "In our present case the debts were past due obligations incurred by the community business. It appears that the key issue is whether these debts can be shifted to the husband in the form of spousal support when there were sufficient community liquid assets to pay them at the time that the marriage was dissolved. It therefore becomes necessary to review prior case law to determine, if possible, what kind of debts can be ordered paid as spousal support."

The panel discussed prior cases, including *Epstein*, then said that

> "The California Family Law Act, as interpreted by *Fonstein* and *Eastis* requiring equal division of the community property assets and obligations when the assets are greater than the debts, requires us to consider carefully orders that transfer more debts to one spouse as spousal support. Either by happenstance or design, there is a growing tendency on the part of the trial courts to use all or portions of spousal support awards for this purpose. What appears to be happening is that trial courts, reluctant to equalize the community property as required by *Fonstein* and *Eastis*, seek refuge by labelling an unauthorized differential as "spousal support."
>
> An order of spousal support is for *future* living expenses of the supported spouse. Payment of continuing obligations to third parties related to such needs is clearly a form of spousal support, and in most situations the propriety of the award will be obvious; for example, if the wife is living in the home and the husband is not, an award that he pay $500 a month spousal support, payable $300 in cash to wife and $200 directly to the beneficiary of the home mortgage, is justifiable without a special finding. The same would be true in many

other typical third-party payment orders. Then there is the situation recognized in Gay, supra, that past unpaid debts for living expenses can be ordered paid so that future payments of spousal support will not be depleted by creditors demanding payment of the spouse receiving the support award. Finally, we have Epstein, supra, that authorizes payments of such debts without reimbursement from the community if they "constituted in reality a discharge of the paying spouse's duty to support the other spouse."

In 1977 the Legislature, in Civil Code section 4801, set the standards for the courts to follow in making spousal support orders. *In re Marriage of Morrison*, 20 Cal.3d 437, 442-454, 143 Cal.Rptr. 139, 573 P.2d 41, addressed the issue of the length of the award. It does not appear that the alleged support award in our present case followed these guidelines. It purported to be a one shot discharge of all spousal support obligations by paying 50 per cent of all community debts. Assumption of these debts by husband, and delivery to wife of a hold-harmless agreement, terminated the spousal support. Such quick termination of spousal support may or may not have been appropriate under the circumstances. Wife testified she had been a secretary, but that her skills had become 'very rusty.' She intended to return to school to replenish these skills so that she could find employment. It is not unusual under these circumstances for the court to retain jurisdiction, at least for a longer period than it did here, to determine if she can become self-supporting. We realize this was not a long marriage, and a lump sum award may be sufficient; but here there seems to be no relationship of the award to the wife's future needs, the husband's ability to pay the debts, or to other standards listed in section 4801. In the long run, it might not benefit wife at all. The creditors of the community debts are not bound by the husband's agreement, and if he does not pay the debts, there is a very good chance that these creditors will turn to wife for payment.

We conclude that under the facts of this case, the court's order was not a correct award of spousal support. It does not meet the standards established by *Gay, Epstein, Morrison*, and section 4801, *supra*. The result was an unequal division of the community property. We are sure the court was trying to be fair with both parties, but we believe the law as cited narrows the discretion that the court now has in

> ordering debts paid in the form of spousal support. It should have first ordered the debts paid from the community cash on hand, and divided the balance remaining equally. The court should then have considered the issue of spousal support using the guidelines of section 4801, *Morrison*, and any other appropriate case law." *Chala*, at 1002, 1003 (italics in original, citation omitted).

In *Marriage of Hebbring* (1989) 207 Cal.App.3d 1260, 255 Cal.Rptr. 488, the parties were married for two years. Each had used post-separation income to pay community debts. However, the trial court denied *Epstein* credits. Although it had found that "the payments were made under circumstances in which it would have been reasonable to expect reimbursement, and did not constitute a discharge of the duty to support," it held that the payments were made "for the acquisition of property" and felt itself limited by then-existing Civil Code §4800.2 to ordering reimbursement only for amounts by which the payments reduced the outstanding principal balance owed. The First District reversed; in analyzing why CC §4800.2 did not apply to *Epstein* credits, the court said that

> "(t)**he issue of *Epstein* credits is, upon close analysis, almost never a property issue, but a support issue.** The Supreme Court holding in *Epstein* was that a spouse 'may claim reimbursement for sums expended after separation ... unless such sums were paid to fulfill ... support obligations.' In most cases, as in the instant case, debts incurred by the parties before separation must be paid, pending the dissolution, from postseparation separate property earnings of one or both spouses. In fashioning an order for temporary support the trial court must take into account the needs of the parties, including who will be making payments on which of the community obligations and whether there should be a right to reimbursement. **The amount of the temporary support is usually fixed in a manner which will assure to the extent financially possible, that payments on debts will be made, to preserve both the community assets pending trial and the credit standing of the spouses.**
>
> **If, as in *Epstein*, no temporary support order has been issued, the right of reimbursement is restricted so that a spouse's support**

> **obligation is considered before allowing that spouse credits for postseparation payments on community obligations."** *Hebbring*, at 1270, 1271 (emphasis added).

Thus, the court can build reimbursement issues into a temporary support order. If the support order is being paid, the payor spouse could claim reimbursement for other payments on community debts without being concerned that the court will disallow them as paid in lieu of support.

On the other hand, the court can order the payor spouse to pay third party creditors in lieu of spousal support, as the Second District noted in *Chala, supra.* An order for direct payment of community debts as discharge of a support obligation need not be explicit in the support order. In *Bushman v. Superior Court* (1973) 33 Cal.App.3d 177, 108 Cal.Rptr. 765, cited in *Epstein*, the trial court awarded H the occupancy of the family home

> "on the following terms and conditions: He is ordered to pay the delinquent monthly mortgage payments for the months of May and June 1972, together with late charges thereon, in the total sum of $533.22 together with delinquent real property taxes thereon in the sum of $1,299.60 plus penalties, or the combined approximate sum of $1,832.82. In addition thereto respondent is ordered to pay all future monthly mortgage payments and real and personal property taxes thereon. Respondent shall not surcharge petitioner's community interest in said property in connection with any of the foregoing payments."

H failed to make four mortgage payments and the trial court held him in contempt. On appeal, H argued that he could not be held in contempt for failure to pay a debt. The Second District affirmed, determining that the mortgage payment order was part of "an integral part of a *pendente lite* plan for spousal support."

> "There is nothing in the order which makes any attempt to adjust the property rights of the parties. It would strain credulity to believe that

> the trial court set aside community property for Ted's use for any reason other than support accountability. To permit Ted at his option to occupy and sublease the premises without support accountability would in effect give him the opportunity to make child support payments, with Soma's portion of the community assets by the simple expedient of not making the mortgage payments in whole or in part, thus reducing Soma's one-half of the equity in the Cook Street premises with the opportunity to increase his own asset position. To forestall any such exploitation of the Cook Street premises, the trial court, with calculation, postponed child support payments for a period of three months.
>
> Further, if Ted could not or did not intend to make the mortgage payments he was under the implied obligation to vacate.
>
> Counsel for Ted raised no question in the trial court that the contempt judgment for failure to make the mortgage payments was imprisonment for debt. …
>
> We do not have before us an integrated or any other property settlement agreement as was the case in Bradley and Fontana nor is there any question in respect of property rights other than spousal support decided by the orders in question." *Bushman*, at 182-83.

As *Epstein* notes, generally there is no reimbursement where one spouse makes payments on an asset with separate property but also had the post-separation use of that asset. In *Hebbring*, the court said that "no reimbursement should be ordered unless the amount of the debt payment greatly exceeds the value of the use of the asset." In other words, the debt can exceed the use value by some amount and still not be reimbursable. In *Marriage of Watts* (1985) 171 Cal.App.3d 366, 217 Cal.Rptr. 301, the appellate court held that the trial court had the authority to order H to reimburse the community for his post-separation exclusive use of the community residence and medical practice. All of these issues collided in *Marriage of Garcia* (1990) 224 Cal.App.3d 885, 274 Cal.Rptr. 194.

In that case, the court granted W the exclusive use of the family residence after separation and the court ordered H to make the mortgage payments "in lieu of spousal support." At trial, the court ordered W to reimburse the community for the house's reasonable rental under *Watts* and also denied H *Epstein* credits for his payments, holding that they were made in discharge of his spousal support obligation. W appealed, and the Third District reversed.

W argued that she made the mortgage payments with spousal support, even though H directly paid the spousal support to the mortgage holder, essentially making those payments for her. "It follows, she argues, that since the payment approximated the home's monthly rental value, she owed the community no further compensation for her postseparation use of the family residence. Wife also asserts that the reimbursement order constituted an impermissible, retroactive modification of spousal support and was invalid under property law." Further, she argued that her mortgage payments offset the house's use value, and that she should not be ordered to pay *Watts* charges.

H, on the other hand, said that there was no spousal support order, he was entitled to credit for having made the mortgage payments and W was chargeable with the house's use. The court agreed with W and discussed *Epstein, Hebbring* and other cases, reversing the Watts charge order. It held that "at all times wife's payments exceeded the $800 per month rental value fixed by the trial court. Wife did not seek, and did not receive, *Epstein* credits for payment of the mortgage. Accordingly, the mortgage payments satisfied her responsibility to compensate the community for her exclusive use of the home. Further compensation should

not have been ordered." Here was its reasoning.

> "The legal principles which underlie this dispute are well established. Where one spouse has the exclusive use of a community asset during the period between separation and trial, that spouse may be required to compensate the community for the reasonable value of that use. A corollary of this principle is that where the asset is not owned outright by the community but is being financed, and the monthly payments equal or exceed the reasonable value of the asset's use, the spouse may satisfy the duty to compensate the community for use of the asset by making the monthly finance payments from his or her separate property.
>
> This duty to compensate often is invoked to reject a claim by the paying spouse that the community should reimburse him or her for the monthly payments even though the spouse had the exclusive use of the asset. 'Thus, reimbursement will usually not be ordered for payments on obligations on the family home made by the spouse remaining in the home, or for automobile payments made by the spouse using the vehicle between separation and trial.'
>
> The case before us presents the mirror image of the situation discussed in *Hebbring*. The result must be the same. Where a spouse with exclusive use of a community asset after separation makes the monthly finance payments on the asset, he or she is not required to further compensate the community for use of the community asset where the monthly finance charges equal or exceed the reasonable value of said use each month and the paying spouse does not obtain *Epstein* credits for the monthly payments.
>
> Application of this principle to the present case turns on a determination of the character of husband's obligation to make the mortgage payments 'in lieu of spousal support.'
>
> Wife does not dispute that she had exclusive use of the family residence during the period between separation and trial. Nor does she dispute that the community was entitled to compensation for the reasonable value of said use. She contends, however, that she already had satisfied her duty to compensate the community because it was she who, in effect, had paid the mortgage. This is so, she reasons,

because t**he mortgage was paid by husband in lieu of spousal support, i.e., with funds that wife otherwise would have received in cash for her support; the fact that husband sent them directly to the mortgage holder is irrelevant.** Thus, she claims that the trial court, by acceding to husband's request that she pay him one-half of the rental value, 'essentially ordered Wife to reimburse Husband for spousal support received by her, and as such is [an impermissible] retroactive modification of the spousal support orders....'

...

It is permissible to include in a spousal support order a requirement that the payment of overdue or future debts, or a portion thereof, be made to third parties. As explained in *Chala*, spousal support is intended to meet the future living expenses of the supported spouse. Where payment of a continuing debt to a third party is related to such living expenses, it 'is clearly a form of spousal support....' For example, if the wife is living in the family residence and the husband is not, an order requiring the husband to pay all or part of the monthly mortgage is justifiable as spousal support because it meets the wife's need for housing. Similarly, **the supporting spouse may be ordered to pay past, unpaid debts as spousal support because an award which does not expressly encompass such debts may be depleted by creditors demanding payment from the spouse receiving the support award, thereby reducing the supported spouse's ability to meet current living expenses.**

...

Husband can prevail in his quest to be compensated for wife's exclusive use of the family residence only if the orders are construed as rejecting any duty of support. Only then would wife be foreclosed from asserting that the mortgage payments effectively were made by her and satisfied her requirement to compensate the community for her exclusive use of the home.

...

Courts have recognized that the existence of a need for support is a prime consideration in determining whether a given payment is, in reality, in discharge of an obligation of support. A second key consideration is **whether the payment was in addition to reasonable support already being provided by the paying spouse, either pursuant to or in the absence of a court order.**

...

Our conclusion that spousal support orders were issued is further

> bolstered by considerations of policy. ... **In directing husband to fulfill his spousal support duty by making payments directly to the mortgage holder, the court assured that the mortgage would be paid, that the home would not be lost to foreclosure before the proceedings had concluded, and that the parties' credit standing would not be needlessly impaired. Supported spouses could not be expected to acquiesce in such orders if they are thereby exposed to a reimbursement claim like that asserted by husband. As wife points out, had she known that she would have been ordered to reimburse the community for her use of the family residence, she would have sought a support payment in cash and made the house payments herself.**" *Garcia*, at 890, 891, 892, 893, 894 (citations omitted, emphasis added).

Garcia makes clear that the court can independently (and retroactively) decide the availability of *Epstein* credits by determining on its own whether or not the payments discharged any portion of the paying party's support obligation. Second, it authorizes the court to deny *Epstein* credits for payments on community debts that were not specifically encompassed in a spousal support order but that were necessarily paid to keep the creditor from seeking repayment from the supported spouse.

Third, *Garcia* allows the court to consider the extent to which a supported spouse agreed to a particular support order on the expectation that the payor spouse would not be allowed credits for payments on community debts that he pays directly, and fourth, it holds that under *Epstein* and *Hebbring*, a spouse who has exclusive use of a community asset after separation and who pays the monthly finance payment on the asset has fully compensated the community for his or her use of the asset if the court denies *Epstein* credits and "the monthly finance charges equal or exceed the reasonable value of said use each month."

C. <u>A spouse can use community property where there is no support order</u>

Under *Epstein*, reimbursement for separate property funds used to pay community debts "should not be ordered where the payment on account of a preexisting community obligation constituted in reality a discharge of the paying spouse's duty to support the other spouse." Conversely, where there is no support order in place and the spouse who would otherwise be entitled to support uses community funds to pay post-separation living expenses, the court can deny the other spouse reimbursement for his share of those funds, holding that the funds were a discharge of the payor spouse's support obligation. In *Marriage of King* (1983) 150 Cal.App.3d 304, 197 Cal.Rptr. 716,

> "(a)t trial, counsel for the wife represented that the accounts receivable of the community property business as of the date of separation were approximately $23,979.06. Husband concurred in such approximation. The accounts receivable at the time of separation were community property. According to husband, wife withdrew $15,822.14 from the business account after separation on December 31, 1980. Thus there remained approximately $8,000 of accounts receivable. Such withdrawals were made prior to the date when husband commenced paying $1,850 per month for the support of wife and children of the parties.
>
> Both spouses owe a duty to support each other and their dependent children. The question is whether the withdrawals derived by wife from such accounts receivable for post-separation maintenance and child support are reimbursable to husband.
>
> Reimbursement to husband should be denied where, in reality, the sums withdrawn from the business account, by husband's own testimony, were in discharge of husband's duty to support the wife and children of the parties. (*In re Marriage of Epstein* (1978) 24 Cal.3d 76, 85, 154 Cal.Rptr. 413, 592 P.2d 1165; *In re Marriage of Smith, supra.*)
>
> Per the further Judgment on Reserved Issues, the remaining approximately $8,000 of accounts receivable was awarded and charged to husband. Such sum must, of course, be considered in the equal division of community property.

> The court concludes that the trial court did not err in refusing to order reimbursement by wife to husband." *King*, at 310-11 (some citations omitted).

Likewise, in *Marriage of Stallworth* (1987) 192 Cal.App.3d 742, 237 Cal.Rptr. 829, W used community funds to support herself and the parties' children after separation and until a temporary support order was in place. W claimed that H had agreed to this arrangement but H denied any agreement. At trial, the court determined the amount used but refused to reimburse H for his share. On H's appeal, the First District affirmed. It held that regardless of whether or not there was an agreement to forego reimbursement, where one party uses community funds for living expenses after separation during a time when the other party is not paying support, the court has the discretion to offset the amount of community funds used against a reasonable support obligation, measured by the amount of the temporary support order finally entered.

> "The community is entitled to reimbursement when one spouse uses community property to pay separate obligations after separation. (I*n re Marriage of Epstein, supra*, 24 Cal.3d at p. 89, 154 Cal.Rptr. 413, 592 P.2d 1165.) However, in the converse situation (separate funds used to pay community obligations after separation) where the general rule is also reimbursement (see supra, Part II), the *Epstein* court held reimbursement should not be ordered 'where the payment ... constituted in reality a discharge of the paying spouse's duty to support the other spouse or a dependent child of the parties.' (*Id.*, at p. 85, 154 Cal.Rptr. 413, 592 P.2d 1165.) By analogy the trial court should have the discretion to allow a spouse requiring support between separation and the issuance of a pendente lite order to use a reasonable amount of community funds for that purpose without being charged for the funds used. Carol should be required to reimburse the community for community funds she used for her living expenses to the extent they, and the amount received in voluntary payments, exceeded a reasonable amount for child and spousal support. Absent evidence to the contrary, the reasonable

amount of child and spousal support for the period between separation and the first court order, would appear to be the amount ordered in the first order, $1,000. Thus unless Carol can show circumstances justifying an amount in excess of what the court later ordered for temporary support, she should reimburse the community $29,434.97 less the difference between $1,000 a month and the amount she received from William prior to July 1, 1984. Alternatively, as part of the division of community property, she could be charged with the excess." *Stallworth*, at 752, 753 (emphasis added).

X. Domestic Violence and Temporary Spousal Support Awards

Family Code §3600:

> During the pendency of any proceeding for dissolution of marriage or for legal separation of the parties or under Division 8 (commencing with Section 3000) (custody of children) or in any proceeding where there is at issue the support of a minor child or a child for whom support is authorized under Section 3901 or 3910, the court may order (a) the husband or wife to pay any amount that is necessary for the support of the wife or husband, **consistent with the requirements of subdivisions (i) and (m) of Section 4320 and Section 4325**, or (b) either or both parents to pay any amount necessary for the support of the child, as the case may be.

Family Code §4325:

> (a) In any proceeding for dissolution of marriage where there is a criminal conviction for an act of domestic violence perpetrated by one spouse against the other spouse entered by the court within five years prior to the filing of the dissolution proceeding, or at any time thereafter, there shall be a rebuttable presumption affecting the burden of proof that any award of temporary or permanent spousal support to the abusive spouse otherwise awardable pursuant to the standards of this part should not be made.
>
> (b) The court may consider documented evidence of a convicted spouse's history as a victim of domestic violence, as defined in Section 6211, perpetrated by the other spouse, or any other factors the court deems just and equitable, as conditions for rebutting this

presumption.

> (c) The rebuttable presumption created in this section may be rebutted by a preponderance of the evidence.

Family Code §4320(i) authorizes the court to consider "(d)ocumented evidence of any history of domestic violence, as defined in Section 6211, between the parties, including, but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party."

In *Marriage of MacManus* (2010) 182 Cal.App.4th 330, 105 Cal.Rptr.3d 785, the Fourth District held that, as a matter of first impression, the trial court could consider a history of domestic violence between the parties when reallocating amounts previously distributed from a trust account as child support to past temporary spousal support. In that case, W filed a disso petition following an incident of DV. The parties stipulated to an RO as well as orders for the distribution of funds from the family business and a child support order. Meanwhile, "(c)riminal charges were filed against Thomas based on the same domestic violence incident, and the criminal court also issued a protective order proscribing contact with Teresa and their three daughters." H violated the protective orders, pleaded guilty to charges of felony spousal abuse and was incarcerated for five months. After he was released, the parties lived together again but ultimately the matter went to trial. At trial, among other things,

> "(t)he court stated it considered the factors in Family Code section 4320 in determining future spousal support, including the 'skills, education, and training of both parties,' 'periods of unemployment,' and 'the ability of both sides to pay spousal support, and the needs of

> each party.' It also considered the history of domestic violence, which it found was 'lengthy, ... pervasive, extensive, and very severe.' It awarded no spousal support to either party, finding it would be 'entirely inappropriate' to order Teresa to pay Thomas 'given the history of domestic violence' and it would be 'a severe hardship' to order Thomas to pay spousal support.
>
> The court indicated its intent to divide the balance of the attorney's trust account equally between the parties, which at that point was $130,950. Teresa's counsel pointed out that a different bench officer had previously ordered $20,000 released from that account to Teresa 'as child support, subject to reallocation by the court,' and $1,200 released to Thomas to be used towards his obligation for attorney fees. Thomas asked for credit for the $20,000 against his obligation for child support arrearages. The court stated, 'I'm inclined to reallocate that as spousal support for the past. I've already given [Thomas] a significant credit against child support arrears for the period of time that they were reconciled. In light of the entire record and the whole history of this matter, ... I am reallocating that to past spousal support.'"

H appealed, arguing that there was nothing in the record to indicate that the court considered need or ability to pay when reallocating the $20,000 to past spousal support, but the Fourth District affirmed. It cited Family Code §4320(i), and held that

> "(t)he question before us is to what extent the trial court's consideration of a history of domestic violence can influence an award of temporary spousal support. There are no California cases on this question. The trial court here made no findings of Teresa's need or Thomas's ability to pay. Thomas was incarcerated from October 2004 to February 2007; presumably, he had no ability to pay during that time. Teresa testified she lost PDS, Thomson Court and the Poway property because she did not have the income to keep them going. From this testimony, we can infer Teresa had the need for support during the separation.
>
> The trial court's comments suggest it made the past spousal support

> award on equitable grounds. The lack of support caused the dissipation of community assets, Teresa had suffered from severe domestic violence, and Thomas was incarcerated because of that domestic violence. While the court could not have ordered Thomas to make temporary support payments to Teresa while he was in jail, it could order him to take on more arrearages at the time the property was divided.
>
> Commentators have observed that the introduction of domestic violence as a consideration for a spousal support award 'is another area where fault evidence is allowed in spousal support litigation.' (Hogoboom & King, *Cal. Practice Guide: Family Law* (The Rutter Group 2009) ¶¶ 6.824.5, 6.924.1, pp. 6-302.6, 6-338; Olear, 'Fault' is Back (and With a Vengeance) (Nov. 2003) 45 Orange Co. Law. 46.) Given the trial court's broad discretion to 'consider the "big picture" concerning the parties' assets and income available for support in light of the marriage standard of living' (*In re Marriage of Wittgrove, supra*, 120 Cal.App.4th at p. 1327, 16 Cal.Rptr.3d 489), we cannot say the order was an abuse." *MacManus,* at 337, 338.

Under Family Code §4325, the court can also modify an ongoing temporary support order without a change in *present* circumstances where the supported spouse has been convicted of domestic violence before entry of the current order. In *Marriage of Freitas* (2012) 209 Cal.App.4th 1059, 147 Cal.Rptr.3d 453, in October of 2010, the trial court ordered W to pay spousal support to H and ordered him to pay child support to W. In its order, it ruled that it would reserve jurisdiction over whether to amend the support awards, and that Kevin could submit additional evidence pertaining to Christine's income for the period of September and October 2010."

In June of 2011, the court terminated H's spousal support after being informed that he had been convicted of domestic violence against W in 2006. "On appeal, Kevin contends that the trial court erred in terminating the temporary spousal support

award on the basis of his prior domestic violence conviction. Kevin maintains that because the court was aware of the conviction at the time it entered the original temporary spousal support award, the changed circumstances rule precluded modification of the award based on this conviction." Disagreeing, the Fourth District affirmed the trial court's order, concluding "that the changed circumstances rule did not prevent the trial court from terminating the temporary spousal support award based upon the court's application of section 4325 to Kevin's domestic violence conviction." Here is what it said.

> "At the outset, we assume for purposes of this decision that the changed circumstances rule generally applies to temporary spousal support orders, notwithstanding the conflicting case law on this issue. Further, we acknowledge that the trial court terminated Kevin's temporary spousal support based on circumstances that arose prior to the court's initial October 2010 temporary spousal support award, namely, Kevin's 2006 domestic violence conviction. However, for the reasons that follow, we conclude that the trial court did not abuse its discretion in terminating the temporary spousal support award despite the absence of changed circumstances, given the '"unusual circumstances"' of this case. (*Stanton, supra*, 190 Cal.App.4th at p. 554, 118 Cal.Rptr.3d 249.)
>
> To begin with, it is undisputed that Kevin suffered a qualifying domestic violence conviction pursuant to section 4325, and that there is no indication in the record that the trial court considered section 4325 at any time prior to June 1, 2011, when the court asked the parties to be prepared to address the applicability of the statute at the next hearing. Further, it is clear from the trial court's June 30, 2011 order that, if the court had considered section 4325 at the October 2010 hearing, it would have found the statutory presumption unrebutted, and would have refused to award Kevin any temporary spousal support. We are aware of no case in which the changed circumstances rule has been applied to require a trial court to leave in place a spousal support order that the court would not have entered in the first place if it had properly considered and applied the law in entering the original support order.

In addition, the circumstance upon which the trial court terminated temporary spousal support, i.e., Kevin's domestic violence conviction, is one that the Legislature has identified in section 4325 as warranting special attention. The *Cauley* court summarized the public policy underlying the statute by stating, 'Section 4325 embodies a legislative determination that victims of domestic violence not be required to finance their own abuse.' (*Cauley, supra*, 138 Cal.App.4th at p. 1107, 41 Cal.Rptr.3d 902.) Indeed, domestic violence is the only issue that the Legislature has expressly mandated that a trial court consider in determining whether to award temporary spousal support. (See §3600 [providing that during pendency of marital dissolution action a court may order 'the husband or wife to pay any amount that is necessary for the support of the wife or husband, *consistent with the requirements of subdivisions (i) and (m) of Section 4320 and Section 4325*' (italics added)].) In contrast to an award of permanent spousal support under sections 4330 and 4320, an award of temporary support does not require consideration of numerous statutory factors. **The fact that the Legislature has singled out domestic violence as a critical factor that a court must consider in determining whether to award temporary spousal support bolsters the conclusion that the trial court did not abuse its discretion in belatedly applying the statute to terminate Kevin's award of spousal support.**

As noted above, the chief reason for the changed circumstances rule is to 'preclude *relitigation* of the same facts.' (*Baker, supra*, 3 Cal.App.4th at p. 501, 4 Cal.Rptr.2d 553, italics added.) In this case, the potential applicability of section 4325 was never litigated prior to June 2011. (*See Stanton, supra*, 190 Cal.App.4th at p. 554, 118 Cal.Rptr.3d 249 [declining to apply changed circumstances rule where merits of issue were addressed for the first time at hearing on petition to modify temporary spousal support].) Further, courts have stated that the changed circumstances rule is necessary to prevent a party from bringing 'an impermissible collateral attack on a prior final order.' (*Smith, supra*, 225 Cal.App.3d at p. 480, 274 Cal.Rptr. 911 [changed circumstances rule is needed to prevent 'unhappy former spouses [from] bring[ing] repeated actions for modification with no burden of showing a justification to change the order'].) In this case, no party attempted to raise a collateral attack on the prior order.

Rather, the trial court raised the issue of the potential applicability of section 4325 *sua sponte* in its June 1 order. Thus, the chief rationale for the changed circumstances rule, i.e. to prevent parties from relitigating issues that the court has previously addressed, has no applicability in this case.

We reject Kevin's primary argument for applying the changed circumstances rule in this case, namely, that 'even if the trial court had not considered the domestic violence ... when it made the October 6, 2010 order, Christine could have appealed the order, but she did not.' While some courts have suggested that the fact that temporary spousal support orders are appealable supports the conclusion that the changed circumstances rule should apply to such orders (*Stanton, supra*, 190 Cal.App.4th at p. 554, 118 Cal.Rptr.3d 249; *Murray, supra*, 101 Cal.App.4th at p. 597, 124 Cal.Rptr.2d 342 [dicta]; see also Hogoboom & King, *supra,* par. 17:139, p. 17–35)—that rationale has little applicability in this case. That is because the court terminated the award on June 30—less than a month after it entered the June 6 order awarding such support. Thus, the time for Christine to appeal the trial court's original spousal support award had not expired prior to the court's termination of that award.

Finally, Kevin argues that the trial court's 'sudden termination' of temporary spousal support constituted an abuse of discretion because it upset his settled expectations that he would receive the amount that the court had previously ordered. We acknowledge that courts have occasionally referred to a reliance-based justification for the changed circumstances rule. However, the reliance justification to which the Smith court alluded is far from compelling in this case. The trial court's pendente lite order awarding Kevin temporary spousal support had become final less than a month before the court terminated the order, and was apparently entered without any consideration of the strong public policy against domestic violence embodied in section 4325. We conclude that the trial court did not abuse its broad discretion in determining that compliance with the Legislature's mandate that 'victims of domestic violence not be required to finance their own abuse' (*Cauley, supra*, 138 Cal.App.4th at p. 1107, 41 Cal.Rptr.3d 902) outweighed any interest that Kevin might have in receiving continued temporary spousal support.

> Accordingly, we conclude that the trial court did not abuse its discretion in terminating Kevin's temporary spousal support award." *Freitas*, at 1070-1073 (some citations omitted).

A *nolo contedere* plea is considered a "conviction" under Family Code §4325, and temporary spousal support can be denied to a party who so pled.

> We note the domestic violence spousal support limitation is not intended to punish the perpetrator Rather, it is intended to ensure that a victim of abuse will not be compelled to reward the perpetrator for his or her behavior, or to underwrite any further abuse.
>
> We also observe that a spouse who has pled *nolo contendere* to misdemeanor domestic violence is nonetheless afforded the opportunity to rebut, by preponderance of the evidence, the presumption created by section 4325. Thus, the plea itself does not automatically result in the denial of support to an offending spouse. Instead, he or she merely has to rebut the negative presumption created by the conviction. Accordingly, we conclude a plea of *nolo contendere* to a charge of misdemeanor domestic violence, made within five years prior to the filing of the dissolution proceeding, may be used as the basis for presumptively denying temporary spousal support under section 4325." *Marriage of Priem* (2013) 214 Cal.App.4th 505, 513, 153 Cal.Rptr.3d 842 (citation omitted).

In *Marriage of J.Q. and T.B.* (2014) 223 Cal.App.4th 687, 167 Cal.Rptr.3d 574, the Fourth District reversed a trial court that denied temporary spousal support to the petitioner pending a hearing on her petition for a domestic violence restraining order. The parties agreed that Family Code §6341(c) authorized the court to make a spousal support "after notice and a hearing," but disagreed as to whether the "hearing" meant the hearing on the issue of whether domestic violence occurred, as T.B. argued and the court found, or whether it meant the hearing on the request for spousal support, as J.Q. contended. The panel agreed with J.Q.'s position. It construed the Domestic Violence Prevention Act and held that

"(b)ased on a plain reading of section 6341, subdivision (c), we conclude a trial court may award spousal support to an applying party prior to concluding domestic violence has occurred. Section 6341, subdivision (c)'s first sentence is couched in terms of spousal support and does not mention or impose a requirement a trial court find domestic violence occurred before ordering spousal support. Giving the words their ordinary meaning, the first sentence authorizes the court to order the respondent to pay the applicant spousal support if the parties are married to each other and no spousal support order exists after notice and a hearing, to determine the amount, if any, that would otherwise be authorized in an action pursuant to Part 1 (commencing with [s]ection 3500) or Part 3 (commencing with [s]ection 4300) of Division 9. By its plain language, section 6341, subdivision (c), does not impose the requirement a trial court must find domestic violence occurred before awarding spousal support.

…

The evil the Act seeks to remedy is the commission of domestic violence, and its purpose in part is to provide for the parties' separation to ensure the applicant's safety. A trial court must consider an applicant's physical safety and financial needs in making its determination whether to award spousal support. To require the applicant to establish domestic violence occurred before awarding spousal support defeats the Legislature's purpose because if the applicant does not have the financial resources, the applicant is often times forced to remain living with the respondent and the recurrence of acts of violence and sexual abuse is increased while the request for a domestic violence restraining order is litigated. Those concerns, the applicant's safety and financial needs, are magnified when as here there is a related criminal case that is repeatedly continued. We cannot envision the Legislature intended for an applicant to wait for a spousal support award while the respondent repeatedly continues his/her criminal case, even for the legitimate purpose of obtaining a better deal in the criminal matter. Such delay does nothing to protect an applicant who has been the victim of acts of violence and/or sexual abuse. Instead, we conclude section 6341, subdivision (c), contemplates the trial court promptly hear a request for spousal support upon proper notice, while considering an applicant's safety and financial needs, irrespective of the merits of an application for a

> domestic violence restraining order.
> …
> Here, the trial court effectively amended section 6341, subdivision (c), to read, "If the parties are married to each other and no spousal support order exists, after notice and a hearing on petitioner's successful request for a domestic violence restraining order, the court may order the respondent to pay spousal support in an amount, if any, that would otherwise be authorized in an action pursuant to Part 1 (commencing with Section 3500) or Part 3 (commencing with Section 4300) of Division 9." Based on section 6341, subdivision (c)'s plain language, the Act's purpose and legislative history, and related statutory provisions, we conclude that is not what the Legislature intended."

For further information on the topic of this course, see Gray and Wagner, *Complex Issues in California Family Law*, Volume I, "Complex Financial Issues In Determining Support, Fees And Sanctions," available at www.lexisnexis.com.