CALIFORNIA
LAWYERS
ASSOCIATION

March 31, 2020

Honorable Governor Gavin Newsom
Honorable Chief Justice Tani Cantil-Sakauye
Honorable Senator Hannah-Beth Jackson, Chair, Senate Judiciary Committee
Honorable Assemblymember Mark Stone, Chair, Assembly Judiciary Committee

Re: COVID-19 – Request for Guidance and Emergency Relief in Family Law Matters

Dear Governor Newson, Chief Justice Cantil-Sakauye, Senator Jackson, and Assemblymember Stone:

We write on behalf of the California Lawyers Association (CLA). We want to begin by expressing our enormous gratitude to each of you for your extraordinary leadership during this unprecedented crisis.

CLA's Family Law Section has over 4,000 members. As discussed more fully below, family law practitioners have recently encountered a number of unique and unresolved issues that continue to arise on a daily basis. Lawyers are facing a great deal of uncertainty about how to advise their clients. Dealing with issues on a case-by-case basis, without clear guidance, is likely to spawn further disputes and litigation. The issues are magnified in the family law context, where the vast majority of litigants are self-represented. These litigants already struggle with the legal process and, absent guidance, may take matters into their own hands on an ad hoc basis, potentially compounding problems that already exist.

We address this letter to all three branches of government, recognizing that each has limited authority and that it is not clear where resolution of the various issues will land. As outlined below, we respectfully seek guidance or other emergency relief, as appropriate, in following areas:

- Adherence to visitation orders in light of the Governor's March 19, 2020 stay at home order
- Modification of child or spousal support
- Domestic violence temporary restraining orders

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We note that other states are grappling with these and related issues. For example, the Oregon Statewide Family Law Advisory Committee recently issued a set of recommendations for Oregon courts. We offer suggestions for resolving some of the issues we have identified, but in many cases clarity and consistency would be more important than the exact solution.

We remain available to work with all interested stakeholders in an effort to resolve these issues. CLA is committed to disseminating any guidance or other clarification we receive to our members as well as the general public, so that self-represented litigants also receive these benefits.

1. Adherence to visitation orders in light of the Governor's March 19, 2020 stay at home order

In these unprecedented times, family law litigants face the dilemma of either violating a court order by not allowing visitation with the non-custodial parent or violating the Governor's stay at home order by exchanging children between households. This dilemma is even more complicated when one parent is under a supervised visitation order. Other issues arise when one parent tests positive for COVID-19 and the other parent is required to return the child to that parent.

Specific issues raised here include the following:

a. Should parents who are under a court order regarding visitation continue to exchange children for regular visitation?

   i. We suggest that parents who are able to drive to the other parent's home or exchange location, and customarily drive to exchange the minor child for visitation, should continue to adhere to the court order and exchange the minor children, so long as it is safe. But further guidance is needed in order to ensure that this would be permissible in light of the Governor's stay at home order. As one example of an approach, the Bay Area stay at home orders issued on March 31, 2020 define "Essential Travel" as including travel "required by law enforcement or court order" and travel "for parental custody arrangements."

   ii. However, if a child is required to use public transportation, or travel more than 60 miles for visitation, the visitation should be suspended pending both the state/county of the custodial parent and the non-custodial parent lifting any stay at home orders and the resumption of safe travel.

iii. In the event that visitation is suspended, the custodial parent should ensure that virtual/video visitation occurs on a regular and frequent basis between the child and the non-custodial parent.

b. Should supervised visitation or exchanges continue during the stay at home order?

i. We suggest that visitation with a professional supervised monitor be suspended during this time and that the custodial parent should have the child have virtual visitation with the non-custodial parent, with the custodial parent supervising the virtual visitation.

ii. If supervised exchanges are ordered and the supervisor is unavailable due to COVID-19 issues or government orders, the parties should work collaboratively to identify a third party to ensure the exchange is conducted in a peaceful and respectful manner. If that is not possible, then the parenting time should be conducted virtually via videoconferencing or by telephone.

c. What should happen with the visitation if a parent or household member tests positive for COVID-19?

i. We suggest that, so long as parents are on unsupervised parenting time, the minor child should remain with the custodial parent and visitation is suspended until such time as the non-custodial parent and/or household member is medically cleared, or if there is no medical clearance procedure, the expiration of the required quarantine time, which means 21 days after the parent has stopped exhibiting all symptoms of COVID-19. However, if the custodial parent, or a member of that household, tests positive for COVID-19, the minor child shall be placed with the non-custodial parent. If the custodial parent, or a member of that household, exhibits symptoms such that the parent or other household member receives a test for COVID-19, the minor child shall be placed with the non-custodial parent pending the results of the test.

ii. We suggest that if the child is with the non-positive parent when the other parent or household member tests positive, the minor child shall remain with the non-positive parent until such time as the other parent and/or household member is medically cleared, or if there is no medical clearance procedure, the expiration of the

required quarantine time, which we understand is approximately 21 days, to begin after the parent has stopped exhibiting all symptoms of COVID-19.

d. With most schools being out of session, do any special parameters regarding vacation or summer visitation kick in or does the regular parenting schedule continue?

   i. We suggest that parents continue with the regular parenting schedule and that vacation/summer schedules do not come into play until the actual date in which school was scheduled to be let out before school was suspended.

e. What should happen with make-up time?

   i. We suggest that parents should not be entitled to "make-up time" as a result of different parenting schedules.

2. Modification of child or spousal support

With many family law litigants being laid off from their employment or having a substantial reduction in income as a result of the COVID-19 crisis, the payors of support may not be able to pay support at the currently ordered level, or at all. However, to seek a modification of a child or spousal support order, the payor must file a motion to modify support, and generally speaking, a modification of support is only retroactively modifiable to the date of the filing of the motion. With many courts statewide being closed, parties have the inability to file a motion to modify support. Questions have arisen about how a payor who has either lost their employment or had their income substantially reduced as a result of the economic downturn during this crisis, but has no ability to file a motion to modify support because the courts are not accepting filings, can preserve their rights to a retroactive modification.

We raise the issues below in light of the established legal framework.

Family Code section 3603 states: "An 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." [emphasis added]

Family Code section 3591(b) states: "An agreement [for support] may not be modified or terminated as to an amount that accrued before the date of the filing of the notice of motion or orders to show cause to modify or terminate." [emphasis added]

Family Code section 3653 states:

"(a) 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 (42 U.S.C. Sec. 666(a)(9)).
(b) If an order modifying or terminating a support order is entered due to the unemployment of either the support obligor or the support obligee, the order shall be made retroactive to the later of the date of the service on the opposing party of the notice of motion or order to show cause to modify or terminate or the date of unemployment, subject to the notice requirements of federal law (42 U.S.C. Sec. 666(a)(9)), unless the court finds good cause not to make order retroactive and states its reasons on the record." [emphasis added]

Family Code section 4009 states: "An original order for child support may be made retroactive to the date of the filing the petition, complaint or other initial pleading. If the parent ordered to pay support was not served with the petition, complain or other initial pleading within 90 days after filing and the court finds that the parent was not intentionally evading service, the child support order shall be effective no earlier than the date of service." [emphasis added]

Family Code section 4333 states: "An order for spousal support in a proceedings for dissolution of marriage or for legal separation of the parties may be made retroactive to the date of filing the notice of motion or order to show cause, or to any subsequent date." [emphasis added]

Marriage of Dick (1993) 15 Cal.App.4th 144 held that a court may make temporary spousal support retroactive to the date of filing a petition for legal separation or divorce; however *Marriage of Dick* did not apply to a modification of a support order.

42 U.S.C. section 666(a)(9) states, in pertinent part:

"(a) Types of procedures required. In order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the use of the following procedures, consistent with this section and with regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part:
…

(9) Procedures which require that any payment or installment of support under any child support order, whether ordered through the State judicial system or

through the expedited processes required by paragraph (2), is (on and after the date it is due)—
…

(C) not subject to retroactive modification by such State or by any other State; except that such procedures may permit modification with respect to any period during which there is pending a petition for modification, but only from the date that notice of such petition has been given, either directly or through the appropriate agent, to the obligee or (where the obligee is the petitioner) to the obligor." [emphasis added]

Marriage of Goodman & Gruen (2011) 191 CalApp.4th 627 held that a family court exceeded its jurisdiction by modifying a temporary child and spousal support order retroactivity and by modifying the temporary order absent a pending order to show cause or motion for modification.

Specific issues raised here include the following:

a. Taking into consideration the fact that payors of child or spousal support have no ability to file a motion to modify support if the court in their jurisdiction is closed or is not accepting filings, we seek guidance as follows:

   i. Whether, in accordance with Family Code section 3653(b), a party may prepare a motion for a modification of support and serve the supported party with the motion, without filing the motion, and the court has the jurisdiction to retroactivity modify support to the later of the date of service of the motion or the date of the loss of employment or substantial reduction in income. The party seeking the reduction would then be required to file the motion and obtain a hearing date within a specific number of days after the court in that particular jurisdiction accepts filings.

   ii. Whether the Legislature would consider emergency legislation providing the courts discretion to grant a retroactive modification of child or spousal support after March 19, 2020 to the earlier of the loss of employment or substantial reduction in income, or the filing of the request for order to modify support, if the motion is filed within 15 days of the court accepting filings in that particular jurisdiction.

3. Domestic violence temporary restraining orders

Another area of concern is the application of the timelines required under Family Code sections 242 and 245 regarding a Domestic Violence Temporary Restraining Order (DVTRO).

Family Code section 242(a) provides: "Within 21 days, or, if good cause appears to the court, 25 days from the date that a temporary restraining order is granted or denied, a hearing shall be held on the petition. If no request for a temporary restraining order is made, the hearing shall be held within 21 days, or, if good cause appears to the court, 25 days from the date that the petition is filed."

Pursuant to Family Code section 245, the court, on good cause shown, may continue the hearing out for a "reasonable period" and keep the DVTRO in place. Most practitioners and judicial officers have considered that "reasonable period" to mean another 25 days. However, there is no guidance on what the "reasonable period" is under the statute. Moreover, the statute requires the restrained party to personally appear at the hearing for a reissuance of the restraining order.

Specific issue raised here include the following:

a. We seek guidance on whether a "reasonable period" under Family Code section 245 to enable a court to extend a DVTRO, while maintaining the DVTRO in place, is determined to be date the court is able to hold the hearing on the DVTRO.

b. Confirm that neither a restrained party, nor their counsel, is required to appear at any hearing on the court's sua sponte reissuance of the DVTRO, unless the court in that party's jurisdiction has arranged for a telephonic or virtual video appearance..

c. We seek guidance as to how the protected party and the restrained party are to receive notice of the continued hearing on the DVTRO.

We greatly appreciate any assistance you may be able to provide with these issues.

If you have questions or would like to discuss any of these issues, please feel free to reach out directly to Michele Brown at 619-906-5745 or Michele.Brown@procopio.com.

Sincerely,

Michele B. Brown
CLA Board Representative
Family Law Section