

A NEW COURT OF APPEAL CASE HOLDS THAT ELIGIBILITY TO BEGIN DRAWING FROM RETIREMENT BENEFITS DOES NOT CONSTITUTE A CHANGE OF CIRCUMSTANCES FOR SUPPORT MODIFICATION PURPOSES.

In the recent case of *In re Marriage of Dietz*, 2009 Cal. App. LEXIS 1282, the court of appeal held that that the distribution to wife of her share of husband's retirement plans and her eligibility to begin drawing from them does not constitute a change of circumstances for support modification purposes because the parties must have contemplated when they entered into their support agreement in 1989 [she] would reach the age when she could begin making withdrawals...without penalty. " Otherwise, it would mean "that as a matter of law the supporting spouse's attainment of retirement age could never constitute a change in circumstances..."

The *Dietz* case goes on to cite another case, *In re Marriage of Schmir*, which, among other things, rejected the notion that "[wife's] ability to make penalty-free withdrawals from her retirement account is not a change in circumstances. Now, there are facts that are pretty distinct in the *Dietz* case, such as, in this more recent case, the wife wasn't working (or had worked in her husband's business as an administrator in for little or no salary) and arguably was not able to work due to medical reasons when the parties came to an agreement. Additionally, the husband's income was very high (almost \$90,000 per month in income). By the time they had reached an agreement, the obligation to pay child support had also terminated. Perhaps at the time the parties briefed this case before the appellate court, the legislation which made the termination of child support an event constituting sufficient change of circumstances had not been placed in effect.

In *Dietz*, the Court held that Laura's rights to access the retirement accounts on a penalty-free basis and to any increase in their values were insufficient, without more, to constitute a material change of circumstances permitting a reduction in her spousal support under *Family Code* Section 4320. It seems to me that what the court is saying is that the parties bargained for the event that each of them would be one day receiving retirement benefits, such that it would even out any change in circumstances. The trial court was required to "give effect to" Park's and Laura's "intent and reasonable expectations . . . as expressed in the [marital settlement] agreement." (*In re Marriage of Aninger, supra*, 220 Cal.App.3d at p. 238.) "The stipulated judgment expressly acknowledges Park and Laura's expectations that the value of the subject retirement accounts might increase."

The trial court said the stipulated judgment "...further expressly stated spousal support was based on the parties' respective incomes. It is undisputed Park's income had significantly increased since the 1999 stipulated judgment and Laura was unable to work due to her medical condition. In *Schmir*, the trial court found three material changes of circumstances had occurred since the parties entered a marital settlement agreement requiring the husband to pay \$5,800 in monthly spousal support: (1) the wife was "presently employable as a licensed clinical social worker"; (2) the wife's monthly medical expenses had

decreased from \$2,000 to \$500; and (3) the wife was eligible to withdraw funds from her retirement account without penalty. (Id. at pp. 46-47.) Two out of three of these findings were not found in *Dietz*. Beware of entering into a stipulation in which it is anticipated that you or your spouse will be receiving retirement benefits without addressing the issue of whether the receipt of such benefits constitutes a change in circumstances significant enough to permit modification.