New York Law Journal

A NEW YORK LAW JOURNAL SPECIAL SECTION

An ALM Publication

Matrimonial Law

WWW.NYLJ.COM

MONDAY, JULY 28, 2014

Child Support Modifications Are Easier After 2010 Amendments

BY HARRIET NEWMAN COHEN
AND TIM JAMES

The 2010 legislative package that made New York the final state in the union to adopt "No Fault" divorce included amendments to the Domestic Relations Law and the Family Court Act that made it easier to obtain modification of an existing child support order and required that all new child support orders advise the parties of their right to seek a modification on appropriate facts and the showing required to succeed (the 2010 Amendments).

Most significantly, the 2010 Amendments amend DRL §236(B)(9)(B) and Family Court Act §451[1] to provide that "the court may modify an order of child support, including an order incorporating without merging an agreement or stipulation of the parties, upon a showing of a substantial change of circumstances."[2] Prior to the 2010 Amendments, that standard, set forth in DRL §236(B)(9)(b), was applicable only with respect to child support orders that did not incorporate an agreement or stipulation between the parties, as the courts had long held that, where a contract between the parties is involved, the party seeking a modification of child support had to meet a higher standard.

In *Boden v. Boden*,[3] the Court of Appeals declared:

> Where, as here, the parties have included child support provisions, the court should consider these provisions as [contracts] between the parties and the stipulated allocation of financial responsibility should not be freely disregarded. ... *Absent a showing of an unanticipated and unreasonable change in circumstances, the support provisions of the agreement should not be disturbed*[4]

Invoking contract principles, the court also allowed that an agreement-based order was subject to modification where "the agreement was not fair and equitable when entered into."[5]

Five years later, the Court of Appeals limited the applicability of *Boden*. In *Brescia v. Brescia*,[6] the court held that the party seeking modification of a contractually established child support level need show an "unanticipated and unreasonable change of circumstances" only "when the dispute is directed solely to readjusting the respective obligations of the parents to support their child,"[7] and not when "the child's right to receive adequate support is at issue."[8]

By amending DRL §236(B)(9)(b) to provide that a "substantial change of circumstances" is sufficient basis for a modification of any child support order, "*including an order incorporating but not merging an agreement or stipulation of the parties*," the 2010 Amendments would appear to have done away with the more demanding "unanticipated and unreasonable change of circumstances" standard established by *Boden*. But it is not that simple.

First, the legislature specifically provided that the 2010 Amendments would affect child support orders that incorporated without merging a stipulation or agreement only "if the incorporated agreement or stipulation was executed on or after this act's effective date [Oct. 13, 2010]."[9]

Second, the legislative history is ambiguous. The Assembly Memorandum in Support of the bill (the Assembly Memorandum) offered contradictory statements as to its intent:

> Currently, there is no uniform statutory standard for modifying child support awards. While the DRL specifies that a child support order may be modified following a showing of a substantial change of circumstances, the FCA is silent on the issue. The courts have not applied this standard to all orders, instead creating two higher thresholds if the order incorporates but does not merge a separation agreement or stipulation of the parties....
>
> This conforming change of including substantial change in circumstances as a basis for modification in the FCA *is not intended to alter existing case law regarding the standard for modification for orders incorporating but not merging separation agreements*. ...
>
> The substantial change in circumstances threshold would apply prospectively to all orders of child support.[10]

Notwithstanding the Assembly Memorandum's disclaimer of any intent "to alter existing case law regarding the standard for modifications for orders incorporating but not merging separation agreements," the courts have thus far read the 2010 Amendments as eliminating the heightened "unanticipated and unreasonable change of circumstances" standard of *Boden* with respect to agreements and stipulations entered into on or

HARRIET NEWMAN COHEN *is a founding partner of Cohen Rabin Stine Schumann*. TIM JAMES *is a partner of the firm*

after Oct. 13, 2010, while leaving it in place with respect to agreements and stipulations made prior to that date.

In *Overbaugh v. Schettini*,[11] the Third Department, after finding that the court below had erred by applying the "substantial change in circumstances" standard to the mother's application for a modification of child support,[12] explained, in a footnote:

> Contrary to the mother's assertion, a 2010 amendment to Family Ct. Act §451(2)(a) is of no aid to her, as the legislative history makes clear that the "substantial change in circumstances" standard set forth therein applies *only to agreements or stipulations executed on or after the effective date of such amendment*. As the parties' opting-out agreement was executed in 2000, they are bound by the "unanticipated and unreasonable change of circumstances" standard originally articulated by the Court of Appeals in *Matter of Boden v. Boden*. ...[13] (emphasis added).

In *DiMaio v. DiMaio*[14] and *Corbisiero v Corbisiero*,[15] the Second Department likewise found that whether the standard of *Boden* or the "substantial change of circumstances" standard should be applied when deciding applications for modification of child support orders which incorporated stipulations depended on whether the stipulation in question was entered into before or after the effective date of the 2010 Amendments. Judge Colleen Duffy, now a member of the Second Department, took the same view in *A.P. v. D R*[16]

In *Malbin v. Martz*,[17] the Second Department, citing the newly created DRL §236(B)(9)(b)(2)(i), erroneously invoked the more lenient "substantial change in circumstances" standard to a father's application to modify a child support order that incorporated but did not merge a stipulation between the parties, even though the underlying stipulations predated the 2010 Amendments, but then found that the father had not met even that standard and reversed the order below granting the requested downward modification.[18] But we have found no case where a court applied the standard of *Boden* to an application for modification of child support that involved a stipulation or agreement entered into after the effective date of the 2010 Amendments.

In addition to establishing the uniform "substantial change of circumstances" standard, the 2010 Amendments made several other changes with respect to modifications of child support.

The newly created DRL §236(B)(9)(b)(2)(ii) provides:

> [U]nless the parties have specifically opted out of the following provisions in a validly executed agreement or stipulation entered into between the parties, the court may modify an order of child support where:
>
> (A) three years have passed since the order was entered, last modified or adjusted; or
>
> (B) there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted. A reduction in income shall not be considered as a ground for modification unless it was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability, and experience.

In addition to making it clear that the parties may "opt out" of either or both of the foregoing bases for modification (depending on the other pertinent facts), the inclusion in the foregoing provision of the phrase "Unless the parties have specifically opted out of the following provisions. ..., " combined with the absence of such language with respect to the availability of a modification of child support based on a "substantial change in circumstances" in the simultaneously created DRL §236(B)(9)(b)(2)(i), strongly implies that the parties to an agreement or stipulation concerning child support *may not* "opt out" with respect to the right to seek a modification based on this ground. We have not found any court decisions that address this subject, but one of us recently had to revise a proposed matrimonial settlement agreement because the New York County Supreme Court judge presiding over the case would not "So Order" it as long as it purported to waive the right to seek modification based on a "substantial change of circumstances." The Assembly Memorandum states expressly that the provisions of DRL §236(B)(9)(b)(2)(ii) were not intended to limit the scope of the "substantial change in circumstances" that may warrant a modification of child support:

> In introducing the two additional bases for modification of child support, the intent of this measure is not to have these issues—change in income of 15 percent or passage of three years[—] ... limit or define substantial change in circumstances, nor is the intent to supersede case law interpreting substantial change of circumstances as a standard for modification. Furthermore, the additional bases are not intended to be considered as necessary threshold requirements for modification of child support on the basis of a substantial change of circumstances.[19]

A similar concern motivated the inclusion in DRL §236(B)(9)(b)(2)(ii) of the proviso that "a reduction in income shall not be considered as a ground for modification unless it was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability, and experience." The Assembly Memorandum explained that

> [t]he bill also adopts and conforms [to] the rule found in the existing body of case law in order to clarify that a reduction in income may not be considered[,] even under the new 15 percent change in income basis[,] unless it was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability and experience.[20]

See, e.g., *Ripa v. Ripa* ("The burden was on the father to show that he used his best efforts to obtain employment commensurate with his qualifications and experience after losing his job.");[21] *Fragola v. Fragola* ("A parent seeking a downward modification based on a loss of employment must demonstrate that he or she has made 'a good-faith effort to obtain employment commensurate with his or her qualifications and experience.'");[22] *Lewittes v Blume* ("That plaintiff has taken a lower paying position than what he had at the time of the stipulation does not warrant vacating the agreement, since he should not be rewarded with a decrease in his obligation due to a reversal of his financial condition brought about by his own action or inaction.");[23] *Reach v Reach* (affirming denial of downward modification where "a

fair reading of petitioner's testimony reveals that his decision to leave the military was voluntary");[24] *McKeown v Wessner* (affirming denial of downward modification where "the record established that the husband was not forced to leave his job. Rather, when his department was downsizing, he was given an attractive incentive to retire[,] which, upon consideration of all of the circumstances, he deemed it 'prudent' to accept.").[25]

It is possibly significant that, while the newly created DRL §236(B)(9)(b)(2)(ii) reaffirms the case law rules that "a reduction in income shall not be considered as a ground for modification unless it was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability, and experience," it contains no such reaffirmation of the (mostly) Second Department case law requiring that a party seeking modification of child support based on loss of employment show that the job loss occurred "through no fault of his [or her] own" (*Fragola*, supra;[26] *Muselevichus v Muselevichus*[27]). That line of case law was apparently descended from *Knights v Knights*,[28] in which the Court of Appeals upheld the denial of a modification of child support based on the applicant's loss of income due to the fact that he was incarcerated, reasoning that, in deciding whether a modification of child support should be granted,

> the court may consider whether a supporting parent's claimed financial difficulties are the result of that parent's intentional conduct. ... Here, it is undisputed that petitioner's current financial hardship is solely the result of his wrongful conduct culminating in a felony conviction and imprisonment. Thus, it cannot be said that Family Court abused its discretion in determining that these "changed financial circumstances" [did not warrant] a reduction of petitioner's child support obligation[.][29]

See *Johnson v Junjulas* ("Here the father admitted that his current financial hardship was the result of his wrongful conduct culminating in the loss of his driver's license" (citing *Knights*)).[30]

The notion that the legislature's failure to reaffirm the Second Department case law concerning intentional misconduct may have been purposeful is supported by its inclusion in DRL §236(B)(9)(b)(2)(i), at the same time, of the following language: "Incarceration shall not be a bar to finding a substantial change in circumstances[,] provided such incarceration is not the result of non-payment of a child support order, or an offense against the custodial parent or child who is the subject of the order of judgment." The Assembly Memorandum explained that that language "is intended to address the impact of the New York State Court of Appeals decision in *Knights v. Knights*, 71 N.Y.2d 865 (1988)."[31] But we have not found any case in which a court has considered whether the 2010 Amendments have thus paved the way for a reconsideration of the Second Department's "fault" rule in any context other than incarceration, and the Second Department itself has continued to apply the rule.[32]

> Both the **number of modification applications** and the **number of successful applications** are likely to **rise significantly over time.**

In each of the two cases we have found in which incarcerated payor parents sought to invoke the new "incarceration" language, the court found the new statutory language inapplicable to the case at hand. In *Baltes v Smith*,[33] the Third Department held that the language did not apply because the support order as to which modification was sought was issued prior to the effective date of the 2010 Amendments, which provided that the newly created DRL §236(B)(9)(b)(2)(i) (which contains that language) is applicable only to support orders (and agreements and stipulations) made after the effective date. In *Commissioner of Social Services v Jessica M D*,[34] the court held that the "incarceration" language was inapplicable because it applied only to *modifications* of child support, while the application at hand concerned a petition for an initial child support order.[35]

The Assembly Memorandum states that "the bill is not anticipated to result in an immediate or long-term increase in the number of modification petitions filed." But that statement was apparently for the consumption of the governor's budget office, or the budget office of OCA when viewed in light of the following. The 2010 Amendments create a new DRL §236(B)(7)(d), which mandates that "any child support order made by the court ... shall include on its face a notice printed or typewritten in a size equal to at least eight point bold type informing the parties of their right to seek a modification of the child support order" on any of the bases specified in §236(B)(9)(b)(2). As the number of child support orders subject to the liberalizing provisions of the 2010 Amendments increases, and as more and more parties to child support proceedings have in their possession orders that spell out when and under what circumstances a modification may be sought, both the number of modification applications and the number of successful applications are likely to rise significantly over time. That appears to be what the legislature, or at least those of its members who played an active role in the passage of the 2010 Amendments, actually intended. The legislature's recent creation of 25 additional Family Court judgeships[36]—20 as of Jan. 1, 2015, and five more as of Jan. 1, 2016—is certainly consistent with that intent.

1 For simplicity's sake, from this point forward, we will refer only to the pertinent sections of the DRL
2 DRL §236(B)(9)(b)(2)(i)
3 42 N Y 2d 210 (1977)
4 Id at 212-13 (emphasis added)
5 Id at 213
6 56 N Y 2d 132 (1982)
7 Id at 139
8 Id
9 L 2010, c 182, §13
10 NY Bill Jacket, 2010 A B 8952, Ch 182 (emphasis added)
11 103 A D 3d 972 (3d Dep't 2013)
12 Id at 973
13 Id n 4 (citations omitted)
14 111 A D 3d 933 (2d Dep't 2013)
15 112 A D 2d 625 (2d Dep't 2013)
16 41 Misc 3d 1227(A), 2013 WL 6038427, at 3, n 2 (Sup Ct Westchester Co 2013)
17 88 A D 3d 715 (2d Dep t 2011)
18 Id at 716
19 See note 10, supra
20 See id
21 61 A D 3d 766 (2d Dep't 2009) (citations omitted)
22 45 A D 3d 684 685 (2d Dep't 2007) (citations omitted)
23 13 A D 3d 104, 105 (1st Dep't 2004) (citations omitted)
24 307 A D 2d 512 513 (3d Dep't 2003)
25 249 A D 2d 396, 397 98 (2d Dep't 1998)
26 See note 21 supra
27 40 A D 3d 997, 998 (2d Dep t 2007)
28 71 N Y 2d 865 (1988)
29 Id at 866-67
30 215 A D 2d 559 560 (2d Dep't 1995)
31 See note 10, supra.
32 See, e g , *Rubenstein v Rubenstein*, 114 A D 3d 798 (2d Dep't 2014), *DaVolio v DaVolio*, 101 A.D 3d 1120 (2d Dep't 2012)
33 111 A D 3d 1072 (3d Dep't 2013)
34 31 Misc 3d 490 (Sup Ct Franklin Co 2011)
35 Id at 492 93
36 L 2014 c 44

Reprinted with permission from the July 28 2014 edition of the NEW YORK LAW JOURNAL © 2014 ALM Media Properties LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877 257 3382 or reprints@alm.com. #070-07 14-42