MATRIMONIAL AND FAMILY LAW

Has the Bar Been Lowered for Child Support Modifications?

By Lloyd C. Rosen

Unlike child support orders emanating from a hearing or trial decision, child support provisions set forth in agreements, and later incorporated without merger into orders, have been for many like a ball and chain shackled to their ankle without any hope for reprieve. This had been equally true for both support payees seeking an increase and support payors seeking a decrease in child support. While a support order issued after a hearing or trial can be modified by the court upon a showing of a change of circumstances, modifying a support obligation set forth in a stipulation has proven far more elusive. The recent economic climate has prompted parties to seek upward and downward modifications of child support orders, only to have their petitions dismissed for failure to meet the thresholds long-established by *Boden* and *Brescia*.

For many years, practicing matrimonial attorneys have relied upon the leading cases of *Boden v. Boden*, 42 N.Y.2d 210, 366 N.E.2d 791 (1977), and *Brescia v. Fitts*, 56 N.Y.2d 132, 436 N.E.2d 518 (1982), in advising clients that a child support obligation negotiated in an agreement and incorporated into an order is very difficult to later modify. These cases state, generally, that before a court should entertain an application to modify an order of child support incorporating, without merger, the terms of a stipulation, the moving party must demonstrate an unanticipated and unreasonable change in circumstances has occurred since the date of the order, resulting in financial hardship or insufficient resources to meet the needs of the child. There has also been in effect a little-known loophole carved out in Family Court Act §413-a, which enables a party to obtain a *de novo* determination of child support, thus entirely avoiding the *Boden* and *Brescia* standard of proof if three criteria are met; (1) the support order is being paid through Support Collections, *and* (2) Support Collections sends out a notice of Cost of Living Adjustment, *and* (3) any party objects to the automatic Cost of Living Adjustment within 35 days of the notice.


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The New York State Legislature has recently modified Domestic Relations Law §236(B)(9)(b)(2) and Family Court Act §451(2), effective October 13, 2010, in a manner which seemingly eliminates the *Boden* and *Brescia* thresholds in an additional yet different manner than provided for in Family Court Act §413-a. Perhaps it is the increasing incidence of financial hardship in our present economy that motivated the legislature to make it easier for either parent to seek modification of a child support obligation even if based upon an agreement.

All newly signed stipulations and court orders pertaining to child support are subject to new standards with regard to modification of child support. A party seeking modification of a support order needs now to demonstrate only a substantial change in circumstances to have occurred since the date of the order or the date the order was last modified, even if the support order is based upon an agreement, without having to meet the previously required *Boden* and *Brescia* thresholds. Establishing "substantial change in circumstances" is a much lesser burden than the previously required "unanticipated and unreasonable change in circumstances." The newly enacted legislation, DRL §236(B)(9)(b)(2) and FCA §451(2), also provide two additional thresholds for modification, in relevant part, as follows:

". . . unless 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: (i) three years have passed since the order was entered, last modified or adjusted; or (ii) 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."

The parties can opt out of these thresholds but only by a validly executed agreement in writing.

It is notable that the new laws provide that the courts "may" (rather than "shall") modify an order of support under these specified circumstances. This language is clearly intended to continue the court's discretion in whether or not to actually modify the order of support. The legislature has lowered the bar for parties seeking modification, and has seemingly unraveled the complicated web of *Boden*, *Brescia* and their progeny, without actually mandating modification when the stated thresholds have been met.

Based upon this development, unless there is an opting out of these new standards, it appears less likely that a negotiated deviation from the Child Support Standards Guidelines cannot be depended upon for any length of time if either party becomes dissatisfied with the agreement. Stay tuned as the courts grapple with these issues in the future.

Note: Lloyd C. Rosen, an associate attorney at Wisselman, Harounian & Associates, P.C., has substantial litigation and appellate experience and handles all aspects of matrimonial and family law. Mr. Rosen regularly appears and litigates in the Family and Supreme Courts throughout Long Island and the five boroughs of New York City.

COURT NOTES

By Ilene Sherwyn Cooper


Ilene S. Cooper

Appellate Division-Second Department

Attorney Resignations

The following attorneys, who are in good standing, with no complaints or charges pending against them, have voluntarily resigned from the practice of law in the State of New York:

Laura M. Rapacioli
Richard C. Sammis
Richard Barton Schoenfeld
Kathryn A. Scholle
Ava Solomon
Joseph Paul Terranova
William B. Thompson
Paul L. Tractenberg
Robert Vischer
Adam P. Warner
Jordan Raphael Yellin

Attorney Reinstatements Granted

The application by the following attorneys for reinstatement was granted:

Howard J. Pobiner

Decisions of Interest Second, Ninth and Eleventh Judicial Districts

Attorneys Suspended

Nadeen R. Gayle: By letter, dated April 19, 2010, the Grievance Committee informed the court that the respondent was found guilty of one count to commit conspiracy to commit visa fraud, and three counts of visa fraud emanating from his participation in a scheme to file immigration documents which contained false statements of material facts. As a consequence, the respondent was immediately suspended from the practice of law as a result of his being found guilty of a serious crime, and the Grievance Committee was authorized to institute and prosecute a disciplinary proceeding against him.

Note: Ilene Sherwyn Cooper is a partner with the law firm of Farrell Fritz, P.C. where she concentrates in the field of trusts and estates. In addition, she is immediate past president of the Suffolk County Bar Association and a member of the Advisory Committee of the Suffolk Academy of Law.