Downward Modification of Court Ordered Support Obligations

By Joel R. Brandes

Unless they have substantial assets, former spouses who have lost their job, or have suffered an injury or illness and are unable to work, need relief from their maintenance or child support obligations. Under certain circumstances a party who makes diligent and good faith efforts to obtain employment after a job loss or injury may obtain a reduction of his support obligation from the court.

Domestic Relations Law §236 (B)(9)(b)(1) provides, in part, that, where there is no surviving agreement the court "may annul or modify any prior order or judgment made after trial as to maintenance, upon a … a showing of a substantial change in circumstance, including financial hardship…." Domestic Relations Law §236 (B)(9)(b)(2)(i) provides in part, 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 in circumstances. Incarceration is not considered voluntary unemployment and is not a bar to finding a substantial change in circumstances where the 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 or judgment. (See also Domestic Relations Law §236 (B)(9)(b)(2) (ii) which provides for two other grounds for modification which apply unless the parties have specifically opted out of that provision).

The party seeking to modify a maintenance or child support order has the burden of establishing the existence of a substantial change in circumstances warranting the modification. (Matter of Holmes v Holmes, 140 A.D.3d 1066, 32 N.Y.S.3d 658 (2 Dept.,2016)). In determining whether there has been a substantial change in circumstances, the change is measured by comparing the payor's financial situation at the time of the application for a downward modification with that at the time of the judgment or order sought to be modified.(Matter of Talty v Talty, 42 AD3d 546 (2007); Matter of Mandelowitz v Bodden, 68 AD3d 871 (2009)).

A party who causes her own inability to pay support is not entitled to a downward modification of support payments. A parent responsible for support may not unilaterally forego employment in an attempt to evade support responsibilities. (Fries v Price-Yablin 209 A.D.2d 1002, 619 N.Y.S.2d 900 (4th Dept.,1994)). A voluntary decision by a parent to reduce his or her income is not a change of circumstances warranting the reduction of a child support obligation. (Matter of Reach v. Reach, 307 A.D.2d 512, 761 N.Y.S.2d 417 (2003)).

Loss of employment may constitute a substantial and unanticipated change in circumstances. However, the proper amount of support to be paid is not determined by the parent's current economic situation, but by the parent's assets and earning capacity (Matter of Muselevichus v Muselevichus, 40 AD3d 997 (2007); Ashmore v Ashmore, 114 AD3d 712 (2014)).

A party seeking a downward modification of support based upon loss of employment must demonstrate that he was terminated from his position through no fault

of his own and that he made diligent or best efforts to obtain new employment commensurate with his education, ability, and experience. (See Matter of Poulos v. Chachere, 163 A.D.3d 679, 81 N.Y.S.3d 428 (2d Dept.,2018)).

In Matter Bianchi v. Breakell (48 A.D.3d 1000, 852 N.Y.S.2d 454 (3d Dept.,2008)) the father was a college graduate with a degree in civil engineering. The father had, at all times, chosen to work for either himself or his family and made no attempt to pursue a position in the engineering field for which he held a degree. The Appellate Divison found that the father had previously earned significantly more income at the time of the prior support order than his reported $35,000 current salary and it was within Family Court's discretion to deny him a downward modification of the support order due to his failure to seek more lucrative employment outside of his family and more consistent with his education and experience. Having failed to use his best efforts to obtain a position that would utilize his education and skills the father's claimed inability to meet his support obligations on his current salary was a self-created hardship, brought about by his own actions or inactions, which was insufficient to establish entitlement to a downward modification.

An application for a downward modification of child support may also be granted based on a party's loss of employment due to an injury or illness. A party who loses his job due to an illness or injury must provide competent medical evidence of his disability. Where the father testified at the hearing that, after the prior order of child support was entered, he became disabled as the result of an ATV accident and was unable to return to work, the Appellate Division held that the father failed to meet his burden of proof since he did not provide competent medical evidence of his disability or establish that his alleged disability rendered him unable to work (Matter of Gray v Gray, 52 A.D.3d 1287, 859 N.Y.S.2d 785 (4th Dept., 2008)).

A party who loses his job due to an illness or injury must also establish that his alleged disability renders him unable to work and that he does not have the ability to provide support through some other type of employment (Matter of Gavin v Worner, 112 A.D.3d 928, 978 N.Y.S.2d 90 (2 Dept.,2013)). In Matter of Gavin v Worner, the Appellate Division held the mother failed to establish that a substantial change in circumstances had occurred since the entry of the prior child support order warranting a downward modification of her support obligation. She testified that she was disabled as a result of spinal stenosis and that she was unable to work due to her disability. However, she failed to present credible evidence that her symptoms or condition at the time of the petition and hearing prevented her from working. The evidence that she was receiving Social Security disability benefits does not, by itself, preclude the Family Court from finding that the mother failed to establish that she was incapable of working.

Downward modification of a support order has been granted based upon the loss of employment of a party who has testified credibly that he lost his job through no fault of his own and made a good faith effort to obtain new employment which was commensurate with his qualifications and experience. (See Ketcham v. Crawford, 1

A.D.3d 359, 767 N.Y.S.2d 47 (2d Dep't 2003); Matter of Smith v McCarthy, 143 A.D.3d 726, 38 N.Y.S.3d 588 (2d Dept.,2016)).

In DiMaio v DiMaio, (111 A.D.3d 933, 976 N.Y.S.2d 133, (2d Dept, 2013)), the father testified that he was unable to pay child support because he lost his prior job in October 2010. He stated that he had been working at a restaurant in the dual capacity of manager and head waiter. Following his loss of that employment, he sought and obtained a position as a manager at a restaurant at a lesser salary, but could not find a position working in the dual capacity of manager and head waiter. The Appellate Division held that under these circumstances, the father demonstrated that his loss of employment and obtainment of new employment at a lesser salary constituted a substantial and unanticipated change in circumstances and that he made a good faith effort to obtain new employment which was commensurate with his qualifications and experience.

In Ceballos v. Castillo, (85 A.D.3d 1161, 1163, 926 N.Y.S.2d 142 (2d Dept., 2011)) the father testified that he was unable to pay child support because he had not worked since 2008 and was not eligible to receive unemployment benefits. He stated that he had been working for the Renaissance Hotel until May 2008, but that he left that job after the hotel significantly cut back his hours. He then obtained employment at a pizzeria, where he was initially able to work longer hours. Although he was eventually let go from his position at the pizzeria, he did not, contrary to the Support Magistrate's finding, quit the pizzeria job. The father testified in detail that he attempted to obtain employment at various specified restaurants and supermarkets; that he went to an employment agency called Labor Ready to find a job; that he looked for employment in newspapers and the "Pennysaver" publication; and that he explored job leads which he earned of via word-of-mouth. The Appellate Divison held that under these circumstances, the father demonstrated that his loss of employment constituted a substantial change in circumstances and that he made a good faith effort to obtain new employment which was commensurate with his qualifications and experience.

In Matter of Poulos v. Chachere, (163 A.D.3d 679, 81 N.Y.S.3d 428 (2d Dept.,2018)), the record supported the Support Magistrate's determination that the mother established a substantial change in circumstances warranting a downward modification of her child support obligation. The mother demonstrated that in January 2009, she was terminated, through no fault of her own, from her position in banking software sales, in which she earned a salary of $80,000. The mother demonstrated that after the entry of the January 4, 2016, order of support, she made diligent efforts to obtain new employment commensurate with her experience and prior salary, but was only able to obtain a position earning approximately $410 per week, which would yield approximately $22,000 per year. The mother, who had been unemployed for seven years, testified to numerous unsuccessful efforts to find a job with a salary commensurate with her prior employment, and that she was continuing to seek employment with a comparable salary while working approximately 40 hours per week.

While diligent efforts to obtain employment may be established by evidence of sending out resumés, answering want ads, and registering at employment agencies

(See Preischel v Preischel, 193 A.D.2d 1118, 598 N.Y.S.2d 642 (4 Dept.,1993)) there appears to be no rule which requires that best efforts to obtain employment and a diligent job search must be established by the submission of evidence in the form of resumes or proof of interviews. Although some appellate division cases appear to indicate that the submission of evidence in the form of resumes or proof of interviews is required to prove a diligent job search, a closer reading of them indicates that their mention is dicta.

In Matter of Fantau, v. Fantau (134 A.D.3d 1109, 21 N.Y.S.3d 725, (2d Dept., 2015)) the Appellate Division affirmed the Family Court's determination that the father failed to establish that he used his best efforts to obtain employment which was commensurate with his qualifications and experience, or that his current income was commensurate with his earning capacity so as to warrant a downward modification of his child support obligation. At the end of its memorandum decision, it wrote: "We note that the father failed to submit evidence such as résumés that he had sent to potential employers, or proof that he had been on any interviews in search of employment commensurate with his education, ability, and experience." (To the same effect see Matter of Ealy v. Levy–Hill, (140 A.D.3d 1164, 33 N.Y.S.3d 754 (2d Dept.,2016) "We note that the father failed to submit evidence such as résumés sent to potential employers, or proof that he had been on any interviews in search of employment (*see Matter of Fantau v Fantau*, 134 AD3d 1109, 1110 [2015])").

Conclusion

A downward modification of a support order will be granted where a party presents credible evidence that he lost his job through no fault of his own and made a good faith effort to obtain new employment commensurate with his qualifications, education, ability, and experience. A party who loses his job due to an illness or injury will be granted a downward modification where he provides competent medical evidence of his disability, and establishes that his disability renders him unable to work, and that he does not have the ability to provide support through some other type of employment.

Joel R. Brandes practices matrimonial law in New York City concentrating on appeals. He is the author of a new twelve-volume treatise, Law and the Family New York, 2021- 2022 Edition, and Law and the Family New York Forms, 2021 Edition (five volumes), both published by Thomson Reuters, and the New York Matrimonial Trial Handbook (Bookbaby). He can be reached at joel@nysdivorce.com or at his website at www.nysdivorce.com.