

**CHANGES IN CIRCUMSTANCES: NAVIGATING THE PROCEDURAL PATHWAY
WHEN ADDRESSING SUPPORT OBLIGATION MODIFICATIONS**

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The economy is bad. It has gotten so bad that the Appellate Division in Piscitelli v. Classic Residence, 408 N.J. Super. 83 (App. Div. 2009) has held that courts can take judicial notice of the severe economic downturn and the unemployment situation facing the country. Unfortunately, a bad economy breeds changed circumstances. Jobs are lost. Retirement assets are decimated through the plunging stock market. The housing market crumbles, and as a result, property values plummet. So, the logical question becomes, what constitutes changed circumstances warranting the modification of a support obligation?

A practitioner must be cognizant that the concept of "changed circumstances" is a procedural analysis, not a substantive analysis. When the legislature enacted N.J.S.A. 2A:34-23, they specifically noted that support obligations may be "revised and altered by the court from time to time as the circumstances may require." At no point did the legislature set forth that spousal support could be modified only through a showing a changed circumstances. Such a requirement is the

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product of the judiciary, designed to ensure litigants are not attempting to obtain the equivalent of a legal mulligan or do-over. By requiring changed circumstances, the Courts are ensuring that new evidence is presented that would warrant the modification of a support obligation, and an individual is not seeking the proverbial second bite at the apple.

What constitutes changed circumstances when addressing the modification of a support obligation? Old age? Retirement? Loss of job? Bankruptcy? Given the current state of the economy, is there an argument to be made that each and every one of us has experienced a change in circumstances that would warrant the review of a support obligation to ensure that it is fair and equitable? The most basic and unwavering premise has always been that matrimonial law is governed by principles of fairness and equity. Peterson v. Peterson, 85 N.J. 638 (1981). Could it not be said that the downturn in the economy requires judicial review of support agreements to ensure that only those agreements that are fair and equitable are enforced?

On the other hand, if the entire nation has experienced a downturn in the economy, would it be fair and equitable to grant a modification of a support obligation to a payor spouse, thereby shifting the entire burden to the payee spouse? Wouldn't the payee spouse also be subject to the economic turmoil caused by the downturn in the economy and then also have

to suffer a reduction in support? How is this fair or equitable? This article will not focus on the fairness or equitable nature of such modifications, but on what constitutes a substantial change in circumstance for purposes of a modification of a support obligation.

As we are all aware, the New Jersey Supreme Court provided the procedure for modification of support orders. First, the moving party bears the burden of showing that there are permanent and substantial changed circumstances. Lepis v. Lepis, 83 N.J. 139 (1980). Such examples of changed circumstances, as set forth in Lepis, include (1) an increase in the cost of living, (2) an increase or decrease in the supporting spouse's income, (3) an illness or disability arising after the original judgment, (4) a dependent spouse's loss of a house or apartment, (5) subsequent employment by the dependent spouse, and (6) changes in the tax laws. Id. at 151. Second, after the moving party has made a prima facie showing of changed circumstances, the court may order financial disclosure of both parties to allow the court to make an informed decision as to "what, in light of all the [circumstances] is equitable and fair." Id. at 158, quoting Smith v. Smith, 72 N.J. 350 (1977). This article will address some of the above changes in circumstances, and the case law surrounding them.

UNEMPLOYMENT

Arguably, one of the more common changes in circumstances that the Court must face is unemployment. At the time of the entry of the Judgment of Divorce, the supporting spouse was gainfully employed and capable of meeting his support obligation. Then, for a multitude of reasons, the supporting spouse becomes unemployed and unable to meet that obligation. Does this constitute a substantial change in circumstances? If so, does this warrant a support modification? What happens if the job loss is temporary?

Temporary unemployment is usually not held as grounds for modification of child support, and trial courts routinely deny such motions. Gertcher v. Gertcher, 262 N.J. Super. 176, 177 (Ch. Div. 1992). Courts have often declined such requests because the party's actual employment is not as significant in determining the amount of support to be paid as is the party's immediate past ability to earn a specific salary and to find employment which will yield an income sufficient to fulfill his obligation. Id. Moreover, if a payor continues to live a lavish lifestyle due to his assets and regardless of a reduction in income, a prima facie case of changed circumstances may not be found. Donnelly v. Donnelly, 405 N.J. Super. 117 (App. Div. 2009).

The Appellate Division also addressed the issue of temporary unemployment in the case of Larbig v. Larbig, 384 N.J. Super. 17 (App. Div. 2006). In seeking a modification of his alimony and child support obligations, the supporting spouse argued that the fortunes of his business had severely declined since the entry of the judgment of divorce, and that changed circumstance warranted a downward modification. Judge Dilts disagreed, and the Appellate Division affirmed.

When addressing Judge Dilts's denial of any finding of changed circumstances, the Appellate Division confirmed that whether an alimony obligation should be modified based upon a claim of changed circumstances rests within a Family Part judge's sound discretion. Id., citing to Innes v. Innes, 117 N.J. 496, 504 (1990); Storey v. Storey, 373 N.J. Super. 464, 470 (App. Div. 2004); Steneken v. Steneken, 367 N.J. Super. 427, 434 (App. Div. 2004), aff'd as modified, 183 N.J. 290 (2005).

The Appellate Division confirmed that each and every motion to modify an alimony obligation "rests upon its own particular footing and the appellate court must give due recognition to the wide discretion which our law rightly affords to the trial judges who deal with these matters." Id., citing to Martindell v. Martindell, 21 N.J. 341, 355 (1956); see also Rolnick v. Rolnick, 262 N.J. Super. 343, 359 (App. Div. 1993).

Ultimately, the Appellate Division confirmed that there was no bright-line rule by which to measure when a changed circumstance has existed long enough to warrant modification of a support obligation. Instead, the Appellate Division noted that such determinations are in the sound discretion of the Family Part. In upholding Judge Dilts, the Appellate Division confirmed that neither compulsory discovery nor a plenary hearing would be required until a movant provides sufficient evidence of changed circumstances. Id.

Temporary circumstances aside, what happens if the supporting spouse decides to change careers after becoming unemployed or otherwise? To obtain a reduction in alimony based upon reduced income from a career change, the supporting spouse who has selected the new, less lucrative career must establish that the benefit he/she derives substantially outweighs the disadvantages to the supported spouse. Storey v. Storey, 373 N.J. Super. 464 (App. Div. 2004).

In Storey, the Appellate Division affirmed the trial court decision to impute earnings consistent with the obligor's background and experience. The appellate court determined that the obligor's career change after a company-wide layoff, from a highly skilled communications technician to a massage therapist, was not reasonable. The court found that the advantages of the

new career choice did not outweigh the disadvantages to the former wife.

Along these same lines, the court in Arribi v. Arribi, 186 N.J. Super. 116 (Ch. Div. 1982), held that a father who was ordered to pay child support could not decide to accept only employment in his field after becoming unemployed and so remain financially unable to pay child support. The court found that "the prevailing philosophy in the aforementioned case is clear: one cannot find himself in, and choose to remain in, a position where he has diminished or no earning capacity and expect to be relieved of or to be able to ignore the obligations of support to one's family." Id. at 118.

Similarly, one cannot voluntarily diminish one's earning capacity and expect to receive a downward modification of the support obligation. Aronson v. Aronson, 245 N.J. Super. 354, 360-361 (App. Div. 1991). Voluntary underemployment is not a change of circumstances warranting a support modification. However, as addressed above, where the obligor suffers a permanent involuntary reduction in income, this constitutes a change in circumstances for purposes of whether a support obligation should be modified. See generally Lepis v. Lepis, 83 N.J. 139 (1980).

Whether dealing with a change in career or a general loss of income as a change in circumstances, the marital lifestyle of

the parties during the marriage is not the only examination to be made when addressing a support obligation modification. The Appellate Division in Glass v. Glass, 366 N.J. Super. 357 (App. Div. 2004), held that allowing alimony to be terminated because the supported spouse has gained employment and now has an income to support herself in a way similar to the marital lifestyle was in error. Notably, the Appellate Division confirmed that basing a determination of alimony only on whether she can support herself as she was supported during the marriage is a 'numbers' inquiry and analysis [that is] too narrow and limited. Id.

"Both Lepis and Crews inform us that the marital standard of living is the 'touchstone' of a change of circumstances application, but other considerations are similarly compelling." Id. at 372. These "other considerations" are based on equity such as what was contemplated at the time the Property Settlement Agreement was made. The court found in Glass that the parties did contemplate that Ms. Glass would return to work, and therefore her returning to work was not a change in circumstance warranting a modification of alimony. This Appellate Division decision clarifies that a supported spouse's increase in income does not, in and of itself, constitute a substantial change in circumstances warranting a reduction or termination of support, even when such an increase enables the supported spouse to

maintain the standard of living enjoyed during the marriage, without the need for support.

This begs the question, if the touchstone of spousal support is to allow a supported spouse to live a lifestyle reasonably commensurate with that of the marriage, and their increased income allows them to live that lifestyle, why would this not constitute a change in circumstances, and why would this not warrant the modification, if not termination, of the spousal support obligation? What would happen if this were not a modification application, but an initial support application?

If both parties had the ability to meet the standard of living at the time of the support obligation, it is respectfully submitted that, all other factors being in equipoise, there would be no support obligation. So why is this not enough to warrant the termination of support based upon changed circumstances? Wouldn't this be enough to at least warrant a plenary hearing? Unfortunately, according to the decision in Glass, apparently the answer is no.

COHABITATION

The next main change in circumstances that typically is presented to the Court in connection with an application to modify a support obligation is cohabitation. When addressing cohabitation, the court utilizes a two-part test to determine when a dependent spouse's cohabitation constitutes "changed

circumstances" justifying a downward modification of alimony. First, the payor spouse must make a prima facie showing that the dependent spouse is cohabitating. Ozolins v. Ozolins, 308 N.J. Super. 243, 245 (App. Div. 1998). Proof of cohabitation then creates a rebuttable presumption of changed circumstances. Id. at 248. The burden then shifts to the payee spouse to show a continuing need for spousal support. It must be stressed, however, that it is the extent of the actual economic dependency, not one's conduct as a cohabitant, which determines the duration and amount of support. Gayet v. Gayet, 92 N.J. 149, 154 (1980).

To prove that the dependent spouse is cohabitating, the supporting spouse must provide the court with evidence of an intimate relationship in which the couple has undertaken duties and privileges commonly associated with marriage. Konzelman v. Konzelman, 158 N.J. 185, 202 (1999). These may include joint bank accounts, sharing living expenses and household chores, holding themselves out as a social "couple," and sharing common meals. Id.

The proving of cohabitation is not the last analysis that one must undertake. To prove that the dependent spouse still requires support, the dependent spouse must show that there is no actual economic benefit to either the dependent spouse or the cohabitant, which is often referred to as the "economic needs"

test. Specifically, the Supreme Court noted that cohabitation may be a basis upon which to modify alimony if "the relationship has reduced the financial needs of the dependent former spouse." Gayet v. Gayet, 92 N.J. 149, 150 (1983).

The Supreme Court instructed trial courts to focus on the economic question of whether the cohabitant has financially contributed to the supported spouse so as to make alimony partially or totally unnecessary. Id. The Supreme Court of New Jersey recognized that "parties might attempt to conceal a new economic dependency by adopting different living arrangements from remarriage..." Gayet v. Gayet, 92 N.J. 149, 155 (1983). However, the Court has instructed trial courts to consider substance over form in these situations, and when considering the substance of the relationship, the court should determine whether the relationship "bears the 'generic character of a family unit as a relatively permanent household.'" Id., citing to State v. Baker, 81 N.J. 99, 108 (1979).

Where the court considers a motion for reduction of alimony based on a change of circumstances, the dependent spouse's finances and economic resources are ordinarily the court's only consideration. Id. at 197; see, e.g. Gayet v. Gayet, 92 N.J. 149 (1983). Nevertheless, a specific consensual agreement between the parties to terminate or reduce alimony based on a predetermined change of circumstances does not require an

inquiry into the financial circumstances or economic status of the dependent spouse so long as the provision itself is fair. Id.

Thus, where the parties have agreed that cohabitation will constitute a material change in circumstances, and that agreement has been judged fair and equitable, the court should defer to the arrangements undertaken by the parties. Id. In that situation where the dependent spouse has entered into a new marriage-like relationship, the court need not delve into the economic needs of the dependent former spouse. Id.

Contrast such a holding with the decision in Palmieri v. Palmieri, 388 N.J. Super. 562 (App. Div. 2006). In Palmieri, the Appellate Division was faced with a clause in a Property Settlement Agreement providing for an automatic termination of alimony upon cohabitation with any individual, without any consideration of the attendant financial arrangement. The Appellate Division set forth that the clause could not be enforced in the face of questions of material fact without a hearing. Id.

In Palmieri, the parties' Property Settlement Agreement included a clause providing that alimony would terminate upon the wife's residing with an unrelated person regardless of the financial arrangements between the wife and the unrelated person. The appellate court stated,

"An unlimited provision such as the one at issue may be perceived as arbitrary, capricious and unreasonable, since it would preclude plaintiff from providing shelter to an ailing relative or even allowing plaintiff to receive care from a live-in nurse if she needed such care. Though hypothetical situations such as these would purport to nullify plaintiff's right to receive alimony, such a literal construction of the Property Settlement Agreement would lead to an absurd result." Id. at 565.

Where the parties' settlement agreement is silent on the issue of cohabitation, a showing of cohabitation creates a rebuttable presumption of changed circumstances, thus shifting the burden to the dependent spouse to show that the spouse derives no actual economic benefit from the cohabitant. Ozolins v. Ozolins, 308 N.J. Super. 243 (App. Div. 1998). Then, as set forth above, the court can modify the support award only when "(1) the (cohabitant) contributes to the dependent spouse's support or (2) the (cohabitant) resides in the dependent spouse's home without contributing anything toward the household expenses." Gayet v. Gayet, 92 N.J. 149 (1983).

RETIREMENT

Retirement, quite possibly the most difficult and elusive concept for both practitioners and the court. Does retirement constitute a change in circumstances warranting the modification of a support obligation? When can a supporting spouse retire? Is it permissible to retire early?

Whether a spouse may voluntarily retire "depend[s] on the individual circumstances of a particular case." Deegan v. Deegan, 254 N.J. Super. 350, 358 (App. Div. 1992). The main issue in determining whether changed circumstances exist due to retirement is "whether the advantage to the retiring spouse substantially outweighs the disadvantage to the payee spouse." Id. "Only if the answer is affirmative, should the retirement be viewed as a legitimate change in circumstances warranting a modification of a pre-existing support obligation." Id.

In Silvan v. Silvan, 267 N.J. Super. 578, 581 (App. Div. 1993), Judge Wefing discussed the factors that a trial court should consider "whether changed circumstances do, in fact, exist, as would justify a modification in alimony." The factors include (1) the difference in ages between the parties, (2) whether the parties considered the possibility of future retirement at the time of the initial alimony award, (3) whether the retirement occurred earlier than was foreseen at the time of the initial alimony award, (4) whether the retirement was mandatory or voluntary, and (5) the financial impact of the retirement upon the parties. Id.

The Appellate Division has instructed the trial courts to consider these factors in making a determination that changed circumstances does in fact exist, and noted as follows:

"The court below did not consider factors such as those we have mentioned; rather, it concluded, with an insufficient record, that plaintiff's retirement was foreseeable when the parties divorced in 1981. We are satisfied that does not end the inquiry." Id. at 582.

Upon addressing these factors, the Appellate Division in Silvan v. Silvan, 267 N.J. Super. 578, 581 (App. Div. 1993), held that a good faith retirement at age 65 may constitute changed circumstances for purposes of modification of alimony, and that upon proof of the changed circumstances, a plenary hearing should be held to determine whether a reduction in alimony is warranted.

VOLUNTARY EARLY RETIREMENT

When a change in circumstances is involuntary, the court need only conduct an analysis of the parties' financial circumstances. Deegan v. Deegan, 254 N.J. Super. 350, 355 (App. Div. 1992). However, when a change is voluntary, such as voluntary early retirement, other considerations come into play. The court must inquire not only whether the retirement was in good faith, but also whether it was reasonable for the supporting former spouse to elect early retirement. Dilger v. Dilger, 242 N.J. Super. 380 (Ch. Div. 1990).

Relative to this inquiry are

- (1) the age,
- (2) health of the party,
- (3) the motives in retiring,
- (4) the timing of the retirement,

- (5) the ability to pay maintenance even after retirement, and
- (6) the ability of the other spouse to provide for himself or herself. Id.

Also significant are the reasonable expectations of the parties at the time of the agreement, evidence bearing on whether the supporting spouse was planning retirement at a particular age, and the opportunity given to the dependent spouse to prepare to live on the reduced support. Dilger at 387-88.

Even if the court is satisfied the retiring spouse has acted in good faith and has advanced rational reasons for his action, the trial judge will be required to decide whether the advantage to the retiring spouse substantially outweighs the disadvantage to the payee spouse. Deegan at 358. Only if that answer is affirmative should the retirement be viewed as a legitimate change in circumstances warranting modification of a support obligation. Id.

LIMITED DURATIONAL ALIMONY MODIFICATION

Is there a change in circumstances that would warrant the conversion of limited duration alimony to permanent alimony? In Gordon v. Rozenwald, 380 N.J. Super 55 (App. Div. 2005), the Appellate Division reversed the trial court determination that converted a limited duration alimony obligation to permanent alimony. In Gordon, the Appellate Division noted that the

moving party did not establish the required "unusual circumstances" of either changed circumstances or a non-realization of a future promise or expectation.

In Gordon, the husband's income fluctuated throughout the marriage, ranging from \$28,000.00 to \$500,000.00. The Property Settlement Agreement provided for limited duration alimony for a period of 15 years. After the divorce, however, the husband's income increased to \$1 million, and at one point as high as \$3.8 million. When the wife filed a motion to modify the support, the trial court converted the limited term alimony to permanent alimony. The Appellate Court reversed the trial court's decision, concluding that the husband's substantial increase in his income was "not relevant to the duration of the alimony," which "was limited on the basis of [his] income at the time of the divorce." Id. at 76.

RESTRUCTURING SUPPORT PAYMENTS

If limited duration alimony cannot be modified absent unusual circumstances, does the Court have the ability to restructure alimony payments? In Morris v. Morris, 263 N.J. Super. 237 (App. Div. 1993), the Appellate Division held that when it is extremely difficult, if not impossible, for the paying spouse to make the required alimony payments, the court has both the power and the duty to establish a reasonable level of current payments based upon defendant's income and assets.

**IS THERE STILL A TRIENNIAL REVIEW PERMITTED IN CONNECTION WITH
CHILD SUPPORT OBLIGATIONS?**

Taking loss of job, retirement, early retirement, change of career and other changes of circumstance out of the equation, is there ever an opportunity to seek a modification to a support obligation without showing a substantial change in circumstances?

For example, you have a client who is paying child support through probation in connection with a Title IV-D Order. Three years have elapsed since the entry of the Judgment of Divorce, and the client wants to have the child support obligation reviewed and modified. Do you have to show a change in circumstances? Do you have to show some increased income, loss of job, or other substantial change to pass through this procedural hurdle? Is the passage of three years enough to allow your client to seek to have the support obligation reviewed?

Pursuant to N.J.S.A. 2A:17-56.9a:

"At least once every three years, unless the State has developed an automated cost-of-living adjustment program for child support payments, the parties subject to a Title IV-D support order shall be provided notice of their right to request a review...

It would appear that since New Jersey established an automated cost-of-living adjustment program pursuant to Rule 5:6B, there would be no right to a triennial review. However,

the reported case of Doring v. Doring, 285 N.J. Super. 369 (1995), says otherwise. In Doring, it was confirmed that pursuant to N.J.S.A. 2A:17-56.9a, all Title IV-D child support orders had to be reviewed every three years. Is this still good law? Is this still viable?

It must be stressed that Doring was decided in 1995, and N.J.S.A. 2A:17-56.9a was amended in 1998 to include the automated cost-of-living adjustment language. Specifically, the above-referenced language of "unless the State has developed an automated cost-of-living adjustment program for child support payments" was added, and contemporaneously thereto, Rule 5:6B, which provides for biennial cost-of-living adjustments, was adopted.

Therefore, with the holding of Doring, the express language of N.J.S.A. 2A:17-56.9a, and Rule 5:6B, there appears to be an inherent conflict about whether a litigant is entitled to an automatic triennial review without the showing of changed circumstances. This conflict was addressed and resolved in the unpublished case of Stein v. Mamolen, which held that:

"the 1998 amendment mandating automatic cost-of-living adjustment for child support awards eliminates the requirement of a three-year review. See Rule 5:6B. Therefore, defendant's argument that he was entitled to a right of review of his child support obligation based on the passage of the three years is without merit."

This holding conforms exactly with what Title IV-D requires. By way of background, Title IV-D refers to a section contained within the United States Code Annotated, which provides federal funds to states that implement programs for the collection of child support. Title 42, Chapter 7, Subchapter IV, Part D (Sections 651 - 669b) addresses the authorization of federal funds for states and mandates how child support should be collected to qualify for these monies.

In addition, Title 42, Chapter 7, Subchapter IV, Part D, §666(10), entitled "Review and adjustment of support orders upon request", contains subsection (a) which is titled "3-year review". Within this subsection, the USCA sets forth that states must establish procedures under which every 3 years (or such shorter cycle as the State may determine), upon request of either parent:

- I) review the order if amount differs from what is in guidelines;
- II) apply a cost of living adjustment OR
- III) use automated methods to identify orders eligible for review

When the NJ legislature added the additional language to N.J.S.A. 2A:17-56.9a, and the Supreme Court adopted R 5:6B, the legislature and the Court effectively eliminated the automatic right of either parent to seek an automatic triennial review of a child support obligation, as confirmed in Stein v. Mamolen.

However, if there is no further right to a triennial review, why has Rule 5:7-4(f) (which deals with notices which must be annexed to child support judgments) not been amended to reflect the language of N.J.S.A. 2A:17-56.9a? Specifically, Rule 5:7-4(f) (7) still provides that the amount of child support in Title IV-D cases shall be subject to review at least once every three years. So, there appears to still be some inherent conflict between case law, N.J.S.A. 2A:17-56.9a and Rule 5:6B; and apparently, there is still the ability to seek a review of a child support obligation, without a showing of changed circumstances, at least once every three years.

CONCLUSION

In summary, the family law practitioner must be cognizant of the concept of changed circumstances, and what will and will not constitute changed circumstances to satisfy this procedural hurdle.