

# THE DAILY RECORD

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## CivilLITIGATION

### Modification of child support by loss of employment

Family law practitioners can readily compare notes regarding cases of child support or maintenance obligations where there is a loss of employment. The state of the economy, nationwide, and of course, locally, has produced an ever-increasing number of these cases.

In Supreme Court actions, Domestic Relations Law §236B 9, b, provides direction where modification of child support or maintenance is necessitated by a loss of employment.

First, the recent amendment to subparagraph b of §236B 9, sets out the three possibilities where modification of a child support order may be obtained:

1. Substantial change in circumstances;
2. Three years have passed since the order was entered, last modified or adjusted;
3. A change in either party's gross income by 15 percent or more since the order was entered, modified, or adjusted.

As to maintenance awards, modification may be ordered in the event the recipient suffers an inability to be self-supporting or there is a substantial change in circumstances. Certainly in the case of child support, a loss of employment could be recognized as a substantial change in circumstances or could result in a reduction in the unemployed party's gross income by 15 percent or more.

However, it must be noted that this new provision of the statute prohibits a party from asserting a loss in income as a ground for modification, unless the reduction was "involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability and experience."

Just as in prior actions, the new legislation will not allow a party quitting his or her job to benefit from that voluntary act by modification of child support in his or her favor. Moreover, the party who, in fact, has involuntarily lost employment cannot proceed on the ground of the loss of 15 percent or more of gross income unless a substantial job search has been undertaken.

Given a solid a line of case opinions, even where modification is sought upon a substantial change in circumstances — disability, downsizing or shutdown of plant — a diligent and sustained job search must be shown.

To provide solid representation to your former Kodak employee client, you must tell her that even though the court will accept the involuntary loss of employment, a reduction in her

child support obligation will not be awarded unless she has been seeking a new job for many months and she can demonstrate the efforts she has made.

Clients will be alarmed to learn that a former employee cannot be awarded a downward modification of his maintenance obligation where he signs a "voluntary reduction in force" application in order to obtain greater benefits than those that would be offered if he were terminated, even when he has seen the number of fellow employees in his department drop from several hundred to but a handful. The handwriting might have been on the wall for this employee, but nevertheless, he "voluntarily" chose to leave his employment.

What is an appropriate job search in the eyes of the court? A resume with date of preparation and dates of revisions, if any; print-outs of online job searches through New York State Job Bank, Monster.com, etc.; letters seeking interviews; calendars and/or diaries or notes indicating interviews' attended with the interviewer's names and employment positions offered; copies of newspaper classified ads reviewed; dates, times and places of job fairs attended; dates, times and places of employment workshops attended; networking events attended; and copies of rejection letters received.

A further note for the unwary client is that arrears in maintenance accrued prior to a court request for modification must be paid unless excused for good cause. For those who are obligated to pay child support, arrears will not be excused.

Lastly, keep in mind that child support or maintenance modification is not geared only toward the party obligated to pay. The recipient, who is seeking an upward modification of child support or maintenance, must abide by the same restrictions in the event that the person receiving child support and/or maintenance loses his or her job. He or she cannot come forward expecting an increase in payments where the loss of employment is voluntary or where an acceptable job search cannot be demonstrated.

In any case, frank discussion at the first instance will serve to curb any undue expectations on the part of the client recently suffering a job loss.

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