

Family Law

Post-Judgment Motions To Modify Support in a Poor Economy

Diligence in accumulating and documenting all the facts is a must

By Maria P. Imbalzano

With the economy still in a downward spiral and unemployment at the highest its been in decades, divorce attorneys as well as family courts have been very busy with post-judgment applications. While it's been noted that divorce filings are down in this period of recession, presumably because couples cannot afford to split up, the same does not appear true for modification motions.

With massive layoffs, plant and store closings, corporate bankruptcies and belt-tightening reorganizations, not only are people losing their jobs, but it is taking much longer to find replacement employment than it has in the past. The newest statistics from the U.S. Department of Labor show that the unemployment rate is up to 9.4 percent (14.5 million people) and that 4.5 percent of that unemployed workforce has been out of a job for 15 weeks or longer. It follows that alimony and child support obligations, which were based on a healthy income at the time of the divorce, have become impossible to

Imbalzano is a shareholder and a member of the divorce and family law group of Stark & Stark in Lawrenceville.

pay from unemployment benefits or, even worse, no benefits.

While it would seem that these modification motions should be granted if the paying spouse no longer has the means to comply with those obligations, courts must also take into consideration the payee spouse's circumstances, including those of the children, in deciding when, if, how much, and for how long, support obligations should be modified.

In analyzing whether to make this type of application, we look to the well-settled principles established through case law. In the event of a substantial change in circumstances, either party in a divorce case may make an application to the court to modify support obligations. *Lepis v. Lepis*, 83 N.J. 139 (1980). Certainly, the loss of a job, through no fault of the employee, is a substantial change in circumstance. Competing with this is the precedent that temporary unemployment is not a basis for modification of support. *Bonano v. Bonano*, 4 N.J. 268 (1950). So how do we balance these two well-established legal principles in representing our clients?

In any modification case, the burden of proof is on the party seeking change. *Glass v. Glass*, 366 N.J. Super. 357 (App.

Div. 2004). Going into court with a certification stating that he or she has lost their job due to the recession, and therefore seeking modification, is not enough. A party's effort to find another job must be aggressive and active.

The proofs attached to that party's certification must capture the time and effort the payor spouse is putting into finding another job. Copies of letters and résumés sent by e-mail or snail mail to companies looking for employees are a start. Most job seekers these days will post their résumé on employment Web sites such as monster.com or careerbuilder.com, but this does not quantify the effort made. Keeping a log of prospective employers who contact your client with the date and synopsis of the conversation or copy of e-mail responses is better proof. Copies of rejection letters, if an employer bothers to send one, are also helpful. The log should include dates and outcomes of interviews, any offers made, and reasons why an offer was not accepted. Any tangible evidence that would support the log is a must.

In addition, an obligor should check local newspapers and trade or industry journals for employment opportunities. Obtaining a headhunter and documenting all job leads, interviews and rejections

is also suggested. Many times the prior employer will offer laid-off employees time with a counseling or other firm as part of their severance package. All of this information must be pooled together, with supporting proof and made part of any certification accompanying a motion for modification.

In searching for employment, it may no longer be acceptable to apply for jobs only in your client's residential area, or only in his or her specific field. If expanding their job search in these ways bears no fruit, then accepting a decrease in pay may be the only option available if they have been in the market for a period of time with no results.

In advising a client with regard to this aspect, you must still keep in mind prior case law that holds that when an obligor changes his or her career, he/she is not free to disregard their pre-existing duty to pay support. *Deegan v. Deegan*, 254 N.J. Super. 350 (App. Div. 1992). The main question then becomes whether the payor's decision to change careers is reasonable under the circumstances and whether the advantages to the supporting spouse substantially outweigh the detriment to the supported spouse.

In the case of *Storey v. Storey*, 373 N.J. Super. 464 (App. Div. 2004), the ex-husband, who was paying alimony, lost his job as a computer hardware specialist. One month later, he decided to become a massage therapist, earning \$95,000 per year less. The Appellate Division set forth factors to consider in a case such as this, dealing with a career change and lesser income. These factors include: the reasons for the career change (both the reasons for leaving the prior job and the reasons for choosing the new job); disparity between prior and present earnings; efforts to find work at comparable pay; the extent to which the new career draws or builds upon education, skills and experience; the avail-

ability of work; the extent to which the new career offers opportunities for enhanced earnings in the future; age and health; and the former spouse's need for support.

In the *Storey* case, the lower court decided, and the Appellate Division agreed, that the husband did not establish that his new career was reasonable given his background in technology. Further, he did little to find a job in his field, instead assuming his industry was depressed. He did ask technicians and sales representatives from companies he had met through his employment if they had heard of any job openings. He had also sent résumés to major companies and posted his résumé on Web sites. He did not contact the consulting firm hired by his previous employer to help him find work, nor did he engage a headhunter or review help wanted ads. As a result, the court found that he was voluntarily underemployed as a massage therapist. The court did, however, modify alimony after imputing income based on prevailing wages for computer service technicians. This imputed income was less than he had made as a computer hardware specialist, but substantially more than he was making as a massage therapist. His support obligation was then based on this imputed income.

If a party does accept a job with lesser pay after a diligent search, it will be much easier to deal with a motion for modification of support. If the proofs are there as to the efforts made for a comparable job to the party's prior employment, and that party has not been able to obtain comparable employment given the state of that industry, then the court will rely on the lesser income in modifying support, absent evidence undermining the payor spouse's proofs.

If, on the other hand, the unemployed spouse has not made a zealous effort and has just accepted a job making lesser pay without proving his or her effort, then a

court may not modify the obligor's support payments.

As one can glean from the above suggestions, a motion to modify support based on job loss should not be filed quickly, even though the payor spouse may be pushing to do it, hoping for quick relief. While courts are now considering motions to modify support based on job loss much more quickly than they have in the past, we must still present a compelling case.

In the not too distant past, it was not unheard of for a court to determine that being out of the workforce for a year was still temporary unemployment, and the court would deny the motion for modification based on changed circumstances. During this past year, with headlines publicizing the severity of the economic downturn, and with financial institutions on Wall Street collapsing or merging, not only affecting their employees (many of whom are New Jersey residents) but thousands of other businesses here in New Jersey, the courts are starting to re-adjust their thinking on this issue. Courts are beginning to consider a modification motion if a payor is out of work for four to six months, instead of 10 to 12 months.

Still, you must be diligent in accumulating all the facts. Has the payor spouse been given a severance package, and if so, how does it compare to his or her prior income? Is that person collecting unemployment? Does the obligor have other assets from which support can be paid temporarily? Are those other assets generating a substantial income or should income be imputed to those assets?

As in any motion filed with the court, the more information a party has to support their position, the better. These post-judgment applications take time and effort to put together, and clients must cooperate in giving you tangible evidence to document their efforts and to bolster their case. ■