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WHAT IS REQUIRED TO MODIFY AN EXISTING CHILD SUPPORT ORDER?

By Raymond P. Raiche, J.D
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A party who is subject to a child support order requires court intervention if that party seeks a modification of said order.

> An agreement between the parties to modify the child support order without court intervention is insufficient.

This article shall discuss the legal standard the court will use to determine if a child support order should be modified.

In 2010, Family Court Act Section 451 and Domestic Relations Law Section 236 were significantly amended to liberalize the grounds for modifying a child support order, regardless of whether the original order has been issued by the Family Court or by the Supreme Court. The original Section 451 remains in effect, with minor clarifying language, and is now designated as subdivision 1. The major change in the law is found in newly enacted subdivision 2.

The new subdivision begins with the following broad provision: "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** (emphasis supplied)."

This newly enacted amendment reflects the large body of case law which had established "the substantial change in circumstances" rule for every child support order that had not been incorporated in a court order or separation agreement dissolving the parties' marriage. Prior to the new amendment, where an agreement or stipulation had been incorporated, as most are, modification had been governed by the Court of Appeals decision of Boden v. Boden 42 N.Y.2d 210 (1977). Essentially, the Boden rule restricted modification to cases in which the petitioner proved an "unreasonable and unanticipated" change in circumstances, provided the child's needs were not jeopardized and the parties were accordingly seeking a reallocation of support. On its face, the new subdivision 2 appears to legislatively overrule Boden.

Whether Boden retains any validity in light of the amendment is questionable. Courts may still look at the parties' agreement for guidance, but will presumably do so, if at all, in the context of applying a "substantial change in circumstances" rule, irrespective of whether the parties had entered into an incorporated agreement.

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In addition, subdivision 2(B) establishes further alternative grounds for modification. First, orders are modifiable after the passage of three years or whenever either of the parties' gross income has changed by fifteen percent, whichever occurs earlier. In such event, "substantial change in circumstances" is irrelevant. Child support orders ordinarily remain in effect until the child has attained the age of 21. Thus, most orders will be automatically modifiable multiple times. Significant parental income changes increase the possibilities and hence the number of court reviews.

Interestingly, subdivision 2(A) additionally provides that "incarceration shall not be a bar to finding a substantial change in circumstances," unless the incarceration is predicated on the non-payment of support or for an offense against the custodial parent or the child. This amendment reverses a line of decisions holding that incarceration is irrelevant to child support, even though the incarcerated parent could not possibly continue support payments.

The amendments discussed above apply only to non-incorporated child support orders issued prior to the effective date. Incorporated agreements are affected only prospectively. Finally, the amendments affect only child support. Spousal support and maintenance rules remain unchanged.

The 3rd Annual "Hooky on the Hill" skiing/networking/fundraising event at Hunter Mountain – co-sponsored by BSR&B and The Ruby Group – was a great success. The weather was perfect, and everyone enjoyed a wonderful day of skiing.

All proceeds from the event went to benefit local non-profit organization **Inspire**, whose mission is to form partnerships with people who have special challenges to maximize their capabilities to lead fuller lives.

THE INS AND OUTS OF ZONING BOARDS OF APPEAL

By William A. Frank, J.D.
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Many homeowners and business owners seeking permission to build on or expand existing buildings on their property are told by their local building inspector or planning board that they need to "go to the ZBA". A zoning board of appeals ("ZBA") is primarily an appellate body and, unless a local law specifies otherwise, has no original jurisdiction.

A ZBA is limited to hearing and deciding appeals and reviewing any order, requirement, decision, interpretation, or determination made by the administrative official (typically a municipal building inspector) or board charged with enforcement of local zoning laws.

In its exercise of appellate power,

> it is not the ZBA's function merely to decide whether the enforcement officer or board's action was wrong

(i.e. arbitrary and capricious). Instead, **the ZBA must conduct a new review, including a review of all of the facts which formed the basis of the officer's decision, and must decide the question as though it were the enforcement officer or board.**

The primary functions of a ZBA are:

- hearing appeals
- interpreting the local zoning code; and
- granting or denying variance applications.

A variance is permission granted by the ZBA so that property may be used in a manner not allowed by the zoning. It is **only** the ZBA that has the power to provide for such exceptions from the zoning.

A use variance grants permission to the owner to do what the local use regulations prohibit. It is critical that any use variance granted by the ZBA does not conflict with the overall zoning scheme for the community and the affected area in particular. The showing required for entitlement to a use variance is therefore intended to be a difficult one.

In cities, towns and villages, no use variance will be granted by a ZBA without a showing by the applicant that existing zoning regulations and restrictions have caused unnecessary hardship. In order to prove such hardship, an applicant must demonstrate to the ZBA that for each and every permitted use under the zoning regulations for the particular district where the property is located:

(1) The applicant cannot realize a reasonable return, provided

that lack of return is substantial as demonstrated by competent financial evidence;

(2) That the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood;

(3) That the requested use variance, if granted, will not alter the essential character of the neighborhood; and

(4) That the alleged hardship has not been self-created.

[Town Law § 267-b(2)(b) and Village Law § 7-712-b(2)(b)]

An area variance is an authorization by the ZBA for the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations. [Town Law § 267(1)(b), and Village Law § 7-712(1)(b)]

A ZBA must balance the benefit to be realized by the applicant against the potential detriment to the health, safety, and general welfare of the neighborhood or community if the variance were to be granted. In balancing these interests, the ZBA must consider the following five factors:

(1) Whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance.

(2) Whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance.

(3) Whether the requested area variance is substantial.

(4) Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.

(5) Whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board but shall not necessarily preclude the granting of the area variance.

[Town Law § 267-b(3), Village Law § 7-712-b(3)]

Appeals to the ZBA must be taken within 60 days of the filing of a determination [Town Law § 267-a(5); Village Law § 7-712-a(5)] and a public hearing must be held before a ZBA decision is issued. It is important to note that planning board and town board information and recommendations may be considered by the ZBA when appropriate, but the ZBA is a completely independent body. The ZBA has 62 days from the conclusion of the hearing to render a decision. [Town Law § 267-a(8), and Village Law § 7-712-a(8)]. This requirement may be extended by agreement of the parties.

There is only a 30-day period in which to bring a court challenge a ZBA decision (known as an Article 78 proceeding), which begins to run from the date the decision is filed with the municipal clerk [Town Law § 267-a(9), Village Law § 7-712-a(9)].

Prior to making any type of application to a ZBA, an experienced land use attorney should be consulted to assist the property owner in following the proper procedures and making an effective and winning argument before the ZBA.

Mom didn't protect her assets against nursing home costs and now she needs care.

IS THERE ANYTHING WE CAN STILL DO?

ByAustin F. DuBois, J.D., LL.M.
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While proactive planning is always the best way to protect one's assets against the growing costs of long-term care,

> even in the "eleventh hour" individuals requiring in-home or nursing home care have options.

According to the New York State Department of Health, the average cost of a nursing home in our region is $11,135 per month. If an elderly family member requires nursing home care, many facilities would be happy to have the family simply pay out-of-pocket, and unfortunately, many people do. Oftentimes, the family is vaguely aware of the "5-year look back", and assumes that because they didn't plan five years in advance, there is nothing they can do. But that is simply not the case.

Instead of paying out-of-pocket, there are ways to qualify for Medicaid. Medicaid is available to persons with resources under $14,550 (as of 2014), and a primary residence is excluded (but remains subject to a Medicaid lien). It is a common misconception that the law prohibits or makes it illegal for a person to give away money or assets in order to qualify for Medicaid. Rather, the law merely discourages asset transfers, as follows: when you apply for Medicaid, you must submit five years' worth of financial records (this is the 5-year "look back"). The Department of Social Services ("DSS") examines those records to see whether the individual has given away any money, property, or anything of substantial value.

Some transfers are considered exempt, such as transfers to a spouse or disabled child, as well as other limited exceptions. As but one example, a spouse can "give away" all assets to the other spouse, and qualify for Medicaid immediately (although there are spousal resource limits that must be taken into consideration as well). However, many people who require nursing home care may be widowed or otherwise unmarried. Most non-spousal transfers, such as those to adult children, are typically "non-exempt". **If the DSS sees that there have been non-exempt transfers, a "penalty period" is imposed**. The penalty period is a period of time during which Medicaid will not be made available to cover the cost of the individual's care. The

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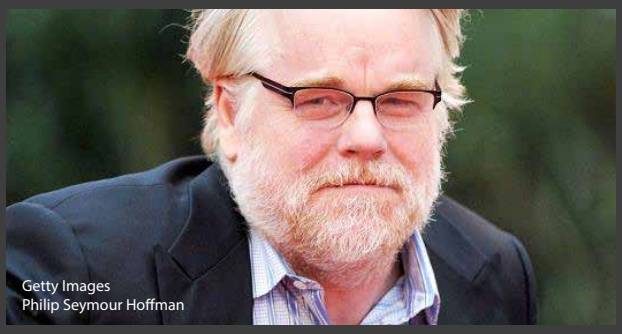
length of that period is directly related to the value of the assets given away: the higher the value of assets transferred, the longer the penalty period. Medicaid will then begin coverage at the end of the penalty period. So, it is not illegal to give away assets—there is merely a period of non-coverage that results from giving assets away.

What, then, is an unmarried person to do? Since we know how the DSS calculates that period of non-coverage, we can set up a plan where we "give away" approximately half of a person's assets, which creates a penalty period, but we can loan the other half (documented by a special type of promissory note) to pay for the Medicaid applicant's care during the penalty period. When the plan is complete, even though half of the person's assets have been paid to the nursing home, the original half that we "gave away" remains protected with the family, and Medicaid coverage begins. **Neither the nursing home nor the DSS is legally permitted to insist that the gifted funds be spent on the applicant's care, thereby avoiding the need to spend down all a person's money**.

Of course, if the person had done proactive planning, significantly more than half of the assets can be protected, so it is always advisable to consult with an experienced Elder Law attorney sooner than later. But if that ship has sailed, an Elder Law attorney should still be able to help.

BREAKING NEWS

CNBC



Getty Images
Philip Seymour Hoffman

In case you missed it yourself, **BSR&B Partner Richard Shapiro was featured in a CNBC news article about Oscar-winning actor Philip Seymour Hoffman**. The story was centered on the actor's problematic estate plan.

Concerned about your estate plan? Attend the next upcoming Estate Plans that Work on April 24.

BSR&B PARTNER RICHARD J. SHAPIRO, ESQ.

FREE EDUCATIONAL WORKSHOPS:

Estate Plans That Work™

April 24, 2014
3:00 p.m. to 6:00 p.m.

May 20, 2014
3:00 p.m. to 6:00 p.m.

We'll explain little-known pitfalls and the best methods to protect your loved ones' inheritance after you're gone.

The above workshops will be held at the
BSR&B Education Center (1st floor)
10 Matthews Street, Goshen, New York

To register for a workshop, call Donna at 291-0011 x.242, or register online at www.mid-hudsonlaw.com by going to the "Upcoming Events" link.

BOYS & GIRLS CLUBS
OF TOWN OF WALLKILL INC.

BSR&B Attorney Marcello Cirigliano has agreed to donate his time to the Town of Wallkill Boys & Girls Clubs as a member of its steering committee for the upcoming **4th Annual Orange County Celebrity Dinner**.

Plans are already well underway for this popular fundraiser, and will feature – for the first time – a serving team from BSR&B! This year each team is supposed to represent a different show on Broadway; watch our Facebook page for the big reveal of our team's theme!