Our Dual System To Modify Child Support

BY ELLIOT WIENER

NEW YORK HAS two fundamentally different sets of rules that govern modification of child support. Its traditional rules, which are routinely applied in matrimonial actions in Supreme Court, are the product of state law (the “traditional” rules).

Abandoning its longstanding deference to the states in the area of family law, the federal government has pressed the states to adopt a completely different method for modifying child support. In response, New York has adopted a second set of rules (the “federal” rules), which reflect federal law and which are routinely applied in Family Court proceedings. Potentially, these federal rules can be applied to judgments and orders in matrimonial actions, thereby imposing unanticipated support obligations upon the parties.

The application by the state of two fundamentally different methods for modifying child support to similarly situated individuals has policy and constitutional implications that the Matrimonial Commission, among others, may want to consider.

State Child Support Rules

Both the traditional state law rules and the federal rules permit courts to fix child support, and allow the parents initially to fix their child support obligations by agreement.  

The traditional rules presume that the parents’ child support agreement addresses the child’s present and future needs.  

An effort to modify the agreement will be rejected if the court views the request as merely an attempt to readjust between the parties the burden of the agreed-upon child support.

If the movant proves that modification is warranted because of an “unanticipated and unreasonable change in circumstances” and a concommitant showing of need, the courts will grant the relief notwithstanding the agreement. This is justified because life is predictable only within certain limits and the child, who is the subject of the agreement, is not a party to, or bound by, its terms.

Further, if the court finds the request for judicial modification to be necessary to meet the child’s needs, the courts will modify the judgment notwithstanding the agreement without requiring proof of unforseeability.

In both of these situations, the state’s interest in insuring that the child’s needs are met outweighs its interest in, and the parties’ right to, enforcement of the agreement. Even where the moving party cannot meet the Boden test or the Brescia test, the courts will modify the child support obligation if the central premise of the parties’ agreement, upon which child support is based, no longer applies due to a fundamental change in circumstances. In that circumstance, the new order will be made in conformance with the Child Support Standards Act (CSSA).

While initial child support orders must be made with regard to the parents’ income, these state law rules do not incorporate periodic review to be sure that the level of child support retains its relationship to the parents’ income. Moreover, modification under the traditional state law rules is not triggered by inflation and its concommitant reduction in the purchasing power of fixed child support dollars.

Change in a parent’s income is insufficient, on its own and in combination with the increased needs of the child, to justify upward modification of child support absent an allegation and proof of the recipient’s inability to meet those needs, which must be identified.

Some cases even hold that the “needs” test requires proof that the child’s “basic” needs are not being met. The movant who pleads only conclusory allegations risks denial of a hearing. The moving party is required to produce evidence of the parties’ financial status at two points in time: at the time of the original agreement or order and at the time of the application for modification. A failure to produce either of these two sets of data is fatal.

Where the initial support is fixed by court order without an agreement, the party seeking modification need not prove an unforeseeable change in circumstances but must, nevertheless, set forth specific increased expenses as opposed to a general claim that the children’s needs have increased as they matured or as a result of inflation.

The traditional state law rules proceed from the fundamental premise that people are free to make their own arrangements and that the state will alter those arrangements only in limited circumstances. These rules thus express a reluctance to permit courts to impose new obligations on parties who freely entered into fair agreements ordering their financial obligation to each other with respect to their children. The new federally inspired rules proceed from a fundamentally different premise and result in completely different rules.

Federal Intervention

In 1988, Congress amended the Social Security Act to condition a state’s receipt of certain federal funds on the adoption by the state of child support guidelines. In response, New York adopted the CSSA. In 1996, Congress expanded federal influence on state child support rules by further conditioning the receipt of federal funds on the state’s adoption of procedures for periodic review.
and adjustment — modification — of child support orders.19

Under the federal scheme, each state is required to establish a statewide child support enforcement agency20 (in New York this is the support collection unit (SCU))21 to provide support enforcement services to all children who receive specified federal benefits. Support services includes "assistance in the preparation and filing of support, … violation and modification petitions,"22 collection of child support payments through SCU,23 "enforcement of support obligations,"24 and "review and adjustment of child support orders" that come within its jurisdiction.25

Federal law requires that modification of child support orders be available upon request.26 The "request" that triggers SCU's review of child support27 is an application to SCU for child support services28 or a petition or motion in court for enforcement or modification of child support.29 The review may not occur earlier than two years from the date of the last "order" and every two years thereafter.30 Any adjustment made by SCU is judicially reviewable.31

If, over the two years since the order was made, the sum of the annual average changes in the consumer price index for all urban consumers is 10 percent or greater, the support obligation is adjusted to reflect that change.32 SCU must notify the parties of the adjusted amount, if any, and the new amount of child support becomes enforceable. However, if an objection is filed, the adjusted amount is not enforceable until the review process is complete.33

An adjustment in child support by SCU merely keeps the amount of child support equal to the original order in real dollar terms. It is therefore more accurately understood as an inflation adjustment rather than as an increase in child support. In these days of relatively low inflation, the COLA will be relatively small while the outcome of an objection could be a substantially different obligation.

Either party or SCU, which calculates the COLA adjustment, may object to the proposed COLA adjustment.34 At the hearing on a COLA objection, the court is required "to determine whether an adjustment is warranted based on the guidelines, not merely on whether the COLA should be applied."35

The new order issued by the court must be "in accordance with the guidelines."36 Such an order ... should be exactly that — an order that comports with the guidelines as set forth in section 413.37 Therefore, the request for a COLA adjustment can readily be converted into a de novo determination of child support based on the guidelines.

SCU is authorized biannually to review and modify child support orders.38 This federal modification system applies both to child support orders made by the court after a hearing and to child support orders based on the parties' agreement or stipulation.39

Applying the Federal Rules

The federal modification procedures can be applied to support orders and judgments in matrimonial actions.40

By definition, the "order" that is subject to SCU modification includes the "original, modified or adjusted order of support,"41 and an order of support that results from judicial review of any cost of living adjustment to child support.42 The statutory definition of "order" also refers to orders of support made pursuant to DRL §240. Child support orders in matrimonial proceedings therefore fall within the subject area of SCU review.

The federal modification process applies to those cases in which child support services are being provided. This includes cases where child support is paid through SCU. Therefore, in a matrimonial case, child support paid through SCU is subject to SCU modification.43

Federal law also requires that child support services be made available to "any other child if an individual applies for child support services,"44 and New York's statute so provides.45 If an individual applies for support enforcement services, the underlying support order is subject to the federal review process.46 A recipient of child support also "applies" for such services by filing a motion for enforcement or modification of support.

If, as is typical, the judgment of divorce may be enforced in Family Court,47 the request for enforcement or modification may be filed in Family Court and SCU is available to help the petitioner prepare the petition.48 The standard form Family Court enforcement petition includes the requisite language so that the filing of the petition constitutes a request for child support services.49

Since the SCU modification process includes judicial review that can be sought by either party or SCU,50 and that review requires application of the guidelines, a request by either party or, as in Tompkins County, by SCU itself, provides a basis for biannual de novo review of child support orders, including those made in matrimonial actions.

What Does This Mean?

It would be a mistake to think that the parties' agreement is a legal barrier to either the COLA adjustment or the broader judicial guidelines review of child support.

The review and adjustment statute says that "nothing herein shall be deemed in any way to limit, restrict, expand or impair the rights of any party to file for a modification of a child support order as is otherwise provided by law."51 This language would seem to incorporate into the review and adjustment process the substantive rules applicable to the modification of child support fixed by agreement, since the SCU process expands a party's right to modification.

As noted above, the traditional contractual defenses are available to avoid a hearing and modification in the first place. They are not limited to arguments about the fairness of an order resulting from application of the guidelines to the facts as they then exist.

However, CSSA specifically says,52 and the Court of Appeals has interpreted the law to say, that the terms of an existing agreement are to be considered as only one factor among the other specifically enumerated factors in determining whether the modified amount of child support is "unjust or inappropriate."53 Not only is an agreement no barrier to application of the modification process, but the statute also provides that the court may issue an adjusted order without proof of a change in circumstances.54

Thus the traditional contractual defenses have been moved from the front end of the analysis to the back end and relegated to one among many factors in an argument to be made in support of deviating from CSSA. The traditional defenses in a modification proceeding, which are essentially contractual in nature, are diluted if not entirely lost. This scheme does not violate the Contract Clause of the U.S. Constitution.55

Recipients of child support may find advantages in this statutory scheme. They are, in effect, entitled to biannual modification of child support without having to overcome the traditional contractual defenses. They need only prove that two years have passed since the last order, and that the inflation trigger under the COLA provisions has been met and their child support can be recalculated based on current income without the necessity of meeting the Boden, Brescia, or Gravlin test.

In comparison with the rule-bound traditional method, which gives parties an incentive to be represented by counsel, the federal system is relatively simple and may facilitate parties proceeding without lawyers, thereby saving significant counsel fees.

Conclusion

New York has two systems for modifying child support.

The primary value expressed in the traditional system is located in contract principles,
modified by the concepts of changed circumstances and demonstrated “need.” This system limits modification to circumstances in which a “good reason” is offered for the change: an unanticipated and unreasonable change in circumstances warranting modification; an inability to meet the child’s needs; the complete breakdown of the custody agreement upon which the child support is based.

The traditional state law system is routinely applied to almost all matrimonial cases in Supreme Court but not in support proceedings in Family Court.

Under the federal modification system, the focus is shifted away from contract principles and toward a policy that insures continuity of income-based child support. Child support awards are reviewed on a statutorily fixed schedule and no reason for adjustment is required other than a request, the passage of time, and changes in the cost of living.

The right to modification of child support is triggered by macroeconomic forces — inflation — not by changes in the microeconomy of the family or by increased “needs.” Once that threshold is met, child support is entirely recalculated.

The federal system’s relative simplicity and its requirement that modification be initiated as an administrative, rather than a judicial, proceeding, makes it easier for parties to seek modification without incurring costs for counsel fees. There are statutory provisions that allow litigants to move from the traditional contract-oriented system to the federally inspired system, but that system should be built around the relatively few complex cases. Judicial review, which is provided for in the federal system, is typically viewed as an acceptable structural remedy in these situations.

The combination of these concerns, taken together with the likelihood that New York will not sacrifice the flow of federal funds that depends upon continued use of the federal inspired system, suggests that if New York is going to adopt a uniform system applicable to all cases, it is likely to employ the federal model. It seems clear that the Matrimonial Commission should ponder the question whether New York should maintain two fundamentally different systems for the modification of child support.

1. DRL §240(1-b)(b); FCA §413(1)(b).
2. Boden v. Boden, 42 NY2d 210, 213, 397 NYS2d 701, 703 (1977). Child support orders fixed by the court speak only as to the date of the order and do not anticipate future needs.
3. Boden, supra, at 212, 397 NYS2d 703.
5. Boden, supra, at 213, 397 NYS2d at 703. Boden, supra, at 212, 397 NYS2d at 703.
12. Greenaway, supra, at 286 AD2d at 856, 692 NYS2d at 229 (AD 1993). What “basic needs” consist of is unclear. They may be, for example, the core “needs” of any child or they may vary with the family’s standard of living.
17. SSL §111-g; §111-h.
18. SSL §111-n(2)(b)). Child support orders are “modified” by courts under the CSSA (§347.26(e)(5)(i). This regulation seems to permit adjustment of a modification of the support amount under review where there is no more than a 10% difference between the support amount under review and the amount SCU calculates on current income, “there is a minimum of request every three years or such shorter period as the state determines. 42 USC §666(a)(10)(A). 42 USC §666(a)(10)(B) requires the state to make modification available outside of the two-year period as well as upon a showing of a “substantial change in circumstances.” This provision, in combination with FCA §413(1)(l) and DLR §240-l(1)(b)(i) accommodates requests for downward modification where the circumstances warrant.
19. SSL §111-l(d).
20. SSL §111-n(2)(d) and (4)(a). Regulations of the New York State Department of Social Services provide that if both parties provide SCD with adequate financial information to calculate child support on a current basis, and if there is a 10 percent difference between the support amount under review and the amount SCU calculates on current income, “there is an adequate basis to adjust the order.” 18 NYCRR §347.26(e)(5)(i). This regulation seems to permit adjustment regardless of increases in the cost of living.
21. SSL §111-n(4)(b) and (5); FCA §413(2)(b) and (3); DRL §240(2)(b) and (3).
22. SSL §111-n(2)(d) and (4)(a). 42 USC §654(4)(A); SSL §111-g.
24. SSL §111-g: FCA §111-n(1); DRL §240-c(1).
25. SSL §111-n(1); SSL §111-h(1); 18 NYCRR §347.17(c)(6).
26. SSL §111-n(2)(d).
27. FCA §413(a)(1). DRL §240-c.
28. 18 NYCRR §347.17(a).
29. SSL §111-n(3)(b) and (7). For recipients of family assistance, review occurs every two years without the necessity of a request. 18 NYCRR §347.17(a)(4).
30. SSL §111-n(2)(b).
31. SSL §111-l(d).
32. SSL §111(n-2) and 4(a). Regulations of the New York State Department of Social Services provide that if both parties provide SCD with adequate financial information to calculate child support on a current basis, and if there is a 10 percent difference between the support amount under review and the amount SCD calculates on current income, “there is an adequate basis to adjust the order.” 18 NYCRR §347.26(e)(5)(i). This regulation seems to permit adjustment regardless of increases in the cost of living.