Diff'rent Strokes for Diff'rent Folks — Differing Standards for Child Support Requests

By Vesselin Mitev

"Substantial change in circumstances" is a phrase thrown around so often in matrimonial/family law circles as it relates to child support, that it sometimes verily appears it has subsumed the long-standing and applicable case law that appends itself to a petition for child support. Like a code word activating a sleeper agent (the support magistrate, or the judge, or opposing counsel, or opposing counsel's brand new associate, who was just this day sent into Family Court to boldly demand child support based on a "substantial change in circumstances"), the phrase has a superficial veneer of authority but by itself is utterly meaningless.

Most child support orders emanate from agreements entered into between the parties and then signed off in some fashion by the courts. For those amounts (presumably the product of arms-length bargaining, negotiating and planning for the future as between the parties), the standard for modification is the so called "unanticipated and unreasonable change in circumstances," as laid out by the Court of Appeals in 1977 in *Boden v Boden*, 42 NY2d 210, 213 [1977]. Cogently reiterating the logical principle that parties who settle their differences are in the best position to (have known) what's best, the court held that:

"It is to be assumed that the parties anticipated the future needs of the child and adequately provided for them. It is also to be presumed that in the negotiation of the terms of the agreement the parties arrived at what they felt was a fair and equitable division of the financial burden to be assumed in the rearing of the child. Included in these obligations is the financial responsibility of providing the child with adequate and reasonable educational opportunities. Absent a showing of an unanticipated and unreasonable change in circumstances, the support provisions of the agreement should not be disturbed."

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Five years later, in *Brescia v. Fitts*, 6 NY2d 132, 139 [1982] the court clarified that where a child's needs were not being met, the higher *Boden* standard did not necessarily apply, clarifying that the *Boden* standard was meant to "apply only when the dispute is directed solely to readjusting the respective obligations of the parents to support their child" and not when it was alleged that the children's needs were not being met. For example, in a support petition seeking contribution to college costs, the *Boden* standard would apply, since that expense would necessarily impact the parties' respective obligations; and while crucial, a college education is not considered a need of a child.

Taken together, in any event, the two cases explicitly stand for the proposition that where the parties settled their child support obligations via an agreement, the standard for modification is "unanticipated and unreasonable change in circumstances, resulting in a concomitant need" and *not* a boilerplate allegation of a substantial change in circumstances, which is the standard used when an order was arrived at by a court (in other words, the lesser standard applies when the parties left it up to a third party (the court) to resolve their dispute for them.

Post-October 2010, however, the law was again amended to add two other ways to modify a child support order (DRL 236 B (9)(b)and FCA 451), where

(A) three years have passed since the order was entered, last modified or adjusted; or

(B) there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted; with the law explicitly requiring diligent efforts to secure commensurate employment for petitions claiming reduced income.

Conversely, the law also allows the parties to specifically opt out of the two additional modification clauses in a "validly executed agreement or stipulation entered into between the parties," which is a maneuver that should be agreed to on a case-by-case basis, depending on whom one represents.

For these self-evident reasons, when faced with a child support petition, it would behoove one to carefully scrutinize the allegations raised therein and to check them against the applicable governing document. For a pre-October 2010 agreement, and a petition filed thereupon, the higher standard of unanticipated *and* unreasonable change in circumstances should apply; one can ably argue, therefore, that nearly everything should have been anticipated by the parties when they came to their initial agreement.

Moreover, the "concomitant need" of the child is a separate element that must be established (either via the petition, but certainly at a hearing). Failure to establish same should properly result in a dismissal, even if the movant overcomes the initial threshold of demonstrating that something unanticipated and unreasonable occurred.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 % devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.