Standards for Modification of Child Support - Did Boden Survive?
By Joel R. Brandes

A persistent source of frustration among matrimonial lawyers has been understanding when child support may be modified where there is no surviving agreement, or where there is a surviving agreement which has been incorporated into a judgment or order. The child support modification roller coaster has had its ups and downs and the lesson to be taught requires a brief history lesson.

Since 1962 Domestic Relations Law §240 has provided, with regard to child support orders and judgments, that in an action for a divorce "[u]pon the application [of either parent] the court the court may annul or modify any such direction, whether made by order or final judgment." (Laws of 1962, Ch 313). That section was modified in 1963 to provide that "the court must give such direction, between the parties, ... as, in the court's discretion, justice requires, having regard to the circumstances of the case". (Laws of 1963, Ch. 685).

Family Court Act §461(b)(ii) as amended in 1970, provided that if an order of the supreme court or of another court of competent jurisdiction requires support of the child, the family court may "entertain an application to modify such order on the ground that changed circumstances warrants such modification, unless the order of the supreme court provides that the supreme court retains exclusive jurisdiction to enforce or modify the order." (Laws of 1970, Ch 28).

Thus, where a parent sought to modify a child support order set by the court, or a merged agreement he or was required to demonstrate a change of circumstances. (Pechstein v Pechstein, 49 A.D.2d 886, 373 N.Y.S.2d 218 (2 Dept., 1975).

In 1980 a "substantial change of circumstances" rule was codified in Domestic Relations Law § 236(B)(9)(b). (Laws of 1980, Ch 281). It provided: "Upon application by either party, the court may annul or modify any prior order or decree as to maintenance or child support, upon a showing of the recipient's Inability to be self-supporting or a substantial change in circumstance, including financial hardship, except as to any sum due and owing which has been reduced to final judgment." The statute was amended in 1989 to add termination of child support pursuant to Domestic Relations Law § 240 as a ground for modification. (Laws of 1989, Ch 567, § 5).

The power to modify child support provisions which are based on an agreement which is incorporated in and survives a judgment of divorce was limited in 1977 in Boden v. Boden, (42 N.Y.2d 210, 397 N.Y.S.2d 701 (1977)). The Court of Appeals held that a judgment based upon the surviving agreement was subject to modification only where it was clear that the parties had not anticipated the child's future needs, or where there was a showing of "unanticipated and unreasonable change in circumstances". The court held that "[u]nless there has been an unforeseen change in circumstances and a concomitant showing of need, an award of child support in excess of that provided in

the (surviving) separation agreement should not be based solely on an increase in cost where the arrangement was fair and equitable when entered into."

Brescia v. Fitts, (56 N.Y.2d 132, 451 N.Y.S.2d 68 (1982)) a later Court of Appeals decision, limited the holding in Boden v. Boden and reaffirmed the right of children in adequate support. The Court held that the principles set forth in *Boden* applied only when the dispute is directed solely to readjusting the respective obligations of the parents to support their child. A different situation is presented, where the child's right to receive adequate support is being asserted by a parent. In Brescia v Fitts, Petitioner introduced evidence tending to show, among other things, that the combination of her own income and the payments contributed by the respondent did not adequately meet the children's needs. Specific items of expense were detailed, as well as the petitioner's and respondent's respective financial situations. The Court held that whether the evidence shows a change of circumstances sufficient to order a modification is a question left to the discretion of the lower court. Considering both the circumstances as they existed at the time of the prior award and at the time the application is made several factors may, in a proper case, enter into the determination, including the increased needs of the children due to special circumstances or to the additional activities of growing children, the increased cost of living insofar as it results in greater expenses for the children, a loss of income or assets by a parent or a substantial improvement in the financial condition of a parent, and the current and prior lifestyles of the children.

In Gravlin v. Ruppert, (98 N.Y.2d 1, 743 N.Y.S.2d 773 (2002)) the Court of Appeals limited Boden further when it held that modification of child support provisions of a surviving separation agreement is warranted where there has been an unforeseen change in circumstances, resulting in a complete failure of the support obligations contemplated in the parties' agreement. In Gravlin there was no showing that the child's needs were not being met. Under the separation agreement, the parties anticipated that the child would spend approximately 35% of her time with her father, at his sole expense, until she reached majority or became emancipated, and he would also pay for her clothing. Both parents assumed an obligation of support yet, after visitation broke down through no apparent fault of either party, only the mother, who was the custodial parent, was providing support. The complete breakdown in the visitation arrangement, which effectively extinguished the father's support obligation, constituted an unanticipated change in circumstances that created the need for modification.

Domestic Relations Law §236 (B)(9)(b) was amended in 2010 to renumber subdivision (b) as (b)(1) and add subdivision (b)(2). At the time of the amendment, the "substantial change in circumstances" rule of Domestic Relations Law §236 (B)(9)(b) and "changed circumstances" rule in Family Court Act §461(b), both limited by Boden, was applied in modification proceedings in the Supreme Court and Family Court.

As amended in 2010, Domestic Relations Law § 236(B)(9)(b)(2) currently provides:

(i) 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.

(ii) In addition, unless the parties have specifically opted out of the following provisions in a validly executed agreement or stipulation entered into between the parties, the court may modify an order of child support 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. A reduction in income shall not be considered as a ground for modification unless it was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability, and experience. (Laws of 2010, Ch 182, § 7).

There was an identical amendment to Family Court Act §451 in 2010 and Family Court Act §461(b) was amended to delete “changed circumstances require such modification” and replace it with “as provided under” Family Court Act §451(2). (Laws of 2010, Ch 182, § 12).

Significantly, the 2010 amendments only apply to child support orders which incorporate but do not merge stipulations or settlement agreements executed on or after its effective date of October 13, 2010. (Laws of 2010, Ch 182 § 13).

Did Boden survive the 2010 amendments? The 2010 amendments modified Domestic Relations Law § 236(B)(9)(b) to authorize the Supreme Court to modify an order of child support incorporating without merging an agreement or stipulation of the parties, upon a showing of a substantial change in circumstances. They also conformed the Family Court Act to the Domestic Relations Law by requiring in both statutes a substantial change of circumstances for modification of a child support provision in an order or judgment with a surviving agreement executed after its effective date.

The New York State Assembly Memorandum in support of the 2010 legislation, specifies that one of the purposes of the legislation was to create a uniform statutory standard for modifying child support awards. It states that the “amendments would clearly state in the FCA that a child support order may be modified upon a substantial change in circumstances and thereby harmonize the FCA with the DRL. This conforming change of including substantial change in circumstances as a basis for modification in the FCA is not intended to alter existing case law regarding the standard for modifications for orders incorporating but not merging separation agreements.” (See NY Legis Memo 182 (2010).

It appears from the memorandum that it was the intention of the legislature not to overrule *Boden v Boden*, yet the wording of the statute and recent case law from the Second, Third and Fourth Departments leads to the conclusion that Boden was superseded by statute where the agreement or stipulation is executed on or after October 13, 2010.

In Fanizzi v Delforte–Fanizzi, (164 A.D.3d 1653, 84 N.Y.S.3d 650, (4 Dept., 2018)) where the parties' surviving agreement post-dated the 2010 amendments, the Fourth Department noted that the Family Court Act provides three separate grounds upon which a party may seek to modify a child support order. It held that Family 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" in addition to the other two grounds.

In Bishop v. Bishop, (170 A.D.3d 642, 644, 95 N.Y.S.3d 317 (2d Dept.,2019)) the Second Department held that since the parties' surviving stipulation of settlement which set forth the plaintiff's child support obligation post-dated the 2010 amendments, the defendant was not required to demonstrate a substantial and unanticipated change in circumstances resulting in a concomitant need, or that the stipulation of settlement was not fair and equitable when entered into, to establish her entitlement to an upward modification of the plaintiff's child support obligation. And as the parties specifically opted out of the other two provisions in the Domestic Relations Law § 236(B)(9)(b)(2) which allow for modification, in order to obtain an upward modification of the plaintiff's child support obligation, she had the burden of establishing "a substantial change in circumstances" (To the same effect see Khost v Ciampi, 189 A.D.3d 1409, 134 N.Y.S.3d 735 (2 Dept., 2020).

In Matter of Siouffi v Siouffi, (186 A.D.3d 1789, 131 N.Y.S.3d 406 (3 Dept., 2020)) where the surviving agreement was executed in 2014 and the parties expressly opted out of the last two provisions in the statute for modification, the Third Department held that the father bore the burden of showing a substantial change in circumstances warranting a downward modification of his child support obligation.

Conclusion

Where there is no agreement or stipulation child support may be modified upon a showing of a substantial change in circumstances. Where there is a surviving agreement or stipulation which was executed before October 13, 2010 Boden is still the law.

Where the agreement or stipulation is executed on or after October 13, 2010 Boden appears to have been superseded by statute. However, no appellate court has held that Boden has been overruled. The memorandum in support of the 2010 legislation states that the amendment was not intended to alter existing case law regarding the standard for modifications for orders incorporating but not merging separation agreements. Was the memorandum referring to the law existing before or after October 13, 2010? Until the Court of Appeals addresses the question squarely it will remain an unanswered question.

Joel R. Brandes practices matrimonial law in New York City concentrating on appeals. He is the author of the nine-volume treatise, Law and the Family New York, 2d, and Law and the Family New York Forms, 2020 Edition (five volumes), both published by Thomson Reuters, and the New York Matrimonial Trial Handbook (Bookbaby). He can be reached at joel@nysdivorce.com.