The Low Income Support Obligation and Performance Improvement Act of 2010

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The "Low Income Support Obligation and Performance Improvement Act,"[2] amends the provisions of the Domestic Relations Law and the Family Court Act with regard to modification of child support orders.

Domestic Relations Law § 236 [B](9)(b)(2) was amended by separating out the "substantial change of circumstances" basis for modification of child support orders into its own section for clarity. It provides two new bases for the modification of an order of child support, and is applicable to an application for either an upward or downward modification of child support. The first basis for modification of child support is the passage of three years since the order was entered, last modified, or adjusted. The second basis for modification of child support is a 15 percent change in either party's income since the order was entered, last modified or adjusted. Any reduction in income must be involuntary and the party whose income has been reduced must have made diligent attempts to secure employment commensurate with his or her education, ability and experience. [3]

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[2] Laws of 2010, Ch 182, § 1, enacted July 15, 2010 and effective as provides in § 13.

[3] Laws of 2010, Ch 182, § 7, effective October 13, 2010 (Laws of 2010, Ch 182, § 13 provides, in part, that :"This act shall take effect on the ninetieth day after it shall

Thus, a reduction in a party's income is not a basis for a downward modification of child support, unless the reduction in income is involuntary and the party whose income has been reduced has made diligent attempts to secure employment commensurate with his or her education, ability and experience. However, a 15% increase in a party's income is a basis for an upward modification of child support, overruling the prior rule[4] that an increase in income alone was not a basis to modify child support. [5] Neither of these rules are applicable where the parties "opt out" of this modification provision in a surviving, validly executed, agreement or stipulation.

The parties may specifically opt out of the two new bases for modification in a validly executed agreement or stipulation. This provision also provides that incarceration is a not a bar to finding a substantial change in circumstances under certain conditions. [6]

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have become law; provided however, that sections six and seven of this act shall apply to any action or proceeding to modify any order of child support entered on or after the effective date of this act except that if the child support order incorporated without merging a valid agreement or stipulation of the parties, the amendments regarding the modification of a child support order set forth in sections six and seven of this act shall only apply if the incorporated agreement or stipulation was executed on or after this act's effective date;....)

[4] The prior rule, adopted by the Court of Appeals in Boden v Boden, 42 NY2d 210 (1977) was that a change in circumstances warranting an upward increase in child support must include an increase in the needs of the children as well as an increase in means of the supporting parent, and that an increase in income of the supporting parent was insufficient.

[5] Laws of 2010, Ch 182, § 7, effective October 13, 2010 (Laws of 2010, Ch 182, § 13 provides, in part, that :"This act shall take effect on the ninetieth day after it shall have become law; provided however, that sections six and seven of this act shall apply to any action or proceeding to modify any order of child support entered on or after the effective date of this act except that if the child support order incorporated without merging a valid agreement or stipulation of the parties, the amendments regarding the modification of a child support order set forth in sections six and seven of this act shall only apply if the incorporated agreement or stipulation was executed on or after this act's effective date;....)

[6] Laws of 2010, Ch 182, § 7, effective October 13, 2010 (Laws of 2010, Ch 182, § 13 provides, in part, that :"This act shall take effect on the ninetieth day after it shall have become law; provided however, that sections six and seven of this act shall apply to any action or proceeding to modify any order of child support entered on or after the effective date of this act except that if the child support order incorporated

Domestic Relations Law § 236 [B](9)(b) (2)[7] now provides:

(2) (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. Incarceration shall not be a bar to finding a substantial change in circumstances provided such incarceration is not the result of non-payment of a child support order, or an offense against the custodial parent or child who is the subject of the order or judgment.
(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.

Family Court Act § 451 is amended [8] to provide two new bases for modification

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without merging a valid agreement or stipulation of the parties, the amendments regarding the modification of a child support order set forth in sections six and seven of this act shall only apply if the incorporated agreement or stipulation was executed on or after this act's effective date;....)

[7] Laws of 2010, Ch 182, § 6, effective October 13, 2010 (Laws of 2010, Ch 182, § 13 provides, in part, that :"This act shall take effect on the ninetieth day after it shall have become law; provided however, that sections six and seven of this act shall apply to any action or proceeding to modify any order of child support entered on or after the effective date of this act except that if the child support order incorporated without merging a valid agreement or stipulation of the parties, the amendments regarding the modification of a child support order set forth in sections six and seven of this act shall only apply if the incorporated agreement or stipulation was executed on or after this act's effective date;....)

[8] Family Court Act § 451 (2) provides:

2. (a) 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.

of an order of child support: (1) the passage of three years since the order was entered, last modified, or adjusted; or (2) a 15 percent change in either party's income since the order was entered, last modified or adjusted provided that any reduction in income was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability and experience. The parties may specifically opt out of the two new bases for modification in a validly executed agreement or stipulation. This section provides that incarceration is not a bar to finding a substantial change in circumstances under certain conditions, and also clarifies that retroactive support is paid and enforceable as provided under Family Court Act § 440. The language of Family Court Act § 451 governing the modification of child support orders and the language of Domestic Relations Law § 236 [B](9)(b) are conformed so that both provisions provide for a "substantial change in circumstances" as a basis for modification of an order of child support. [9]

> Incarceration shall not be a bar to finding a substantial change in circumstances provided such incarceration is not the result of non-payment of a child support order, or an offense against the custodial parent or child who is the subject of the order or judgment.
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> (b) 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:
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> (i) three years have passed since the order was entered, last modified or adjusted; or
>
> (ii) 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, § 6, effective October 13, 2010 (Laws of 2010, Ch 182, § 13 provides, in part, that :“This act shall take effect on the ninetieth day after it shall have become law; provided however, that sections six and seven of this act shall apply to any action or proceeding to modify any order of child support entered on or after the effective date of this act except that if the child support order incorporated without merging a valid agreement or stipulation of the parties, the amendments regarding the modification of a child support order set forth in sections six and seven of this act shall only apply if the incorporated agreement or stipulation was executed on or after this act's effective date;....)

[9] Laws of 2010, Ch 182, § 6, effective October 13, 2010 (Laws of 2010, Ch 182, § 13 provides, in part, that :“This act shall take effect on the ninetieth day after it shall have become law; provided however, that sections six and seven of this act shall apply to any action or proceeding to modify any order of child support entered on or

Opting-out of Domestic Relations Law § 236 [B](9)(b)(2)(ii) and Family Court Act § 451 (2)(b)

The "Child Support Standards Act" [10] allows the parties to "opt out" of its provisions regarding the basic child support obligation by executing a written agreement doing so. The statute states that it does not alter the rights of the parties to "voluntarily enter into validly executed agreements or stipulations." It specifically provides that the parties may agree that the child support standards "established by this subdivision" are not applicable to validly executed agreements or stipulations voluntarily entered into between the parties, "when executed." [11] However, a validly executed agreement or stipulation that "opts-out" of the child support standards act which is presented to the court for incorporation in an order or judgment must include a provision that the parties have been advised of the provisions of Section 240(1-b) of the Domestic Relations Law and New York Family Court Act §413(1)(b). An agreement which opts out of the law must also contain a provision that the parties have been advised that the "basic child support obligation" provided in New York Domestic Relations Law §240(1-b) and New York Family Court Act §413(1)(b) "would presumptively result in the correct amount of child support to be awarded." In the event that the Agreement or Stipulation deviates from the "basic child support obligation," the Agreement or Stipulation must specify the amount that the "basic child support obligation." would have been and the reason or reasons that such Agreement or Stipulation does not provide for payment of that amount. These provisions may not be waived by either party or counsel. [12]
The failure to include such a clause in an "opting-out" agreement is fatal.[13]

Unlike the provisions of the Child Support Standards Act, Domestic Relations Law § 236 [B](9)(b)(2)(ii) and Family Court Act § 451 (2)(b) permit the parties to "opt out "of the three year or fifteen percent threshold for modification of a child support

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after the effective date of this act except that if the child support order incorporated without merging a valid agreement or stipulation of the parties, the amendments regarding the modification of a child support order set forth in sections six and seven of this act shall only apply if the incorporated agreement or stipulation was executed on or after this act's effective date;....)

[10] The term "Child Support Standards Act", as enacted in 1989, refers generally to the provisions of New York Domestic Relations Law §240(1-b) and New York Family Court Act §413(1)(b).

[11] Domestic Relations Law §240(1-b)(h); Family Court Act §413(1)(h).

[12] Domestic Relations Law §240(1-b)(h); Family Court Act §413(1)(h).

[13] See Sloam v Sloam ,185 App Div 2d 808, 586 NYS2d 651(2d Dept 1992)

order “in a validly executed agreement or stipulation,” without a provision that the parties have been advised of any specific provisions of the Domestic Relations Law or Family Court Act. Nor is there any requirement that the Agreement or Stipulation must specify the reason or reasons that they are opting out of the provisions of Domestic Relations Law § 236 [B](9)(b)(2)(ii) and Family Court Act § 451 (2)(b).

Domestic Relations Law § 236 [B](9)(b)(2)(ii) and Family Court Act § 451 (2)(b) provide that “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.”

We suggest the following opting out clause:

“In accordance with the provisions of Domestic Relations Law § 236 [B](9)(b)(2)(ii) and Family Court Act § 451 (2)(b) the parties to this (agreement) (stipulation) have specifically opted out of the provisions of Domestic Relations Law § 236 [B](9)(b)(2)(ii) and Family Court Act § 451 (2)(b) which provide that “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. In the event that the provisions of Domestic Relations Law § 236 [B](9)(b)(2)(ii) and Family Court Act § 451 (2)(b) are subsequently modified to add additional grounds or requirements for modification of an order of child support, this opting out provision shall apply to such additional grounds or requirements, and shall remain in full force and effect, to the extent permitted by law.

Does Boden Survive?

Existing statutory and case law distinguishes between modification of a child support provision in a court order or divorce judgment, where there is no surviving agreement, and modification of a child support provision in a separation agreement or stipulation, where there is a surviving separation agreement or stipulation.

Where there is merely a court order or judgment ordering child support the rule is that in order to have an award modified so as to increase or decrease payments for child support, a substantial change of circumstances must be shown to have occurred since the time of the entry of the order. [14]

[14] See Domestic Relations Law § 236 [B][9][b] (“Upon application by either party, the court may annul or modify any prior order or judgment as to maintenance or child support, upon a showing of the recipient's inability to be self-supporting or a substantial

An agreement executed by the parties, which is fair and adequate when made and which provides support for children, confines the obligation of the non-custodial parent to that which is set forth in the agreement. Unless and until the agreement is set aside or modified, no other award may be made for child support.[15] However, the parties cannot by agreement eliminate or diminish either parent's duty to support a child of the marriage. A child is entitled to support, maintenance and education in accordance with his parent's financial means and ability.[16] Family Court Act §461(a) provides that a separation agreement does not diminish a parent's duty to support his child, and the initial adequacy of the provisions of a separation agreement for the child may be challenged at any time.

Where there is a separation agreement or stipulation that is incorporated into but not merged with a divorce decree the agreement or stipulation is an independent contract binding on the parties unless impeached or challenged for some cause recognized by law.[17] Courts of this State enjoy only limited authority to disturb the terms of a separation agreement.[18]

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change in circumstance or termination of child support awarded pursuant to section two hundred forty of this article, including financial hardship".) Family Court Act §466 (c)(2)(ii) ("If the supreme court enters an order or decree granting alimony, maintenance or support in an action for divorce, separation or annulment and if the supreme court does not exercise the authority given under subdivision (a) or (b) of this section; or if a court of competent jurisdiction not of the state of New York shall enter an order or decree granting alimony, maintenance or support in any such action, the family court may ...(ii) entertain an application to modify the order or decree granting alimony or maintenance on the ground that there has been a subsequent change of circumstances and that modification is required. ")

[15] Riemer v Riemer, (2d Dept 1969) 31 App Div 2d 482, 299 NYS2d 318, affd 31 NY2d 881, 340 NYS2d 185, 292 NE2d 320.

[16] Moat v Moat, 27 App Div 2d 895, 277 NYS2d 921 (3d Dept 1967) ; Riemer v Riemer, 31 App Div 2d 482, 299 NYS2d 318 (2d Dept 1969), affd 31 NY2d 881, 340 NYS2d 185, 292 NE2d 320; Kulok v Kulok, 20 App Div 2d 568, 245 NYS2d 859 (2d Dept 1963); Re Proceeding for Support under Article 4 of Family Court Act, 50 App Div 2d 59, 376 NYS2d 524 (1st Dept 1975), affd 40 NY2d 993, 391 NYS2d 106, 359 NE2d 700; Banat v Banat, 41 App Div 2d 960, 344 NYS2d 12 (2d Dept 1973).

[17] Kleila v Kleila, 50 NY2d 277, 283; Christian v Christian, 42 NY2d 63; Leffler v Leffler, 40 NY2d 1036, affg 50 AD2d 93; Goldman v Goldman, 282 NY 296, 300; Galusha v Galusha,116 NY 635; Steers v Steers, 69 AD2d 858.

[18] Kleila v Kleila, 50 NY2d 272, 283,supra.

In Matter of Boden v. Boden,[19] the Court of Appeals held: “Where, as here, the parties have included child support provisions in their separation agreement, the court should consider these provisions as between the parties and the stipulated allocation of financial responsibility should not be freely disregarded. 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. Unless there has been an unforeseen change in circumstances and a concomitant showing of need, an award for child support in excess of that provided for in the separation agreement should not be made based solely on an increase in cost where the agreement was fair and equitable when entered into.” [20] In Boden, petitioner sought an increase in respondent's support obligations in order to help send the child to a costly private university even though respondent had honored his obligation under the separation agreement to provide for the child's education. The Court declined to modify the parties' “stipulated allocation of financial responsibility” absent a showing that an unanticipated or unreasonable change in circumstances occurred with a concomitant showing of need, or that the agreement was unfair when made.”

Boden was subsequently qualified in Brescia v Fitts,[21] on the basis that the needs of a child must take precedence over the terms of the agreement when it appears that the best interests of the child are not being met. Recognizing this, the Court, in Brescia, established a means for modification of support obligations, based purely on a “needs of the child” analysis in order to determine whether there has been a sufficient showing to justify modification of the agreement. In Brescia, the Court of Appeals stated that a “different situation is presented, however, where it is the child's right to receive adequate support that is being asserted. Family Court's power regarding child support derives from the Family Court Act. Section 461 of that act, insofar as it related to the case, provides that the parents' duty to support their child is not diminished by the existence of, inter alia, a separation agreement or judgment of divorce and, in the absence of an order of Supreme Court directing support, Family Court may make an order of support. Thus, the principles iterated in Boden did not alter the scope of Family Court's power to order support where the dispute concerns the child's right to receive adequate support. In Brescia, the Petitioner introduced evidence tending to show, among other things, that the combination of her own income and the

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[19] Matter of Boden v Boden, 42 N.Y.2d 210, 397 N.Y.S.2d 701 (1977)

[20] 42 N.Y.2d at 213, 397 N.Y.S.2d 701(1977)

[21] Brescia v. Fitts, 56 N.Y.2d 132, 451 N.Y.S.2d 68, 436 N.E.2d 518 (1982)

payments contributed by respondent did not adequately meet the children's needs. Specific items of expense were detailed, as well as petitioner's and respondent's respective financial situations.[22] The Court of Appeals pointed out that whether the evidence adduced by the parties shows a change of circumstances sufficient for Family Court to order a modification was a question best left to the discretion of the lower courts, whose primary goal is, of course, to make a determination based upon the best interests of the children. 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 life-styles of the children. Consideration of such factors in a given case may lead to the determination that the children's best interests require an upward modification of the child support award."

In Gravlin v Ruppert[23] the Court of Appeals held that the complete breakdown in the visitation arrangement, which effectively extinguished respondents' support obligation, constituted an unanticipated change in circumstances that created the need for modification of the child support obligations. It noted that, in Brescia it established a means for modification of support obligations, based purely on the needs of the child. Separately, in Boden, it recognized the need for modification based on maintaining the fairness of the original agreement as between the parties in light of a subsequent unanticipated change in circumstances, or undoing an agreement that was unfair ab initio. In Gravlin, there was no showing that the child's needs were not being met. Thus, there was no reason to engage in a "needs of the child" analysis. The petitioner's income had increased to nearly $56,000 and respondent's was approximately $30,000. The increase in petitioner's expenses alone did not justify a modification. Nevertheless, the Court of Appeals concluded that the complete breakdown in the parties visitation arrangement, which effectively extinguished respondents' support obligation, constituted an unanticipated change in circumstances that created the need for modification of the child support obligations. 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

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[22] See Michaels v Michaels, 56 NY2d 924, 453 NYS2d 605, 439 NE2d 321 (1982) ("Inasmuch as the request here for increased child support was predicated on the child's right to receive adequate support, it was not necessary to demonstrate an unanticipated and unreasonable change in circumstances to justify an increase (see Matter of Brescia v Fitts, 56 NY2d 132, 138- 140). It is sufficient in such a case that a change in circumstances has occurred warranting the increase in the best interests of the child.")

[23] Gravlin v Ruppert ,98 N.Y.2d 1, 770 N.E.2d 561, 743 N.Y.S.2d 773 (2002)

would in addition pay for her clothing. These expectations were part of the basis for the parties' agreement to deviate from CSSA. The unanticipated change in respondent's relationship with his daughter created a need for modification of the support terms of the separation agreement as those terms became unworkable. It was the necessity of ensuring that respondent continued to support his child as agreed upon by the parties, despite the inability to perform under the original terms of the agreement, that justified modification of the support provisions. Under the agreement, both parents assumed an obligation of support yet, after visitation broke down through no apparent fault of either party, only the custodial parent was providing support. The Court of Appeals held that under these circumstances the Family Court may reestablish the support obligation of the noncustodial parent by modifying the support provisions of the separation agreement.

The U.S. Constitution provides that the state may cannot impair the obligation of contract.[24] Nevertheless Domestic Relations Law §236 [B][9][b], which was enacted in 1980, provides that the court may modify the maintenance portion of decree/order upon a showing of extreme hardship, and that it is a modification of the agreement for such time and under such circumstances at the court shall determine. This provision may be unconstitutional. In Busetti v Busetti[25], the Second Department, in construing the maintenance modification provisions contained in New York Domestic Relations Law §236(B)(9)(b), stated that paragraph (b) of Subdivision (9) purports to allow the court to, in effect, suspend the separation agreement for as long as necessary and to what extent necessary and, thus, precludes the party who is adversely affected by the modification from bringing a contract claim to recover the difference between the amount agreed to and the amount as modified. In a footnote, it stated that there was some question as to whether this is constitutional and cited Kleila v Kleila, decided only some two months before the effective date of the Equitable Distribution Law. There the Court of Appeals indicated that "any attempt to confer upon a court of any jurisdiction within the United State broad powers to modify the terms of a separation agreement might well run afoul of constitutional limitations upon the State's power to tamper with vested contractual rights."[26]

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[24] U.S. Const. Art. 1 §10

[25] 108 App Div 2d 769, 484 NYS2d 873 (2d Dept 1985)

[26] See also Cohen v Seletsky (2d Dept 1988) 142 App Div 2d 111, 534 NYS2d 688. Iffland v Iffland (Sup 1992, Sup) 155 Misc 2d 661, 589 NYS2d 249, held that the extreme hardship provisions of Domestic Relations Law §236(B)(9)(b) unconstitutional, in violation of Article I, §10, Clause of the U.S. Constitution (the contract clause because it impaired the parties' ability to contract. It held that the "extreme hardship" standard as enacted by the legislature was devoid of a clear purpose and failed to narrowly and reasonably tailor its means of achieving that purpose.

Domestic Relations Law §236 [B][9][b] does not contain similar language with respect to modification of child support where there is a surviving agreement because public policy permits the court to always modify the order where the child is being inadequately supported, and in certain circumstances it may declare the agreement or its child support provisions void, where it violates the public policy enunciated in the Child Support Standards Act.

Thus, in Priolo v Priolo,[27] finding that the modification was in keeping with the "overriding policy of ensuring adequate child support," the Appellate Division concluded that "the terms of the settlement agreement must yield to the welfare of the children and cannot support an action to recover damages for breach of contract arising from the increase in the father's child support obligation." In Pecora v Cerillo [28] the court held that since children are not bound by separation agreements, one that does not provide adequate support for the parties' child does not bind a court from remedying the inadequacy. Therefore, an inadequate child support provision "is voidable and cannot bind an appropriate court from remedying the inadequacy nor can it bind a parent from seeking to remedy the inadequacy." It rejected that plaintiffs' argument that it was unconstitutional under the impairment of contracts doctrine (U.S. Const. Art. 1 §10) to preclude a breach of contract action in such a case stating that a statute that is intended to prevent an economic wrong, in this case against the children, is not unconstitutional as impairing contract rights." In Maki v Straub [29] the Appellate Division held that the terms of an inadequate child support provision in an agreement do not bind the court or the child and cannot support a civil action for breach thereof, and that the theory behind such an action was contrary to the public policy incorporated in the "Child Support Standards Act."

The first sentence of Domestic Relations Law § 236 [B](9)(b) (2) and Family Court Act § 451 (2)(b) now provide that 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. "

This language might, at first blush, appear to eliminate the rule enunciated in Boden v Boden[30] that where there was a surviving agreement, a child support award in excess of that provided for in a separation agreement should not be made "[u]nless there has been an unforeseen change in circumstances and a concomitant showing of need".

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[27] 211 AD2d 627, 621 NYS2d 367 (2d Dept 1995)

[28] 207 AD2d 215, 621 NYS2d 363 (2d Dept 1995)

[29] 167 AD2d 589, 563 NYS2d 218 (3rd Dept 1990)

[30] 42 NY2d 210 (1982)

Actually, the first sentence of Domestic Relations Law § 236 [B](9)(b)(2) and Family Court Act § 451 appears to be a recognition of the rules enunciated in Boden, Brescia and Gravlin v Ruppert. [31] In Boden, where there was a surviving agreement, the Court declined to modify the parties' "stipulated allocation of financial responsibility" absent a showing that an unanticipated or unreasonable change in circumstances occurred with a concomitant showing of need, where the agreement was fair when made." The Court, in Brescia, where there was also a surviving agreement, established a needs test for modification of support obligations, where the child's right to receive adequate support is being asserted, based purely on a "needs of the child" analysis. In Brescia, the Petitioner introduced evidence tending to show, among other things, that the combination of her own income and the payments contributed by respondent did not adequately meet the children's needs. Specific items of expense were detailed, as well as petitioner's and respondent's respective financial situations.[32] The principles iterated in Boden did not alter the scope of Family Court's power to order support where the dispute concerns the child's right to receive adequate support.

The prior rule in New York, where there was no surviving agreement, was unresolved. The Second Department held that an increase in the income of the supporting parent was sufficient to obtain an upward modification of child support.[33] The other Departments held that a change in circumstances warranting an upward increase in child support must include an increase in the needs of the children as well as an increase in means of the supporting parent, and that an increase in income of

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[31] Matter of Boden v Boden, 42 NY2d 210 (1982); Matter of Brescia v Fitts, 56 NY2d 132 (1982); Gravlin v Ruppert, 98 N.Y.2d 1(2002).

[32] See Michaels v Michaels, 56 NY2d 924, 453 NYS2d 605, 439 NE2d 321 (1982) ("Inasmuch as the request here for increased child support was predicated on the child's right to receive adequate support, it was not necessary to demonstrate an unanticipated and unreasonable change in circumstances to justify an increase (see Matter of Brescia v Fitts, 56 NY2d 132, 138- 140). It is sufficient in such a case that a change in circumstances has occurred warranting the increase in the best interests of the child.")

[33] Handel v Handel (1969, 2d Dept) 32 App Div 2d 946, 304 NYS2d 76, affd 26 NY2d 853, 309 NYS2d 599, 258 NE2d 94; Haggerty v Haggerty (1974, 2d Dept) 43 App Div 2d 969, 352 NYS2d 218. Edwards v Edwards (1978, 2d Dept) 62 App Div 2d 977, 403 NYS2d 329, vacated (2d Dept) 62 App Div 2d 1027, 404 NYS2d 359, reiterated rule that a substantial increase in a father's salary is alone sufficient to warrant an increase in child support payments.

the supporting parent alone was insufficient.[34] This rule was adopted by the Court of Appeals in Boden v Boden, 42 NY2d 210 (1977). Domestic Relations Law § 236 [B](9)(b)(2) and Family Court Act § 451 do not eliminate this rule since they both permit the parties to opt out of these modification provisions, including the 15% change in income provision, by a surviving agreement or stipulation.

It does not appear to be intention of the legislature to overrule Boden v Boden [35] and to allow the court to readjust the parties' respective child support obligations in those situations where there is a surviving agreement, and the child is being adequately supported. As Brescia v Fitts[36] tells us, "the principles iterated in Boden did not alter the scope of Family Court's power to order support where the dispute concerns the child's right to receive adequate support." The legislative intent may be gleaned from the Assembly Memorandum, which states that the amendments to Domestic Relations Law § 236 [B](9)(b) and Family Court Act § 451 are intended to clarify portions of the Family Court Act to make it clear that a child support order may be modified upon a substantial change in circumstances, and harmonize the Family Court Act with the Domestic Relations Law. "This conforming change of including substantial change in circumstances as a basis for modification in the Family Court Act is not intended to alter existing case law regarding the standard for modifications for orders incorporating but not merging separation agreements. "[37] (emphasis supplied)

If the legislature intended to enact a statute specifically overruling Boden, the Assembly Memorandum would have mentioned the Boden decison in the memorandum or that statute would state that so.

The New York State Assembly Memorandum[38] in support of the legislation, states that the amendments to Domestic Relations Law § 236 [B](9)(b) and Family

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[34] Schwartz v Schwartz, 23 App Div 2d 204, 259 NYS2d 751 (1st Dept 1965); Gould v Hannan, 57 App Div 2d 517, 393 NYS2d 561 (1st Dept 1977), affd 44 NY2d 932, 408 NYS2d 313, 380 NE2d 145; Re Proceeding for Support under Article IV of Family Court Act, 52 App Div 2d 557, 382 NYS2d 318 (1st Dept 1976); Klein v Sheppard (1st Dept 1976) 52 App Div 2d 532, 381 NYS2d 885. See also Vosburgh v Vosburgh, 58 App Div 2d 676, 395 NYS2d 745 (3d Dept 1977) ; Nardone v Coyne, 78 App Div 2d 987, 433 NYS2d 656 (4th Dept 1980) .

[35] Matter of Boden v Boden, 42 NY2d 210 (1982); Matter of Brescia v Fitts, 56 NY2d 132 (1982).

[36] Matter of Brescia v Fitts, 56 NY2d 132 (1982).

[37] See NY Legis Memo 182 (2010)

[38] See NY Legis Memo 182 (2010)

Court Act § 451(2) are intended to clarify portions of the Family Court Act to make it clear that a child support order may be modified upon a substantial change in circumstances and harmonize the Family Court Act with the Domestic Relations Law. The memorandum specifies that "This conforming change of including substantial change in circumstances as a basis for modification in the Family Court Act is not intended to alter existing case law regarding the standard for modifications for orders incorporating but not merging separation agreements"

The Assembly Memorandum refers to the fact that the amendments to Domestic Relations Law § 236 [B](9)(b) and Family Court Act § 451(2) provide for two additional bases, for obtaining a review of an order of child support: the passage of three years or a 15 percent change in a party's income since the order was entered, last modified or adjusted. The Assembly Memorandum states that the intent of this measure is not to have these bases limit or define substantial change in circumstances, nor is the intent to supersede case law interpreting substantial change of circumstances as a standard for modification. The additional bases are not intended to be considered as necessary threshold requirements for modification of child support on the basis of a substantial change of circumstances. The amendments are intended to continue to allow evidence of a substantial change in circumstances as permitted under existing case law for modification. The legislation is intended to adopt and conform the rule found in the existing body of case law in order to clarify that a reduction in income may not be considered even under the new 15 percent change in income basis unless it was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability and experience. [39]

Clarification of Knights v Knights

Domestic Relations Law § 236 [B](9)(b) (2)(i) and Family Court Act § 451 (2)(i) provide that: "Incarceration shall not be a bar to finding a substantial change in circumstances provided such incarceration is not the result of non-payment of a child support order, or an offense against the custodial parent or child who is the subject of the order or judgment. This sentence is not part of the modification provisions of Domestic Relations Law § 236 [B](9)(b) (2)(ii) and Family Court Act § 451 (2)(ii). It appears in subdivision (i) of the statute and follows the sentence: "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."

In Knights v Knights[40] the Court of Appeals held that the Family Court did not abuse its discretion in denying the petitioner's application for a downward modification of child support following his conviction of a felony resulting in a prison sentence. The

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[39] See NY Legis Memo 182 (2010)

[40] 71 NY2d 865, 527 NYS2d 748, 522 NE2d 1045 (1988)

court had concluded that it would be unfair for an individual who had freely chosen to commit a crime to be relieved from the accrual of a support obligation. The court concluded that the order should remain in effect, and during the period of petitioner's release it would determine whether to enter judgment for the entire amount due or forgive part of the arrears that had accumulated since the filing of the application. It held that in exercising its discretion to modify a prior support order the court may consider various factors including "a loss of income or assets by a parent . . ." The Court of Appeals held that the court may consider whether a supporting parent's claimed financial difficulties are the result of that parent's intentional conduct. Here, it found the significant the fact that the petitioner's financial hardship was solely the result of his wrongful conduct culminating in a felony conviction and imprisonment. Thus, Family Court did not abuse its discretion.

The Assembly Memorandum in support of the legislation states that the amendments to Domestic Relations Law § 236 [B](9)(b) and Family Court Act § 451 (2) provide that incarceration is not a ban to a finding of a substantial change in circumstances and is intended to address the impact of the New York State Court of Appeals decision in Knights v. Knights, 71 N.Y.2d 865 (1983), and thereby clarify that a court may modify an order of child support where a party has been incarcerated considering the circumstances of the case, provided, however, that the incarceration is not the result of nonpayment of child support or an offense against the custodial parent or child who is the subject of the order or judgment of child support.[41] This statement appears to indicate that the court may not modify a child support order where the incarceration is the result of nonpayment of child support or an offense against the custodial parent.

Family Court Act § 461

Family Court Act § 461 was amended to reflect the two new bases for modification of an order of child support.[42]

Retroactivity

The legislation adopting these amendments on July 15, 2010, provides, with regard to the modification provisions, that: "This act shall take effect on the ninetieth

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[41] See NY Legis Memo 182 (2010)

[42] Family Court Act § 461 provides: (b) If an order of the supreme court or of another court of competent jurisdiction requires support of the child, the family court may: (i) entertain an application to enforce the order requiring support; or (ii) entertain an application to modify such order as provided under subdivision two of section four hundred fifty-one of this article, unless the order of the supreme court provides that the supreme court retains exclusive jurisdiction to enforce or modify the order. Laws of 2010, Ch 186, § 12. (Effective October 13, 2010. Laws of 2010, Ch 186, § 13)

day after it shall have become law; provided however, that sections six and seven of this act shall apply to any action or proceeding to modify any order of child support entered on or after the effective date of this act except that if the child support order incorporated without merging a valid agreement or stipulation of the parties, the amendments regarding the modification of a child support order set forth in sections six and seven of this act shall only apply if the incorporated agreement or stipulation was executed on or after this act's effective date. "[43] The act's effective date is therefore October 13, 2010.

Thus, the modification provisions apply to any action or proceeding to modify any order of child support entered on or after October 13, 2010, and if a child support order incorporated a surviving agreement or stipulation of the parties, the amendments regarding the modification of a child support order only apply if the incorporated agreement or stipulation was executed on or after October 13, 2010.

Notably, the Assembly Memorandum states that the "substantial change in circumstances threshold" in the amendments to Domestic Relations Law § 236 [B](9)(b) and Family Court Act § 451 is intended to apply prospectively to all orders of child support. If the order incorporates but does not merge a stipulation or settlement agreement, the amendment would be effective only if the stipulation or agreement was executed on or after the effective date of the amendment. Parties who have consented or will consent to deviations from the basic child support order calculated under the Child Support Standards Act would be protected. The Amendments are not intended to affect vested rights under existing valid separation agreements or stipulations.[44]

Notice Requirement

Domestic Relations Law § 236 [B](7) was amended to add a new subdivision (d).[45] It requires that all orders establishing a child support obligation contain a notice

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[43] Laws of 2010, Ch 182, § 13.

[44] See NY Legis Memo 182. (2010).

[45] Domestic Relations Law 236 [B][7][d] provides:

> d. Any child support order made by the court in any proceeding under the provisions of this section shall include, on its face, a notice printed or typewritten in a size equal to at least eight point bold type informing the parties of their right to seek a modification of the child support order upon a showing of:
> (i) a substantial change in circumstances; or
> (ii) that three years have passed since the order was entered, last modified or adjusted; or

regarding the right to apply for a modification of the order if there has been a substantial change in circumstances or the occurrence of the additional enumerated bases for modification.

Similarly, Family Court Act § 440 was amended to add a subdivision 4. It requires that all orders establishing a child support obligation contain a notice regarding the right to apply for a modification of the order if there has been a substantial change in circumstances or the occurrence of the additional enumerated bases for modification. [46]

Authorization to Require Non-custodial Parent to Seek Employment

Family Court Act § 437-a [47] was added to authorize the Family Court to require the non-custodial parent of a child to seek employment, or to participate in job training, employment counseling or other programs designed to lead to employment, where such programs are available, if he or she is unemployed at the time the court is establishing the support order unless he or she is in receipt of supplemental security income (SSI) or social security disability (SSD) benefits.

The Assembly Memorandum indicates that Family Court Act § 437-a is added to permit the Family Court to require an unemployed non-custodial parent to seek employment, participate in job training, employment counseling or other programs

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(iii) 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;
however, if the parties have specifically opted out of subparagraph (ii) or (iii) of this paragraph in a validly executed agreement or stipulation, then that basis to seek modification does not apply.

Laws of 2010, Ch 186, § 9. (Effective October 13, 2010. Laws of 2010, Ch 186, § 13)

[46] Laws of 2010, Ch 186, § 8.(Effective October 13, 2010. Laws of 2010, Ch 186, § 13)

[47] Family Court Act 437-a provides: § 437-a. Referral to work programs. In any proceeding to establish an order of support, if the respondent is unemployed, the court may require the respondent to seek employment, or to participate in job training, employment counseling or other programs designed to lead to employment provided such programs are available. The court shall not require the respondent to seek employment or to participate in job training, employment counseling, or other programs designed to lead to employment under this section if the respondent is in receipt of supplemental security income or social security disability benefits. Laws of 2010, Ch 182, § 10, effective October 13, 2010.

designed to lead to employment at the time an order is established. Noncustodial parents in receipt of SSI or SSD may not be required to participate in such employment programs. It states that this provision is not intended to limit the non-custodial parent's obligation to support his or her child, nor curtail the court's obligation to set a fair and reasonable child support obligation in accordance with the Child Support Standards Act.[48]

Social Services Law § 111-h [49] was amended to add a paragraph (20) which provides that if the respondent is required to participate in work programs or activities, and if the order of support is made payable on behalf of persons in receipt of public assistance, the support collection unit may not file a petition to increase the support obligation for twelve months from the date of entry of the order if the respondent's income is derived from the work activity or program. Social Services Law § 111-h provides that no modification of the order would be sought for 12 months from the date of entry of the order if a non-custodial parent is or was enrolled in work programs or activities and the order of support is payable to a local department of social services pursuant to an assignment. [50]

These provisions are effective October 13, 2010, except that sections 6 and 7 only apply to child support orders which incorporate but do not merge stipulations or settlement agreements if the stipulation or agreement was executed on or after the effective date of the bill.[51]

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[48] See NY Legis Memo 182 (2010)

[49] Social Services Law §111-h (20) provides: 20. If the respondent is required to participate in work programs pursuant to section four hundred thirty-seven-a of the family court act, and the court enters an order of support on behalf of the persons in receipt of public assistance, the support collection unit shall not file a petition to increase the support obligation for twelve months from the date of entry of the order of support if the respondent's income is derived from participation in such programs.Laws of 2010, Ch 182, § 11, effective October 13, 2010

[50] See NY Legis Memo 182 (2010)

[51] Laws of 2010, Ch 186, § 13