

Child Support Modifications

Is It Time for a Change?

by Marci R. Carroll, Esq.

Child support is one of those aspects of your final order that is always subject to modification if circumstances have changed substantially. Overall, if any of the factors which go into determining the child support obligation under the West Virginia income shares formula have changed to the extent that the new calculation would be more than fifteen percent more or less than the existing child support obligation amount that existing obligation can be modified.¹ The fifteen percent change mark is the magical number in child support modifications.² Where the child support obligation change does not meet the fifteen percent threshold, the court does not have authority to modify the existing child support obligation. This literally means that if the obligation would only change fourteen percent under a recalculation, the court is not supposed to grant a request for child support modification. Further, you will want to be reasonably confident that your child support obligation would not be changed in the *opposite* direction than you request in your modification motion.

Accordingly, you want to be especially alert for significant changes in income from employment or other recurring income (including pensions, annuities, and retirement),³ in the out-of-pocket cost of health insurance covering the minor children, and in child care costs so that a parent can work. If a parent employed at a rate less than full time at minimum wage was not attributed income under the existing child support calculation because that parent was staying at home to care for a child of pre-school age, your child support calculation should be reexamined once that child begins attending school. Where a parent was given a deduction under the existing calculation for a preexisting child support obligation or for alimony/spousal support payments and is no longer ordered to make those payments, the child support order in your case should be reevaluated.

¹ In the uncommon event that the existing child support order sets an obligation agreed to by the parents which is different from the obligation that would have resulted under then then-existing guidelines, the fifteen percent change would be in comparison to the agreed child support amount under the existing order.

² Be certain to read your existing child support order carefully. All child support orders entered on or after October 1, 1999, should explicitly require each of the parents to notify the other parent and the Bureau for Child Support Enforcement any change in gross income of at least fifteen percent as well as any change in source of employment. Make sure that you promptly comply with any such requirement; it is always safest to do so in writing and to keep a copy for your own records. *A fifteen or more percent change in a parent's gross income does not necessarily mean that the child support obligation will change the requisite fifteen percent to trigger a modification, but such a change in gross income is a red flag that the obligation amount should probably be reexamined.*

³ The potential for a significant change in income of either parent is the reason why including a provision in child support orders requiring the parents to exchange Forms W-2 and 1099, end of the year paystubs, and any documentation of other sources of that parent's income is such a good idea.

If a parent was given the discretionary deduction for additional dependents under the existing child support obligation and those persons are no longer that parent's legal dependents, the impact that the absence or reduction in that deduction may have on the child support obligation should be investigated. On the other hand, an *increase* in a parent's legal dependents cannot be used to decrease the child support obligation; notwithstanding that limitation, an increase in a parent's legal dependents might be used to prevent the child support obligation from increasing where an increase in the obligation would otherwise be appropriate.

If your child support order covers more than one child, as each child turns eighteen years of age, you should most definitely have your child support order reviewed by a knowledgeable domestic relations attorney for obligation reduction purposes. Do *not* operate under the mistaken belief that your child support obligation automatically changes as your children attain their majority. Further, do not assume that your child support obligation will even be reduced proportionately when you go back to court as that is very rarely the case and you run a high risk of running up a staggering arrearage.

Conversely, do not assume that because a child has turned eighteen that child support is no longer available. However, this generally requires a motion to extend the period of the child support obligation. Child support obligations may be extended for children who have turned eighteen years of age so long as the child is unmarried; residing with a parent, guardian, or custodian; and is enrolled as a full-time student in high school or a vocational program and making substantial progress toward a diploma. However, under no circumstances other than where the adult child is handicapped or disabled, can child support be continued beyond the child's twentieth birthday.

With respect to the child support obligation possibly terminating or extending beyond the child's eighteenth birthday without having to file a modification motion, the language in your existing child support order needs to be examined carefully.

If your child support order was entered as far back as the mid-1990s under the old Melson Formula, which used the parents' *net incomes* and allowed for the deduction of certain living expenses, you should certainly consult with an attorney to see if your child support obligation ought to be modified.

Almost as important as the analysis of the potential percent change in the child support obligation is the issue of when to file for a child support modification. The family court has absolutely no authority to cancel or otherwise modify accrued support payments. Generally, the family court can modify child support retroactively only to the date of service of the child support modification motion.

If your child support obligation is in fact reduced, you will want to make certain that your modification order addresses the potential issue of overpayments which you may have made in the interim between the service of the modification motion and the court's new child support ruling. The flip side is that if your child support obligation is

increased, you may be getting into a situation where you are deemed to be in arrears by the time that the new child support ruling is issued; your attorney should be able to make some educated guesses based upon the pleadings and advise you how much extra funds you should be setting aside each month in the event of such an increase in your obligation.

Under certain circumstances, you may be eligible to take advantage of an expedited process for modifying your existing child support order. Where either parent has a substantial change in employment income due to being fired, receiving low earnings, being laid off, other loss of employment or other involuntary cause, promotion, change in employment, reemployment, or other change in employment status, the expedited process may be utilized. Basically, the expedited child support modification process means that you may not have to go through the traditional process of filing a modification motion with the circuit clerk and waiting months for a hearing and a ruling by the family court judge. Instead, a motion is filed with the family court's secretary-clerk describing the increase or decrease in income and the reason for that change along with any available supporting documentation. The secretary-clerk then makes a tentative recalculation of the child support obligation based on the expedited motion filed. Do not assume that calculation is correct or based on accurate information. If the tentative recalculation is such that the requisite minimum fifteen percent change is met, the secretary-clerk shall serve the other parent with a copy of the expedited motion, the tentative recalculation, and any supporting documentation provided by the moving parent upon the other parent and the Bureau for Child Support Enforcement along with a notice of filing. The notice of filing advises that the recipient has only fourteen days from the date of the notice mailing to contest the tentative recalculation and request a hearing on the proposed child support modification. If within the prescribed time period no recipient files an objection contesting the tentative recalculation and requesting a hearing, the modification will be made effective by a default judgment without any hearing. The catch is that if this expedited process is used to either reduce or increase the child support obligation, the moving parent is required to notify the other parent of any change in employment conditions which change the moving parent's income. The professional services of a domestic relations attorney remains valuable even in the expedited modification process as knowing when a favorable modification is likely and ensuring that the calculation is done properly using accurate information requires skill and experience.

The lessons here are several. Be vigilant in watching for changes in factors which may impact the child support calculation. If you suspect that a significant change has occurred, consult with a knowledgeable domestic relations attorney promptly. Lastly, where it appears that the child support obligation may in fact be recalculated to be at least fifteen percent different than the existing order in your favor, run – don't walk – to secure the representation of such an attorney to file your modification motion.

For additional information regarding the complexities of child support calculation and how an experienced domestic relations attorney can help you, refer to the companion

article *Child Support Gets Calculated How?: Factors and Tables and Worksheets, Oh My!* available on this web site.

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