

## Ask the Lawyer: Modifying Child Support Payments

By Mathew B. Tully

### Question:

I'm divorced and own a restaurant. My business is still reeling from a horrible winter and I'm having trouble meeting my child support obligations. At what point does a decline in business merit lower child support payments?

### Answer:

Whether your business is struck by an economic downturn, you lost your job, or you experienced a pay cut, the deciding factor for a child support modification boils down to the parent's ability to pay. Under New York's Domestic Relations Law, courts will consider lowering a parent's child support payments in cases where there has been a "substantial change in circumstances." However, paying parents, or "payors," could end up shooting themselves in the foot if such substantial change is the result of their own doing and not something unanticipated and unreasonable.

A parent must petition for a downward modification in child support. So long as he or she can present evidence showing an apparent and extreme hardship caused by a change in circumstances, then the court should hold a hearing to determine the proper amount of support owed. However, not all business problems will merit relief from child support payments.

New York courts have repeatedly stressed that a parent's child support obligations "are not necessarily determined by his or her current financial condition." Under New York's Family Court Act, if a parent possesses a "sufficient means" or is "able to earn such means" then he or she must pay the amount of child support the court deems fair. Courts often base child support obligations on the payor's "earning ability" rather than on what he or she actually earns.

Documentation will be crucial to obtaining an order of downward modification. The court wants to know what the payor's income and assets were when the child support order was recorded and what his or her income and assets were when the petition for modification was filed. The petitioner's expenses will also be of interest to the court. Signed and dated tax returns will be helpful, as will business records, receipts, affidavits and sometimes even forensic accounting reports.

It is important to remember that the cause for a decrease in income can sometimes carry as much weight, if not more, as the loss itself. A court may not find there to be grounds for a downward modification order if, for example, a business owner voluntarily eliminated a part of his or her business for the sake of lowering his or her income.

For example, in the case of *Westwater v. Donnelly*, a father who left a high-paying job to start

a business requested a downward modification in child support because his new self-employment provided him with substantially less income. However, the New York Supreme Court, Appellate Division, Second Department rejected his request, saying a modification order would essentially subsidize the father's financial decisions.

Convincing a court that there has been an unanticipated and unreasonable substantial change in circumstances can be difficult. Courts do not have to rely on the financial information provided by payors. A court may even calculate how much a payor could be earning, based on his or her education or skill levels.

Parents interested in modifying their child support obligations should consult with a family and matrimonial attorney who can help them present to the court compelling evidence of a substantial change in circumstances.

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