Modification of Maintenance and Child Support Orders and Judgments

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Modification of Maintenance Orders and Judgments - Domestic Relations Law §§236(A)(1) and 236(B)(9)(b).

The statutory powers of the Supreme Court to modify the alimony or maintenance provisions of a New York order or judgment are found in Domestic Relations Law §§236(A)(1) and 236(B)(9)(b). Thus, two different sets of rules apply to modification of an agreement, judgment or order depending upon when it was made and whether it is governed by Part A or Part B of Domestic Relations Law §236.

The Supreme Court has continuing jurisdiction over any matrimonial action and, upon application, may modify or vacate any order made in the course of the action. The effect of the statute is to write a reservation into every final judgment of divorce. The jurisdiction of the court over the parties and the incidental subject matter is prolonged; and to that extent the action may be said to be pending. The proceeding is considered to be a motion in the action, as the action is considered to be still pending and the jurisdiction of the court that was originally obtained when the action was commenced continues.

Domestic Relations Law §236(A)(1), providing for modification of orders and judgments for alimony, requires that the applicant for modification must give such notice to the other party as the court directs, thereby requiring the application to be brought on by order to show cause in which the court may prescribe the manner of service. Domestic Relations Law §236(B)(9)(b) provides that the court may annul or modify any

prior order or judgment as to maintenance "upon application by either party. ..." Thus, an application under this section may be made by order to show cause or notice of motion. If the application is made by notice of motion, it should be personally served upon the opposing party.

An application for modification is a motion in the original action and must be brought in the court that directed the original judgment and not in another county.

Domestic Relations Law §236(B)(9)(b), which applies to all agreements, orders and judgments entered into or made in actions commenced on or after July 19, 1980, provides that a court—ordered provision for maintenance may be modified upwards or downwards upon a showing of the recipients inability to be self—supporting or a substantial change of circumstances, including financial hardship or upon actual full or partial retirement of the payor if the retirement results in a substantial change in financial circumstances. This modification power also exists where an agreement has been incorporated into an order or dissolution judgment and merges into it.[1]

The Domestic Relations Law formerly provided, that the termination of child support awarded pursuant to Domestic Relations Law §240 was an additional basis for a modification of a maintenance award.[2] This provision was removed from Domestic Relations Law §§236(B)(9)(b) (1), effective as of January 23, 2016.[3] However, it remains a factor for the court to consider in awarding temporary maintenance and post-divorce maintenance. In making an award of temporary maintenance and post-divorce maintenance the court may consider the termination of a child support award before the termination of the maintenance award when the calculation of maintenance was based upon child support being awarded which resulted in a maintenance award lower than it would have been had child support not been awarded.[4]

Any arrears that have accrued under a judgment or order prior to the making of an application for modification are not subject to modification or annulment unless the defaulting party shows good cause for failure to move for relief from the order directing payment prior to the accrual of the arrears. The court must set forth the facts constituting such good cause in a written decision.

To obtain a modification it must be demonstrated in the moving papers that there

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[1] Laws of 2015, Ch 269 amended Domestic Relations Law §236 [B][9][b] [1], effective January 23, 2016.

[2] Domestic Relations Law §236(B)(9)(b)(1), Laws of 1989, c. 567, §5, as amended by Laws of 1992, c. 41, §140.

[3] Laws of 2015, Ch 269 amended Domestic Relations Law §236 [B][9][b] [1], effective January 23, 2016.

[4] See Domestic Relations Law §236 [B][6][e][1], as added by Laws of 2015, Ch 269, effective January 23, 2016.

See Domestic Relations Law §236 [B][5-a][h][1][d], as added by Laws of 2015, Ch 269, effective October 25, 2015.

has been a change of circumstances from the date of the last order or judgment.

Motions for Maintenance, Child Support, Counsel Fees, or any modification of an award thereof are governed by 22 NYCRR §202.16. A notice of motion submitted with any motion for or related to interim maintenance or child support must contain a notation indicating the nature of the motion. Any such motion must be determined within thirty (30) days after the motion is submitted for decision.

Such motions are also governed by Domestic Relations Law§240(1), which provides, in part, that any written application or motion to the court for the establishment, modification or enforcement of a child support obligation for persons not in receipt of aid to dependent children must contain either a request for child support enforcement services completed in the manner specified in §111(g) of the Social Services Law, or a statement that the applicant has applied for or is in receipt of such services, or a statement that the applicant knows of the availability of such services and has declined them at this time. An application for alimony, maintenance, counsel fees (other than a motion made pursuant to §237(c) or 238 of the Domestic Relations Law for counsel fees for services rendered by an attorney to secure the enforcement of a previously granted order or decree) or any modification of maintenance or child support pendente lite must be brought on by order to show cause, as there is no specific requirement that the application be brought on by such notice as the court may direct.

Motions for alimony, maintenance, counsel fees (other than a motion made pursuant to §237(c) or 238 of the Domestic Relations Law for counsel fees for services rendered by an attorney to secure the enforcement of a previously granted order or decree) or any modification of such awards are governed by a separate part of the Uniform Rules applicable only to such motions that require that certain papers be filed as a prerequisite to submission of the motion.

Unless on application made to the court the requirements are waived for "good cause shown" or unless otherwise expressly provided by any provision of the Civil Practice Law and Rules or other statute, no such motion can be heard unless the moving papers include a statement of net worth in the official form prescribed by the Uniform Rules. The form statement of net worth which is referred to in 22 NYCRR §202.16(d) is found in Chapter 121 [Net Worth], Net Worth.

The Uniform Rules also provide that the failure to comply with the provisions of the rules relative to the submission of the statement of net worth shall be good cause, in the discretion of the judge presiding, either to draw an inference favorable to the adverse party with respect to any disputed fact or issue affected by such failure, or to deny the motion without prejudice to renewal upon compliance with the provisions of the rule. Thus, where the moving party fails to submit the official form statement of net worth, the court can draw an inference favorable to the party opposing the motion or, as in the usual case, deny the motion without prejudice to renew.

Where the official form statement is not filed with the moving papers, the court

may deny the application.

The Uniform Rules do not state that the party opposing a motion for alimony, maintenance, counsel fees (other than a motion made pursuant to §§237(c) or 238 of the Domestic Relations Law for counsel fees for services rendered by an attorney to secure the enforcement of a previously granted order or decree) or any modification of such awards must submit his or her own affidavit, the affidavit of his or her attorney or an official form statement of net worth. However, under the rules, the party opposing such a motion is deemed to have admitted, "for the purpose of the motion but not otherwise," such facts set forth in the moving party's statement of net worth as are not controverted in (1) the opposing party's official form statement of net worth which is made a part of the answering papers or (2) other sworn statements or affidavits with respect to any fact which is not feasible to controvert in the opposing party's statement of net worth. Thus, the opposing party must either submit an official form net worth statement controverting the facts in the moving party's statement of net worth or an affidavit in opposition, if it is not feasible to controvert the facts in the moving party's statement of net worth by the submission of the opposing party's statement of net worth; and if he or she does not do so, he or she is deemed to have admitted the facts in the moving party's statement of net worth for the purposes of the motion only.

Modification of Child Support Judgments and Orders - Domestic Relations Law §236(B)(9)(b)

Where there is no surviving agreement and a judgment or order providing for child support is rendered after trial, or if there was an agreement which was merged into a prior order or judgment, the court may modify or terminate an order or judgment for child support, except as to sums reduced to judgment, upon a showing of substantial change in circumstances, including financial hardship. The court may also modify, either upwards or downwards, a child support order or judgment upon a showing of the recipient's inability to be self—supporting. This modification power is authorized by Domestic Relations Law §236(B)(9)(b) which applies only to orders or judgments rendered in actions commenced on or after July 19, 1980.

Where there is a surviving, viable agreement, Domestic Relations Law §236(B)(9)(b) does not extend modification power to child support. Domestic Relations Law §236(B)(9)(b) makes no mention of child support. The statutory powers of the Supreme Court to modify the child support provisions of a New York order or judgment are also found in Domestic Relations Law §240(1).

The principles applicable to modification of maintenance awards are generally applicable to the modification of child support orders. In order to have an award modified so as to increase payments for child support, a change of circumstances must

be shown to have occurred since the time of the entry of the order warranting the increase in the best interest of the child.

The "Low Income Support Obligation and Performance Improvement Act," amended DRL §236 [B](9)(b)(2) 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% 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.[1]

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.

Unlike the provisions of the Child Support Standards Act, DRL §236 [B](9)(b)(2)(ii) and FCA §451 (2)(b) permit the parties to "opt out" of the three year or 15% threshold for modification of a child support 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 DRL §236 [B](9)(b)(2)(ii) and FCA §451 (2)(b).

The first sentence of DRL §236 [B](9)(b) (2) and FCA §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."

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

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[1] 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; ....).

agreement or stipulation was executed on or after October 13, 2010.[10]

The Supreme Court has continuing jurisdiction over any matrimonial action and may modify or vacate any order made in the course of the action. However, where an agreement has been made between the parents of a child, which provides for child support, and no action or proceeding has been brought whereby the agreement has been incorporated in a court order or judgment, the court may not modify the contract in a plenary action or proceeding.

The proceeding, which is considered a motion in the action, should be brought on by order to show cause or notice of motion personally served upon the other spouse. Arrears of child support that have accrued under a judgment or order prior to the making of an application for modification are not subject to modification or annulment.

An application for modification of child support is considered a motion in the original action and must be brought in the court which directed the original judgment and not in another county.

Modification of child support awards - Domestic Relations Law §236(B) (9) (b)

The judicial power to modify child support orders specified in an existing separation agreement was judicially limited in 1977 in Boden v. Boden.[4] The issue raised by *Boden* was whether parents, by their separation agreement, should have the power to set child support for the future or whether, since the child was not a party to the contract, child support should be treated the same as a custody award and hence readily modifiable upon a showing of change of circumstances. The court in *Boden* gave parents relative freedom of contract as to child support, holding that a judgment based upon the 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 further stated 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.**"**

Domestic Relations Law **§**236(B)(9)(b) which was enacted in 1980[1] provided that there may be a modification of maintenance or child support upon a showing of substantial change in circumstance, including financial hardship, where there was no agreement or where the agreement was merged into the judgment. Where, however, the agreement survives the judgment, as in *Boden,* the power to modify extends only to

[10] Laws of 2010, Ch 182 §13.

[4] Boden v. Boden, 42 N.Y.2d 210, 397 N.Y.S.2d 701, 366 N.E.2d 791 (1977).

[1] Laws of 1980, Ch 281, effective July 19, 1980

maintenance and not to child support. Likewise, Domestic Relations Law §236(B) (9) (b) was limited to agreements and decrees entered into or issued after July 19, 1980, and this section was not retroactive as to prior agreements and decrees.

Brescia v. Fitts,[5] a later Court of Appeals decision, examined New York public policy as to the child support obligation. The most significant result of this decision is the substantial limitation of the holding in Boden v. Boden to its facts, and the reaffirmation of the interest of children in adequate support. In *Brescia*, the Court of Appeals 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, however, where the child's right to receive adequate support is being asserted. The principles iterated in *Boden* did not alter the scope of the Court's power to order support where the dispute concerns the child's right to receive adequate support.

The "Low Income Support Obligation and Performance Improvement Act of 2010,[6]" inter alia, amended Domestic Relations Law §236[B][9][b] and Family Court Act §451 to create a uniform statutory standard for modifying child support awards.

Domestic Relations Law § 236(B)(9)(b)(2) and Family Court Act § 451(3)(a) each provide:

(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 considered voluntary unemployment and 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

[5] Brescia v. Fitts, 56 N.Y.2d 132, 451 N.Y.S.2d 68, 436 N.E.2d 518 (1982).
[6] 2010 N.Y. Laws ch. 182 §1, effective October 13, 2010.

party has made diligent attempts to secure employment commensurate with his or her education, ability, and experience. [2]

Did Boden survive the 2010 amendment? The 2010 amendment conformed Family Court Act § 451(3)(a) to Domestic Relations Law § 236(B)(9)(b)(2) by both statutes requiring a substantial change of circumstances for modification of a child support provision. The New York State Assembly Memorandum in support of the 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 this conforming change of including a substantial change in circumstances as a basis for modification in the Family Court Act was not intended to alter existing case law regarding the standard for modifications for orders incorporating but not merging separation agreements. [3] It appears from this language that it was the intention of the legislature not to overrule *Boden v Boden*, yet the wording of the statute and recent case law leads to the conclusion that it was implicitly superseded by statute. Since about 2018 the Appellate

[2] Laws of 2010, Ch 182, § 7, effective October 13, 2010
[3] See NY Legis Memo 182 (2010)

Divisions of the Second,[4] Third, [5]and Fourth[6] Departments have held, without stating that Boden was legislatively overruled, that Family Court "may modify an order of child

[4] 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. As the parties specifically opted out of those provisions of the Domestic Relations Law which allow for modification when "three years have passed since the order was entered, last modified or adjusted" or "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 order to establish her entitlement to an upward modification of the plaintiff's child support obligation, the defendant had the burden of establishing "a substantial change in circumstances" .(citing Domestic Relations Law § 236 [B] [9] [b] [2] [i]; Family Ct Act § 451 [3] [a]). To the same effect see Khost v Ciampi, 189 A.D.3d 1409, 134 N.Y.S.3d 735 (2 Dept., 2020); Emig v. Emig, 192 A.D.3d 1024 140 N.Y.S.3d 764 (2d Dept., 2021). See also Murphy v Murphy, 88 N.Y.S.3d 468, 471, 2018 WL 6187113 (2 Dept., 2018) (affirming denial of modification for failure to establish substantial change of circumstances).

[5] In Matter of Siouffi v Siouffi, 186 A.D.3d 1789, 131 N.Y.S.3d 406 (3 Dept., 2020) the Third Department observed that pursuant to statute, a court may modify a child support order based on "a showing of a substantial change in circumstances" the passage of three years since the order's entry or last modification, or a change in either party's gross income by 15% or more since the order's entry or last modification. The last two bases could not be applied, as the parties expressly opted out of those provisions in their validly executed separation agreement, as permitted by statute. (citing Family Ct Act § 451 [3] [b].) Thus, the father bore the burden of showing a substantial change in circumstances warranting a downward modification of his child support obligation.

[6] In Fanizzi v Delforte–Fanizzi, 164 A.D.3d 1653, 84 N.Y.S.3d 650, (4 Dept., 2018) where the parties' surviving agreement which set forth the plaintiff's child support obligation 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, the court may modify an order of child support where three years have passed or 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.

support, including an order incorporating without merging an agreement or stipulation of the parties, upon a showing of a substantial change in circumstances".[7]

Boden appears to have been superseded by statute as evidenced by the case law in the Second, Third, and Fourth Department. However, none of these appellate courts have held that Boden has been overruled or superseded. The New York State Assembly Memorandum in support of the legislation states that the conforming change of including a substantial change in circumstances as a basis for modification in the Family Court Act was not intended to alter existing case law regarding the standard for modifications for orders incorporating but not merging separation agreements. This language creates confusion rather than clarification. Until the Court of Appeals addresses the issue squarely it will remain an unanswered question and we urge counsel to proceed with caution when seeking a modification of child support where there is a surviving agreement.

Motions for Maintenance, Child Support, Counsel Fees, or any modification of an award thereof are governed by 22 NYCRR §202.16. A notice of motion submitted with any motion for or related to interim maintenance or child support must contain a notation indicating the nature of the motion. Any such motion must be determined within 30 days after the motion is submitted for decision.

Such motions are also governed by Domestic Relations Law §240(1), which provides, in part, that any written application or motion to the court for the establishment, modification or enforcement of a child support obligation for persons not in receipt of aid to dependent children must contain either a request for child support enforcement services completed in the manner specified in §111(g) of the Social Services Law, or a statement that the applicant has applied for or is in receipt of such services, or a statement that the applicant knows of the availability of such services and has declined them at this time. An application for alimony, maintenance, child support and counsel fees (other than a motion made pursuant to §§237(c) or 238 of the Domestic Relations Law for counsel fees for services rendered by an attorney to secure the enforcement of a previously granted order or decree) or any modification of maintenance or child support pendente lite must be brought on by order to show cause, as there is no specific requirement that the application be brought on by such notice as the court may direct.

Motions for alimony, maintenance, child support and counsel fees (other than a motion made pursuant to §§237(c) or 238 of the Domestic Relations Law for counsel fees for services rendered by an attorney to secure the enforcement of a previously granted order or decree) or any modification of such awards are governed by a separate part of the Uniform Rules applicable only to such motions that require that

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[7] citing Family Ct Act § 451[3][a]

certain papers be filed as a prerequisite to submission of the motion.

Unless on application made to the court the requirements are waived for "good cause shown" or unless otherwise expressly provided by any provision of the Civil Practice Law and Rules or other statute, no such motion can be heard unless the moving papers include a statement of net worth in the official form prescribed by the Uniform Rules.

The Uniform Rules also provide that the failure to comply with the provisions of the rules relative to the submission of the statement of net worth shall be good cause, in the discretion of the judge presiding, either to draw an inference favorable to the adverse party with respect to any disputed fact or issue affected by such failure, or to deny the motion without prejudice to renewal upon compliance with the provisions of the rule. Thus, where the moving party fails to submit the official form statement of net worth, the court can draw an inference favorable to the party opposing the motion or, as in the usual case, deny the motion without prejudice to renew.

Where the official form statement is not filed with the moving papers, the court may deny the application.

The Uniform Rules do not state that the party opposing a motion for alimony, maintenance, child support and counsel fees (other than a motion made pursuant to §§237(c) or 238 of the Domestic Relations Law for counsel fees for services rendered by an attorney to secure the enforcement of a previously granted order or decree) or any modification of such awards must submit his or her own affidavit, the affidavit of his or her attorney or an official form statement of net worth. However, under the rules, the party opposing such a motion is deemed to have admitted, "for the purpose of the motion but not otherwise," such facts set forth in the moving party's statement of net worth as are not controverted in (1) the opposing party's official form statement of net worth which is made a part of the answering papers or (2) other sworn statements or affidavits with respect to any fact which is not feasible to controvert in the opposing party's statement of net worth. Thus, the opposing party must either submit an official form net worth statement controverting the facts in the moving party's statement of net worth or an affidavit in opposition and if it is not feasible to controvert facts in the moving party's statement of net worth by the submission of the opposing party's statement of net worth; and if he or she does not do so, he or she is deemed to have admitted the facts in the moving party's statement of net worth for the purposes of the motion only.

Modification of Maintenance Upon Party's Remarriage - Domestic Relations Law § 248

Section 248 of the Domestic Relations Law provides that upon application of the paying spouse and proof that the recipient has remarried, the court must annul any maintenance or support order granted in a divorce or annulment action. Thus, the

paying spouse's obligation to support the recipient is terminated when the recipient remarries since the public policy underlying the statute is that a former spouse who has a new spouse should look to that new spouse for support and not to the former spouse. The right to modification may be enforced by the personal representative of the paying spouse upon his or her death. This statute is mandatory, and where applicable the court has no discretion to deny relief. The annulment of a maintenance provision may be ordered nunc pro tunc as of the date of remarriage of the recipient.

Modification of Maintenance Upon Party's Cohabitation with Another - Domestic Relations Law § 248

Where a former wife is habitually living with another man and holding herself out as his wife, the second sentence of Domestic Relations Law §248 provides that court-ordered support for her may be terminated. It has been held by the Court of Appeals that the statute is to be read in the conjunctive and that there must be both a "habitually living with another man" and a "holding herself out."

Counsel Fees in a Modification or Custody Proceeding- Domestic Relations Law § 238

An application for counsel fees in a modification or custody proceeding is made in the same manner as an application for counsel fees under Domestic Relations Law §237(a). It may be made pendente lite, prior to the final determination or at the conclusion of the matter.

DRL §§237 and 238 create a rebuttable presumption that counsel fees shall be awarded to the “less monied spouse.”[1]

The parties and their attorneys are required to submit an affidavit to the court with financial information to enable the court to make its determination. The monied spouse is required to disclose how much he has agreed to pay and how much he has paid his attorney. The affidavit must include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses.[2]

In addition 22 NYCRR §202.16(k)(3) provides that no motion for counsel fees and expenses shall be heard unless the moving papers also include the affidavit of the movant's attorney stating the moneys, if any, received on account of such attorney's fee

[1] See NY Legis Memo 329 (2010).

[2] See Domestic Relations Law §§237 and 238.

from the movant or any other person on behalf of the movant, the hourly amount charged by the attorney, the amounts paid, or to be paid, to counsel and any experts, and any additional costs, disbursements or expenses, and the moneys such attorney has been promised by, or the agreement made with, the movant or other persons on behalf of the movant, concerning or in payment of the fee. Fees and expenses of experts shall include appraisal, accounting, actuarial, investigative and other fees and expenses to enable a spouse to carry on or defend a matrimonial action or proceeding in the Supreme Court.

Prior law placed an onus upon the party in a matrimonial action seeking counsel fees pendente lite, to show why the interests of justice require it. The burden is now on the “more-monied” spouse to show why, in the interests of justice, a counsel fee award should not be made.

Neither DRL §237 nor Domestic Relations Law §238 define the term “less monied.” It is submitted that the “less monied” spouse should be defined as the party with less income (and liquid assets) available to pay his or her own counsel fees.

An application for counsel fees in a modification proceeding may be brought on by notice of motion or order to show cause as there is no specific requirement that the application be brought on by such notice as the court may direct. The modification proceeding itself, however, must be properly commenced.

Motions under Domestic Relations Law §237(b) for counsel fees are governed by the Uniform Rules which prescribe certain papers that are required to be served prior to the submission and as a prerequisite, for such submission. Unless on application made to the court the requirements are waived for "good cause shown" or unless otherwise expressly provided by any provision of the Civil Practice Law and Rules or other statute, no motion for counsel fees can be heard unless the moving papers include an official form statement of net worth. In addition, no motion for counsel fees pendente lite may be heard unless the moving papers also include "... the affidavit of the movant's attorney stating the moneys, if any, received on account of such attorney's fee from the movant or any other person on behalf of the movant and the moneys such attorney has been promised by or the agreement made with the movant or other persons on behalf of the movant, concerning or in payment of the fee."

In addition, although not required by any court rule, the moving party should set forth in his/her affidavit, which is based upon his or her personal knowledge of the fact, the reasons why the court should grant the application demonstrating financial need for the award.

The Uniform Rules provide that the failure to comply with the provisions of rules relative to the submission of the statement of net worth shall be good cause, in the discretion of the judge presiding, either to draw an inference favorable to the adverse party with respect to any disputed fact or issue affected by such failure; or to deny the motion without prejudice to renewal upon compliance with the provisions of the rule.

The Uniform Rules do not require the party opposing a motion for counsel fees, in modification or custody proceedings, brought under Domestic Relations Law 237(b), to submit his or her own affidavit, the affidavit of his or her attorney or a statement of net worth. However, the party opposing a motion for counsel fees pendente lite is deemed to have admitted, "for the purpose of the motion but not otherwise," such facts set forth in the moving party's official form statement of net worth as are not controverted in the opposing party's official form statement of net worth made a part of the answering papers or other sworn statements or affidavits with respect to any fact which is not feasible to controvert in the opposing party's statement of net worth. Thus, the opposing party must either submit an official form statement of net worth controverting the facts in the moving party's statement of net worth, or submit an affidavit in opposition if it is not feasible to controvert the facts in the moving party's statement of net worth by the submission of the opposing party's statement of net worth. If the opposing party does not submit a statement of net worth or other sworn statements or affidavits he/she is deemed to have admitted the facts in the moving party's statement of net worth for the purposes of the motion only.