

Requesting Changes in Alimony Post-Divorce: What Happens When the Financially Responsible Ex-Spouse Faces Pandemic-Related Economic Hardships Caused by Unemployment or Decreased Income?

June 11, 2020 | by Patricia Veres

With national unemployment claims nearing 2 million in the last week of May, alone, the pandemic's impact on jobs has forced ex-spouses to face challenging times. As the financially dependent ex-spouse, who relies upon alimony to pay the bills, or as the ex-spouse who is responsible for alimony, any changes to employment have the potential to bring about extreme hardship. If the financially responsible ex-spouse has had a change in work or income, due to the disruption the pandemic has caused, he or she may be experiencing, involuntarily, a drastic decrease in income, which may cause a strain on all financial obligations.

What happens when the financially responsible ex-spouse loses income?

Since the pandemic began, positions of employment in numerous fields and industries have been cut or changed, resulting in the loss of jobs or reduced income. As we continue to see, even the most upper-level executives are not immune to the current economic volatility. What does this mean for a financially responsible ex-spouse? What does this mean for the ex-spouse, who depends upon alimony? The answer is that "it depends." Understanding the law surrounding enforcement of family support obligations is crucial, and relief may be available depending upon certain criteria.

In New Jersey, a financially responsible ex-spouse who is either unemployed or income-reduced must make diligent efforts to seek replacement employment or income. Depending on experience and qualifications, age, salary level, and other factors, this may be a lengthy process.

If the parties cannot agree upon a modification of support in a written document that is properly executed and filed with the Court, either party may need to seek Court intervention. Support directives including alimony derive from either a mutual written agreement between former spouses that is incorporated into their Judgment of Divorce, or from a Judgment awarding alimony, after a divorce trial. In most cases, the Courts will enforce those support directives and maintain the financial obligation, but by statute and well-settled caselaw precedent, New Jersey courts may modify support obligations in certain situations upon a showing of a substantial change in circumstances. Under the relevant statute, amended in 2014, the Court must weigh certain factors in a request for modification. Those factors, as well as the timing required for filing an application for modification of support, are discussed next.

Ten Factors Courts Consider for Modification of Support Obligations

To assess whether a support-paying individual is entitled to some relief, the courts in New Jersey must consider these ten factors:

1. The reasons for any loss of income;
2. Under circumstances where there has been a loss of employment, the obligor's documented efforts to obtain replacement employment or to pursue an alternative occupation;
3. Under circumstances where there has been a loss of employment, whether the obligor is making a good faith effort to find remunerative employment at any level and in any field;
4. The income of the obligee; the obligee's circumstances; and the obligee's reasonable efforts to obtain employment in view of those circumstances and existing opportunities;
5. The impact of the parties' health and their ability to obtain employment;
6. Any severance compensation or award made in connection with any loss of employment;
7. Any changes in the respective financial circumstances of the parties that have occurred since the date of the order from which modification is sought;
8. The reasons for any change in either party's financial circumstances since the date of the order from which modification is sought, including, but not limited to, assessment of the extent to which either party's financial circumstances at the time of the application are attributable to enhanced earnings or financial benefits received from any source since the date of the order;

9. Whether a temporary remedy should be fashioned to provide adjustment of the support award from which modification is sought, and the terms of any such adjustment, pending continuing employment investigations by the unemployed spouse or partner; and
10. Any other factor the court deems relevant to fairly and equitably decide the application.

Courts also require a 90-day period before an ex-spouse can file an application for modification of support.

By statute, a party is prohibited from filing an application for modification of support until he or she has been unemployed, or has not been able to return to or attain employment at prior income levels, or both, **for a period of ninety (90) days**. The Court does have the discretion to make any relief granted retroactive to the date of the loss of employment or reduction in income. It is imperative that an individual facing a reduction or elimination in income seek legal counsel as soon as possible, as it will be important to document the facts supporting such an application if it remains necessary at the conclusion of the 90-day period.

Courts will also take note of good faith efforts on the part of the obligor spouse to continue to pay support. The economically-dependent spouse would also be well-served to consult with an attorney, under these circumstances, as their own financial circumstances may come into high focus, and they will want to defend against any premature or unwarranted reduction or termination of support.

Can a self-employed ex-spouse request support modification?

For financially responsible ex-spouses who are self-employed business owners, any request for modification of support obligations requires extensive documentation. Specifically, by statute the party's application for relief must include an "analysis that sets forth the economic and non-economic benefits the party receives from the business, and which compares these economic and non-economic benefits to those that were in existence at the time of the entry of the order."

This analysis includes all facts concerning the decline in business, whether such declines are beyond their control, and what they have done in good faith to mitigate losses. The court requires

documentation of benefits that the individual enjoys from self-employment, including the ability to write off various expenses for income tax purposes, such as cell phones, automobile expenses, and insurances.

The self-employed individual should be prepared to produce an abundance of evidence including accounting ledgers, tax returns, business account statements, profit and loss statements, and other documentation to demonstrate that, through no fault of their own, their business revenue and profits have decreased significantly since the time that the support order was put into place.

How does the modification request proceed to resolution?

Once a former spouse has filed a motion for reduction or modification of alimony, under the circumstances outlined above, the opposing party may also file a motion for enforcement of support. Alternatively, in a situation where support payments have ceased, the recipient of alimony may file an enforcement application first, with a responding motion for modification from the other party. Since it is generally the supporting spouse that will know first that their financial circumstances have changed, he or she should address the subject as soon as possible with the other spouse, and counsel should be consulted as soon as possible to ensure the best possible outcomes.

Consider mediation and settlement first.

In any matter where circumstances have changed so substantially that support modification is being considered, the matter should be analyzed for possible resolution. Experienced counsel will be able to exchange discovery and determine whether the matter can be resolved through mediation, which may be more expedient and less costly than going to court. Some cases must be decided by the Court, but the possibility of a settlement should at least be explored at the outset.

If mediation and/or settlement are not possible, the court may decide the issue summarily, or decide that a hearing is necessary if there are facts in dispute.

A hearing can lead to a range of remedies.

At that point, pending the hearing, the court may issue a temporary reduction or suspension of support, or the court may direct that support will be paid from assets, pending the hearing.

If there are no disputed facts and the case warrants a reduction or suspension of support, the court may also direct that the matter be reviewed periodically for a restoration of the supporting party's income.

All cases are fact sensitive, and there is a wide range of remedies that may be appropriate so long as the court ties the remedy to the concepts of fairness and equity to both parties.

Know the factors for consideration and adhere to the 90-day timeframe.

Certainly, in these times of high unemployment, closed businesses, and the many restrictions individuals and businesses must adhere to, questions about seeking a support modification are more common than pre-COVID-19. It is important to be informed about the laws in New Jersey, the factors that a court will consider, and the 90-day timeframe required before filing an application, which should be used to document job search efforts and explore settlement of the issues.