CAN THE PAYOR'S OBLIGATION TO PAY ALIMONY BE IMPACTED BY VOLUNTARY ACTS OF THE PAYOR

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At the time of the entry of a judgment dissolving the marriage of two people in Connecticut, the Court has the discretion of entering an order that either party pay alimony (the "Payor") to the other party (the "Payee) in an amount and for a duration that it believes is fair and equitable. The Connecticut General Statutes (C.G.S.) set forth at section 46b-82 certain criteria that a Judge **must consider** in making its decision concerning alimony, whether it be pursuant to a decision rendered after a trial or approving of a settlement agreement submitted by or on behalf of the parties.

Unless the divorce judgment contains language that clearly precludes the modification of the amount and/or the duration of alimony, C.G.S. section 46b-86(a) provides the Court, post judgment upon motion filed by either party, to continue, set aside, alter or modify the Payor's obligation to pay alimony. The statutory standard for determining whether the request for such change to the obligation to pay alimony is whether the petitioner has made a showing of "...a substantial change in the circumstances of either party..." C.G.S. section 46b-86(a).

In making its decision as to whether to modify or otherwise change the alimony obligation, the Court is required to consider at the time of the post judgment determination the same criteria found at C.G.S. 46b-82 as it had been required to consider at the time of the entry of the original divorce judgment. The Ct. Supreme Court stated in the case of **Borkowski vs. Borkowski**, 228 Conn. 729 (1994) that the party who seeks the modification bears the burden of demonstrating that a substantial change in circumstances has occurred between the most recent Court order and the time of the hearing on the new petition for modification of alimony.

At the time of the post judgment hearing on the motion for modification, the Court will carefully scrutinize the content of the separate signed financial affidavits signed by each party in accordance with Section 25-30 of the Connecticut Rules of Court, and submitted to the Court, both as of the time of the entry of the original divorce judgment, as compared with the financial affidavits submitted at the time of the motion for modification hearing. The Court will also allow each party to provide evidence to the Court in the form of testimony and/or documentary evidence pursuant to his/her own testimony and documents or through other witnesses.

The **Borkowski** case and its progeny have set forth a two pronged test that the Court must follow at the time of the hearing on the motion to modify. The Court must first determine whether there has been a substantial change in the financial circumstances of one or both of the parties in accordance with the evidence presented at the hearing. In order to meet the constitutional criteria of fair notice and due process, the petitioner must file the modification motion in accordance with the criteria of Section 25-26(e) of the Connecticut Rules of Court and which must clearly state, "...the factual and legal basis for the claimed modification and shall include the outstanding order and date thereof to which the motion for modification is addressed...".

If the Court determines that the petitioner has met his/her burden to show that such substantial change in circumstances has occurred since the date of the original judgment, the Court then utilizes the evidence already received and other evidence presented to determine what the amount of the modification, if any, should be.

Issues have arisen in this regard in cases in which the substantial change in circumstances occurred through the actions of one party or the other. The Supreme Court ruled in the case of **Sanchione vs. Sanchione** 173 Conn. 397 (1977) that in order to meet the threshold of a substantial change in circumstances, the alleged inability to pay "...must be excusable and not brought about by the Defendant's own fault..." see page 407. This language caused some rift between and among Appellate Court and Trial Court decisions that have been rendered since the Supreme Court issued the **Borkowski** and **Sanchione** decisions.

Alas!! The Connecticut Supreme Court issued a decision on 12/10/2013 in the case of **Olson vs. Mohammadu** 310 Conn 665(2013) to clarify this issue. The **Olson** case is instructive and will, in my opinion, become a seminal case in this regard. The parties in **Olson** were married 6/7/2001 and had one child during the marriage. The Wife, Marianne Olson, resided in CT with the child and the Husband, Fusaini Mohammadu, resided in Florida in 9/2008 as of the date when the Wife filed for divorce in CT. The CT. Trial Court dissolved the marriage on 8/5/2009 and ordered visitation rights to the Husband to be exercised only in CT, with both parties sharing joint legal custody and the Wife being the primary residential parent.

The Court also ordered on 8/5/2009 that the Husband pay alimony to the Wife in the amount of $777.00 per week (FYI the Court also ordered child support $334.00 per week payable by Husband - but child support orders are not being discussed in this article). After the Wife had filed several Motions for Contempt during the seven months that followed the divorce judgment, the Husband filed a motion to modify alimony (also child support). The Husband had been earning $180,000.00 per year, at the time of the divorce as a doctor in Florida, but he suffered a reduction in income to $150,000.00 per year when he chose to move back to CT (i.e. a $30,000.00 per year reduction in income on an annual basis). The Husband claimed that the reason for the move back to CT was that the Husband wanted to be closer to his child.

The Husband testified at trial that the Wife made it very difficult for him to have parental contact with the child and his telephone time with the child was limited by her. "...it came to a point in time I cannot even have time to talk to him (the minor child) over the telephone, so I finally decided...I need to be closer to my son. And...so I moved back...". **p668**

The trial court denied the Husband's motion for modification of alimony (also denied a modification of child support). In denying the motion for modification, the trial court relied on "...the voluntary nature of the income change ...of the Husband. .....the Court acknowledged that the Husband's 'stated motivation might have been a good parental decision...**BUT** ...the court concluded that the relocation was a 'decision that ignored the realities of the financial obligation as set forth in the original divorce judgment issued just months earlier..."

The Husband appealed the trial court decision to the CT. Appellate Court and the Appellate Court upheld the trial court's denial of the Husband's motion to modify alimony. The Husband then appealed the Appellate Court decision to the CT. Supreme Court.

The CT Supreme Court overturned the rulings of the trial court and the Appellate Court. The Supreme Court ruled that although the Husband's voluntary decision to move back to Connecticut is what caused the reduction in his income, the Husband's motivation had to be considered by the trial court, which it had not considered. "...Because the trial court made no finding on the culpability of the Defendant's conduct, we conclude that the trial court incorrectly applied the law when it denied the Husband's motion for modification..." **Olson** p.680

In its decision, the Supreme court stated in part that, "...a court that is confronted with a motion for modification under section 46b-86(a) must first determine whether the moving party has established a substantial change in circumstances. In making this threshold determination, if a party's **voluntary action** gives rise to the alleged substantial change in circumstances warranting modification, the Court must assess the motivations underlying the voluntary conduct in order to determine whether there is **culpable** conduct foreclosing a threshold determination of a substantial change in circumstances. If the Court finds a substantial change in circumstances, then the Court may determine what modification, if any, is appropriate in light of the changed circumstances..." p.684

In the **Olson** case, the Supreme Court ruled that the trial court had improperly denied the Husband's motion for modification of alimony solely on the basis that the Husband's voluntary relocation to CT gave rise to the alleged substantial change in circumstances. The Supreme court determined that the "...crux of the inquiry is culpability and not voluntariness..." p. 679. Because the trial court had not made a finding on the culpability of the Husband's conduct, "... we conclude that the trial court incorrectly applied the law when it denied the Defendant's motion for modification..." p.680 Conduct that is within one's control , that is voluntary, is not necessarily brought about by one's own fault. In other words, not all voluntary conduct is fault worthy..." p. 678 - ftnote #8.

The **Olson** case provides an important road map to issues that must be considered when filing a post judgment motion for modification and in analyzing whether a Court might grant or deny such motion. The law in divorce cases, as applied by the Court's and analyzed by attorney's in providing advice to clients, is rarely "black and white" and most typically shaded in gray. The discussion in **Olson**, however, provides good guidance on proceeding with such motions.