Are COLA Adjustments 'Modifications' of an Order?

By Vesselin Mitev

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You're retained on a child support modification case. The client gives you the thumbnail sketch of the prior history: the parties were never married and the only existing court order is one that was entered back in 2014, after a Family Court hearing. Support, you note, is payable through CSEB. A lot of time has passed and a modification certainly appears to be in order. Oh, your client also notes in passing that she received a COLA adjustment in the last six months, which brought up the support award a whole $65 dollars.

You file the petition, replete with the initial prior order and the requisite financials. The matter proceeds to a hearing and following the hearing is dismissed. The magistrate rules that the COLA order was the "controlling" order and there was no evidence that there had been a change in income of either party since the order was entered; and certainly three years had not elapsed.

This doesn't sit right with you so you embark on a grueling research quest (Toss a coin to your Witcher-style) until you've found the answer to the question: does a COLA modification to an order render it the "controlling" order? The answer is a qualified No.

Although dreadfully boring, a brief primer on what is COLA: Cost of Living Adjustment, which is a primordial remnant from the stratospheric inflation in the 1970s, is correlated with the Consumer Price Index (W or U, depending on which state you are in); basically, if the CPI went up (that is, if the aggregate cost for a basket of goods and services goes up over time) then COLA would be an effort to offset the "cost of living" with a corresponding increase to Social Security benefits that is supposed to counteract inflation.

Family Court Act 413-a deals with COLAs. It provides for automatic review upon a 10 percent change in the CPI and for objections to an adjusted order within a certain time frame. If neither party objects to the adjustment the order does not supersede the "most recent order" of support but is merely "append[ed]" to it (see FCA 413 subd. 2c). If objections are made in a timely fashion, the court will hold a hearing with two possible outcomes:

> "(1) the issuance by the court of a *new order of support* in accordance with the child support standards as set forth in section four hundred thirteen of this article; or
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> (2) where application of the child support standards as set forth in section four hundred thirteen of this article results in a determination that no adjustment is appropriate, an order of no adjustment." (my emph.).

413-a(4) goes on to state: "Modification of orders. Nothing herein shall be deemed in any way to limit, restrict, expand or impair the rights of any party to file for a modification of a child support order as is otherwise provided by law.

Although this should dispose of the matter, a deeper dive into the commentaries is worth it. A COLA adjustment is, explicitly, *not* a modification of an order, as cogently stated by Prof. Merril Sobie in the Practice Commentaries: "modification should not be confused with the cost of living adjustment (COLA) provided in Section 413-a. A COLA increase, when required, is not a modification." (my emph.).

In short, the only way a COLA adjustment could transmogrify into a "modified" order of support is if one of the parties objected to it, a hearing was held, and a new order of support was issued under FCA 413. Otherwise, an adjustment to a COLA order is merely an appendage and the initial "most recent" order remains controlling for modification purposes.

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