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### CHANGES IN CIRCUMSTANCES

In Lepis v. Lepis, 83 N.J. 133 (1980), the Supreme Court outlined the substantive and procedural law respecting modification of support agreements. It recognized that spousal support agreements are enforceable only to the extent they remain fair and equitable. Smith v. Smith, 72 N.J. 350 (1977); Carlsen v. Carlsen, 72 N.J. 363 (1977); Schlemm v. Schlemm, 31 N.J. 557 (1960). A Family Court retains continuing "supervisory control" over spousal agreements and to the extent they are no longer fair and equitable, by virtue of changes in circumstances, there should be modification.

Lepis establishes a two-tiered procedural test. First, the moving party has the burden of demonstrating that "changed circumstances" exist. Before a court will order discovery of an ex-spouse's financial status, a prima facie, showing of changes must be established. Once that prima facie showing is established, discovery is ordered and then at the second hearing (which may be a plenary hearing depending on whether there are disputed material facts) a determination is made whether those changed circumstances warrant modification of the underlying agreement.

There may well be a distinction between modifying an alimony, as opposed to a child support award, since Lepis indicates that the guiding principle in modification of child support is "the best interests of the children". A prima facie showing would require demonstration that the child's needs have increased to an extent for which the original agreement did not provide. It appears to be a more liberal standard than the one for alimony.

It is also clear that the obligation of the supporting spouse to pay child support is determined by the quality of economic life during the marriage and that a parent "has an obligation to share with his children the benefit of his financial achievement". Dunne v. Dunne, 209 N.J. Super. 559 (App. Div. 1986). This permits the argument that a child may receive support beyond the standard of living enjoyed during the marriage, i.e. the child support level is determined by what the child would have received had the marriage continued. In short, a child should not be penalized by divorce. This philosophy is reflected in the Child Support Guidelines:

"A child should receive the same proportion of income that would have been received had the family remained intact or formed. By ensuring a child receive this proportionate level of income, he or she is insulated from the

negative economic effects of dissolution or non-formation of the family." See N.J. Child Support Guidelines, First Year Evaluation, Dec., 1987, prepared by the Child Support Enforcement Services, N.J. AOC. (emphasis added)

With alimony, Lepis makes it clear that an increase in support is necessary whenever the changed circumstances "substantially impair the dependent spouse's ability to maintain the standard of living reflected in the original decree or agreement" and, conversely, a decrease is warranted when "all or a portion of support received is unnecessary" to maintain that standard. Importantly, the supporting spouse's obligation is "mainly determined by the quality of economic life during the marriage, not bare survival". Lepis, at 150.

The Lepis Court also recognized the strong public policy in enforcing freely bargained for agreements (see Petersen v. Petersen, 85 N.J. 638, 642 (1981)) but, notwithstanding that, if the court determines the agreement is no longer fair and equitable, it should not be enforced. Lepis, at 149. In fact, a court's authority to modify a spousal support agreement in response to changed circumstances "cannot be restricted". Lepis, at 149; Smith v. Smith, 72 N.J. at 360.

#### ELEMENTS OF CHANGED CIRCUMSTANCES

- 1) an increase in the cost of living, see Martindell, 21 N.J. at 353;
- 2) increase or decrease in the supporting spouse's income, Martindell, 21 N.J. at 355; Traudt v. Traudt, 116 N.J. Eq. 75 (E & A 1934); Acheson v. Acheson, 24 N.J. Misc. 133 (Ch. 1946);
- 3) illness, disability or infirmity arising after the original judgment, e. g., Kirshbaum v. Kirshbaum, 129 N.J. Eq. 429 (E & A 1941); Limpert v. Limpert, 119 N.J. Super. 438 (App. Div. 1972); see Ostrow v. Ostrow, 59 N.J. Super. 299, 305-306 (App. Div. 1960);
- 4) the dependent spouse's loss of a house or apartment, Jackson v. Jackson, 140 N.J. Eq. 124 (E & A 1947); McLeod v. McLeod, 131 N.J. Eq. 44 (E & A 1942);

- 5) the dependent spouse's cohabitation with another, Wertlake v. Wertlake, 137 N.J. Super. 476 (App. Div. 1975); Garlinger v. Garlinger, 137 N.J. Super. 56 (App. Div. 1975); Eames v. Eames, 153 N.J. Super. 99 (Ch. Div. 1976); Grossman v. Grossman, 128 N.J. Super. 193 (Ch. Div. 1974);
- 6) subsequent employment by the dependent spouse, Ramhorst v. Ramhorst, 138 N.J. Eq. 523 (E & A 1946); Kavanagh v. Kavanagh, 134 N.J. Eq. 358 (E & A 1944), see also Lavene v. Lavene, 162 N.J. Super. 187, 203 (Ch. Div. 1978); and
- 7) changes in federal income tax law, Acheson, supra.

#### PRACTICAL HINTS IN LEPIS APPLICATIONS

1. Insist that counsel demonstrate what the circumstances were at the time the original order was entered.
2. There is no distinction between bargained for agreements and court ordered support in subsequent modification applications.
3. Has the moving party made full and complete financial disclosure - a Case Information Statement and tax returns.
4. The change in circumstances in alimony is measured by the standard of living enjoyed during the marriage. (But see Sterling v. Sterling, 180 N.J. Super. 569 (Ch. Div. 1981) and Gugliotta v. Gugliotta, 160 N.J. Super. 169 (Ch. Div. 1978), aff'd. 164 N.J. Super. 139 (App. Div. 1978)).
5. Cohabitation, if proven, is a prima facie proof of changed circumstances warranting financial disclosure. See Gayet v. Gayet, 92 N.J. 149 (1983).
6. The changes in circumstances need not be unforeseen at execution of the agreement. Lepis at 152.
7. Temporary changes, or those which have not occurred, are not sufficient to warrant modification. Lepis, at 151.

8. Remember, as Justice Pashman observed, that "contract principles have little place in the law of domestic relations". Lepis, at 148.