The Newton Principle

By Michael F. LoFrumento

It is well-settled that when parties enter into an agreement concerning the custody of their children, the agreement will "not be set aside unless there is a sufficient change in circumstances since the time of the stipulation." *McNally v. McNally*, 28 A.D.3d 526, 526, 816 N.Y.S.2d 98, 99 (2d Dept. 2006) (internal quotations and citations omitted). As seasoned practitioners are aware, a party seeking a change of custody is not automatically entitled to a hearing. *See Acworth v. Kollmar*, 119 A.D.3d 676, 989 N.Y.S.2d 612 (2d Dept. 2014) (where the Second Department held that the mother was not entitled to a hearing on her application to modify custody as she failed to make an evidentiary showing sufficient to warrant a hearing); *Grant v. Hunter*, 64 A.D.3d 779, 884 N.Y.S.2d 763 (2d Dept. 2009) (where the Second Department held that the mother failed to make an evidentiary showing sufficient to warrant a hearing based upon her unsubstantiated and conclusory allegations).

Michael F. LoFrumento

The moving party must establish the change in circumstances by a preponderance of the evidence and that the circumstances changed to such an extent warranting a modification. *See Abbott v. Abbott*, 96 A.D.3d 887, 888, 946 N.Y.S.2d 511, 512 (2d Dept. 2012) (where the Second Department held that "[a] party seeking to modify an existing custody arrangement must demonstrate by a preponderance of the evidence that there has been a change of circumstances such that a modification would be in the best interests of the subject children").

An application that fails to make a *prima facie* change in circumstances warranting a modification must be dismissed. *See Bacchus v. McGregor*, 147 A.D.3d 1049, 48 N.Y.S.3d 683 (2d Dept. 2017) (where the Second Department held that even accepting the father's alleged evidence as true and granting him the benefit of every reasonable inference, he failed to present evidence sufficient to establish a prima facie change of circumstances potentially warranting a modifying of custody and visitation); *Matter of Saldana v. Lopresti*, 133 A.D.3d 669, 20 N.Y.S.3d 382 (2d Dept. 2015) (where the Second Department held that the father failed to demonstrate a change of circumstances warranting a modification).

Recently, the Second Department in *Newton v. McFarlane*, 174 A.D.3d 67, 103 N.Y.S.3d 445 (2d Dept. 2019), issued a comprehensive and potentially ground breaking decision regarding applications to modify custody and/or visitation. In reversing the lower court's modification of a custody order after a hearing, the Second Department held:

(Continued on page 30)

Family (Continued from page 11)

> Before subjecting children and their parents to additional litigation, courts require that, before a full hearing is ordered, the parent seeking a change of custody must make an evidentiary showing of a change in circumstances demonstrating a need to conduct a full hearing into whether a change of custody is appropriate in order to insure the child's best interests…In determining whether such a change has occurred, the court should consider the totality of circumstances…
>
> Courts have dismissed modification petitions without a hearing where the allegations, even if assumed to be true, fail to set forth that a material change in circumstances has occurred between the making of the existing court order and the time of the modification application…Hearings have been denied, and modification requests dismissed, where the allegations were conclusory and unsubstantiated…and where the allegations were before the court on a prior occasion and found wanting. Id. at 77, 103 N.Y.S.3d at 454.

In deciding *Newton*, the Second Department went through painstaking detail in explaining its rationale to not only reverse the Family Court's change of custody order, but more importantly, to also dismiss the petitioner-mother's petition for a change of custody for her failure to meet her *primae facie* burden of a change of circumstances. The Appellate Division's focus was twofold. One, to limit trauma to child litigants. Two, to limit the time and expense to parent litigants. The decision reads:

> The existence of custody litigation, by itself, can create trauma and uncertainty for the child, as well as trauma, uncertainty and expense for the parents. Repetitive applications for modification brought by disgruntled litigants in order to harass or vex their former spouses or domestic partners are not unheard of. Litigation over established court- approved child custody and access arrangements can be unsettling and traumatic for children, particularly for children of sufficient age or maturity to comprehend, and worry, about potentially significant changes in their daily lives, such as what home they live in, what family members they live with, what schools they go to, what friends they have, and what activities they undertake. The prospect of having to be interviewed by a judge, consult with counsel, be examined by a forensic clinician, and deal with parents who are embroiled with each other in litigation, can create significant anxiety and stress, which, by itself, may be harmful to a child's development. While courts must be vigilant to assure that children are fully protected and their best interests secured, courts must also consider, in the context of modification petitions, whether an appropriate basis for judicial intervention has been appropriately articulated.

In the event the stay is granted, the Appellate Division would now be tasked with determining if the underlying petition/application met its evidentiary burden before subjecting litigants and children to a potentially unnecessary and traumatic experience.

As a result, Appellate practitioners take note. Should a similar situation arise where a lower court orders a hearing based upon a perceived showing of a change of circumstances, the aggrieved litigant has options other than continuing with a costly hearing. Procedurally, the aggrieved litigant could request a stay at the Appellate Division, which must also include a request for leave to appeal the lower court's decision, given that the aggrieved party does not have a right to appeal an order directing a hearing.

In requesting a stay based upon a lack of an evidentiary showing of a change of circumstances at the Appellate Division, the aggrieved party must establish that they would suffer "irreparable harm" should the lower court proceeding continue. Typically, financial harm is not considered "irreparable harm," but Newton now opens the door that "irreparable harm" in this context would be the unnecessary cost of litigation coupled with the trauma the child(ren) subject to the litigation would suffer if the proceeding continued. In the event the stay is granted, the Appellate Division would now be tasked with determining if the underlying petition/application met its evidentiary burden before subjecting litigants and children to a potentially unnecessary and traumatic experience.

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