

ASSEMBLY, No. 80

STATE OF NEW JERSEY

Introduced Pending Technical Review by Legislative Counsel

PRE-FILED FOR INTRODUCTION IN THE 1996 SESSION

By Assemblyman KAVANAUGH

1 AN ACT concerning child support and amending P.L.1988, c.111.

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3 **BE IT ENACTED** *by the Senate and General Assembly of the State*
4 *of New Jersey:*

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6 1. Section 1 of P.L.1988, c.111 (C.2A:17-56.23a) is amended to
7 read as follows:

8 1. Any payment or installment of an order for child support, or
9 those portions of an order which are allocated for child support,
10 whether ordered in this State or in another state, shall be fully
11 enforceable and entitled to full faith and credit and shall be a judgment
12 by operation of law on and after the date it is due. No payment or
13 installment of an order for child support, or those portions of an order
14 which are allocated for child support established prior to or
15 subsequent to the effective date of P.L.1993, c.45 (C.2A:17-56.23a),
16 shall be retroactively modified by the court except as follows:

17 (a) An order for child support or portions of an order which are
18 allocated for child support may be retroactively modified by the court
19 with respect to the period during which there is a pending application
20 for modification, but only from the date the notice of motion was
21 mailed either directly or through the appropriate agent. The written
22 notice will state that a change of circumstances has occurred and a
23 motion for modification of the order will be filed within 45 days. In
24 the event a motion is not filed within the 45-day period, modification
25 shall be permitted only from the date the motion is filed with the court.

26 (b) With respect to a period during which there was no pending
27 application for modification, an order for child support or portions of
28 an order which are allocated for child support may be retroactively
29 modified by the court only if the result of not doing so would be
30 unjust, due to a substantial change of physical custody of the child or
31 other factors.

32 The non-modification provision of this section is intended to be

EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and intended to be omitted in the law.

Matter underlined thus is new matter.

1 curative and shall apply to all orders entered before, on and after the
2 effective date of this act.

3 (cf: P.L.1993, c.45)

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5 2. This act shall take effect immediately.

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STATEMENT

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10 This bill would modify the stringent provisions of current law, set
11 out in N.J.S.A.2A:17-56.23a, which bar the retroactive modification
12 of child support orders except for the period during which there is a
13 pending court application for modification.

14 In Ohlhoff v. Ohlhoff, 246 N.J.Super. 1 (App. Div. 1991), the
15 Appellate Division strictly construed the statute to hold that a
16 non-custodial father's obligation to pay child support on behalf of his
17 son could not be retroactively modified to reflect the fact that the child
18 was no longer living with the custodial parent (his mother). Although
19 the child had moved out of his mother's house at the age of 13 and had
20 been living with his father for the past year and a half, the court
21 refused to modify the father's child support arrearages that had
22 accumulated during that time, holding that the statute prohibited such
23 modification.

24 The sponsor believes that it was never the intent of the Legislature
25 to prohibit retroactive modification of child support arrearages in
26 cases like this one, where an obvious injustice would result. The
27 Ohlhoff decision is also likely to lead to increased litigation, since
28 non-custodial parents whose teen-age children decide to live with them
29 are now forced to immediately file court motions in order to protect
30 themselves from accumulating an irreducible amount of child support
31 arrearages.

32 Consequently, this proposed legislation would amend
33 N.J.S.A.2A:17-56.23a to allow the court to retroactively modify child
34 support orders, with respect to a period during which there is no
35 pending application for modification, but only if the result of not doing
36 so would be unjust, due to a substantial change of physical custody of
37 the child or other factors.

38 The courts have always had the authority, pursuant to Court Rule,
39 to modify or void a judgment or order for equitable reasons, and to
40 interpret new statutory mandates in accordance with pre-existing
41 statutory principles. (See R.4:50, allowing relief of a final judgment
42 or order for reasons of "mistake, inadvertence, excusable neglect . . .
43 the judgment or order is void . . . the judgment or order has been
44 satisfied." And see the recent Appellate Division decision in Mallamo
45 v. Mallamo, A-134-93T2, decided Feb. 27, 1995, holding that, despite
46 the literal words of N.J.S.A.2A:17-56.23a, a child support order can

1 be retroactively modified when the order is pendente lite (temporary),
2 issued before the trial of the case.) The proposed legislation would
3 reiterate this judicial authority statutorily.

4 This bill embodies Recommendation 18 of the report of the
5 Commission to Study the Law of Divorce, issued April 18, 1995.

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10 Permits retroactive modification of child support under certain
11 circumstances.