

Understanding Retroactivity and the Modification of Existing Child Support Orders

Often you will hear a family law attorney say, "It will be retroactive back to the filing date of the Request for Order." What exactly does this mean in layman's terms?

As used in the family law context the term *retroactive* refers to a date back in time on which a new order will be effective. For example, a court might issue an order on April 1st that support is increased by \$1,000/mo. due on the first of each month retroactive i.e., going back in time to February 1st of that same year. Thus, the payor of the support would owe an extra \$3,000 on April 1st to cover the months of February, March and April.

The general rule of thumb on retroactivity, subject to some exceptions, is that the court has the discretion to make any order it issues retroactive to the date that the request for that order (Request for Order or RFO) was initially filed and/or served. [*Filed* means the date that the RFO papers were provided to the court and *served* means the date that the party on the receiving end of the RFO is first given a copy of the RFO papers.] While you might, for example, file an RFO on February 1st the court might not give you a hearing date on the matter until April 1st simply because the court is too busy to give you an earlier date.

Below are a couple scenarios applying the concept of retroactivity.

Scenario 1

On February 1st in year one, a court order is issued stating the following:

- Child custody is 50/50 between Mom and Dad for one child.
- Dad pays child support in the amount of \$2,000 each month to Mom for the one child.

Dad pays this support for a year and then on February 1st the following year, Dad suddenly suffers a pay cut in his salary because the business he works for is going through difficult financial times.

Dad has no savings and after paying for essential personal expenses like his rent and food, he simply cannot afford the \$2,000/mo. child support. As a result, Dad pays Mom only \$1,500 per month. Dad hires an attorney who assists him to serve and file a RFO on April 1st to modify child support.

At the hearing on June 1st, the court will determine based upon Dad's decrease in income whether a decrease in child support is appropriate (see article entitled, *How is Child Support Calculated?*). Let's assume the court issues an order that child support is decreased from \$2,000/mo. to \$1,200/mo. retroactive to the RFO service/filing date of April 1st. What is the effect of this?

- Dad will still owe Mom the shortage of \$500 for February and March (a total of \$1,000) because the RFO was not filed and served until April.
 - This is because the court did not acquire jurisdiction over the matter until April 1st.
 - Dad will owe this \$1,000 and if he can't pay it right away he will have to pay simple interest on each missed payment at the rate of 10% per year.

- Dad will not be held in contempt of the prior court order if he truly did not have the funds to make the full \$2,000/mo. payment e.g., no savings or other means of making the full payment. Because in order to be found in contempt of a court order, which can result in fines and even imprisonment, there must be a knowing and willful violation of a court order. If Dad, simply did not have the funds to pay the support it was not a willful violation.
- Because the Court's order of \$1,200/mo. child support is retroactive to April 1st and the hearing did not take place until June 1st that means Dad will also get a credit for the \$300 (\$1,500-\$1,200) over payment for April and May for a total credit of \$600. Thus, the court will offset the \$1,000 under payment by Dad discussed above from the \$600 credit and dad will owe net *arrears* of \$600 plus the 10% annual interest discussed above.

In summary, the court's order stipulates that Dad's child support as of April 1st is modified from \$2,000/mo. to \$1,200 and that Dad owes Mom arrears of \$600 plus simple interest of 10% per annum.

Scenario 2

On February 1st in year one, a court order is issued stating the following:

- Child custody is 50/50 between Mom and Dad for one child.
- Although Mom and Dad are both employed, because Dad makes a much higher income he pays child support in the amount of \$2,000 each month to Mom for the one child.
- A year later Dad loses his job but uses his savings to continue to pay the \$2,000/mo. so he is not in violation of the existing court order. Dad hires an attorney to file and serve an RFO on April 1st to modify child support. The hearing is set for June 1st. At the June 1st hearing the court orders that because Dad lost his job and Mom is still employed, Mom now owes Dad \$500/mo. in child support retroactive to April 1st but Dad must make diligent efforts to find a new job and report same to Mom upon obtaining employment.
- What is the likely effect of this ruling? Mom will probably be ordered to return the \$2,000 over payment that she received from Dad for both April and May plus pay Dad the \$500/mo. for April and May for a total amount owed to Dad of \$3,000 plus simple interest at 10% per annum. The court will probably order a payment plan for those past due amounts. In addition, going forward, Mom will also continue to owe Dad \$500/mo. in child support.

In Conclusion

The two scenarios illustrate how retroactivity can work. Different judges may have decided the above scenarios differently because there is much left to their personal discretion in determining what is fair and there may be other facts not discussed above that could come into consideration. The key factors to remember are:

- Retroactivity is largely up to the discretion of the judge based on the law and the facts of your case.
- If the court decides to make orders retroactive it will typically go back to the date that the RFO was first filed and served though in certain limited circumstances the court has the power to go back further in time.
- When a material change in circumstances occurs (like losing your job, having an increased time share of responsibility for your child/children or the other party getting a significant increase in pay) it is important to file and serve your RFO as soon as possible to maximize retroactivity.

- The existing court order is extremely important and remains an order until changed by a further order.
- Child support payments, if not paid in full per court order, are subject to 10% interest, monetary sanctions, and/or even imprisonment.
- Because of such potentially severe consequences of violating a court order contact an attorney for professional advice prior to deviating from any court order if possible.

buncher

www.buncherlaw.com