LAW AND THE FAMILY

Child Support, Agreements and the Rights of Children

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HE WAS TICKLED PINK with just how inventive he was in dreaming up excuses to avoid paying the increase she sought in child support. A second family, vacations, braces leave little, if any, excess money, he reasoned. Meanwhile, she had all but spent the money she felt sure she would win from his endless breaches. First he said ``get a job''; then he complained, ``Since you're working, you're never with the children.'' In the background, a child hoped that the dreaded encounter would never take place. But the opening of the courtroom door signals the start of Round 1.

This child is just one of countless casualties. The child, who in theory, is the focus of the matter, is too often subordinated to the needs and emotions of the parents embroiled in the battle. The courts and legislators are taking notice and doing something about it.

In Priolo v. Priolo the parties' settlement agreement provided that the father would pay child support of $200 per month for each of the parties' two children and, among other things, contained a ``mutual waiver'' provision whereby the parties waived the right ``to institute and prosecute to completion any action or proceeding to record, revise, alter or amend the agreement between the parties as to . . . maintenance for the [mother] and/or the children.''

The parties' 1985 divorce judgment incorporated this provision. In 1990, after the mother sought and obtained from Family Court an upward modification of the child support provisions of the divorce judgment, the father commenced an action to recover damages for breach of the mutual waiver provision. The Appellate Division reversed an order of the Supreme Court, which granted the father summary judgment on the issue of liability and dismissed the complaint as a ``violation of the clear public policy of the state to ensure that minor children receive adequate financial support from their parents.*1

Policy of Ensuring Support

Finding that the modification was in keeping with the ``overriding policy of ensuring adequate child support,'' the court concluded that ``the terms of the settlement agreement must yield to the welfare of the children and cannot support an action to recover damages for breach of contract arising from the increase in the father's child support obligation.''

In Pecora v. Cerillo,*2 (decided on the same day) the parties' 1983 separation agreement as modified, which was incorporated into and survived their judgment of divorce, provided that the father, who had

exclusive physical custody of the children, would provide for their support out of ``his own funds without contribution from the mother.'' The father thereafter sought and obtained a temporary order of support in Family Court, which directed her to pay $866 per month in child support, based on his allegations that he was unable to meet the childrens' support obligations on his own.

After the Family Court proceeding was terminated and the children returned to the mother's exclusive custody, she brought an action alleging that the father had breached the agreement to provide for the complete support of the children without her contribution. The Appellate Division reversed the Supreme Court's order denying the father's motion to dismiss the complaint and granted the motion. It held that to allow such a suit would violate New York State's public policy and that ``conceding the duty of a custodial parent . . . to take whatever action is necessary to ensure adequate child support, we hold that parent can not later be asked to respond in damages for an alleged breach of the previously executed agreement.''

The court found that this policy of mandating ``adequate child support as justice requires'' is memorialized in the Child Support Standards Act, which gives a parent, from whom an increase in child support is sought in contradiction to a separation agreement, an opportunity to be heard on the reasonableness of the agreement in the proceeding for the increase (citing Family Court Act (FCA) Sec.413 [1] [b] [1] [f]).

The court held that since children are not bound by separation agreements, one that does not provide adequate support for the parties' child does not bind a court from remedying the inadequacy. Therefore, an inadequate child support provision ``is voidable and cannot bind an appropriate court from remedying the inadequacy (***) nor can it bind a parent from seeking to remedy the inadequacy.'' The court held that ``in consideration of the foregoing and under the circumstances of this case, that plaintiffs' argument that it is unconstitutional under the impairment of contracts doctrine (U.S. Const., Art 1, Sec.10) to preclude a breach of contract action fails. A statute that is intended to prevent an economic wrong, in this case against the children, is not unconstitutional as impairing contract rights.(***)''

Inadequate Terms Do Not Bind

Both Priolo and Pecora cite the 1990 Third Department decision in Maki v. Straub,*3 which held that the terms of an inadequate child support provision in an agreement do not bind the court or the child and cannot support a civil action for breach thereof, and that the theory behind such an action was contrary to the public policy incorporated in the Child Support Standards Act (CSSA).*4 In Maki the plaintiff sought damages, which represented the difference between the amount due under the parties' agreement, which was incorporated into and survived their divorce judgment, and the amount of the post-judgement order of the Family Court increasing that amount. There was no specific provision in the agreement prohibiting or waving the right to modification.

In Cohen v. Rosen,*5 the parties' 1983 separation agreement, which was incorporated in and survived the divorce, provided that the father would waive his rights to the marital home in exchange for a wavier by the mother ofmaintenance and child support arrearages under a prior court order and for reduced child support payments of $25 per child. It

contained no provision for the post-secondary education of the parties' two children. The house was subsequently sold and produced net proceeds of $100,000. The Appellate Division affirmed an order of the Family Court that directed the father to pay 66 percent of his daughter's college education. It rejected the father's argument that college expenses were an element of the general child support obligation encompassed by the parties' separation agreement and that the ``Boden-Brescia'' standards controlled.

Separate Item

The court held that the determination of post-secondary education expenses is a separate item in addition to the ``basic child support obligation'' in which the court must consider (1) the educational background of the parents; (2) the child's academic ability; and (3) the parties' financial ability to provide the necessary funds.*6 Because the mother was not seeking upward modification of the ``basic child support obligation'' in a surviving separation agreement, or seeking to modify a specific provision in the agreement for an amount that the parties felt was adequate to cover post-secondary educational expenses, neither the tests of Boden v. Boden nor of Brescia had to be met to establish the father's share of these expenses under the CSSA.*7 The court held that the operative consideration for finding that neither Boden nor Brescia applied was the fact that the agreement was silent on the issue of post-secondary educational expenses which were not part of the ``basic'' child support.

From these recent decisions reemerges New York's pre-1977 (pre-Boden) public policy favoring the interest of children in receiving ``adequate'' child support. The law, as to modification of maintenance, child support awards and agreements, has always been based on the same construction of the law, which has been not to impede the contractual provisions of a surviving agreement. By turning to Goldman, McMains and Schmelzel, the leading cases on modification of maintenance where there is a surviving agreement, one can gain a fuller understanding.

In Goldman v. Goldman, the Court of Appeals held that where a separation agreement was incorporated in a divorce judgment and survived, the Supreme Court, in the exercise of its statutory powers, could modify the alimony provisions of the judgment downward, based on a substantial change in the husband's financial circumstances,*8 without impeding the contractual provision of the surviving agreement. The agreement could not limit the statutory power of the court and could not confer power.

The downward modification of the judgment did not affect the rights of the wife to recover in an action to enforce the agreement. As the agreement was not modified and was still an enforceable contract, the wife could sue for the difference between the contract amount and the reduced amount set by the modified judgment.*9 In McMains v. McMains, the court held that the Supreme Court could modify the alimony provisions of the judgment upward, where the former wife ``is actually unable to support herself on the amount heretofore allowed, and is in actual danger of becoming a public charge.''*10

Where, as here, a modification of alimony provisions in a divorce judgment was necessary to prevent a wife who remained married from becoming a public charge, it was proper as a recognition of the husband's statutory duty imposed by Sec.5-311 of the General Obligations Law. The court reasoned that if it had the power to modify

the judgment downward, it had the power to modify it upward to prevent the wife from becoming a public charge.

In Schmelzel v. Schmelzel,*11 the court held that where an agreement was incorporated in and survived a judgment, the separation agreement is in full force and effect, and the court cannot increase the amount provided therein for alimony or award counsel fees. The husband's enhanced earnings and improved financial situation is of no moment to the application for modification of the alimony provisions of the judgment upward.

The effect of Goldman, McMains and Schmelzel, where there was a surviving agreement is to limit the power of the court to modify its judgment or order, upward or downward, while denying it authority to impair the contract.

Merger Into Judgment

Where, however, a separation agreement executed before July 19, 1980, was merged by the court into its judgment, the agreement no longer existed as an independent contract and became a part of the judgment, separate from the contract and subject to all the rules and regulations respecting such a judgment. And the court could modify the alimony provision upward or downward based upon a substantial change of circumstances.*12 Although New York enacted Domestic Relations Law (DRL) Sec.236 [B] [9] [b] in 1980, which permits the actual modification of agreements for maintenance where there is a surviving agreement, its constitutionality is questionable and has never been sustained.*13

The statutory powers of the Supreme Court to modify the maintenance and child support provisions of a New York order or judgment are now found in DRL Sec.Sec.236[B][9][b], 240 (1) and 240 (1-b)(l).*14 DRL Sec.236 (B)(9)(b) provides that where a court makes an award directing a parent to pay support for his/her child, and there is no surviving agreement, the Supreme Court is empowered to modify that award based on a showing of the recipient's inability to be self-supporting or a substantial change of circumstances, including financial hardship.*15

The significance of a court-ordered provision for child support, like a court ordered provision for maintenance, is that it may be modified at any time based upon a showing of a change of circumstances. It has always been the general rule that an agreement executed by the parties that is fair and adequate when made, which provides support for children, confines the obligation of the noncustodial parent to that which is set forth in the agreement. Unless and until the agreement is set aside or modified, no other award may be made for child support.*16

Expanded Rights

The strong public policy enunciated in FCA Sec.461 (a), effective Sept. 1, 1962, that the parties' cannot by agreement eliminate or diminish the duty of either parent to support their child is expanding. A child is entitled to support, maintenance and an education. All those rights are in accordance with his/her parent's financial means and ability.*17

Indeed, rightfully, properly and perhaps necessarily the courts, are transforming our children's keepers into fiduciaries. And why not? Practically speaking there is no one else upon whom children may rely. If the care or support is inadequate someone must come forward for the

child. Once brought forth to the court, an application to remedy the inadequacy of child support is addressed by the court to the financial benefit or detriment of the parent/fiduciary who brought it. It is the child's needs, circumstances and rights that are the focus.

FCA Sec.461(a) provides that a separation agreement does not eliminate or diminish either parent's duty to provide for a child of the marriage under FCA Sec.413. The initial adequacy of the provisions of a separation agreement for the child may be challenged at any time. As a consequence, it was the rule until 1977 that child support awards were always modifiable based on a substantial change of circumstances.

This rule was limited by the Court of Appeals, in 1977 in Boden, when it attempted to stop the flood of postjudgment child support proceedings inundating the courts. Where a separation agreement or stipulation was incorporated into or survived a judgment of divorce, modification of the child support provisions was limited by the Court of Appeals in Boden,*18 which was not affected by the 1980 Equitable Distribution Law (EDL) amendments.

In Boden, the court restated the general rule that the child is not a party to the agreement and is not bound by the terms of a separation agreement pertaining to child support and that an action may be commenced against the father for child support, despite the existence of an agreement. Finding, however, that the Appellate Division abused its discretion by increasing the child support provisions of that particular separation agreement under those circumstances, the Court of Appeals set forth the rule that; . . . [absent a showing of unanticipated and unreasonable change in circumstances, the support provisions of the agreement should not be disturbed . . . Unless there has been an unforeseen change in circumstances and a concomitant showing of need, an award for child support in excess of that provided for in the separation agreement should not be made solely on an increase in cost where the agreement was fair and equitable when entered into . . . . (citations omitted).

Five years later, in 1982, spurred by a concern that the Boden rule was too harsh, the Court of Appeals qualified the rule of Boden in Brescia v. Fitts.*19 It held that the principles of Boden did not alter the scope of Family Court's power to order support where the dispute concerns the child's right to receive adequate support and that the principles set forth in Boden apply only when the dispute is directed solely to readjusting the respective obligations of the parents to support their child.

The Court held that a different situation was presented where it is the child's right to receive adequate support that is being asserted. It stated:

In seeking increased child support from the father, the mother was not asserting the right of the child to be supported by the father, as the child's needs could clearly have been met by either parent, given their respective financial situations. Rather, the mother was asserting her own interest in having the father contribute more to the financial burden of raising the child. Thus, the principles set forth in Boden apply only when the dispute is directed solely to readjusting the respective obligations of the parents to support their child.

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A different situation is presented, however, where it is the child's right to receive adequate support that is being asserted. Here, Family Court's power regarding child support derives from the FCA. Section 461 of that act, insofar as it relates to this case, provides

that the parents' duty to support their child is not diminished by the existence of, inter alia, a separation agreement or judgment of divorce and, in the absence of an order of the Supreme Court directing support, Family Court may make an order of support. If such an order of the Supreme Court already exists, however, and the Supreme Court has not retained exclusive jurisdiction in itself to enforce or modify its order, the Family Court is authorized to enforce the order or, on a finding that changed circumstances exist, to modify it.

[2] Thus, the principles iterated in Boden did not alter the scope of the Family Court's power to order support where the dispute concerns the child's right to receive adequate support. In the present case, because a pre-existing Supreme Court order directs child support payments and grants concurrent jurisdiction to the Family Court to enforce or modify the order, the Family Court could properly order an increase in the child support award if the petitioner has demonstrated a change of circumstances (FCA Sec.461, Subdivision [b]), warranting such an upward modification. Petitioner introduced evidence tending to show, among other things, that the combination of her own income and the payments contributed by respondent does not adequately meet the children's needs. `` (citations omitted) (emphasis supplied).

In Brescia, the Court of Appeals unequivocally stated that a court has the power to order an increase in child support if the petitioner demonstrated a change of circumstances. The key is the introduction of evidence intending to show, among other things, that the combination of the custodial parent's income and the payments contributed by the non-custodial parent did not adequately meet the children's needs.

Specific items of expense were detailed as well as petitioner's and respondent's respective financial circumstances. The Court of Appeals held that whether the evidence shows a change of circumstances sufficient to order a modification is a question best left to the discretion of the lower courts whose primary goal is `` . . . to make a determination based upon the best interests of the children . . . ."

`Adequate' Support

Brescia v. Fitts is the leading Court of Appeals decision that examines current New York public policy as to child support obligations. The most significant result of the Brescia decision is the substantial limitation of the prior holding in Boden to its facts, and the reaffirmation of the interest of children in receiving ``adequate'' support. In effect, Boden remains relevant for the allocation of the child support burden between parties to a surviving separation agreement, but it no longer may be extended as a bar to a child's claim for adequate support.

The distinction between the child's interest and that of each parent may prove to be the most significant aspect of the Court of Appeals decision in Brescia. Although there are obvious practical difficulties in determining where a child's right ends and a parental right begins, since child support may indirectly benefit the custodial parent, the emphasis on the child's right demonstrates the current sensitivity of the Court of Appeals to the welfare of children. Indeed, any conflict that arises is subsumed by the necessity of the situation and counterbalanced by the decision-making position of the courts.

Legislators, courts and (it is hoped) commentators of the law continue to forge the way for expanding children's rights. Proponents of children's rights pioneered the way with the CSSA, which despite its reader unfriendly nature, is intended to ensure that children receive adequate support.

Among other things, it provides that ``the termination of child support awarded pursuant to Section 240 of this Article'' is an additional basis for a modification of a maintenance or child support award.*20 This applies to awards made without an underlying agreement, after a trial or a hearing, or where an agreement providing for maintenance or child support merges into an order or judgment.

While the enactment of the CSSA is not in and of itself to be considered a ``change of circumstances'' warranting modification where the court finds that the circumstances warrant modification of a child support order, which was in existence before Sept. 15, 1989, the court ``must'' apply the standards. Said another way, existing support orders and agreements are not subject to modification simply because of the enactment of DRL Sec.240(1b). The criteria for modification must first be met. Assuming the criteria for modification are met, the court must apply the standards effective Sept. 1, 1991.

notes

(1) ---- AD2d ---- , 621 NYS2d 567 (2d Dept, 1995).

(2) ---- AD2D ---- , 621 NYS2d 363 (2d Dept. 1995).

(3) 167 AD2d 589, 563 NYS2d 218 (3d Dept., 1990).

(4) Laws of 1989, Ch 567.

(5) ---- AD2D ---- , 621 NYS2d 567 (3d Dept. 1995).

(6) Citing Romansoff v. Romansoff 167 AD2d 527, 562NYS 2d 523.

(7) The test of Boden v. Boden, 42 NY2d 210, 397 NYS2d 701 (1977) is that an inadequate or unreasonable change of circumstances has occurred; the test of Brescia v. Fitts, 56 NY2d 132, 451 NYS2d 68 (1982) is that the custodial parent is unable to meet the needs or provide adequate support for the child.

(8) Goldman v. Goldman, 282 NY 296, 26 NE2d 265.

(9) King v. Schultz, 29 NY2d 718, 325 NYS2d 754, 275 NE2d 336; Morse v. Morse (1st Dept.), 45 AD2d 370, 357 NYS2d 534, app dismd 36 NY2d 911, 372 NYS2d 651, 334 NE2d 599. But see, Mackey v. Mackey (2d Dept.), 58 AD2d 806, 396 NYS2d 257.

(10) McMains v. McMains, 15 NY2d 283, 258 NYS2d 93, 206 NE2d 185, later app (2d Dept.) 23 AD2d 889, 260 NYS2d 251.

(11) 287 NY 21, 38 NE2d 114 (1941).

(12) Staehr v. Staehr (1932), 237 AD 843, 261 NYS 103; Holahan v. Holahan (1932), 234 AD 572, 255 NYS 693; Kunker v. Kunker (1930), 230 AD 641, 246 NYS 118; Goldfish v. Goldfish (1920), 193 AD 686, 184 NYS 512, affd 230 NY 606, 130 NE 912.

(13) In Busetti v. Busetti, 108 AD2d 769, 484 NYS2d 873 (2d Dept., 1985) the court, in construing the maintenance modification provisions contained in DRL Sec.236(B)(9)(b), stated that paragraph b of subdivision 9 purports to allow the court to, in effect, suspend the separation agreement for as long as necessary and to what extent necessary and, thus, precludes the party who is hurt by the modification from bringing a contract claim to recover the difference between the amount agreed to and the amount as modified. In a footnote the court stated that there was some question whether this is constitutional and cited Kleila v. Kleila, 50 NY2d 277, 283-284, 428 NYS2d 896, 406 NE2d 753 decided only some two months before the effective date of EDL. There the Court of Appeals indicated that ``any attempt to confer upon a court of any jurisdiction within the United States broad powers to modify the terms of a separation agreement might well run afoul of constitutional limitations upon the State's power to

tamper with vested contractual rights.'' See also Cohen v. Seletsky, 142 AD2d 111, 534 NYS2d 688 (2d Dept., 1988).

(14) See Laws of 1980, Ch. 645, Sec.Sec.2, 3, Laws of 1989, Ch 567, Sec.5, as amended by Laws of 1992, Ch. 41, Sec.140, amending DRL Sec.236 (B)(9)(b). The FCA has not been similarly amended. The statute provides in part: ``Upon application by either party, the court may annul or modify any prior order or judgment as to maintenance or child support, upon a showing of the recipient's inability to be self-supporting or a substantial change in circumstance or termination of child support awarded pursuant to Sec.240 of this Article, including financial hardship. Where, after the effective date of this Part, a separation agreement remains in force no modification of a prior order or judgment incorporating the terms of said agreement shall be made as to maintenance without a showing of extreme hardship on either party, in which event the judgment or order as modified shall supersede the terms of the prior agreement and judgment for such period of time and under such circumstances as the court determines. Provided, however, that no modification or annulment shall reduce or annul any arrears of child support which have accrued prior to the date of application to annul or modify any prior order or judgment as to child support . . . The provisions of this Subdivision shall not apply to a separation agreement made prior to the effective date of this part.''

(15) See DRL Sec.236 Part B, Subdivision (9)(b).

(16) Reimer v. Reimer, 25 AD2d 956, 299 NYS2d 318, aff'd 31 NY2d 881, 340 NYS2d 185.

(17) Moat v. Moat, 27 AD2d 895; Reimer v. Reimer, 31 AD2d 482, 299 NYS2d 318, aff'd 31 NY2d 881, 340 NYS2d 185; Kulok v. Kulok, 20 Ad2d 568, 245 NYS2d 859 (2d Dept. 1963); Hoppl v. Hoppl, 50 AD2d 59, 376 NYS2d 524; Banat v. Banat, 41 AD2d 960, 344 NYS2d 12 (2d Dept. 1973); Boden v. Boden, 42 NY2d 210 (177); Bresca v. Fitts, 56 NY2d 132, 451 NYS2d 68 (1982).

(18) Boden v. Boden, supra.

(19) Brescia v. Fitts. (20) See DRL Sec.240(1-b)(l).

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