Superior Court of New Jersey

Appellate Division

Docket No.

Civil Action

Cynthia Ann Coldberg

Plaintiff Respondent

vs.

Alan Richard Coldberg

Defendant Appellant

On Appeal from

a final judgment of the Superior Court of New Jersey, Chancery Division, Family Part, Mercer County

Sat below

Hon. Audrey P. Blackburn, JSC

Appellant's Brief and Appendix

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On the Brief

Table of Contents

Legal Argument

Table of Authorities

New Jersey Statutes

New Jersey Case Law

Table of Contents to Appendix

[1]The cross motion is captioned as a "counter motion" and appears on page 6 (Da 43), following plaintiff's certification.

Procedural History

On August 16, 2000, defendant filed a motion seeking, *inter alia*, to modify the emancipation date of Todd Goldberg, one of the parties' three children, and to credit his overpayment in child support since Todd's emancipation against his future obligation to turn over to plaintiff a portion of his retirement benefits (Da22-38).

On September 27, 2000, plaintiff filed a cross-motion and certification (43-68a).

On October 13, 2000, defendant filed a reply certification (Da69-80).

October 19, 2000, plaintiff filed a sur-reply (Da81-85).[2]

On October 27, 2000, the Court issued an Order denying defendant's application to credit him for overpayment of child support paid since Todd's emancipation (Da2 at ¶4). The issue of calculating child support for the remaining unemancipated child was referred to a child support hearing officer (Da1-2a at ¶2). The new support obligation was to be effective as of the August 14, 2000 filing of defendant's motion (Da 2 at ¶3).

On November 29, 2000, defendant filed a motion asking the trial court to reconsider its ruling that defendant was not entitled to a credit for child support paid after Todd's

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[2] No leave of the Court was sought pursuant to R. 1:6-3 to file a sur-reply. The trial court did not explicitly state

emancipation (Da 86-87).

On December 11, 2000, defendant's child support was reduced from $1,288.41 to $641.31 per month, a reduction of $647.10 per month (Da 4-5). The hearing officer ordered the new support obligation to be effective as of Judge Blackburn's October 27, 2000 Order (Da 4). Defendant requested that, at a minimum, the new obligation should be made retroactive to August 14, 2000, the date ordered by Judge Blackburn (Da 103).

On January 10, 2001, plaintiff filed a letter brief in opposition to defendant's motion for reconsideration (Da 93-97).

On January 12, 2001, defendant filed a reply letter brief (Da 98-102).

On January 29, 2001, the trial placed on the record the reasons for its denial of defendant's application for reconsideration (T, Da 104-107). This decision was reflected in an Order filed January 31, 2001 (Da 3).

Statement of Facts

Defendant father appeals a determination of the Family Part that N.J.S.A. 2A:17-56.23(a) precludes the retroactive modification of child support upon the emancipation of a child. He asks this Court to remand for the entry of an Order making the $647.10 per month reduction of child support effective as of the

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whether this document was considered in reaching its decision.

January 1, 1999 emancipation of the child. The reduction is now effective only as of the October 27, 2000 decision of the trial court, twenty-two months after the child was emancipated. It is respectfully suggested that the trial Court erred in denying defendant's request that the resulting $14,236.20 overpayment be credited against his future obligation to provide plaintiff with a share of his pension.

The record demonstrates that the parties were married in 1974 and divorced in 1988 (Da 7-19). They are parents of three children, David (born 1977), Todd (born June 30, 1980) and Heather, (born May 1982). David and Todd are emancipated. At the time of the motion, Heather was under 18 and still entitled to child support.[3] Pursuant to the parties Judgment of Divorce, plaintiff was named the custodial parent and defendant paid child support pursuant to a schedule calling for a 10% per year increase (Da7-19). By 1998, he was paying $1,992.00 per month (Da 39 ¶2), an amount which exceeded the child support guidelines (Da 32).[4]

David, the parties' oldest child, was emancipated in 1998 (Da 20-21) and defendant's child support obligation for the remaining two children was adjusted to $1,288.41 per month (Da45-

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[3] Heather remains unemancipated as she is now a full time college student.

[4] In fact, this child support obligation represented 51% of

46).

On January 20, 2000, an Order was entered emancipating Todd Goldberg effective January 1, 1999 (Da6). The Order did not adjust defendant's child support obligation (Da6).

On August 16, 2000, defendant filed a motion to modify the emancipation date of Todd to June 30, 1998, the date when he was over 18 and no longer a full time student, and to adjust his child support obligation for Heather pursuant to the child support guidelines (Da22-38). He also sought to credit his overpayment in child support since the emancipation of Todd against his future obligation to provide plaintiff with a portion of his retirement benefits (Da22-38a).

The trial Court denied defendant's application, citing the prohibition against the retroactive modification of child support contained in N.J.S.A. 2A:17-56.23a. (Da2 ¶4). When presented with the controlling case law and asked to reconsider this decision, the trial Court instead treated the application as a motion brought under R. 4:50-1 and found that defendant had not established good cause to alter the judgment.
In spite of it's reliance on R. 4:50-1, the trial Court also noted that the application was filed beyond the twenty day time limit applicable to motions for reconsideration (T 4-17 to 4-18,

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defendant's 2000 net income.

Da 106) under R. 4:49-2, in spite of the indisputable fact that the Court's October 27, 2000 Order (which referred the parties to a hearing officer for recalculation of child support) was interlocutory and therefore not subject to said time limitation. This appeal followed.

Legal Argument

I. THE TRIAL COURT ERRED IN APPLYING N.J.S.A. 2A:17-56.23a WHEN THE CHILD AT ISSUE WAS EMANCIPATED. THE EMANCIPATION OF A CHILD IS AN ABSOLUTE, JURISDICTIONAL BAR TO THE COLLECTION OF CHILD SUPPORT.

The general rule is that findings of a trial Court are binding on appeal when supported by adequate, substantial and credible evidence. Pascale v. Pascale, 113 N.J. 20, 33, (1988) (*citing* Gallo v. Gallo, 66 N.J.Super. 1, 5, (App.Div.1961)), Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974). It is not the role of the Appellate Division to re-weigh the factual determinations of the trial court, which alone has the opportunity to view the demeanor of and judge the credibility of witnesses. Cesare v. Cesare, 154 N.J. 394, 416 (1998). However when, as here, the issue on appeal concerns an issue of law and not a question of fact, review by the Appellate Division is de novo. Manalapan Realty v. Township Comm., 140 N.J. 366, 378 (1995).

New Jersey Statute Annotated 2A:17-56.23a prohibits the retroactive modification of child support. The statute provides no exceptions:

> No payment or installment of an order for child support, or those portions of an order which are allocated for child

> support, shall be retroactively modified by the court except for the period during which the party seeking relief has pending an application for modification, but only from the date of mailing the notice of motion to the court or from the date of mailing written notice to the other party, either directly or through the appropriate agent. ... N.J.S.A. 2A:17-56.23(a).

Notwithstanding the express language of the statute, the Appellate Division has repeatedly held that emancipation is an exception to the strictures of N.J.S.A. 2A:17-56.23(a). See, e.g. Mahoney v. Pennell, 285 N.J.Super. 638 (App. Div. 1995), Bowens v. Bowens, 286 N.J.Super. 70 (App. Div. 1995), Ohlhoff v. Ohlhoff, 246 N.J.Super. 1 (App.Div. 1991), Thorson v. Thorson, 241 N.J.Super. 10 (Ch.Div.1989). N.J.S.A. 2A:34-23(a) provides the trial court with the authority to order the payment of child support for a "child." As the Court in Ohlhoff stated:

> N.J.S.A. 2A:17-56.23a is inapplicable where child support has been terminated upon the emancipation of the child. Ohloff, *supra*, at 8.

A child is defined as being an individual either under the age of 18, or over 18 and a full-time student at an accredited educational program. Newburgh v. Arrigo, 88 N.J. 529 (1982), Leith v. Horgan, 24 N.J.Super. 516, 518, (App. Div. 1953), Slep v. Slep, 43 N.J.Super. 538, 543, (Ch. Div. 1957), Alford v.

Somerset Co. Welfare Board, 158 N.J.Super. 302, 310, (App. Div. 1978). A "child" who is over the age of 18 and not a full-time student ceases to be a "child" and the trial court loses its authority under N.J.S.A. 2A:34-23(a) to enter or enforce a child support award. Id.

When a court determines that an 18 year old is not a full-time student and is emancipated, the inquiry as to the duty of a parent to provide support ends. The case law is uniform that the emancipation of a child is an exception to the prohibition on the retroactive modification of child support. Todd Goldberg was emancipated effective January 1, 1999 (Da 6) and defendant should have received a credit against his future obligation to provide plaintiff with a share of the maritally-acquired portion of his pension.

II. THE TRIAL COURT ERRED BY APPLYING THE FACTORS APPLICABLE TO AN APPLICATION BROUGHT PURSUANT TO RULE 4:50-1 TO AN APPLICATION BROUGHT UNDER RULE 4:49-2.

In its decision, the trial Court noted several times that the application before the court was one for "reconsideration." (T 3-1 to 6-11, Da 105-107). In defendant's application for reconsideration, in plaintiff's response letter brief, and in defendant's reply letter brief, there are at least a half dozen references to R. 4:49-2. Nonetheless, in denying defendant's application, the trial court applied the factors applicable to a motion brought under R. 4:50-1 (T 5-11). It is respectfully asserted that this was manifest error warranting reversal.

III. THE TRIAL COURT ERRED BY APPLYING THE TWENTY DAY TIME LIMIT APPLICABLE TO FINAL ORDERS TO DEFENDANT'S APPLICATION FOR RECONSIDERATION OF AN INTERLOCUTORY ORDER.

In opposition to defendant's application for reconsideration, plaintiff asserted that defendant's motion was not timely as more than 20 days had passed since the Court's October 27, 2000 Order (Da 94). In its decision, the trial Court noted that defendant's motion "must be done within the specified time." (T 4-17 to 4-18, Da 106).

The trial court's October 27, 2000 Order referred the parties to a hearing officer for recalculation of child support (Da 1-2a at ¶2). Had the hearing officer determined that defendant was not entitled to a reduction, the issue of applying a change retroactively would have been moot. An interlocutory Order is one that does not dispose of all issues as to all parties. Greco v. Zecchino, 285 N.J.Super. 418 (App.Div. 1995). Hudson v. Hudson, 36 N.J. 549, 552-553 (1962); Petersen v. Falzarano, 6 N.J. 447, 452-53 (1951). Judge Blackburn's October 27 Order did not become final until the hearing officer's December 11 determination the he was entitled to a reduction.

As the Appellate Division affirmed earlier this year, interlocutory orders are not subject to the twenty day time limitation applicable to motions brought under R. 4:49-2 for

reconsideration of final orders. *See, e.g.,* Sharp v. Sharp, 336 N.J.Super. 492 (App.Div. 2001).

Conclusion

For the foregoing reasons, the trial court's October 27, 2000 and January 31, 2001 Orders should be reversed. The matter should be remanded for the entry of an Order making the $647.10 per month reduction of child support effective as of the January 1, 1999 emancipation of the child.

Respectfully submitted,

David Perry Davis, Esq.