LAW AND THE FAMILY

"Child Support : The Increasing Right of Children"

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New York Law Journal

November 26, 1996

THE PRESERVATION and expansion of children's rights are sharply on the rise. Legislators and courts are supportive. The "children's best interest" is quickly going from a term of fact to reality.

For openers, parents cannot make a contract that takes away their children's right to receive adequate support. They never could. Family Court Act (FCA) s 461(a) ensure this. It provides that a separation agreement cannot eliminate or diminish either parent's duty to support his or her child. The initial adequacy of an agreement may be challenged at any time. Recently we have welcomed a flurry of decisions on the subject.

In Maki v. Straub, [FN1] the Third Department was outspoken on the topic. It 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 of contract. In pursuing this line of reason, the Court went on to say that the theory behind such an action was contrary to the public policy enunciated in the Child Support Standards Act (CSSA). [FN2]

In Maki the plaintiff sought damages representing 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 Priolo v. Priolo and Pecora v. Cerillo [FN3] the Second Department embraced this policy, declaring that an agreement to waive the right to initially seek or obtain a modification of child support violates public policy and is void.

'Court Is Not Bound'

Just recently in Harriman v. Harriman [FN4] - the Third Department evoked a sense of strength behind this policy. The parties' 1990 separation agreement (which was incorporated into their judgment of divorce), provided for joint custody of the two children with primary physical custody to defendant. Defendant agreed not to seek child support from the plaintiff in exchange for plaintiff's agreement to accept a sum certain of money in lieu of maintenance. Plaintiff waived her right to seek child support during the five-week summer break when the children were to reside with her.

A year later, during a custody proceeding, the parties altered their custody arrangement to provide for one child to reside with plaintiff. During that proceeding each party applied for child support for the child residing with him/her, and the Hearing Examiner awarded plaintiff $200 per month, representing defendant's net support obligation. Plaintiff did not attempt to appeal that decision. Instead she commenced an action for breach of contract, alleging that defendant had breached the separation agreement when he applied for child support.

The Appellate Division affirmed the dismissal of the complaint, holding that "... a court simply is not bound by a separation agreement that fails to provide for adequate support for the parties' children ..." and that "... the terms of an inadequate support provision contained in a separation agreement cannot support a civil action for breach thereof."

Because the time to seek appellate review of the Hearing Examiner's decision had long since passed the court could not reach plaintiff's argument that the cases discussed above were distinguishable in that there had been no showing that the children were not being adequately supported under the terms of the separation agreement.

As a reminder in the struggle to retain all the data on child support, child support awards are no longer limited by the "blind application rule" that outlawed the automatic application of the CSSA to combined parental income over $80,000, absent a showing of the actual needs of the child. Last year, the Court of Appeals in Cassano v. Cassano, switched the concept. The New York State Court of Appeals held that under the facts of that case, absent extraordinary circumstances, the child support percentage should be applied to the combined parental income in excess of $80,000. [FN5]

A Shift to Total Income

The Cassano Court stated the policy behind the CSSA is to replace "... a needs-based discretionary system with a precisely articulated, three-step method for determining child support and that the enactment of the statute 'signalled a new era in calculating child support awards."' The emphasis is "to shift from a balancing of the expressed needs of the child and the income available to the parents after expenses to the total income available to the parents and the standard of living that should be shared with the child."

The Court held that the provision allowing the court to disregard the formula if its application is "unjust and inappropriate" was pertinent to income over $80,000 as well as under $80,000. It noted that if it disregards the formula, the reasons must be set forth in a formal written order, which can not be waived by either party. It stated that courts have the discretion to apply the "paragraph (f)" factors, or to apply the statutory percentages, or to apply both in fixing the basic child support obligation on parental income over $80,000.

The exercise of discretion by the Court is subject to review for abuse. And some record articulation of the reasons for the Court's choice to apply the percentage to the combined parental income over $80,000 is necessary to facilitate that review.

This new fundamental calculation approach overcame its first hurdle in Jones v. Reese, [FN6] decided this year, where the Third Department held that Family Court did not err in fixing child support for the parties' infant son at $3,532 a month based on the combined parental income of both parties exceeding $80,000. The petitioner earned $22,370 a year, and the respondent, a physician, earned $293,182 a year.

Initially, the Hearing Examiner found the respondent responsible for 93 percent of the child's needs and directed respondent to pay $2,700 a month in support in addition to all unreimbursed medical, dental, orthodontic, optical, pharmaceutical and psychological expenses of the child. The Family Court reduced the amount to $1,787.46 finding that the child's needs were $1,922 per month and applied 93 percent to this amount in calculating the respondent's share. It held that the CSSA should be applied to the parents' income in excess of $80,000 to the extent necessary to meet the child's actual needs.

Following the Appellate Division reversal and remittal in view of the Cassano, [FN7] the Hearing Examiner set child support at $2,700 a month considering the factors set out in FCA s413(1). Family Court

reduced it to $1,787 per month on the basis of the needs of the child, not the combined income of his parents.

The Appellate Division stood unshakably behind Cassano, calling the lower court decision wrong in view of Cassano, which requires that the application of the CSSA percentage in computing the award of child support under FCA s 413(1)(f) be based on the combined income of the parents, not the needs of the child.

The Reach of CSSA

Finally, CSSA becomes increasingly difficult to escape. Last year, in Cohen v. Rosen, [FN8] the parties' 1983 separation agreement, which was incorporated in and survived their divorce, provided that the father would waive his rights to the marital home in exchange for a waiver by the mother of maintenance and child support arrearages 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 netted $100,000.)

The Appellate Division affirmed an order that directed the father to pay 66 percent of his daughter's college education. The court held that the determination of post-secondary education expenses is a separate item in addition to the "basic child support obligation." [FN9]

Recently, in Bill v. Bill [FN10] the Second Department held that the child support provisions of a stipulation of settlement that does not award the custodial parent child care expenses is not an effective waiver and may not be enforced where it neither indicates that the parents were aware of the provisions of the CSSA or that they were knowingly waiving them. [FN11] Consequently, the Family Court did not err in directing the father to pay a pro rata share of the mother's child care expenses.

The parties' 1992 open court stipulation of settlement provided that the wife would have custody of the two children with the husband paying $325 a week in child support. The stipulation did not contain the statutorily required statement that the parties had been advised of the provisions of the CSSA. Significantly, it neglected to set forth that the husband's child support obligation had been calculated in accordance with the statutory formula. Likewise it failed to explain why it deviated from that amount. It did not state that the parties were aware of the noncustodial parent's statutory obligation to pay a pro rata share of child care expenses and made no provision for the division of such costs.

A judgment of divorce incorporating the provisions of the stipulation was entered in March 1993. Before entering the proposed judgment the court added a handwritten provision stating that "the basic child support obligation in this case is $28,750 per year and the noncustodial parent's pro rata share of the basic support obligation as set forth in the parties' settlement stipulation is neither unjust nor inappropriate."

Shortly after the entry of the judgment of divorce the wife commenced a proceeding to require the husband to pay a share of the child care costs. He contended that he had never consented to pay an additional sum for child care and asserted that his $325 a week support obligation exceeded the amount of support he would have been required to pay under the CSSA. The wife's understanding was that the husband was to pay 50 percent of child care expenses. The husband testified that although the parties discussed the issue of child care on the date they entered into the stipulation they were unable to agree on the issue.

The Hearing Examiner concluded that the husband was required to pay a pro rata share of child care expenses because the wife had not waived her right to seek reimbursement for a portion of such expenses in the stipulation and it contained no provision addressing child care costs. The Appellate Division determined that, while the parties to a matrimonial action are permitted to "opt out" of the CSSA there is an affirmative obligation, based on the strong policy objectives underlying the statute, that such a decision be made knowingly and a finding that either party was unaware of the CSSA will invalidate an agreement that does not comply with its mandates.

As originally enacted, the statute expressly required any agreement containing a child support provision to include a statement that the parties were aware of the CSSA. In 1992 the Legislature stiffened the prior law by amending paragraph (h) of the statute to require parties to an "opt out" agreement to state that they are aware that the application of the CSSA guidelines would presumptively result in the correct amount of child support to be awarded. Under the 1992 amendments the parties must also set forth what the CSSA result would have been had child support been calculated in accordance with the guidelines and explain the reasons they agreed not to employ that result.

These amendments, which make it more difficult for parties to effectively agree to deviate from the CSSA results, are intended to protect the interests of the children who are the intended beneficiaries of the CSSA. The statutory intent was to insure that a

party be aware of all of the relevant provisions of the CSSA including his or her right to receive a pro rata share of child care expenses in order to knowingly and intelligently waive those rights.

The court stated that while an agreement need not expressly state that each potential supplement to the basic child support obligation has been considered, compliance with the newly amended paragraph (h) demands, at a minimum, that an agreement demonstrate that the parties have been fully informed of the provisions of the statute and the application of the guidelines in their individual circumstances. Compliance with paragraph (h) further mandates that the parties agree on what their respective support obligations under the CSSA would be.

FN1. 167 AD2d 589 (3d Dept., 1990).

FN2. Laws of 1989, Ch 567.

FN3. Priolo v. Priolo, 211 AD2d 627 (2d Dept., 1995); Pecora v. Cerillo, 207 AD2d 215 (2d Dept. 1995).

FN4. ___ AD2d ___, 642 NYS2d 405 (3d Dept., 1996); See also Strenge v. Bearman, ___ AD2d ___, 645 NYS2d 315 (2d Dept., 1996) holding that an action to enforce an agreement in which a parent purports to contract away his or her child support obligation contravenes public policy.

FN5. 85 NY2d 649 (1995).

FN6. ___ AD2d ___, 642 NYS2d 378 (3d Dept., 1996).

FN7. ___ AD2d ___, 629 NYS2d 311 (3d Dept., 1996).

FN8. 207 AD2D 155 (3d Dept., 1995).

FN9. Citing Romansoff v. Romansoff 167 AD2D 527.

FN10. 214 AD2d 84 (2d Dept, 1995).

FN11. See Sloam v. Sloam, 185 AD2d 808 (2d Dept., 1992); Clark v. Clark, 198 AD2d 599 (3d Dept., 1993); Gonsalves v. Gonsalves, 212 AD2d 932(3d Dept., 1995); Sievers v. Estelle, 211 AD2d 173 (3d Dept., 1995).

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11/26/96 NYLJ 3, (col. 1)

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