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Summary of Fernandez v. Fernandez, 126 Nev. Adv. Op. No. 3

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Fernandez v. Fernandez, 126 Nev. Adv. Op. No. 3 (Feb. 04, 2010)[1]

Family Law- Modifying Child Support

Summary

Reverse and remand of the trial court's affirmation to the question of whether parents can, by stipulation, eliminate or abridge a trial court's statutory authority to review and modify a child support order.

Disposition/Outcome

The Court answered the question in the negative concluding that modification statutes NRS 125B.145(4), NRS 125B.070, and NRS 125B.080 apply to appeals to review and modify child support orders.

Factual and Procedural History

Anthony Fernandez, appellant, and Jennifer Fernandez, respondent, had two children prior to the court granting their joint petition for divorce in August 1998.

The original divorce decree awarded the parents joint legal custody of the children, giving primary physical custody to the mother. The decree obligated the father to pay child support of $3,000 per month. While the decree stated the child support was "consistent with the provisions of NRS 125B.070," it actually exceeded NRS 125B.070's presumptive maximum.[2]

In July 1999, the trial court approved an increase in the father's monthly child support obligations from $3,000 to $4,000.

In June 2000, the court approved a new stipulation between the parents. This stipulation provided for joint physical custody in both parents. While this stipulation left the amount of child support obligations unchanged, it also purportedly made the child support obligation nonmodifiable, stating that both parties "voluntarily waive any right they may have pursuant to Chapter 125 B of the Nevada Revised Statutes to seek a modification to [father's] child support obligations to [mother]."

In 2007, the father's child support obligations amounted to $80,000 a year. From 1995-2001 the father earned sums ranging from $500,000 to more than $4,000,000. However, high losses in the market in 2002 led to his inability to trade at his prior high levels and by 2007 he no longer traded and was earning only $3,000 a month selling cars.

In 2007, the father filed the motion to modify underlying this appeal. At this time both he and the mother had roughly equal passive and earned income.[3]

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[2] NEV. REV. STAT. § 125B.070 (2009) and NEV. REV. STAT. § 125B.080 (2009) set presumptive limits on child support keyed to the number of children and the obligor parent's gross monthly income, with a $100 minimum and $800 maximum per child per month, adjusted by the Consumer Price Index.

[3] At this time the father and mother each separately had an additional child to support.

The trial court declined to review the father's motion under NRS 125B.145. Instead, the trial court ordered a limited hearing to address whether the waiver made the child support order nonmodifiable.

The trial court denied the father's motion to modify, holding that "the child support provisions of the [decree and its stipulated modifications] shall not be disturbed by the Court based upon the waivers of the parties set forth therein and upon the fact that [the father] still has the ability to pay said amount from his currently held assets." The trial court further stated that "the Court is not bound by the provisions of NRS 125B.145 where the parties have previously agreed in a stipulation and order modifying the Decree of Divorce that neither party will seek modification of child support."

The father appealed. The Eight Judicial District Court addressed the question of whether parents can, by stipulation, eliminate or abridge a trial court's statutory authority to review and modify a child support order. The mother maintained that the parties' agreement to nonmodifiable child support should be upheld as a matter of contract law and equity, based on her part performance. The father asserted that when the parties incorporated the support agreement into the decree, it ceased being a matter of private contract and became a judicially imposed obligation, at which point the statutory modification provisions of NRS 125B.070 and NRS 125B.080 apply, notwithstanding the parties' agreement to the contrary. Relying on NRS 125B.145(1)(b), the father urged that the award should have been modified to conform to the formulas in NRS 125B.070 and NRS 125B.080 without regard to changed circumstances, since more than three years had passed since the award's last review; failing that he urged that he demonstrated sufficient change in circumstances to warrant modification.

Discussion

While Nevada's child support statutes do not directly address whether parents can stipulate to a nonmodifiable child support order, Nevada's child support statutes establish that child support involves more than private contract.

I. *Child Support Orders*

The trial court has continuing jurisdiction over its child support orders.[4] In 2003 NRS 125B.145(4) was clarified stating that "[a]n order for the support of a child may be reviewed at any time on the basis of changed circumstances."[5] Further, a change of 20 percent or more in a child support obligor's gross monthly income "shall be deemed to constitute changed circumstances requiring a review for modification of the order for the support of the child."[6] Upon the request of the parent or legal guardian, "[a]n order for the support of a child must . . . be reviewed by the court at least every 3 years . . . to determine whether the order should be modified or adjusted."[7] Finally, "[i]f the court . . . [h]as jurisdiction to modify the order and, taking into account the best interests of the child determines that modification or adjustment of

[4] NEV. REV. STAT. § 125.510(1)(b) states that once a trial court determines custody it may "[a]t any time modify or vacate" its support and custody orders.
[5] *Id.* § 125B.145.
[6] *Id.*
[7] *Id.* § 125B.145(1)(b).

the order is appropriate, the court shall enter an order modifying or adjusting the previous order for support in accordance with the requirements of NRS 125B.070 and 125B.080."[8]

II. *Child Support Order Modifications*

The Court stated that had the Legislature wanted to give parents the option of agreement to a decree providing for nonmodifiable child support, it could have easily provided an exception to NRS 125B.145.[9] Currently, Nevada's child support modification statutes say nothing about parental agreements. Thus, the Court stated, public policy prevents a court from enforcing a purportedly nonmodifiable child support order, even if the parties stipulate to it.

The mother argued that public policy supports nonmodification agreements when applied to preclude downward modification, no matter the impact on the obligor parent, reasoning that more support will always serve the child's best interest. The Court found that neither Nevada statutes nor public policy supports this argument. The formula and guideline statutes intend child support payments to meet the child's needs, to be fair to both parents, and to be met without impoverishing the obligor parent.[10]

The Court also stated that when agreed-upon support is incorporated into a decree, it becomes a court order. Court-ordered child support is not a fixed obligation but is subject to readjustment as circumstances may direct.[11] The Court found that the trial court failed to follow the statutes as written when it justified its decision by stating that the father still had assets he could use to pay child support, even if the support obligation exceeded his gross income. The trial court's test resembled more closely the "undue hardship" standard in the enforcement statutes, than the changed circumstance standard in the modifications statutes.[12]

The Court concluded that the trial court erred in declaring the modification statutes not applicable to the father's motion and reversed and remanded for proceedings under NRS 125B.145(4), NRS 125B.070, and NRS 125B.080.

III. *The Mother's Part Performance.*

The mother maintained that her part performance of the nonmodifiabiltiy stipulation estopped the father from contesting enforceability. The Court found that the stipulation waiving modification rights was entered after the property settlement between the parties was concluded and the support obligations were set. The Court concluded that estoppel is not available to resurrect the contract right that public policy invalidates.[13]

IV. *Scope of Proceedings on Remand*

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[8] *Id.* § 125B.145(2)(b).

[9] *See* Amodio v. Amodio, 56 Conn. App. 459, 471, 743 A.2d 1135, 1143 (Conn. App. Ct. 2000) (discussing CONN. GEN. STAT. § 46b-86(a) , which provides for modification based on changed circumstances "unless and to the extent the decree precludes modification").

[10] *See* Barbagallo v. Barbagallo, 105 Nev. 546, 551, 779 P.2d 532, 536 (1989) ("[w]hat really matters...is whether the children are being taken care of as well as possible under the financial circumstances in which the two parents find themselves.").

[11] Riemer v. Riemer, 73 Nev. 197, 199, 314 P.2d 381, 383 (1957).

[12] NEV. REV. STAT. § 125B.140(c)(2).

[13] Krieman v. Goldberg, 214 Wis. 2d 163, 177, 571 N.W.2d 425, 432 (Wis. Ct. App. 1997).

The Court stated that in order for the father to prevail on his modification motion on remand, the father must demonstrate changed circumstances.[14] The Court differentiated between the custody setting, in which NRS 125.480(1) makes the best interest of the child "the sole consideration," and the support setting in which the parents' and the child's best interest are interwoven.

Conclusion

So long as the statutory criteria for modification are met, a "trial court always has the power to modify an existing child support order, either upward or downward, notwithstanding the parties' agreement to the contrary."[15]

[14] Rivero v. Rivero, 125 Nev. __, ___, 216 P.3d 213, 228 (2009).
[15] *In re* Marriage of Alter, 171 Cal. App. 4th 718, 722, 89 Cal Rptr. 3d 849, 852 (Ct. App. 2009).