## 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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