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Johansson v. Johansson

ELIZABETH M. JOHANSSON, Petitioner/Plaintiff,
v. PER H. JOHANSSON, Respondent/Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
DRS 2002-00453

Support appeal; Post-separation agreement for child support; Change of circumstances

1. A court may modify, either upward or downward, the child support terms of a post-separation agreement where a change has occurred in the circumstances of one or both parties. 23 Pa.C.S.A. 3105(b).
2. A party aggrieved by the court's decision to lower the obligor's support obligation retains the right to sue the obligor on the agreement in an independent action for breach of contract, which can include damages, interest, costs and specific performance.
3. Where a party appeals an order requiring him to pay a portion of the children's private school tuition, the court must decide whether such education is a reasonable need and is consistent with the family's standard of living before the separation and divorce.

Appearances:

Lynn Y. MacBride, Esq., *Counsel for Plaintiff*

Beth Ann C. Gabler, Esq., *Counsel for Defendant*

OPINION

Herman, J., May 6, 2003

Background

Plaintiff (mother) and defendant (father) signed a post-separation agreement on June 27, 2001 which included a provision for support of their two minor children. Father agreed to pay \$2,000 per month to mother who has primary physical custody: \$800 on the second day of each month and \$1,200 on the sixteenth day of each month. The agreement provided that any modification or waiver of its terms must be in writing and signed by both parties. The agreement also stated mother could file a petition to enforce with Domestic Relations if father did not pay according to the agreement. The agreement was incorporated into the divorce decree which was signed in January of 2002.

Father unilaterally stopped making payments in mid-June of 2002 and mother petitioned Domestic Relations to enforce the agreement. After a hearing before Domestic Relations, the court entered an Order on August 2, 2002 directing father to pay \$1,764.78 per month in child support plus arrears. Both parties appealed the Order. Mother argues Domestic Relations erred in treating her petition as an initial complaint

for support and then allowing father to pay less than he previously agreed to pay. Father contends Domestic Relations correctly treated mother's petition as an initial complaint for support insofar as his financial circumstances have changed but then erred in calculating his obligation to include payments for the children's private school tuition.

The threshold legal question is whether father can be directed to pay support at a lower level than he previously agreed to pay in the post-separation agreement, or whether the agreement should be enforced without inquiring about whether there has been a change in either or both party's circumstances. Counsel submitted written argument. This matter is ready for decision.

Discussion

Section 3105 of the Domestic Relations Code governs divorce agreements:

(a) Enforcement.-- A party to an agreement regarding matters within the jurisdiction of the court under this part, whether or not the agreement has been merged or incorporated into the decree, may utilize a remedy or sanction set forth in this part to enforce the agreement to the same extent as though the agreement had been an order of the court, except as provided to the contrary in the agreement.

(b) Certain provisions subject to modification.-- A provision of an agreement regarding child support, visitation or custody shall be subject to modification by the court upon a showing of changed circumstances.

Under section (b), the court may modify, either upward or downward, the child support terms of a post-separation agreement where a change has occurred in the circumstances of one or both parties. This is appropriate because, insofar as the failure to comply with a support Order can lead to incarceration, the court must be able to reduce the amount if the obligor shows he is unable to pay. At the same time, the party aggrieved by the court's decision to lower the payment amount nevertheless retains the right to sue the obligor on the agreement in an independent action for breach of contract which can include damages, interest, costs and specific performance. *Nicholson v. Combs*, 703 A.2d 407 (Pa. 1997); *Patterson v. Robbins*, 703 A.2d 1049 (Pa.Super. 1997). This is so because a support obligation contained in a post-separation agreement constitutes an independent financial obligation between the parties. *Swartz v. Swartz*, 689 A.2d 302 (Pa.Super. 1997); *Brown v. Hall*, 435 A.2d 859 (Pa. 1981). It is a bargained-for contract, the same as any other contract. Such agreements are enforceable at law or in equity. *Gaster v. Gaster*, 703 A.2d 513 (Pa.Super. 1997). From this perspective, section 3105(a) neither adds to nor subtracts from the substantive rights of the parties under their post-separation agreement, but simply provides another mechanism for the enforcement of those rights through Domestic Relations. *Peck v. Peck*, 707 A.2d 1163 (Pa.Super. 1998).

Mother in the case at bar relies on *McMichael v. McMichael*, 700 A.2d 1337 (Pa.Super. 1997), where Superior Court held that, although the court has general authority to modify its own support Orders in light of a change of circumstances, once the parties have agreed to a specific support amount in a post-separation agreement and the agreement requires any modifications to be in writing, the court cannot reduce a support obligation to a lower amount than the agreement provides. The *McMichael* court relied heavily on the Superior Court decision in *Nicholson v. Combs*, 650 A.2d 55 (Pa.Super. 1994). At the time of the *McMichael* ruling, however, the Supreme Court had granted allocatur in *Nicholson* and a decision was pending. Shortly thereafter, the Supreme Court reversed the Superior Court's holding as to this issue, and the *Patterson* decision immediately followed. Based on the foregoing, we will dismiss mother's appeal from the August 2, 2002 Order and she remains free to pursue a separate action against father for breach of contract due to his failure to pay according to the terms of the post-separation agreement.

Father has also appealed the August 2nd Order, challenging his obligation to pay a portion of the children's private school expenses and there is a factual dispute as to whether this obligation is reasonable in light of the parties' pre-separation approach to the children's education. The basic child support schedule appearing in Pa.R.C.P. 1910.16-3 does not take into account the cost of private school tuition. If the court determines this is a reasonable need of the child, the expense will be allocated between the parties in proportion to their net incomes. The obligor's share may be added to his or her basic support obligation. Pa.R.C.P. 1910.16-6(d); 1910.16-5; *Pellish v. Gerhart*, 701 A.2d 594 (Pa.Super. 1997).

The court at this juncture is unable to determine whether Domestic Relations erred in imposing this obligation on father. This is because there appears from the parties' briefs to be a factual dispute about how the parties handled their children's education while they were still an intact family and whether private schooling is consistent with the family's standard of living and station in life before the separation and divorce. *Fitzgerald v. Kempf*, 805 A.2d 529 (Pa.Super. 2002). Father asserts that Stefan, born February 3, 1995 and now 8 years old, was home-schooled by mother but that after separation, mother told father

she would stop home-schooling Stefan and would enroll both children in a private Montessori school. Mother, on the other hand, asserts that Stefan has always attended the Montessori school since the start of his education and that she and father specifically discussed and anticipated that Stefan would continue to attend the Montessori school and that the younger child Katarina, born July 30, 1998 and now 4 years old, would also attend once she reached school age. (She is currently enrolled at the Montessori school at the preschool level.)

Attached to mother's brief is a photocopy of the parties' joint 2000 federal income tax return (Exhibit B) which shows father earned \$61,083.37 in 2000. We learn from the briefs that Domestic Relations also had at its disposal the 2001 tax return and father's income for the first half of 2002. According to counsel's representations, father earned \$88,108.90 in 2001. His 2002 income as of June 30, 2002 was \$53,531.10. However, this information alone is insufficient to enable us to decide whether obligating father to pay for the cost of the Montessori school for one or both children is reasonable because many other factors can come into play in that determination. Consequently we direct the parties to obtain a hearing date to bring these factual matters before the Domestic Relations Section.

ORDER OF COURT

Now this 6th day of May 2003, the court hereby dismisses the appeal filed by plaintiff to the Order entered August 2, 2002, and further the court grants leave to the parties to obtain a hearing before a Domestic Relations hearing officer to present evidence concerning whether it is reasonable to impose on defendant the cost of private school tuition for one or both of the parties' minor children in accordance with the standards discussed in *Pellish v. Gerhart*, 701 A.2d 594 (Pa.Super. 1997).

This authority applies to all marital agreements executed after the statute's amendment on February 12, 1988 .