Internoscia v. Internoscia

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NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

Submitted April 21, 2008

Before Judges Sabatino and Alvarez.

The narrow issue on this appeal concerns whether the Family Part judge committed reversible error in his choice of an effective date for the reduction of a parent's child support obligation. In his order now under review, the judge specified an effective date that was later than the date the parent obligor had desired. We perceive no reversible error in this timing decision, and thus affirm the judge's ruling.

Appellant Kim Internoscia ("the mother") and respondent David Internoscia ("the father") were married in 1997. They have twin daughters, who were born in March 2002. The parties were divorced in August 2005, pursuant to a consensual Final Judgment of Divorce ("FJD").

The parties were recently before us in a separate appeal by the mother involving issues of child custody and parenting time.[1]

In that prior appeal, we sustained provisions in an order the Family Part issued on October 20, 2006, which maintained the father's primary custody of the twins. The custody order was consistent with the recommendations of a court-appointed expert, who had identified certain behavioral and substance abuse concerns about the mother and her present boyfriend, and who had opined that the father was the more suitable primary caretaker. We also upheld the trial court's restrictions on the children's contact with the boyfriend.

The child support issues now before us stem initially from a consent order that the parties entered into on April 7, 2006. Among other things, the parties agreed in that order that the mother would have one overnight visit with the twins each week. The parties further agreed that the mother would pay the father $125 weekly in child support, a sum that was less than the amount that the mother would have been obligated to pay under the State's child support guidelines, as applied to the parties' respective incomes. The father also agreed to waive any child support for a transitional period of six months. Therefore, the mother's $125 weekly support obligation, in the form of direct payments to the father, was scheduled to commence on September 28, 2006. The agreement also contemplated that the mother could seek to increase the frequency of her overnight visits, provided that she

relocated to a closer residence within thirty miles of the father.

Following the April 2006 consent order, the mother moved to an apartment about five blocks from the father's home. The father then informally permitted her to have more contact with the children. By May 2006, the children were staying at the mother's residence three times per week. The mother did not, however, move at that time to modify the child support agreement, so as to reflect her added expenses associated with the increased overnight stays. Instead, the mother moved to gain primary custody of the children, an application that the trial judge denied in October 2006 and we since affirmed in the separate appeal.

In the meantime, the September 28, 2006 trigger date arrived for the mother's agreed-upon $125 weekly support payment. She did not begin making those payments. Instead, the parties' attorneys engaged in settlement discussions about modifying the ongoing support. Those discussions did not result in an agreement.[2]

Eventually, the mother filed a motion in April 2007 to reduce her child support obligation to $40 weekly, reflecting her extra parenting time. The mother also sought to have that reduction made retroactive to September 28, 2006, the date on which her support obligation was originally supposed to begin.

After examining the updated circumstances, including the mother's more frequent overnights with the twins, the trial judge entered an order on May 25, 2007, granting a reduction of the child support to $49 per week.[3] The order made that decrease retroactive to April 18, 2007, the date on which the mother had filed her reduction motion. The judge denied, however, the mother's request for additional retroactive treatment back to September 2006. The judge also denied the father's cross-motion for counsel fees.[4]

In designating the mother's filing date as the effective date for the downward adjustment, the judge relied upon the so-called anti-retroactivity statute, N.J.S.A. 2A:17-56.23a. That statute generally precludes the reduction of child support after it has already become due for payment, except as to the date on which a motion for modification is filed, unless a child has been emancipated. Ibid. See also Mahoney v. Pennell, 285 N.J. Super. 638, 643 (App. Div. 1995).

The judge rejected the mother's argument that adopting an effective date later than September 28, 2006 in this case would cause the father to receive an unfair windfall. In that regard, the judge noted that the father had originally agreed to accept a child support figure below the amount called for under the State guidelines, and that he had also waived support for a full six-month period. Given these accommodations by the father, the judge found no equitable reason to depart from the dictates of the anti-retroactivity statute.

The statute at issue, N.J.S.A. 2A:17-56.23a, provides in its present amended form:

No payment or installment of an order for child support, or those portions of an order which are allocated for child support established prior to or subsequent to the effective date of P.L.1993, c.45 (C.2A:17-56.23a), shall be retroactively modified by the court except with respect to the period during which there is a pending application for modification, but only from the date the notice of motion was mailed either directly or through the appropriate agent. The written notice will state that a change of circumstances has occurred and a motion for modification of the order will be filed within 45 days. In the event a motion is not filed within the 45-day period, modification shall be permitted only from the date the motion is filed with the court.

This provision, enacted in 1988, was designed to comply with federal legislation, 42 U.S.C.A. § 666(a)(9)(C). That federal statute requires, as a condition of funding, that states conform with various federal child support standards, including a mandate that "child support obligations may not be subject to retroactive modification on and after the date they are due." Mahoney, supra, 285 N.J. Super. at 642.

On appeal, the mother urges that the anti-retroactivity statute should not be strictly enforced here, and that she is equitably entitled to an earlier reduction date. She principally argues that, by the time her motion was argued in May 2007, she had been hosting the twins in three overnight visits each week for about a full year. Thus, the mother contends, she had no duty to support the children at the previously agreed-upon $125 weekly figure, which she claims had been predicated upon an assumption of her having only one weekly overnight visit. She further notes that the September 2006 retroactive date she proposed would not require the father to refund her any money. That is because she did not pay him any support until the present motion was decided, and the father had not gone to court in the interim to seek enforcement. She also alleges that her delay in filing her reduction motion was justified, because her attorney had been trying, albeit unsuccessfully, to negotiate a settlement of the issue.

We are mindful that, in some very rare instances, the courts have not strictly enforced the anti-retroactivity statute where its application would cause a manifest inequity. For example, if a parent's legal obligation to pay support has clearly ceased to exist, the effective date of termination may be adjusted to a date earlier than the motion filing date. See Mahoney, supra, 285 N.J. Super. at 643 (the anti-retroactivity statute does not preclude the equitable retroactive modification of support where the children have become emancipated); see also Ohlhoff v. Ohlhoff, 246 N.J. Super. 1, 9 (App. Div. 1991) (the statute may be inapplicable where there has been a formal agreement to change custodial arrangements).

Here, the motion judge had ample reason to adhere to the dictates of the statute and to deny the mother's request for an earlier effective date. Although she may well have been hosting the children more frequently than envisioned under the April 2006 consent order, no formal agreement between the parties memorializing those arrangements was ever filed with the court. Indeed, the mother put the stability of the arrangements in doubt when she sought in the fall of 2006 to transfer custody

altogether. The mother also deviated from the statute by not filing a motion within forty-five days of the alleged change in circumstances associated with the increased overnight visits. See N.J.S.A. 2A:17-56.23a.

Although we appreciate that the support adjustment issue was being negotiated by the parties' counsel through the latter part of 2006 and into early 2007, the mother failed to file a motion in the meantime to protect her interests in preserving an earlier trigger date. If such a motion had been filed sooner, counsel could have requested the court to adjourn the motion while the settlement talks were ongoing. That was not done here.

Lastly, the mother should receive no equitable solace from her unilateral decision to withhold all support payments from the father until her reduction motion was filed and decided. We do not wish to encourage other support obligors to engage in similar improper "self-help" measures to circumvent the anti-retroactivity statute.

In sum, we discern no error by the Family Part judge in applying the normal strictures of the statute and utilizing the mother's filing date as the effective date of the support reduction. Indeed, the judge acted equitably in utilizing the motion filing date rather than making his order completely prospective. As is often the case, the Family Part's expertise, and the judge's first-hand feel for the equities of the case, warrant our substantial deference. Cesare v. Cesare, 154 N.J. 394, 412-13 (1998).

Affirmed.

1. See Internoscia v. Internoscia, No. A-1818-06 (App. Div. Oct. 10, 2007).

2. Pursuant to N.J.R.E. 408, we do not delve into the substance of those settlement discussions.

3. The mother's brief on appeal repeatedly refers to the weekly support figure as $44, contrary to the $49 figure specified in the judge's handwritten portion of the May 25, 2007 order and also in the motion transcript. We presume that the figure written into the court's order is the correct one, and that the deviations in the mother's brief are typographical errors.

4. The father has not cross-appealed the denial of fees.