Salvatore: Child Support Modification: Circumstances re Former Wife's Employment Contemplated at the Time of Divorce Due to Language within MSA and JPA

In re Marriage of Brenda and Daniel Salvatore, 2019 IL App (2d) 180425.
In this case, Daniel Salvatore, appealed the denial of his post-divorce petition to modify his child support obligation. He argued that McHenry County trial court's ruling by the Honorable Mark R. Facchini was in error because there had been a substantial change in circumstances since his divorce to Brenda Salvatore. Namely, he argued that his child support obligation should be decreased based on his former wife's income from her recent employment. The appellate court affirmed the trial court's decision based upon the specific language within the parties' marital settlement and joint parenting agreements.

Under the terms of the parties' marital settlement agreement, Daniel agreed to pay Brenda $8,100 per month child support. The MSA stated that this amount represented 32% of Daniel's net income of $25,312 per month from his dental practice. It noted that this calculation was based solely on Daniel's individual tax returns and was in accordance with the child support guidelines in section 505 of the IMDMA.

On November 1, 2017, Daniel filed a petition to modify child support, arguing that his decreased income constituted a substantial change in circumstances. He further noted that the child support guidelines in section 505 of the IMDMA had recently been changed and that the nonsupporting parent's income is now factored into a determination of the supporting parent's child support obligation. Although Daniel made no initial argument that Brenda's income constituted a substantial change in circumstances, he nonetheless maintained that it was an appropriate basis for lowering his child support obligation. According to Daniel, Brenda's gross income from her new job was approximately $45,000 per year. Daniel argued that, applying the current section 505 guidelines and factoring in Brenda's income, his monthly child support obligation should be reduced from $8100 to $3244.

At a hearing on the petition to modify, Brenda testified that she was unemployed when the divorce judgment was entered on August 26, 2015. Yet in the years before the divorce she had performed office work for two separate dental practices. She earned approximately $20 per hour in these jobs, although the precise amount of her gross earnings had been unclear from the parties' joint tax returns. Following the divorce judgment, Brenda remarried and started working as a triage nurse, earning $26 to $30 per hour depending on shift differentials. She confirmed her statement in her financial affidavit that her gross monthly income was $3,451. However, her gross earnings for the 2017 tax year were only around $23,500, as she had taken a maternity leave.

Daniel testified that his individual 2017 tax return showed a gross income that was significantly less than his gross incomes from prior years. However, he acknowledged during cross-examination that there were discrepancies between the gross receipts from his business checking account and the amount reflected on his business's tax return. He also acknowledged

that he had deposited several large sums into his personal bank account during 2017 that were not reflected in his gross income. According to Daniel, these discrepancies resulted from his payment of business tax liabilities from past years.

At the close of proofs, Brend's counsel moved for a directed verdict arguing that his tax returns were "fictitious" and that he was simply attempting to take advantage of the new child support guidelines. In response Daniel argued there had been two changes in circumstances: both his decreased earnings and his former wife's increased earnings. Over objection, the trial court allowed Daniel to amend his petition to conform to the proofs and add an allegation as to increased income of his ex-wife. However, the court also posed the question of whether Brenda's income was an appropriate basis for lowering Daniel's child support obligation given that it was not factored into the original calculation in the MSA. The court directed the parties to provide supplemental briefs addressing the issue before it ruled on Brenda's motion for a directed finding.

The trial court found that tax returns were "not the most accurate tell of his income" and rejected his argument that they constituted a substantial change in circumstances. Turning to the issue of Brenda's income, the court commented that this was the "harder part of the case" given the recent changes to section 505 of the IMDMA. The court first stated that, under the law in effect when the parties entered the MSA, absent something extraordinary like a "windfall of lottery," the nonsupporting parent's income had not been a factor in determining the supporting parent's child support obligation. Next, the court observed that Daniel's child support obligation was based solely on his own income, "[N]o essentially when this was set in 2015, [Brenda's] financial situation really had no impact then, nor does it have any impact now, on [Daniel's] ability to pay child support." The court's final observation was that, although Brenda was unemployed at the time of the divorce, there was evidence that she had been employed during the marriage. The court stated, however, that "[t]here was no evidence presented that when child support was set it was ever even contemplated that she was going to remain unemployed the entire time she was
receiving support." The court agreed with Brenda that, because her income was not factored into Daniel's child support obligation, "the only logical conclusion is that the basis for modification is the new Act itself."

The trial court ultimately ruled that Brenda's current income could not be a basis to modify Daniel's child support obligation. The court went on to find that, even if Brenda's current income were considered, "she makes such a small amount compared to [Daniel], that even if that's in there, it's not a substantial change in circumstances." Accordingly, the court granted Brenda's motion for a directed finding and denied Daniel's petition to modify his child support obligation.

The appellate court ruled:

> Our resolution of this issue turns not on whether Brenda's income was factored

> into the original calculation of Daniel's child support obligation but rather on whether the parties contemplated Brenda's future employment when they agreed to the terms of their MSA. We note that a party's increased income does not constitute a substantial change in circumstances when the increase was based on events that were contemplated and expected by the trial court when the judgment of dissolution was entered. Hughes, 322 Ill. App. 3d at 819; see also In re Marriage of Reynard, 378 Ill. App. 3d 997, 1005 (2008) ("we are reluctant to find a 'substantial change in circumstances' where the trial court contemplated and expected the financial change at issue"). Likewise, when the parties have entered a marital settlement agreement, as is the case here, a substantial change in circumstances will not be found when the parties' present circumstances were contemplated when they entered their agreement. In re Marriage of Mulry, 314 Ill. App. 3d 756, 760 (2000).

The appellate court continued:

> Here, the trial court observed that Brenda was unemployed when the judgment of dissolution was entered but that she had worked during the marriage. The court reasoned, however, that "[t]here was no evidence presented that when child support was set it was ever even contemplated that [Brenda] was going to remain unemployed the entire time she was receiving support." In other words, the court found nothing to indicate that Daniel's child support obligation was based on the parties' mutual understanding that Brenda would remain unemployed so long as Daniel was paying child support. The logical corollary is that the parties did not intend for Brenda's income from her future employment *to trigger a downward modification* of Daniel's child support obligation. Our review of the record supports these conclusions.

The appellate court then focused upon the fact that under the terms of the MSA the parties did not factor the wife's potential income in determining the husband's child support obligation nor did they mention her future employment as an event that would trigger modification. Yet they considered her potential employment when they negotiated their support obligations regarding the children's health insurance where their agreement provided:

> "If for any reason health insurance is not provided through either party's employer, then [Daniel] shall secure health insurance for the benefit of the parties' children and the parties shall equally divide the premiums associated therewith. Alternatively, should the parties agree in writing to do so, the parties can secure independent health insurance for the parties' children and divide the costs on a proportionate basis *in relation to the parties' net annual incomes* after taking child support payments into consideration." (Emphases added.)

Daniel's counsel pointed out that this drafting was merely a contingency provision that should

not be considered in determining the intent regarding child support. The decision stated that the judgment incorporated both the MSA and the JPA and that the JPA had a provision:

> "Each party shall keep each other informed as to the exact place where each of them resides, the phone numbers of their residences, their places of employment, and the phone numbers of their places of employment. If either party travels out of town for a period of time exceeding 48 hours, then such person shall notify the other of his or her destination and provide a phone number where he or she can be reached." (Emphasis added.)

Section 12(a) of the JPA also contained a "Miscellaneous" provision stating that the parties would "cooperate in scheduling make-up parenting time in the event a party's parenting time gets canceled for reasons *beyond his or her control and other than for work related cancellations.*" (Emphasis added.)

The appellate court then stated:

> Taken together, the health insurance provision of the MSA and the above-referenced provisions of the JPA establish that the parties clearly contemplated Brenda's future employment at the time of the judgment of dissolution. And even assuming, arguendo, that the judgment of dissolution were ambiguous in this respect, we would ascertain the parties' intent by "examining the facts and circumstances" surrounding the formation of their agreements. *In re Marriage of Schurtz*, 382 Ill. App. 3d 1123, 1125 (2008). There is no dispute that Brenda worked at two dental offices in the years prior to the judgment of dissolution. The pleadings also reflect that Brenda worked during the marriage as a registered nurse.

The appellate court noted that prior to the divorce and before a temporary support order was entered, the husband had sought an order compelling Brenda to seek employment. He alleged that Brenda was "voluntarily unemployed" but "fully capable of gainful employment as she is a licensed registered nurse who worked throughout the parties' marriage." He further alleged that he was "in need of financial support" from Brenda and that Brenda was able to contribute to expenses "including but not limited to child support."

The appellate court then reviewed the *In re Marriage of Hughes* decision, 322 Ill. App. 3d 815, 818-19 (2001), at some length and stated:

> In Hughes, the ex-wife filed a petition to modify the ex-husband's child support obligation, based on the ex-husband's increased income due to the termination of his maintenance and car payments. Hughes, 322 Ill. App. 3d at 817. The trial court granted the petition and increased the ex-husband's child support obligation, based on these changes in his " 'financial situation.' " Id. at 818. We reversed,

> holding in pertinent part: "The increase in [the ex-husband's] available income to pay child support following the termination of maintenance and car payments did not constitute a substantial change in circumstances because these events were contemplated and expected by the court when the judgment for dissolution of marriage was entered." Id. at 819

Justice Hutchinson acknowledged that Hughes was decided under a "slightly different circumstance" because it did not involve a MSA and the issue was whether a modification of support was warranted based on the *supporting parent's* increased income. Moreover, the events contemplated in *Hughes* were virtually certain to occur, whereas the possibility remained in this case that Brenda would never earn any income. The appellate court stated, however:

> We nonetheless hold that the reasoning in *Hughes* is applicable here. It strains credulity to suggest that the parties did not contemplate Brenda's future employment when they entered the JPA and MSA. They expressly agreed to keep each other informed of "their places of employment, and the phone numbers of their places of employment," and they further contemplated Brenda's employment when they negotiated their "make-up parenting time" and their health insurance obligations. Daniel cannot now rely on the occurrence of an event that he contemplated when he negotiated these other contractual obligations to establish a substantial change in circumstances that would trigger a downward modification of his child support obligation. We therefore hold that the trial court was correct in refusing to consider Brenda's income as a basis for determining whether there was a substantial change in circumstances.

The former husband maintained that his child support obligation would be less than half the amount under the new child support guidelines. He argued that courts "cannot simply ignore this type of disparity in considering whether there has been a substantial change in circumstances." The appellate court disagreed and stated:

> Daniel's argument underscores his reliance on the passage of Public Act 99-764 to establish a substantial change in circumstances. However, in proclaiming that "[t]he enactment of this amendatory Act of the 99th General Assembly itself does not constitute a substantial change in circumstances warranting a modification" (Pub. Act 99-764 (eff. July 1, 2017) (amending 750 ILCS 5/510(a))), our General Assembly included a safeguard against maneuvers such as Daniel's. Given the disparity of which Daniel complains, it is predictable that similarly situated individuals with substantial child support obligations will seek to establish any substantial change in circumstances so that they may avail themselves of the new section 505 guidelines. By including the limitation in section 510(a), our General Assembly signaled a policy consideration that courts should remain reluctant to find a substantial change in circumstances based on events that were contemplated

and expected when a party's child support obligation was calculated under the prior guidelines. See Reynard, 378 Ill. App. 3d at 1005. Here, there is nothing to warrant a modification of Daniel's child support obligation because the parties contemplated their present circumstances when they entered the JPA and MSA.

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