A legal note from Marshal Willick about how, as a matter of public policy, child support just cannot be made non-modifiable

In *Fernandez v. Fernandez*, 126 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 3, Feb. 4, 2010), the Nevada Supreme Court determined that a child support obligor could not be held to the terms of a prior stipulation and order that "neither party would seek modification of child support."

I. LEGAL BACKGROUND; THE LAW OF WAIVER AND PROTECTION OF CHILDREN

Nevada has an uncomfortable relationship with the law of waiver. Our case law generally favors the honoring of agreements, including waivers. *See*, *e.g.*, *Barelli v. Barelli*, 113 Nev. 873, 944 P.2d 246 (1997) (enforcing alimony waiver); *State of Montana v. Lopez*, 112 Nev. 1213, 925 P.2d 880 (1996) (enforcing child support waiver by conduct); *McKellar v. McKellar*, 110 Nev. 200, 871 P.2d 296 (1994) (even right to child support can be waived by express agreement); *Parkinson v. Parkinson*, 106 Nev. 481, 796 P.2d 229 (1990) ("the devil's bargain"; same).

However, our case law also goes to some lengths to protect children from the detrimental effects of agreements to which they were not parties. *See*, *e.g.*, *Willerton v. Bassham*, 111 Nev. 10, 889 P.2d 823 (1995) (while the mother is barred from seeking paternity or support based on her prior stipulated settlement, the child was not, and either the child or the State could seek to modify the compromise settlement); *Hermanson v. Hermanson*, 110 Nev. 1400, 887 P.2d 1241 (1994) (paternity of child not determined by estoppel); *Parkinson*, *supra* (defense of waiver may not be asserted if its application would be injurious to child).

II. FACTUAL BACKGROUND LEADING TO THIS CASE

The parties had a short marriage which produced two children. They divorced in 1998, at which time they were doing well financially, owning two homes and with no debt. The father was a day trader earning a minimum $500,000 per year, and the mother also worked in the securities industry. The mother had primary physical custody, and the father voluntarily paid $3,000 per month in child support, plus the costs of a housekeeper, nanny, and all medical expenses for the children.

In 1999, the parties stipulated to an increase in child support from $3,000 to $4,000, to take effect in 2001, and for the father to pay for private school. In 2000, custody was changed to joint physical, but the support terms remained unchanged, and were stipulated to be "nonmodifiable" unless the mother tried to relocate out of Nevada with the children.

Both parties remarried and each was supporting one additional child. The father's second marriage also failed. By 2002, he began losing heavily in the market. Things worsened, and by 2007, he no longer traded and earned $3,000 a month selling cars, plus another $3,000 or so in interest on what was left of his assets. By this time the mother and her new husband together earned about as much as the father, and the parties had essentially equal net worth.

On those facts, the father moved to modify child support. The trial court declined to review the motion under NRS 125B.145, finding child support unmodifiable based on the parties' 2000 stipulated order.

III. THE APPELLATE ANALYSIS AND DECISION

On appeal, the Nevada Supreme Court noted that the child support statutes do not distinguish between upward and downward modifications. Finding that the parties' stipulation had been incorporated into a court order and was thus a "judicially-imposed obligation," the Court ducked by footnote squarely addressing the old case law holding that non-merged support agreements are independently enforceable as a matter of contract law (*see Renshaw v. Renshaw*, 96 Nev. 541, 543, 611 P.2d 1070, 1071 (1980); *Day v. Day*, 80 Nev. 386, 395 P.2d 321 (1964) (modifiable because merged); *Ballin v. Ballin*, 78 Nev. 224, 371 P.2d 32 (1962)). But the Court noted that the question of whether the "merger" distinction remains valid under modern child support statutes has been asked, and remains for a later day.

Based on a California holding, the Court concluded that 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."

In further exposition, the Court found the child support statutes binding in all cases, with parties permitted to deviate upward or downward from the guidelines only on stated facts which are made written findings by a trial court, and based on the statutory factors of NRS 125B.080(9), which it further found are "exclusive, not illustrative."

Parsing the child support statutes, the Court found the absence of an explicit provision permitting ***non***-modifiability to be an intentional omission, and found that many other States had held similarly.

Coming down on the child-protection side of the cases recounted above, the Court found that a child support order "affects the child's interests, as much or more than the parents'," and thus that waiver of the statutory right to seek child support modification is just not permitted.

And the Court rejected the mother's request to make the bar unidirectional (i.e., one that would prohibit downward, but not upward, modifications of child support), finding that neither statute nor public policy supports the argument that "more court-ordered child support is always better for the child than less," because a child's best interests are not necessarily served by "perpetuating a supererogatory support order the obligor parent can no longer meet." It thus rejected the notion that a nonmodifiable child support obligation serves the child's best interests where the obligor parent's changed circumstances allegedly make the award unreasonable.

The Court was unimpressed with the mother's "partial performance" argument (that she had not sought an increase when the father was making extreme amounts of money, so he should not be able to seek a decrease when his income dropped), finding estoppel "unavailable" since modifiability was a matter of public policy. Finally, the Court provided a new definition of the expression "the child's

best interest" in the context of child support, finding it to mean "to provide fair support, as defined in NRS 125B.070 and 125B.080, in keeping with both parents' relative financial means."

IV. BROADER IMPLICATIONS TO THE DECISION

Fernandez is another step in the long march toward maximizing "predictability, consistency, and adequacy," the intended goals of child support guidelines enacted throughout the country in 1987. At some point, the "angels-dancing-on-the-head-of-a-pin" technicalities of reciting magical non-merger language in a decree should and presumably will be found to be similarly superseded by public policy considerations.

There is an attraction to the concept of holding parties to their agreements, no matter how ill-advised, no matter what changes later, and no matter the effects on third parties. In the context of child support, however – as in child custody – it is more appropriate for the result to be guided by the public policy goals of protecting those who have no part in making such agreements. The result in this case will do lots more good than harm, and was the right call.

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