

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND DEPARTMENT

Wendel v. Nelson

116 A.D.3d 1057 (N.Y. App. Div. 2d Dep't 2014) · Decided April 30, 2014

SUMMARY

The Appellate Division affirmed an order denying the father’s objections to orders that dismissed his petition for a downward modification of child support, awarded the mother child support arrears, and directed entry of a \$60,175 money judgment. The court held that the mother had not waived child support by accepting the child’s Social Security benefits, that accrued arrears could not be modified absent timely application and good cause, and that the father failed to establish a substantial change in circumstances warranting modification.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Department
WRITING FOR THE COURT	Dickerson, J.E.; Roman, J.; Miller, J.; LaSalle, J.
JURISDICTION	New York
DECIDED	April 30, 2014
DISPOSITION	affirmed
PROCEDURAL POSTURE	The father appealed from a Family Court order denying his objections to Support Magistrate orders that dismissed his petition for downward modification of child support, awarded the mother child support arrears, and directed entry of a money judgment for \$60,175.
STANDARD OF REVIEW	The Appellate Division reviewed whether the Family Court erred in denying the father's objections, including whether the record supported the court's credibility determination and whether the father established grounds for modification of child support.
PRECEDENTIAL VALUE	published appellate decision
PARTIES	Father v. Mother

TOPICS

- child support
- family law procedure
- appellate procedure
- standard of review
- remedies

PRACTICE AREAS

family law

child support

appellate procedure

remedies

QUESTIONS PRESENTED

1. Whether the mother waived her right to child support by accepting the child's Social Security benefits or by otherwise agreeing to relinquish support.
2. Whether the father could obtain modification or annulment of child support arrears that accrued before he applied for modification.
3. Whether the father established a substantial change in circumstances warranting a downward modification of his child support obligation.
4. Whether the Support Magistrate properly entered a money judgment for child support arrears.

HOLDINGS

1. The mother did not waive her right to child support because the father failed to prove a voluntary and intentional relinquishment of that right, and acceptance of the child's Social Security benefits did not constitute a waiver.
2. Modification or annulment of accrued child support arrears was prohibited because the father failed to apply for modification until after the arrears accrued and did not show good cause for his delay.
3. The father was not entitled to a downward modification because he failed to establish a substantial change in circumstances.

KEY QUOTATIONS

“In the absence of an express waiver, a party seeking modification of a child support obligation is required to apply to the courts” (1058)

“Therefore, any modification or annulment of accrued child support arrears is prohibited” (1058)

FACTUAL BACKGROUND

The father sought a downward modification of his child support obligation and argued that the mother had waived child support by accepting the child's Social Security benefits. The mother denied agreeing to waive support, and the Family Court credited her testimony. The father did not seek modification until after support arrears had accrued and failed to establish good cause for the delay or a substantial change in circumstances warranting downward modification.

PROCEDURAL HISTORY

In related Family Court Act article 4 proceedings, the Support Magistrate dismissed the father's downward-modification petition, effectively granted the mother's petition for child support arrears, and directed entry of a \$60,175 money judgment. The Family Court, Nassau County, denied the father's objections, and the Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- Matter of Hinck v. Hinck, 113 A.D.3d 681, 682-683 (2014)
- Matter of Tafuro v. Tafuro, 102 A.D.3d 877, 878 (2013)
- Stevens v. Stevens, 82 A.D.3d 873 (2011)
- Matter of Graby v. Graby, 87 N.Y.2d 605, 611 (1996)
- Matter of Jones v. Smith, 59 A.D.3d 546, 547 (2009)
- Matter of Anonymous, 20 A.D.3d 562, 563 (2005)
- Matter of Williams v. Chapman, 22 A.D.3d 1015, 1017 (2005)
- Matter of Dox v. Tynon, 90 N.Y.2d 166, 175-176 (1997)
- Matter of Anderson v. Anderson, 92 A.D.3d 779 (2012)
- Matter of Ceballos v. Castillo, 85 A.D.3d 1161 (2011)

OPINION

PER CURIAM.

In related child support proceedings pursuant to Family Court Act article 4, the father appeals from an order of the Family Court, Nassau County (Kent, J.), dated January 31, 2013, which denied his objections to two orders of the same court (Cohn, S.M.), both dated September 4, 2012, which, after a hearing, dismissed his petition for a downward modification of his child support obligation, in effect, granted the mother's petition for an award of child support arrears, and directed the entry of a money judgment in favor of the mother and against him in the amount of \$60,175.

Ordered that the order dated January 31, 2013, is affirmed, without costs or disbursements. The Family Court did not err in denying the father's objections to the Support Magistrate's orders. The father failed to prove that the mother waived her right to child support, as he failed to proffer evidence of a voluntary and intentional relinquishment of that right by the mother (see Matter of Hinck v Hinck, 113 AD3d 681, 682-683 [2014]; Matter of Tafuro v Tafuro, 102 AD3d 877, 878 [2013]; Stevens v Stevens, 82 AD3d *1058873 [2011]).

The mother did not waive her right to child support by accepting the child's Social Security benefits. A dependent child's Social Security benefits are designed to supplement existing resources and are not intended to displace the obligation of parents to support their children (see Matter of Graby v Graby, 87 NY2d 605, 611 [1996]; Matter of Jones v Smith, 59 AD3d 546, 547 [2009]).

Although the father testified at a hearing that the mother expressly agreed, in 2006, to accept Social Security benefits in lieu of child support, the court credited the mother's testimony that she did not agree to waive child support in exchange for Social Security benefits, and there is no basis in the record to disturb the court's credibility determination (see *Matter of Anonymous*, 20 AD3d 562, 563 [2005]).

The father did not adduce any other evidence to prove that the mother agreed to waive child support. In the absence of an express waiver, a party seeking modification of a child support obligation is required to apply to the courts (see *Matter of Williams v Chapman*, 22 AD3d 1015, 1017 [2005]).

The father here failed to move for modification of his support obligation until after arrears had already accrued, and did not show good cause for his failure to do so. Therefore, any modification or annulment of accrued child support arrears is prohibited (see *Matter of Dox v Tynon*, 90 NY2d 166, 175-176 [1997]).

The Support Magistrate did not err in entering a money judgment against the father for support arrears. The Support Magistrate also did not err in dismissing the father's modification petition, as he failed to establish that there was a substantial change in circumstances warranting a downward modification of his child support obligation (see *Matter of Anderson v Anderson*, 92 AD3d 779 [2012]; *Matter of Ceballos v Castillo*, 85 AD3d 1161 [2011]).

Dickerson, J.E, Roman, Miller and LaSalle, JJ., concur.