

SUPREME COURT OF NEW HAMPSHIRE

In re Rossino

153 N.H. 282 (2006) · Decided February 24, 2006

SUMMARY

The New Hampshire Supreme Court held that Noddin v. Noddin did not apply to impute income where the respondent's reduced financial condition occurred before the divorce filing and no child-support order existed. The court remanded for consideration of whether the respondent voluntarily became unemployed or underemployed under RSA 458-C:2, IV(a), and vacated the sole-legal-custody award for reconsideration of the impact of the petitioner's repeated legal actions on the respondent's involvement with the children.

CASE DETAILS

COURT	Supreme Court of New Hampshire
WRITING FOR THE COURT	Broderick, C.J.; Dalianis, J.; Duggan, J.; Galway, J.
JURISDICTION	New Hampshire
DECIDED	February 24, 2006
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The respondent appealed an order of the Superior Court approving a divorce decree, challenging the imputation of income under Noddin v. Noddin and the denial of joint legal custody.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Joseph A. Rossino v. Lucille Rossino

TOPICS

- family law procedure
- divorce
- child support
- child custody
- appellate procedure

PRACTICE AREAS

- family law
- divorce
- child support
- child custody
- appellate procedure

QUESTIONS PRESENTED

1. Whether the Superior Court properly applied Noddin v. Noddin to impute the respondent's former police-department earnings when his employment loss occurred before the divorce was filed and no child-support order yet existed.

2. Whether the Superior Court properly denied joint legal custody without adequately considering the effect of the petitioner's repeated legal actions and resulting contact restrictions on the respondent's involvement with the children.

HOLDINGS

1. Noddin does not apply when a party's reduced financial condition allegedly caused by wrongdoing occurs before the filing of the divorce and before any child-support order exists. The Superior Court therefore erred by imputing income based on Noddin.
2. The Superior Court must determine whether RSA 458-C:2, IV(a) applies and, if so, whether the respondent voluntarily became unemployed or underemployed under that statute for purposes of calculating child support.
3. The Superior Court's award of sole legal custody was legally erroneous because its decision apparently failed to consider how the petitioner's repeated legal actions and resulting bail restrictions affected the respondent's ability to maintain contact and involvement with the children.

KEY QUOTATIONS

“Noddin does not apply where the reduced financial condition occasioned by a party’s alleged wrongdoing occurred before the filing for divorce.” (153 N.H. at 283)

“The court’s determination on the award of legal custody apparently did not take into account the actions of the petitioner as set forth above, and thus was legally erroneous.” (153 N.H. at 284)

FACTUAL BACKGROUND

Joseph and Lucille Rossino married in 1994 and had three children. In 2003, while the parties were still married, Joseph involuntarily resigned from his police-officer position after allegations that he had engaged in sexual relations with another woman, and Lucille then filed for divorce. During the divorce process, Lucille initiated several domestic-violence, stalking, criminal, and felony-related proceedings against Joseph; the matters were dismissed or the charges were dropped, and bail conditions restricted Joseph's contact with Lucille. The Superior Court nevertheless imputed Joseph's former earnings to him and awarded Lucille sole legal custody.

PROCEDURAL HISTORY

After a two-day hearing in the divorce proceeding, the Superior Court attributed \$66,992 in prior police-department earnings to the respondent for child-support purposes and awarded sole legal custody to the petitioner. The Supreme Court of New Hampshire reversed the income-imputation ruling, vacated the legal-custody award, and remanded for further proceedings.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The Superior Court must determine whether N.H. Rev. Stat. Ann. § 458-C:2, IV(a) applies and, if so, whether the respondent voluntarily became unemployed or underemployed for child-support purposes. It must also reconsider legal custody, including the impact of the petitioner's repeated lawsuits and related restrictions on the respondent's ability to maintain contact and involvement with the children.

CASES CITED

- Noddin v. Noddin, 123 N.H. 73 (1983)

OPINION

BRODERICK, J.

Broderick, C.J. The respondent, Joseph A. Rossino, appeals an order of the Superior Court (Hicks, J.) approving a decree of divorce. The respondent argues that the court erred in applying Noddin v. Noddin, 123 N.H. 73 (1983), to the facts of this case and in denying joint legal custody of his minor children.

We reverse in part, vacate in part, and remand. The respondent and the petitioner, Lucille Rossino, were married in 1994. Together they have three children, born in 1996, 1999 and 2002. In March 2003, the respondent involuntarily resigned from his employment as a police officer in the Hudson Police Department following allegations that he had had sexual relations with another woman while on duty during the previous year.

The respondent denied that he had sexual relations on duty but did not deny that he had sexual relations with another woman in 2002. Shortly thereafter, the petitioner filed for divorce alleging adultery and irreconcilable differences. Following a two-day hearing, the court ruled that the Noddin decision applied to this case and that the respondent's earnings of \$66,992 from the Hudson Police Department should be attributed to him.

The court stated that "[i]n light of the [husband's] abandonment of responsibility during the past year, the Court concurs that the [wife's] request [to impute income of \$5,582 gross monthly income based upon the case of Noddin v. Noddin] is equitable." We do not agree. *283In Noddin, two years after a divorce, the defendant husband requested that his support obligations be reduced because of a change in his financial condition in that he had been arrested for stealing trade secrets from his employer, was fired from the position and was receiving considerably less income.

Noddin, 128 N.H. at 74. The master agreed that the defendant's earning capacity had been substantially reduced so that he was no longer able to meet his obligations contained in the divorce decree and recommended a reduction in the child support payments. Id. at 75.

We disagreed, holding that because "the defendant was engaged in criminal activity at his own peril, and his reduced financial ability was due to his own fault," his child support obligations "should not be reduced where his own conduct has resulted in his loss of high-earning

employment.” Id. at 76. Noddin applied to a post-divorce case in which a child support order had been made.

In the case before us, however, the parties were still married when the respondent involuntarily resigned from his employment, and there was no existing child support order. Noddin does not apply where the reduced financial condition occasioned by a party’s alleged wrongdoing occurred before the filing for divorce.

Therefore, the superior court erred in imputing income to the respondent based upon that case, and we reverse that ruling. Subsequent to Noddin, the legislature passed RSA 458-C:2, IV(a) (2004), which provides: “The court, in its discretion, may consider as gross income the difference between the amount a parent is earning and the amount a parent has earned in cases where the parent voluntarily becomes unemployed or underemployed, unless the parent is physically or mentally incapacitated.” We remand to the superior court for a determination as to whether RSA 458-C:2, IV(a) (2004) applies and, if so, whether under the terms of the statute, the respondent voluntarily became “unemployed or underemployed” for purposes of calculating child support.

The respondent next argues that the superior court erred in awarding sole legal custody of the children to the petitioner. Except in cases involving abuse, “there shall be a presumption, affecting the burden of proof, that joint legal custody is in the best interest of minor children.” RSA 458:17, II (2004) (repealed Oct. 1, 2005). “If the court declines to enter an order awarding joint legal custody, the court shall state in its decision the reasons for denial of an award of joint legal custody.” RSA 458:17,11(b).

The court’s decision states that “[j]oint legal custody is not in the best interest of the children at this time, due to the father’s unwarranted insignificant involvement with the children over the past year *284and his willingness to surrender total responsibility to mother during a year long financial crisis.” The record supports that during the divorce process, the petitioner brought no less than four additional legal actions against the respondent.

Shortly before filing for divorce, the petitioner filed a domestic violence petition. The petition was subsequently dismissed. The petitioner then filed a stalking petition that was also dismissed. The petitioner then brought a criminal complaint against the respondent for sending flowers from the children on Mother’s Day.

The petition was subsequently dismissed. Finally, the petitioner caused a felony charge to be brought for alleged theft of her property. Approximately eight months later, after at least ten appearances in court by the respondent, the prosecution dismissed the charges. While the criminal charges were pending, bail conditions prohibited the respondent from having any communication or contact with the petitioner.

The court's determination on the award of legal custody apparently did not take into account the actions of the petitioner as set forth above, and thus was legally erroneous. Accordingly, we vacate the award and remand for consideration of the impact of the petitioner's repeated lawsuits on the respondent's ability to maintain contact and sustain involvement with his children during the divorce process in determining the award of legal custody.

Reversed in part; vacated in part; and remanded. Dalianis, Duggan and Galway, JJ., concurred.