

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

Duma v. Edgar

58 A.D.3d 1085, 873 N.Y.S.2d 747 (N.Y. App. Div. 2009) · Decided January 29, 2009

SUMMARY

The New York Appellate Division, Third Department, affirmed an order modifying a child-support obligation upward. The court held that Family Court properly precluded the respondent from presenting financial evidence because his failure to provide meaningful financial disclosure was willful and contumacious, while noting that he was still permitted to testify about his studies and employment history.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Third Department
WRITING FOR THE COURT	Lahtinen, J.; Mercure, J.P.; Malone Jr., J.; Kavanagh, J.
JURISDICTION	New York
DECIDED	January 29, 2009
DISPOSITION	affirmed
PROCEDURAL POSTURE	Respondent appealed from a Family Court order granting petitioner’s application to modify a prior child-support order.
STANDARD OF REVIEW	Abuse of discretion; the court reviewed whether the Support Magistrate abused her discretion in precluding respondent from presenting financial proof.
PRECEDENTIAL VALUE	published appellate decision
PARTIES	Edgar v. Duma

TOPICS

- child support
- discovery dispute
- sanctions
- family law procedure
- appellate procedure

PRACTICE AREAS

- family law
- child support
- civil procedure
- appellate procedure

QUESTIONS PRESENTED

1. Whether Family Court and the Support Magistrate abused their discretion by precluding respondent from presenting proof concerning his financial circumstances because of his inadequate and evasive disclosure.

HOLDINGS

1. Preclusion was proper because respondent's failure to provide meaningful financial disclosure, despite warnings and an adjournment, supported an inference that his noncompliance was willful, deliberate, and contumacious; therefore, the Support Magistrate did not abuse her discretion by resolving financial issues in petitioner's favor.

KEY QUOTATIONS

"the offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious" (1086)

FACTUAL BACKGROUND

Respondent had previously consented to a child-support order based on his status as a full-time student and was required to notify petitioner and the local support collection unit when he became employed. When petitioner later sought an upward modification, respondent submitted materially incomplete financial affidavits, omitted income, assets, expenses, liabilities, wage information, and tax information, and gave vague responses to discovery and the Support Magistrate's inquiries. Despite warnings and more than a month to comply, he made no meaningful effort to provide the required disclosure.

PROCEDURAL HISTORY

The parties had consented in 2002 to an order requiring respondent to pay \$25 per month in child support and \$15 per month toward arrears, with an obligation to disclose subsequent employment. Petitioner sought an upward modification in 2007 based on increased needs and respondent's alleged employment. After respondent failed to provide meaningful financial disclosure, Family Court granted petitioner's motion for preclusion concerning financial issues. The Support Magistrate increased support to \$122.62 per week plus \$10 per week toward arrears, and Family Court dismissed respondent's objections. The Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- Maillard v. Maillard, 243 A.D.2d 448, 449 (N.Y. App. Div. 1997)
- Getty v. Zimmerman, 37 A.D.3d 1095, 1096-1097 (N.Y. App. Div. 2007)
- Lotardo v. Lotardo, 31 A.D.3d 504, 505 (N.Y. App. Div. 2006)

OPINION

LAHTINEN, J.

Lahtinen, J. Appeal from an order of the Family Court of Fulton County (Jung, J.), entered November 21, 2007, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 4, to modify a prior order of support.

In 2002, ostensibly because respondent was a full-time student, the parties consented to an order of support requiring respondent to pay child support in the amount of \$25 per month, in addition to \$15 per month in arrears. Additionally, respondent was obligated to inform petitioner and the local support collection unit when he became employed.

In February 2007, petitioner commenced this proceeding seeking an upward modification of respondent's child support obligation contending, among other things, that the children's needs had increased and, since entry of the prior order, respondent had been gainfully employed and failed to make the required notifications. When respondent proved to be less than forthcoming with the court-ordered disclosure, petitioner moved for an order of preclusion, which Family Court granted to the extent of ordering that "issues to which [Respondent's financial information is relevant shall be deemed to be resolved in favor of [p]etitioner." At the conclusion of the hearing that followed, the Support Magistrate granted petitioner's application and, among other things, awarded child support in the amount of \$122.62 per week, plus an additional \$10 per week toward arrears.

Family Court dismissed respondent's objections thereto, prompting this appeal. Respondent, as so limited by his brief, contends only that the Support Magistrate erred in precluding him from presenting proof as to his financial circumstances at the time of the support hearing.

We cannot agree. Although respondent did file two sworn financial disclosure affidavits (see Family Ct Act § 424-a), the first filing contained no information whatsoever; no income, assets, expenses or liabilities were listed, and respondent failed to submit any wage or tax information. Respondent's second disclosure affidavit and his response to petitioner's interrogatories fared no better, reciting only a few expenses and an unspecified amount of student loan proceeds.

Additionally, during his two pretrial appearances before the Support Magistrate, respondent professed complete ignorance of his financial situation and, despite being warned as to the consequences of failing to comply with discovery demands and being granted an adjournment of more than a month to comply, provided only vague and evasive responses to the Support Magistrate's repeated inquiries.

While the remedy of preclusion indeed should be reserved for those instances where "the offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious" (*Maillard v Maillard*, 243 AD2d 448, 449 [1997]), such conduct may be inferred where, as here, there was no meaningful attempt to comply with disclosure and an entirely inadequate excuse for such failure (see *Getty v Zimmerman*, 37 AD3d 1095, 1096-1097 [2007]).

Hence, under these circumstances, we cannot say that the Support Magistrate abused her discretion in resolving the financial issues in favor of petitioner (see generally *Lotardo v Lotardo*, 31 AD3d 504, 505 [2006]). In any event, a review of the hearing transcript reveals that respondent was allowed to testify as to his current course of study, as well as what little he could recall of his employment history.

Mercure, J.E, Malone Jr. and Kavanagh, JJ., concur. Ordered that the order is affirmed, without costs.