

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

Freedman v. Horike

68 A.D.3d 1205 (N.Y. App. Div. 2009) · Decided December 3, 2009

SUMMARY

The New York Appellate Division reviewed proceedings concerning child support arrears, an alleged willful violation of a support order, and the father's request for a downward modification of support. The court affirmed Family Court's determination that the father failed to prove inability to pay or a sufficient change in circumstances warranting modification.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Third Department
WRITING FOR THE COURT	Mercure, J.; Cardona, E.J.; Spain, J.; Malone Jr., J.; Kavanagh, J.
JURISDICTION	New York
DECIDED	December 3, 2009
DISPOSITION	affirmed
PROCEDURAL POSTURE	Father appealed from a Family Court order denying his objections to a Support Magistrate's determination that dismissed his support-modification petition and related motions and found him in willful violation of a prior child-support order.
STANDARD OF REVIEW	The Appellate Division accorded due deference to Family Court as the trier of fact and upheld its determination where the record amply supported the findings.
PRECEDENTIAL VALUE	published and precedential
PARTIES	Freedman v. Horike

TOPICS

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

PRACTICE AREAS

- family law
- child support
- appellate procedure

QUESTIONS PRESENTED

1. Whether the father established an inability to comply with the prior child-support order sufficient to defeat a finding of willful violation.
2. Whether the father established a sufficient change in circumstances warranting a downward modification of child support.
3. Whether Family Court's factual findings were supported by the record.

HOLDINGS

1. Because the father undisputedly failed to meet his support obligations, he bore the burden of proving by competent, credible evidence that he was unable to make the required payments. He failed to meet that burden, so the finding of willful violation was affirmed.
2. The father failed to establish a sufficient change in circumstances warranting a downward modification of child support. A child-support obligation turns on the parent's ability to provide support rather than solely on the parent's current financial situation, and the father's longstanding voluntary reduction of income and receipt of public assistance did not constitute a substantial change in circumstances.

KEY QUOTATIONS

“Thus, he bore the burden of demonstrating “his inability to make the required payments” by “competent, credible evidence”” (68 A.D.3d at 1206)

“a child support obligation turns on a parent’s ability to provide support, rather than the parent’s current financial situation” (68 A.D.3d at 1206)

FACTUAL BACKGROUND

The parties were divorced parents of two children, and the father had accumulated approximately \$50,000 in child-support arrears. After agreeing that the arrears would be entered as a judgment, the father sought a downward modification based on unemployment, alleged disability, and public assistance. He failed to provide competent medical proof of disability, presented insufficient proof concerning his income and job-search efforts, and was found not credible; his income reduction and receipt of public assistance were also longstanding and voluntary.

PROCEDURAL HISTORY

The divorced parents had entered into a stipulation providing that approximately \$50,000 in child-support arrears would be entered as a judgment while permitting the father to seek modification of support accruing after June 29, 2007. The father sought downward modification based on terminated employment and alleged disability, while the mother sought a finding that he willfully violated a prior support order. After a hearing, the Support Magistrate dismissed the father's requests and found a willful violation; Family Court denied his objections, and the Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- Matter of Horike v. Freedman, 37 A.D.3d 978 (2007)
- Matter of Freedman v. Horike, 29 A.D.3d 1093 (2006)
- Matter of Freedman v. Horike, 26 A.D.3d 680 (2006)
- Matter of Powers v. Powers, 86 N.Y.2d 63, 70 (1995)
- Matter of Vickery v. Vickery, 63 A.D.3d 1220, 1221 (2009)
- Matter of Heyn v. Burr, 6 A.D.3d 781, 782-783 (2004)
- Matter of Latimer v. Cartin, 57 A.D.3d 1264, 1265 (2008)
- Matter of Holbert v. Rifanburg, 39 A.D.3d 902, 903 (2007)

OPINION

MERCURE, J.

Mercure, J. The underlying facts of this matter are more fully set forth in our three prior decisions involving the parties' disputes over the custody and support of their children (see Matter of Horike v. *1206Freedman, 37 AD3d 978 [2007]; Matter of Freedman v Horike, 29 AD3d 1093 [2006]; Matter of Freedman v Horike, 26 AD3d 680 [2006]). Briefly, the parties are the divorced parents of two children (born in 1990 and 1998).

Following our most recent decision, they entered into a stipulation of settlement, memorialized in an order upon consent dated December 19, 2007, which provided that the total amount of child support arrearage as of June 2007 — approximately \$50,000 — would “be in judgment,” and that all underlying child support would continue but petitioner (hereinafter the father) was not barred from filing a future petition to modify support due after June 29, 2007.

On December 31, 2007, the father commenced the first of these proceedings, seeking a downward modification of child support, asserting that his employment had terminated and his income was below the poverty level. Shortly thereafter, respondent (hereinafter the mother) filed a petition alleging that the father willfully violated a September 2006 support order.

The father also filed orders to show cause seeking reinstatement of his driving privileges and vacatur of an order dismissing another support modification petition. Following a hearing, a Support Magistrate dismissed the father's petition and motions, and found the father in willful violation of the prior order. Family Court denied the father's objections to the Support Magistrate's determination, prompting this appeal.

We affirm. With respect to the father's argument that he did not willfully violate the prior support order, it is undisputed that he did not meet his support obligations. Thus, he bore the burden of

demonstrating “his inability to make the required payments” by “competent, credible evidence” (Matter of Powers v Powers, 86 NY2d 63, 70 [1995]; see Matter of Vickery v Vickery, 63 AD3d 1220, 1221 [2009]).

Furthermore, in connection with his request for a modification of support, it was the father’s burden to “establish a sufficient change in circumstances warranting the requested downward modification” (Matter of Heyn v Burr, 6 AD3d 781, 782 [2004]). Particularly relevant here, a child support obligation turns on a parent’s ability to provide support, rather than the parent’s current financial situation (see Matter of Latimer v Cartin, 57 AD3d 1264, 1265 [2008]; Matter of Heyn v Burr, 6 AD3d at 782).

In our view, the father has failed to meet these burdens. Although the father indicates that he is disabled and on public assistance but nonetheless engaged in a diligent job search, we note that he failed to submit any competent medical proof to support his claim of disability (see Matter of Vickery v Vickery, *120763 AD3d at 1221; Matter of Holbert v Rifanburg, 39 AD3d 902, 903 [2007]).

Furthermore, Family Court found that the proof of his actual income and the diligence of his efforts to find employment was insufficient, and that his testimony regarding the same lacked credibility. In any event, the father’s long-standing, voluntary reduction of his income and concomitant receipt of public assistance do not constitute a substantial change in circumstances herein.

According due deference to the trier of fact, we conclude that the record amply supports Family Court’s determination that respondent willfully violated the prior support order and that a downward modification of support was unwarranted (see Matter of Vickery v Vickery, 63 AD3d at 1221; Matter of Latimer v Cartin, 57 AD3d at 1265; Matter of Holbert v Rifanburg, 39 AD3d at 903; Matter of Heyn v Burr, 6 AD3d at 782-783).

The father’s remaining arguments are either rendered academic by our decision, unpreserved, not properly before us or, upon consideration, have been found to be lacking in merit. Cardona, EJ., Spain, Malone Jr. and Kavanagh, JJ., concur. Ordered that the order is affirmed, without costs.