No. 34736 - Donna Sue Skidmore v. Walter Burke Skidmore

FILED
March 30, 2010
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Workman, Justice, dissenting:

I dissent from the majority's decision in this case because I believe that the award of retroactive child support was proper and just given the circumstances. If Mr. Skidmore had complied with the original child support order by providing Mrs. Skidmore his financial information, she could have filed a motion for modification earlier. Moreover, it is clear that such a motion would have been granted as the evidence showed an increase in income warranting an increase in the child support.

The majority points out that Mrs. Skidmore could have sought a contempt order or the assistance of the Bureau for Child Support Enforcement in order to compel Mr. Skidmore to produce his financial information. However, not having information that increased income was being concealed, Mrs. Skidmore's failure to take such action should not benefit Mr. Skidmore. The purpose of child support is not to provide a source of income for the other parent. Rather, "the obligation of child support is grounded in the moral and legal duty of support of one's children from the time of birth." *Supcoe v. Shearer*, 204 W.Va. 326, 330, 512 S.E.2d 583, 587 (1998). Furthermore, "[c]hildren are entitled to have their 'needs' accord with the current standard of living of both parents, which may reflect an

increase in parental good fortune." *Zazzo v. Zazzo*, 245 N.J. Super 124, 130, 584 A.2d 281, 284 (1990).

In *Lanza v. Lanza*, 268 N.J. Super. 603, 634 A.2d 152 (1993), the father also failed to report his receipt of higher income as required by a divorce decree. The New Jersey court upheld an order granting retroactive child support even though *N.J.S.A.* 2A:17-56.23a prohibited a retroactive modification of child support except for the period during which the party seeking relief had pending an application for modification. Noting its holding in *Zazzo*, the court reasoned that

> because there is no divorce between parents and their children, the court finds that under the particular circumstances of this case, an increase in child support for 1990 is appropriate. To decide otherwise would be a failure to provide equitable relief to those clearly entitled to it. Had defendant made a timely disclosure of his 1990 income, his child support would have been modified. His failure to do so cannot benefit him to the detriment of his children despite the statutory language to the contrary.

268 N.J.Super. at 607, 634 A.2d at 154. This is a far superior approach than the one taken by the majority because there are certain circumstances such as those in this case where a retroactive modification of child support is appropriate.

The unfortunate fact is that most West Virginians who interface with the court system do so by virtue of divorce or other domestic upheaval, and children are usually involved. The further unfortunate fact is that a substantial majority of such litigants are poor

people, without ready access to legal services. Further, where children are involved, the court system must not forget that their rights are separate and independent of the rights of competing sets of adults.

Who spoke or acted for the child here? The Bureau for Child Support Enforcement did not. They could have sought contempt against the father to obey the court order to turn over his records, but they are apparently too overwhelmed to routinely pursue such investigatory contempt citations, when there is not information to indicate the obligor is in contempt. Yet we expect custodial parents, often impoverished and barely eking out the necessities of life for their families, to somehow find the funds to hire a lawyer to file a contempt action even though they have no information that the other parent's income has increased. Unlike the father in this case, who contumaciously withheld income information and short-changed his child, the mother did not have the funds to retain an attorney. Even in the proceedings before this Court, the mother was unrepresented. And of course, there was no lawyer for the child. Our system is failing to recognize that procedural niceties must somehow give way to effect the rights of the weakest, most voiceless segment of our population—children. Children have a right to financial support from those who brought them into this world.

For the reasons set forth above, I would have affirmed the decision of the lower courts granting an award of retroactive child support. However, I would have reversed the

final order to the extent that it denied a prospective modification of child support to Mr. Skidmore beginning in October 2007. Given the fact that there was clear evidence that Mr. Skidmore was entitled to a reduction at that time, it is a tremendous waste of judicial resources, as well as an additional financial strain on the parties, to force them to return to court yet again after Mr. Skidmore files a formal petition for modification.

Accordingly, I dissent.