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Fasano v Fasano

Supreme Court of New York, Appellate Division, Second Department

September 26, 2018, Decided

2016-03417, 2017-07930

Reporter

164 A.D.3d 1421 *; 83 N.Y.S.3d 224 **; 2018 N.Y. App. Div. LEXIS 6184 ***; 2018 NY Slip Op 06228 ****; 2018 WL 4608886

[****1] Susan A. Fasano, Appellant, v Nicholas C. Fasano, Respondent. (Index No. 32031/13)

Core Terms

divorce, modification, upward, settlement, calculation, marital, unreimbursed, ancillary, deviating, monthly, add-on, vacate, merge, remit

Case Summary

Overview

HOLDINGS: [1]-The ex-husband's action in selling and moving away from the marital residence constituted a substantial change in circumstances under [Domestic Relations Law § 236\(B\)\(9\)\(b\)\(2\)\(I\)](#) to support upward modification of his child support obligation because the parties' stipulation indicated that their reason for deviating from the Child Support Standard Act calculation was to allow the ex-husband to retain the marital residence as a place for the children to be with him when they were together.

Outcome

Judgment reversed.

Headnotes/Summary

Headnotes

Parent, Child and Family—Support—Upward Modification

Counsel: [***1] Quatela Chimeri, PLLC, Hauppauge, NY (Christopher J. Chimeri and Nicole J. Brodsky of counsel), for appellant.

Arza Rayches Feldman, Uniondale, NY (Steven Feldman of counsel), for respondent.

Judges: REINALDO E. RIVERA, J.P., CHERYL E. CHAMBERS, LEONARD B. AUSTIN, BETSY BARROS, JJ. RIVERA, J.P., CHAMBERS, AUSTIN and BARROS, JJ., concur.

Opinion

[**225] [*1421] In an action for a divorce and ancillary relief, the plaintiff appeals from (1) an order of the Supreme Court, Suffolk County (Carol MacKenzie, J.), dated March 3, 2016, and (2) a judgment of divorce of the same court entered June 23, 2017. The order, insofar as appealed from, denied that branch of the plaintiff's motion which was for an upward modification of the defendant's child support obligation, which was

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set forth in a stipulation of settlement dated October 25, 2012. The judgment of divorce, insofar as appealed from, incorporated but did not merge the stipulation of settlement, and awarded the plaintiff child support in the sum of only \$1,500 per month.

[*1422] Ordered that the appeal from the order is dismissed; and it is further,

Ordered that the judgment of divorce is reversed insofar as appealed from, on the law and the facts, so much of the order **[***2]** as denied that branch of the plaintiff's motion which was for an upward modification of the defendant's child support obligation is vacated, and the matter is remitted to the Supreme Court, Suffolk County, for a new determination of that branch of the plaintiff's motion in accordance herewith and the entry of an appropriate amended judgment thereafter; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

The parties were married in 1993 and have two children together. On October 25, 2012, the parties entered into a stipulation of settlement regarding a prior divorce action. The stipulation provided that although the defendant's monthly child support obligation using the [Child Support Standards Act](#) (hereinafter CSSA) calculation (see [Domestic Relations Law § 240 \[1-b\]](#)) would be \$1,994.45 on the first \$130,000 of combined parental income and **[**226]** \$2,575.61 on the total combined parental income, the parties had agreed that the defendant's monthly child support obligation would be \$1,500. The stipulation also provided that there would be no "add-ons" or "additional health costs" added to these child support payments, even though the CSSA generally provides that each parent's share of unreimbursed health **[***3]** care expenses is to be prorated in the same proportion as each parent's income is to the combined parental income (see [Domestic Relations Law § 240 \[1-b\] \[c\] \[5\] \[v\]](#); [Castello v Castello, 144 AD3d 723, 727, 41 NYS3d 250 \[2016\]](#)). The stipulation contained an **[****2]** explanation that the deviation from the CSSA calculation was necessary "to allow the [defendant] to retain the marital residence as a place for the children to be with him when they are together" and had "been agreed by the parties to be in the best interests of the children to provide them continuity and stability in their living and educational environments."

In December 2013, after the prior action had been discontinued, the plaintiff commenced this action for a divorce and ancillary relief, requesting that the terms of

the stipulation of settlement be incorporated into the judgment of divorce. In June 2014, the plaintiff moved, inter alia, for an upward modification of the defendant's child support obligation, including an add-on for unreimbursed health care expenses. The plaintiff presented evidence that the defendant had recently sold the marital residence and was moving to another residence in a **[*1423]** different school district. The plaintiff also presented evidence that one of the children had begun incurring significant unreimbursed **[***4]** health care expenses after being hospitalized for mental illness.

In an order dated March 3, 2016, the Supreme Court, inter alia, denied that branch of the plaintiff's motion which was for an upward modification of the defendant's child support obligation. A judgment of divorce entered June 23, 2017, among other things, incorporated but did not merge the stipulation of settlement, and awarded the plaintiff child support in the sum of \$1,500 per month. The plaintiff appeals from these portions of the order and the judgment of divorce.

The appeal from the order should be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment of divorce (see [Matter of Aho, 39 NY2d 241, 248, 347 NE2d 647, 383 NYS2d 285 \[1976\]](#)). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment of divorce (see [CPLR 5501 \[a\] \[1\]](#)).

The Supreme Court should have granted that branch of the plaintiff's motion which was for an upward modification of the defendant's child support obligation. The stipulation indicated that the parties' reason for deviating from the CSSA calculation was to allow the defendant to retain the marital residence as a place for the children to be with him when they were **[***5]** together. Under these circumstances, the defendant's actions in selling and moving away from the marital residence constituted a substantial change in circumstances (see [Domestic Relations Law § 236 \[B\] \[9\] \[b\] \[2\] \[i\]](#); [Matter of O'Connor-Gang v Munoz, 143 AD3d 825, 827, 39 NYS3d 67 \[2016\]](#)).

Accordingly, we reverse the judgment of divorce insofar as appealed from, vacate so much of the order as denied that branch of the plaintiff's motion which was for an upward modification of the defendant's child support obligation, and remit the matter to the Supreme Court, Suffolk County, for a new determination of that branch of the plaintiff's motion after applying the CSSA

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calculation and thereafter **[**227]** the entry of an appropriate amended judgment. Rivera, J.P., Chambers, Austin and Barros, JJ., concur.

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