State of New Hampshire
Supreme Court

NO. 2009-0520

2010 TERM

MARCH SESSION

In the Matter of Roberta L. (Pierce) Scott

and

James B. Pierce

RULE 7 APPEAL OF FINAL DECISION OF
HILLSBOROUGH COUNTY (NORTH) SUPERIOR COURT

RESPONSE TO REPLY BRIEF

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I. USO Language and Narrative Language are Consistent

In her reply brief, Ms. Scott claims that the narrative portion of the court's 2003 order trumps the standing order attached to it because "there is an ambiguity between the USO and the [n]arrative [o]rder" and because the narrative is more "specific." REPLY BRF. at 1. These claims are unsupported by the record.

First, there is no ambiguity. The passage in the narrative order which Ms. Scott quotes[1] does not address when child support ends or when emancipation takes place. But the standing order clearly does.[2] Even if there were an ambiguity, accepted rules of construction require that the more specific controls over the more general. *See e.g., Parkhurst v. Gibson*, 133 N.H. 57 (1990) (In contract interpretation, "[w]here there is a repugnancy between general clauses and specific ones, the latter will govern"); *In re Laurie B.*, 125 N.H. 784 (1984) ("In construing conflicting statutes, a specific statute controls the construction of a general statute.").

Second, the narrative portion and the standing order are consistent. At the time of the 2003 order, the elder child was 20 and the younger was 17. The standing order provides that child support ends when "the youngest child" finishes high school or turns 18. Accordingly the narrative provided that child support would continue for both.

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[1]"In light of the parties' April 4, 1997 Agreement to continue child support for two children, the Court will order child support for two at the rate of $187, minus the $40 visitation/college escrow fund. The Court notes that Roberta L. Scott will be receiving an extra $45 a week than she would have for one child." REPLY BRF. at 2, *quoting* ORDER ON PENDING MATTERS, *Ms.Scott's Appx*. at 38-39.

[2]The Standing Order specifies that "Child support shall terminate when the youngest child terminates his/her high school education or reaches the age of 18 years, whichever is later; gets married; or becomes a member of the armed forces." STANDING ORDER ¶ SO-4A, *Mr.Pierce's Brf.* at 38.

II. 1997 Bargain Was Abandoned in 2003 at the Request of Ms. Scott

Ms. Scott also points to the quoted portion of the narrative and suggests that "in light of the parties' … agreement" means that the parties' original agreement somehow controls. The suggestion cannot be sustained.

First, the quoted portion of the narrative does not reference the emancipation section of the 1997 agreement. Setting the *amount* of child support at the rate for two children does not override the *date* child support would end.

Second, no argument was made below that the agreement mandated an emancipation age that could not be changed by the Massachusetts court. As noted in Mr. Pierce's opposing brief, not only can courts modify agreements concerning the welfare of children, but the agreement was specifically merged by the Massachusetts and New Hampshire orders.

Third, the 1997 agreement contained bargained-for provisions benefitting both parties – a reduced amount of support traded for a later emancipation age. These provisions were abandoned, however, in the 2003 order which provided for higher support coupled with sooner emancipation. Resurrecting just the higher-age emancipation portion of the 1997 agreement, as Ms. Scott suggests, would give her both more than she bargained for in 1997 and more than the court ordered in 2003.

Fourth, when Ms. Scott requested in 2003 that child support be increased in accord with the support guidelines, PETITION FOR CHILD SUPPORT, COLLEGE PAYMENTS AND EXPENSES, ARREARAGE FOR NON-PAYMENT OF EXPENSES, CONTEMPT AND OTHER RELIEF ¶ 2e. (Aug. 6, 2002), *Ms.Scott's Appx*. at 27, 31, rather than in accord with the parties' 1997 agreement, *she* caused the abandonment of the 1997 bargain. The 2003 court understood the 1997 bargain, and that it was being abandoned. It thus equitably ordered support within the guidelines and emancipation within the statute.

III. "See Order" Refers to Split Payment Arrangement

In her reply brief Ms. Scott alleges that in paragraph 6 of the USO the court wrote the words "see order," and that this phrase operates to alert the reader that the narrative trumps the USO on the issue of emancipation dates. REPLY BRF. at 2. While it is conceivable that the phrase differently placed could operate as such, that is far from the circumstance here.

Paragraph 6 of the USO states, "This order complies with the child support guidelines. RSA 458-C. - see order." UNIFORM SUPPORT ORDER ¶6, *Mr.Pierce's Brf*. at 30 (underlining indicates words handwritten by court).

Whatever the court was indicating by writing in the phrase "see order," it obviously had to do with compliance with the child support guidelines, and nothing to do with emancipation dates, which are not addressed by the guidelines. Moreover, given that Mr. Pierce's $187 child support was divided into two parts – $147 weekly payments and $40 deposits into the escrow travel account – and that this is a deviation from the guidelines, it is obvious that the split-payment arrangement is what the "see order" phrase referred to.

The issue, insofar as one exists, was not preserved below.

IV. USO and Standing Order Properly Affixed

In her reply brief Ms. Scott alleges that the USO and Standing Order somehow do not count because they may have been "affixed as a routine practice" and they were not the most current versions then available. REPLY BRF. at 2.

How they were affixed is not relevant. A USO and its accompanying Standing Order are required to be made a part of all child support orders, and it is not credible that the marital master and presiding justice did not know this. SUPER.CT.R. 202-C & 202-D; FAM.DIV.R. 2.17 ("The family division Uniform Support Order, Uniform Support Order-Standing Order, and Instructions for Completion of the Uniform Support Order shall be used in all cases involving dependent children in which child support may be ordered.").

That the court affixed the 1996 Standing Order rather than the 2001 version (which is believed to be the most current as of 2003) is also not relevant. The operative language is identical.[3]

If there were some error that could be alleged, it is both harmless and unpreserved.

[3]The language of the 2001 Standing Order, attached to this brief, is identical. "Child support shall terminate *when the youngest child* terminates his/her high school education or reaches the age of 18 years, whichever is later; gets married; or becomes a member of the armed forces." USO-SO-FEB 2001, ¶ SO-4A (emphasis added), *Appx.to Response* at 9. The language changed beginning with the 2005 form, which reads "An obligation for child support terminates *when a child* terminates his/her high school education or reaches the age of 18 years, whichever is later, or gets married, or becomes a member of the armed services." ADMINISTRATIVE ORDER 2005-02, ¶ SO-4A (emphasis added).

V. Too Late to Attack the 2003 Change in Duration

In her reply brief Ms. Scott repeatedly suggests that because Mr. Pierce did not in 2003 request a change of child support duration, the change in duration made by the court is somehow less binding.

There is no known bar to the court in 2003 changing child support termination dates, whether by request or unbidden, especially given that at the time termination was determined by the age of the *youngest* child.[4] 461-A:14, IV ("The amount of a child support obligation shall remain as stated in the order until all dependent children for whom support is ordered shall terminate their high school education or reach the age of 18 years, whichever is later …, at which time the child support obligation, including all educational support obligations, terminates without further legal action."). In 2003, the youngest child was still in high school and not yet 18, thus causing the continuance of child support at that time.

To the extent there was error in 2003, however, Ms. Scott long ago waived the opportunity to address it. At this point, the 2003 order is unassailable, and Ms. Scott's efforts to undermine it now are anachronistic and unsupported by any known procedure.

Moreover, it is Ms. Scott whose acts between 2003 and 2008 were inconsistent with the position she now advances. Although Mr. Pierce tried to stop the Massachusetts withdrawals from his bank accounts, Ms. Scott made no attempt to pursue alleged arrearages or college contributions until after Mr. Pierce filed his petition for termination in 2008.

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[4] *Compare* 2001 STANDING ORDER ("Child support shall terminate *when the youngest child* terminates his/her high school education or reaches the age of 18 years, whichever is later.") *with* e.g., 2005 STANDING ORDER ("An obligation for child support terminates *when a child* terminates his/her high school education or reaches the age of 18 years, whichever is later.").

VI. Minnesota Citation Does Not Apply Here

Finally, in her reply brief Ms. Scott cites a Minnesota intermediate-appeals court for the unremarkable proposition that "the duration of a child-support obligation may not be modified if the law of the issuing state would not permit it to be modified." *Hennepin County v. Hill*, 777 N.W.2d 252, 256 (Minn.App. 2010).

Hennepin County involves a claim that Minnesota could end child support at age 20 because its law allowed that, even though Mississippi, the issuing state, mandated that emancipation not occur until age 21. But the case does not apply here for the same reasons as the cases Ms. Scott cited in her opening brief.

First, it does not contain the procedural wrinkle present here: the responding state long ago becoming the new issuing state, which Ms. Scott did not appeal in 2003.

Second, the parties in *Hennepin County* agreed that Mississippi law mandated that emancipation could not occur until age 21. As noted in Mr. Pierce's opposing brief, Massachusetts law does not *mandate* anything. Rather, it provides that the court "*may* make appropriate orders of maintenance, support and education of any child" between ages 18 and 21 who is dependent upon the obligee, and "*may* make appropriate orders of maintenance, support and education for any child" between ages 21 and 23 if the child is in college. MASS.GEN.LAWS ch. 28, § 208 (emphasis added). The Massachusetts statute gives a court *permission* to order support beyond age 18, but does not *mandate* it. Support and educational expenses are thus not among the aspects of the child support order that cannot be modified under Massachusetts law. And because they are modifiable in Massachusetts, they are also modifiable in New Hampshire.

For these reasons *Hennepin County* sheds no light on Ms. Scott's and Mr. Pierce's situation.

CONCLUSION

For the foregoing reasons, and for the reasons noted in Mr. Pierce's Opposing Brief, this Court should affirm the judgment of the court below.

Respectfully submitted,

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By his Attorney,

Law Office of Joshua L. Gordon

Dated: March 22, 2010

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for James Pierce requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issues raised in this case are novel in this jurisdiction.

I hereby certify that on March 22, 2010, copies of the foregoing will be forwarded to Andrea Q. Labonte, Esq.

Dated: March 22, 2010

Joshua L. Gordon, Esq.

APPENDIX