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Must I Still Pay Child Support?

Developing Case Law on Visitation, Emancipation and Child Support. Part One of a Two-Part Article

By Jerome A. Wisselman and Randall Malone

Prior to enactment of the Child Support Standards Act (CSSA) in 1989, court holdings often referred to "reciprocal" duties of visitation and child support. Today, generally, it is the public policy of New York State to strictly separate visitation from child support issues. New York's family courts accordingly assign different categories of hearing officers to address these issues separately: A judge or referee will handle issues like custody, family offenses and neglect, while a "Support Magistrate" handles support issues.

There are good reasons for this policy. Issues behind why a noncustodial parent and child are not seeing each other can be complicated, often with deep histories and interlacing areas of fault or failure on everyone's part. Family Court judges have the power to direct parties to special resources — such as expert psychologists and therapeutic visitation programs — to address these problems, sometimes over long periods of time.

On the other hand, particularly since enactment of the CSSA, the state has treated child support as an absolute obligation of each parent, enforced pursuant to statutory mandate. The custodial parent's direct payments of housing and other expenses are generally proportionate to that parent's resources (given the tendency to live at the highest standard of living that income allows), while the noncustodial parent's payments are expressly calculated to be proportionate to his or her income. Thus, the child shares in the standard of living of both parents.

However, visitation and child support issues can become intertwined in extreme cases of visitation denial. Where parental access is unjustifiably frustrated, a noncustodial parent may petition the Family Court (or the NY Supreme Court if the parties are, or were, in a divorce proceeding) to suspend child support. This can be done on one of two bases, both of which have developed over the years solely from case law.

Visitation Issues

Parents often find themselves in conflict over visitation, whether because of scheduling problems, parental animosity during hand-offs or myriad other causes. When do visitation problems rise to a level justifying suspension of child support?

New York courts will suspend child support where a noncustodial parent can show that his or her reasonable access to the child has been unjustifiably frustrated by the custodial parent. *Thompson v. Thompson*, 78 AD3d 845 (2nd Dept. 2010); *Boccalino v. Boccalino*, 59 AD3d 901 (3rd Dept., 2009); *Crouse v. Crouse*, 53 AD3d 750 (3rd Dept., 2008). However, the court will suspend child support only where the custodial parent's actions rise to the level of "deliberate frustration" or "active interference" with the noncustodial parent's visitation rights. *Thompson, supra*, 78 AD3d at 846.

A prerequisite to any such finding may be that there is a court order establishing visitation. *See Maya B. v. Omar Anthony*, 27 Misc.3d 1227(A) (Family Ct., Queens Cty., 2010); *Y.G. v. A.T.*, 25 Misc.3d 1223(A) (Sup. Ct., Kings Cty., 2009). (However, dicta in both cases may suggest that unjustified frustration of an established parental relationship, by itself, might be held sufficient for suspension of child support.) On the other hand, it is clear that a noncustodial parent consenting to an order suspending all visitation rights "cannot claim an interference with any such rights as a basis to reduce or stay his child support obligations." *See, e.g., Beal v. Beal*, 244 AD2d 550 (2nd Dept., 1997); *Labanowski v. Labanowski*, 49 AD3d 1051 (3rd Dept., 2008).

Routine visitation disputes are not sufficient for suspension of child support. *See, e.g., Boccalino v. Boccalino*, 59 AD3d 901 (3rd Dept., 2009) ("While the mother could have done more to assure meaningful contact between the child and the father, the record as a whole does not support the conclusion that she 'intentionally orchestrated and encouraged the estrangement of the [father] from the child.'"); *see also Crouse, supra* ("With respect to the mother, although she made very little effort to fulfill her duty to 'assure meaningful contact between the children and the [father]'... Under all of these

circumstances, we find that the children's alienation from the father resulted from a general breakdown in communication and lack of effort by all concerned.").

Unjustifiable frustration of visitation rights can include cases where the child has been "alienated" from the noncustodial parent to the point that the child refuses a relationship with him or her. Remedies for such problems might normally include attempts to restore the relationship (through therapeutic visitation, etc.), or even to hold the custodial parent in contempt or direct a change of custody. However, such remedies are not always possible. Thus, in *Thompson, supra*, the lower court found that the subject child "was so closely allied with his mother and her negative view of the father that it appears that the hoped-for reconnection between [the child] and his father was unlikely at that time." The Second Department confirmed that the mother, "by her example, her actions, and her inaction" "deliberately frustrated visitation by manipulating the child's loyalty and orchestrating and encouraging the estrangement of father and son." *Thompson, supra*, 78 AD2d 846-847.

Is There a Good Reason?

A necessary element for suspension of child support is that the frustration of parental access occurs "unjustifiably." If the court finds the custodial parent's visitation noncompliance to be justified, in whole or even in part, by the noncustodial parent's actions, the court may not relieve the noncustodial parent from child support. *See, e.g., Hecht v. Hecht*, 222 AD2d 589 ("[T]he mother did not comply with certain visitation requirements due to her financial situation, which was made worse by the father's failure to pay over \$5,000.00 in past child support payments").

Moreover, a court will not grant relief if the noncustodial parent has not made real and ongoing attempts to repair and reestablish the relationship, to the extent possible. *Crouse, supra*, 53 AD3d 750 (3rd Dept., 2008) ("By his own admission, [the father] made no effort to resume visitation with his children after the therapeutic visitation terminated Although he regularly sent the children birthday and Christmas cards containing checks, he did not otherwise attempt to contact them, either directly or through the mother, nor did he initiate any court proceedings seeking to enforce his visitation rights.").

While a custodial parent's relocation of the children to a distant state, without permission, may constitute unjustified frustration of visitation (*see, e.g., Miosky v. Miosky*, 33 AD3d 1163 at 1167 (3rd Dept., 2006)), a noncustodial parent who does not bring timely court action in response may be barred from requesting suspension of child support based on the relocation. *See Crouse, supra*. However, where the noncustodial parent acts to enforce rights of visitation but remains frustrated by the custodial parent in exercising those rights, relief may be granted.

In next month's newsletter we will look at more issues that must be considered when a parent feels child support is no longer warranted because a custodial parent has interfered with visitation efforts, or a child has emancipated him- or herself.

Jerome A. Wisselman, a member of this newsletter's Board of Editors, is a partner in the Great Neck firm of Wisselman, Harounian & Associates, P.C. **Randall Malone** is an associate with the firm.