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Emancipation, Frustration of Visitation and Child Support

Part Two of a Two-Part Article

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Last month, we covered the basics of when courts may consider relieving a parent of the duty to pay child support because a custodial parent has continually interfered with court-ordered visitation. But there are a few more things that parents and their legal counsel should consider when seeking this type of relief.

Interference with Visitation

Some parents, frustrated by being cut off from their children, may discontinue paying support even absent a court order. When the custodial parent applies to the court for help collecting, the noncustodial parent may be surprised to find that back child support is owed even though the court finds unjustified frustration of visitation rights. However, like other modifications, suspension of child support for unjustified frustration of visitation is prospective from the time of application. *Katz v. Katz*, 55 AD3d 680, 867 N.Y.S.2d 100 (2nd Dept. 2008); *Rivera v. Echavarria*, 48 AD3d 578 (2nd Dept., 2008); *Ledgin v. Ledgin*, 36 AD3d 699 (2nd Dept., 2007).

The motion papers must be specific as to the conduct complained of, because while a hearing is required to find unjustified frustration of visitation, a hearing will not be granted unless the noncustodial parent's moving papers demonstrate "active interference" or "deliberate frustration." *Ledgin, supra*; *Mazzola v. Lee*, 76 AD3d 531 (2nd Dept., 2010).

Another thing to keep in mind when considering an application to discontinue child support because of interference with visitation is the financial position of the custodial parent. Courts are mindful that support should not be suspended on the basis of unjustified frustration of visitation where doing so would result in the children becoming public charges. *Usack v. Usack*, 17 AD2d 736 (3rd Dept., 2005); *Labanowski, supra*, 49 AD3d at 1054.

It should also be noted that, while this "unjustified frustration" basis for termination of child support has developed from case law, DRL § 241 provides a statutory basis for a similar suspension of maintenance (and even for cancellation of maintenance arrears) for periods in which a custodial parent has "wrongfully interfered with or withheld visitation rights" which were granted pursuant to the judgment or order that also granted the maintenance.

Emancipation

The second basis for suspending child support is, again, a development that came about through case law. "Emancipation" generally means that a child is no longer under parental control, and in the context of support, usually means that a child is age 21 or (rarely) economically independent. However, "constructive emancipation" from a custodial parent will be found where the child has effectively "emancipated" him- or herself by abandoning his or her home and withdrawing from parental control (living with friends, etc.). *Roe v. Doe*, 29 NY2d 188 (1971).

Constructive Emancipation

New York courts have expanded the concept of "constructive emancipation" to also include "emancipation" from the noncustodial parent, holding that this occurs where a child of employable age, without cause, actively abandons the noncustodial parent by refusing all contact and visitation; in other words, the child will have nothing to do with that parent. See, e.g., *Boccalino v. Boccalino*, 59 AD3d 901 (3rd Dept., 2009); *Garcia v. Barie*, 875 NYS2d 655 (4th Dept., 2009); *Gold v. Fisher*, 59 AD3d 443 (2nd Dept., 2009); *Juneau v. Morzillo*, 56 AD3d 1082 (3rd Dept., 2008). Noncustodial parents in these cases have the burden of showing that they are unable to establish a relationship with their children, and that the children are at fault, not the custodial parents. Such "constructive emancipation" is also referred to as "abandonment" of the noncustodial parent by the child, by which abandonment the child has "forfeited" his right to support.

There is no absolute age that constitutes an "employable age" for purposes of constructive emancipation. A number of cases have entertained constructive emancipation petitions for 18-year-olds, as well as for children who were 17 years old at the time of the petition. *See, e.g., Chestara v. Chestara*, 47 AD3d 1046 (3rd Dept., 2008). However, a child who was 16 years old at the time of the order (on the noncustodial parent's petition) has been held to be not of "employable age." *Dobies v. Brefka*, 83 AD3d 1148 (3rd Dept., 2011); *see also, Foster v. Daigle*, 25 AD2d 1002 (3rd Dept., 2006) (child, 16 years of age at time of noncustodial parent's application, held not "of employable age").

In line with the requirement in frustration of visitation cases that the frustration be "unjustified," the "without cause" element is essential for constructive emancipation cases; the court will not grant relief where it finds that the child has good cause to avoid the noncustodial parent. Moreover, the noncustodial parent actually has a burden of establishing lack of good cause for the child's refusal to maintain contact. *See Labanowski, supra*, 49 AD3d at 1053.

Accordingly, the court will not grant relief where the noncustodial parent has caused the breakdown in communications with the child or has not made real and ongoing attempts to reestablish the relationship. *See, e.g., Farina v. Farina*, 82 AD3d 1516 (3rd Dept., 2011) (noncustodial mother caused or contributed to breakdown in communication with oldest child, where she "adopted a no-contact position with respect to defendant due to his [the defendant father's] alleged prior harassment."); *Boccalino v. Boccalino, supra* ("Nor can the father's sporadic telephone calls and the handful of letters he wrote to the child between 2000 and 2007 be construed as serious attempts to establish contact with his daughter. ... Moreover, he failed to initiate a court proceeding to enforce his visitation rights"); *Juneau, supra* (Where the noncustodial parent and child present different reasons for their estrangement, "the burden of proof as to emancipation is on the party asserting it."); *see also, Gold v. Fisher, supra*.

Both "unjustified frustration" and "constructive emancipation" carry a heavy burden of proof. In addition, decisions on the relevant issues in these cases inherently involve substantial fact finder subjectivity and discretion.

Active Abandonment

It has been held that "active abandonment" does not exist where the noncustodial parent had agreed to visitation based solely on the desires of a child, and where there had not been planned visits but there had been occasional unplanned contacts. *Naylor v. Galster*, 48 AD3d 951, (3rd Dept., 2008). This outcome is similar to the difficulties that noncustodial parents have in establishing "unjustified frustration" of visitation where the noncustodial parent had previously agreed to suspend visitation.

As with the unjustified frustration of visitation cases, a finding of constructive emancipation requires a hearing. *Labanowski, supra*, 49 AD3d at 1054. However, to be entitled to hearing, the noncustodial parent must establish a *prima facie* case for relief, by submitting a petition supported by affidavit and other evidentiary material establishing that the child has abandoned the noncustodial parent. *Garcia, supra* ("petitioner established a *prima facie* case for the relief requested with respect to child support by submitting evidentiary material establishing that his daughter had abandoned him. His submissions in support of the petition established that his repeated attempts at communication with his daughter had been refused and that she had expressed a clear wish 'to have nothing to do with [him]'").

Particularly in cases of alienation, "constructive emancipation" or "abandonment" (by the child) is commonly raised as an alternative to "unjustified frustration" of visitation (by the custodial parent), as a basis for suspension of child support. Technically, however, a claim for "deliberate frustration" of visits by the child should end when the child turns 18 (after which court-ordered visitation would no longer apply), while "constructive emancipation" would apply to an older teenager who is of potentially employable age.

Suspended Support

Under either basis — "unjustified frustration" or "constructive emancipation" — support may be suspended, not terminated. So, child support that has been suspended for unjustified frustration of access rights may be restored if rights of visitation are restored. *Thompson, supra*, 78 AD3d at 846. *See Usack, supra*, 17 AD3d at 740. In this light, while one court has held that "frustration of visitation" or "parental alienation" could be invoked as an affirmative defense to even establishing a child support order (F.S.P. v. A.H.R., 17 Misc.3d 390 (Family Ct., Nassau Cty., 2007)), a support order presumably could be effected once visitation was restored.

Consistent with this non-final nature of child support suspension, in one recent Second Department case, the court technically suspended only 50% of the father's support obligation, and directed that the other 50% be paid into escrow, "until the mother can certify, to the satisfaction of the Supreme Court, her compliance with the visitation ... order ... and the absence of her interference with the father's visitation rights." *Lew v. Sobel*, 46 AD2d 893 (2nd Dept., 2007). In explaining its use of support suspension as a remedy for visitation interference, the Second Department observed that, "While one parent's alienation of a child from the other parent is an act inconsistent with the best interests of the child ... here, the children's bond to the alienating parent is so strong that a change of custody would be harmful."

Conclusion

The Second Department's holding in *Lew* appears to reflect a general public policy, especially for unjustified frustration cases, of using child support suspension as a last-resort measure for motivating visitation compliance from an alienating custodial parent. In unjustified frustration cases, the issue of penalty is de-emphasized, as child support is the right of the children, not the offending custodial parent. However, in constructive emancipation cases, courts' holdings often reflect a second purpose for child support suspension; that of providing some measure of justice for the noncustodial parent who finds him- or herself in the role of "parent" for the sole purpose of paying child support. Thus, at least in constructive emancipation cases, the principle of "reciprocal" duties of visitation and support may have made a limited reappearance.

In any event, whether the claim is against a custodial parent for unjustified frustration of visitation, or against a teenage child for constructive emancipation by abandonment of the custodial parent, any application for child support suspension on the basis of visitation denial requires careful analysis and diligent preparation, in light of the burdens under existing case law.

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