IN THE SUPREME COURT OF GUAM

DORIS LEON GUERRERO,
Plaintiff-Appellee,

v.

DOUGLAS B. MOYLAN,
Defendant-Appellant.

Supreme Court Case No. CVA02-001
Superior Court Case No. DM0457-97

OPINION

Filed: September 10, 2002

Cite as: 2002 Guam 17

Appeal from the Superior Court of Guam
Argued and submitted on June 17, 2002
Hagåtña, Guam

Appearing for Defendant-Appellant:
Curtis C. Van de Veld, Esq.
The Van de Veld Law Offices, P.C.
Union Bank Bldg., Suite 215
194 Hernan Cortes Ave.
Hagåtña, Guam 96910

Appearing for Plaintiff-Appellee:
NO APPEARANCE

BEFORE: PETER C. SIGUENZA, JR., Chief Justice, JOHN A. MANGLONA, Designated Justice, and RICHARD H. BENSON, Justice *Pro Tempore*.

SIGUENZA, C.J.:

[1] Defendant-Appellant Douglas B. Moylan (hereinafter "Moylan") appeals from an order increasing the amount of his child support payments made to Plaintiff-Appellee Doris Leon Guerrero (hereinafter "Leon Guerrero"). This modification was made while the original child support order was the subject of a pending appeal filed by Moylan. We find that the lower court lacked jurisdiction to modify the child support award while the award was the subject of a pending appeal, and therefore vacate its December 6, 2001 Decision and Order.

I.

[2] Moylan and Leon Guerrero divorced on July 2, 1997. The parties agreed to share joint legal and physical custody of their two minor children but left the matter of child support unresolved. On March 6, 2001, the lower court set a temporary support order of $523.32, to be paid by Moylan to Leon Guerrero. Moylan moved to amend the order, and the trial court denied his motion. Moylan then appealed the child support order in Supreme Court Case No. CVA01-020. Subsequent to Moylan's appeal, on December 6, 2001, the court *sua sponte* amended the March 6th order after finding that it erred in its calculation of child support. The lower court's apparent error related to the reduction of payments to account of the parties' joint custody arrangement.

[3] Moylan now appeals from the trial court's amendment on two grounds: (1) that the trial court lacked jurisdiction to modify the child support order while the order was on appeal; and (2) that the trial court erred in finding that the March 6th order was inequitable and insufficient to support the children's necessary expenses.

II.

[4] "An order for child support is a final judgment as to any installment or payment of money which has accrued up to the time either party makes a motion to set aside, alter or modify the order." Title 5 GCA § 34121 (1996). This court has jurisdiction to review all final judgments of the Superior Court, Title 7 GCA § 3107(a) (1994), and therefore has jurisdiction over the instant appeal.

III.

[5] The first issue before this court is whether the trial court retains jurisdiction to modify a child support order when that order is the subject of a pending appeal. The general rule is that a trial court is divested of jurisdiction once a timely notice of appeal is filed. *Dumaliang v. Silan*, 2000 Guam 24, ¶ 14. However, this is not an absolute rule. *Id.* Title 5 GCA § 34121 vests in the trial court continuing jurisdiction to execute and enforce any order for support even pending an appeal. *See* Title 5 GCA § 34121 (1996) ("any order directing payment of money for support or maintenance of the spouse or the minor child or children shall not be suspended nor the execution of the order stayed pending an appeal."). Thus, the Supreme Court's jurisdiction over a child support order on appeal is not exclusive. The question remains, however, whether the Superior Court's authority extends from merely enforcing an order to actually modifying it while the order is on appeal.

[6] The same statute which gives the Superior Court authority to enforce support orders pending an appeal also confers upon the Superior Court authority to modify those orders. Section 34121 states, "The Superior Court of Guam shall have authority to modify any order, award, stipulation, or agreement as to child support . . . upon a showing of substantial and material change of circumstances." *Id.* Construed broadly, this sentence may be read to permit the Superior Court to modify a child support order even when that order is on appeal. However, unlike the section of the statute which allows for enforcement of an order

pending appeal, the modification section contains no "pending appeal" language. The absence of such express language may speak to an intent by the legislature that the Superior Court retain jurisdiction to enforce a child support despite the filing of an appeal, but not jurisdiction to modify that same order.

[7] This view would be consistent with the approach adopted by most states when confronted with this same issue. In *Decker v. Decker*, 440 S.E.2d 411 (Va. Ct. App. 1994), the Virginia Court of Appeals held that a trial court does not have jurisdiction to modify a support award on appeal unless the party seeking the modification first obtains leave from the appellate court. *Decker*, 440 S.E.2d at 411. The *Decker* court recognized that while a trial court retains authority to enforce a support order, it does not possess the authority to modify such an order. *Id.* at 412. Thus, is it not inconsistent for this court to read our local statute, section 34121, as simultaneously conferring authority on the Superior Court to enforce a child support order on appeal, but no authority to modify it. In support of its position, the *Decker* court quoted its Supreme Court as stating, "The orderly administration of justice demands that when an appellate court acquires jurisdiction over the parties involved in a litigation and the subject matter of their controversy, the jurisdiction of the trial court from which the appeal was taken must cease." *Id.* (*quoting Greene v. Green*, 228 S.E.2d 447, 448 (Va. 1982)).

[8] The Florida Court of Appeals held similarly. In *Campbell v. Campbell*, 436 So. 2d 374 (Fla. Ct. App. 1983), a former husband filed a motion to modify an alimony and child support order after filing an appeal. The trial court modified the order, finding that it was not making a ruling as to the "reasonableness, excessiveness or insufficiency of child support and alimony as previously awarded, which issues were on appeal . . .," but was simply ruling on the modification on the basis of a substantial change of circumstances. *Campbell*, 436 So. 2d at 375. The appellate court reversed the modification, finding that the "trial court has no jurisdiction to modify the very order appealed from, during the pendency of the appeal." *Id.* at 377. Echoing the sentiments of the Virginia courts, this Florida court stated:

> There is a serious question as to the authority of the trial court to enter a temporary order affecting the merits of a cause involved in the main appeal or which would have the effect of rendering the main appeal moot. Unquestionably the trial court has the power to grant temporary relief *pending appeal* and possesses the inherent power and authority to take such action as justice and equity requires. It would appear, however, that when the jurisdiction of the appellate court attaches it is exclusive as to the subject covered by the appeal; so that modification of an order under appeal would be beyond the jurisdiction of the trial court from the very innate nature of the appellate jurisdiction and from the very practical viewpoint that there is no order to be modified until the appellate court determines what the order actually is.

Id. at 376 (internal citations omitted) (*quoting Kalmutz v. Kalmutz*, 299 So. 2d 30, 32 (Fla. Ct. App. 1974)).

[9] The Florida Rules of Appellate Procedure expressly provides jurisdiction to the lower court to enforce orders *pending appeal*. FLA. R. APP. P. 9.600(c). This language is identical to Title 5 GCA § 34121. The *Campbell* court used this language to emphasize that a trial court's jurisdiction over a child support order pending appeal is *limited* to those circumstances listed in the rule. *Id.* at 376. Guam's statute can be read similarly. Because section 34121 speaks directly to a trial court's jurisdiction over orders of child support pending appeal, then the legislature intended that such jurisdiction be *limited* to those delineated instances.[1]

[10] Other states which have found that a lower court is without jurisdiction to modify a support order once that order has been appealed include Oregon and Arizona. *See Grosse v. Grosse*, 734 P.2d 900, 902 (Or. Ct. App. 1987) (finding that the lower court lacked jurisdiction to hold a hearing to modify a child support order when the order was already on appeal); *see also Burkhardt v. Burkhardt*, 510 P.2d 735, 737 (Ariz. 1973) (finding that the trial court had no jurisdiction to consider modification in alimony when the matter was being appealed).

[1] Florida's rule does differ in that it does not simultaneously confer to the lower court jurisdiction to modify a child support order; this jurisdiction is granted in a separate statute.

[11] In contrast to the above states, California and New Jersey have both permitted their lower courts to modify support orders despite the fact that those orders were the subject of a pending appeal. In *Horowitz v. Horowitz*, 205 Cal. Rptr. 880, 159 Cal. App. 3d 377 (Ct. App. 1984), a lower court entered an order terminating spousal support based on a change of circumstances. The wife challenged the modification, contending that the court lacked jurisdiction to modify a judgment that was on appeal. The appellate court upheld the modification, finding that "the trial court in a dissolution proceeding retains jurisdiction to modify the amount of spousal support, upon a showing of changed circumstances, pending an appeal from an order for spousal support in the dissolution judgment." *Horowitz*, 205 Cal. Rptr. at 882, 159 Cal. App. 3d at 379.

[12] California's Code of Civil Procedure permits parties to post a bond and thereby stay an order of spousal support. *Id.* at 883-84, 159 Cal. App. 3d at 382. The appellate court reasoned that because the parties could have achieved the same result, i.e. termination of spousal support, through the posting of a bond, then the modification of the order was not a matter which affected the appeal. *Id.* at 883-84, 159 Cal. App. 3d at 381-83. Thus, depriving the trial court of its jurisdiction to modify the support order would not protect the appellate court's jurisdiction. *Id.* at 382-83, 159 Cal. App. 3d at 884. "Temporary support proceedings pending appeal would have been needlessly expensive both in terms of the cost to the litigants of legal services and of judicial economy." *Id.* at 384, 159 Cal. App. 3d at 885. Unlike California, the Guam statute expressly prohibits the suspension of a support order pending appeal. 5 GCA § 34121 ("any order directing payment of money for support . . . *shall not* be suspended nor execution of the order stayed pending an appeal.") (emphasis added). Thus, we find any reliance on California cases with respect to this issue unpersuasive.

//

//

[13] New Jersey also permitted a lower court to modify a support order that was on appeal. In *McNair v. McNair*, 753 A.2d 147 (N.J. Super. Ct. App. Div. 2000), a wife acknowledged she submitted an erroneous figure to the court resulting in a miscalculation of the child support amount. Despite the wife's acknowledgment of her mistake, the lower court refused to modify the order and correct the error, finding that it was without jurisdiction since the order had been appealed. *McNair*, 753 A.2d at 148-49. The appellate court disagreed, stating:

> Unquestionably, as a general rule, once an appeal is filed, the trial court loses jurisdiction to make substantive rulings in the matter. The rules of court nevertheless confer authority upon the trial court to continue to deal with the matter in limited ways. The trial court, for example, has continuing jurisdiction to enforce judgments and orders notwithstanding that they are being challenged on appeal. It makes sense that such a power must include the authority, whether or not in the context of an enforcement proceeding, to correct a conceded error in the order or judgment, even when the error originated in a party's miscalculation during the proof stage.

Id. at 149. The *McNair* court noted that granting the lower court such liberal jurisdiction could materially affect the merits of the appeal. On this point, it stated:

> It may be that correction of such an error will render an appeal moot in whole or in part. If that is so, a simple motion before us will suffice to dismiss the appeal or modify its scope. This is, on the whole, a more efficient and less time-consuming procedure than requiring the parties to move before us for a temporary remand, followed by their return to the trial court for the conceded correction, and then return to us for the mootness determination.

Id.

[14] Factually, *McNair* is similar to the instant matter in that the modification of the child support order arose from a mathematical miscalculation. However, there is one significant distinction between *McNair* and the instant appeal. The error here is not one which the other party is willing to concede. Moylan challenges the trial court's re-calculations, arguing that it misapplied the shared custody reduction. Thus, the exception created in *McNair* does not apply.

[15] Therefore, we agree with the majority of jurisdictions which have found that the orderly administration of justice demands that the lower court be divested of its jurisdiction to modifying a support order that is the subject of a pending appeal. This is not to say that there are no circumstances in which a child support order can be modified once an appeal is perfected; the lower court must simply obtain leave from the appellate court before making a modification. The lower court also retains jurisdiction to enforce the order.

[16] Our finding that the lower court's December 6, 2001 order is void precludes the need for any discussion with respect to Moylan's second point of appeal wherein he argues the merits of the lower court's apparent miscalculation.

IV.

[17] We find that the lower court lacked jurisdiction to issue its December 6, 2001 Decision and Order. While 5 GCA § 34121 gives the lower court the power to modify a support order, this power ceases once the order is appealed. Because the lower court's previous child support order was the subject of a pending appeal, the court was without jurisdiction to modify the order by its December 6th decision. Therefore, the lower court's Decision and Order of December 6, 2001 is **VACATED**.