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GUIDELINES FOR MODIFICATION OF CHILD SUPPORT AWARDS: SPINGOLA v. SPINGOLA¹

As the divorce rate soars, and along with it the number of children affected by divorce,¹ courts will increasingly be called upon to consider requests for modification of child support awards. The New Mexico Supreme Court, in *Spingola v. Spingola*,² recently addressed this issue and provided specific criteria for use by trial courts in determining whether child support modifications should be granted. This note will examine the criteria used by the court in holding that an increase in the supporting parent's income may justify an upward modification of child support. It will also discuss a subsequent New Mexico case, *Barela v. Barela*,³ in which one of the *Spingola* guidelines was applied to terminate the child support obligation of a father who was denied visitation rights by his former spouse.

BACKGROUND

It is well settled in New Mexico that courts have the power to modify child support orders incorporated in divorce decrees.⁴ This power is conferred by statute.⁵ Section 40-4-7 authorizes courts to

1. National Center for Health Statistics, Monthly Vital Statistics Report, Advance Report, Final Divorce Statistics, 1975, Vol. 26, No. 2, Supp. 2 (May 19, 1977). Final statistics for 1975 indicated that 1,036,000 divorces were granted in the United States in that year affecting 1,123,000 children under the age of 18.

2. 91 N.M. 737, 580 P.2d 958 (1978).

3. 91 N.M. 686, 579 P.2d 1253 (1978).

4. *Unser v. Unser*, 86 N.M. 648, 526 P.2d 790 (1974); *Fox v. Doak*, 78 N.M. 743, 438 P.2d 153 (1968); *Quintana v. Quintana*, 45 N.M. 429, 115 P.2d 1011 (1941).

5. N.M. Stat. Ann. § 40-4-7 (1978) states:

A. In any proceeding for the dissolution of marriage, division of property, disposition of children or alimony, the court may make and enforce by attachment or otherwise an order to restrain the use or disposition of the property of either party, or for the control of the children, or to provide for the support of either party during the pendency of the proceedings, as in its discretion may seem just and proper. The court may make an order, relative to the expenses of the proceeding, as will ensure either party an efficient preparation and presentation of his case.

B. On final hearing, the court:

(1) may allow either party such a reasonable portion of the spouse's separate property, or such a reasonable sum of money to be paid by either spouse, either in a single sum, or in installments, as alimony, as under the circumstances of the case may seem just and proper;

(2) may modify and change any order in respect to alimony allowed either spouse, whenever the circumstances render such change proper;

modify child support orders resulting from divorce and separation proceedings, and permits modification "whenever the circumstances render such change proper." A related statute⁶ requires that, in a proceeding to determine the liability of a parent for child support, the court "make a specific determination and finding of the amount of support to be paid . . . to provide properly for the care, maintenance and education of the minor children, considering the financial resources of the parent." Child support determinations are an area of the law in which courts are allowed broad discretion.⁷ A trial court will not be overruled absent a patent abuse or manifest error in the exercise of this discretion.⁸ The standard for modification of child support in New Mexico was articulated by the supreme court in *Unser v. Unser*, "[section 40-4-7] . . . requires a showing of changed circumstances. As to the degree and kind of change in circumstances required, the change must be substantial, materially affecting the existing welfare of the child. The change in circumstances must have

(3) may set apart out of the property of the respective parties, such portion thereof, for the maintenance and education of their minor children, as may seem just and proper; and

(4) may make such an order for the guardianship, care, custody, maintenance and education of the minor children, or with reference to the control of the property of the respective parties to the proceeding, or with reference to the control of the property decreed or fund created by the court for the maintenance and education of the minor children, as may seem just and proper.

C. The court may modify and change any order in respect to the guardianship, care, custody, maintenance or education of the children, whenever circumstances render such change proper. The district court shall have exclusive jurisdiction of all matters pertaining to the guardianship, care, custody, maintenance and education of the children, and with reference to the property decreed or funds created for their maintenance and education, so long as they, or any of them remain minors. If any of the property decreed or funds created for the maintenance and education of the children shall remain on hand and be undisposed of at the time the minor children reach the age of majority, the same may be disposed of by the court as it may deem just and proper.

6. N.M. Stat. Ann. § 40-4-11 (1978) states:

In any proceeding before a court in which the court has the duty or authority to determine liability of a parent for the support of minor children or the amount of that support, the court:

A. shall make a specific determination and finding of the amount of support to be paid by a parent to provide properly for the care, maintenance and education of the minor children, considering the financial resources of the parent; and

B. shall not consider present or future welfare financial assistance payments to or on behalf of the children in making its determination under subsection A.

7. *Schaab v. Schaab*, 87 N.M. 220, 531 P.2d 954 (1974); *Muckleroy v. Muckleroy*, 84 N.M. 14, 498 P.2d 1357 (1972).

8. *Schaab v. Schaab*, 87 N.M. 220, 222, 531 P.2d 954, 956 (1974).

occurred since the prior adjudication where child support was originally awarded."⁹ This standard is the same as the standard previously adopted in New Mexico for review of child custody modification proceedings.¹⁰

The broad language of the statutes and the *Unser* standard have left the New Mexico courts the task of determining which changes in circumstance will justify modification of child support orders. Prior to *Spingola*, it was impossible to compile an extensive list of changes warranting modification because of the relatively few cases reported on the subject. Factors which were held to be relevant to modification of child support were a decrease in the supporting parent's income,¹¹ a change in the custody of a child,¹² and a child's attainment of majority.¹³ It was also recognized that several countervailing changes in circumstance might offset one another, resulting in no modification at all.¹⁴

SPINGOLA v. SPINGOLA

The New Mexico Supreme Court re-examined New Mexico law on child support modification in *Spingola v. Spingola*.¹⁵ In that case Mrs. Spingola, the custodial parent, sought an increase in child support awarded for the couple's three minor children. When the Spingolas divorced, Dr. Spingola, the noncustodial parent, was ordered to pay child support of \$1,000 per month in accordance with a stipulated settlement agreement incorporated in the divorce decree.¹⁶ At the time of the divorce, Dr. Spingola earned an annual salary of \$42,000. His monthly child support payment approximated the amount called for by the Bernalillo County child support guidelines.¹⁷ Three years after the divorce Mrs. Spingola filed a petition seeking an increase in child support. She alleged that a modification was justified by a change in the needs of the children and an increase in Dr. Spingola's ability to pay.¹⁸ At the time Mrs. Spingola's re-

9. 86 N.M. at 655, 526 P.2d at 797.

10. *Allgood v. Orason*, 85 N.M. 260, 511 P.2d 746 (1973); *Merrill v. Merrill*, 82 N.M. 458, 483 P.2d 932 (1971); *Albright v. Albright*, 45 N.M. 302, 115 P.2d 59 (1941); *Evens v. Keller*, 35 N.M. 659, 6 P.2d 200 (1931).

11. *Fox v. Doak*, 78 N.M. 743, 746, 438 P.2d 153, 156 (1968).

12. *Corliss v. Corliss*, 89 N.M. 235, 239, 549 P.2d 1070, 1074 (1976); *Schaab v. Schaab*, 87 N.M. 220, 222, 531 P.2d 954, 956 (1974).

13. *Schaab v. Schaab*, 87 N.M. 220, 222, 531 P.2d 954, 956 (1974).

14. *Id.*

15. 91 N.M. 737, 580 P.2d 958 (1978).

16. *Id.* at 740, 580 P.2d at 961.

17. *Id.*

18. *Id.*

quest for modification was filed, Dr. Spingola was earning approximately \$87,000 per year. This salary was 107% greater than at the time of divorce. Dr. Spingola's salary at the time the modification petition was filed would have called for monthly child support payments of \$3,000 under the Bernalillo County guidelines.¹⁹

The trial court denied Mrs. Spingola's request for modification. The court found that no substantial change in circumstance had occurred that would materially affect the welfare of the children, that \$1,000 per month was an adequate amount to provide for the welfare of the children, and that Dr. Spingola's increase in salary was insufficient justification for an increase in the amount of child support.²⁰ On appeal, the New Mexico Supreme Court reversed and remanded the case for further proceedings consistent with its holding in *Spingola*.²¹

The first issue presented in *Spingola* was whether a stipulated settlement agreement incorporated in the decree, by which Mrs. Spingola allegedly waived her rights to seek an increase in child support, was sufficient to bar the entire action for a modification of the child support decree. The court held that there was no substantial evidence to support Dr. Spingola's claim of waiver by Mrs. Spingola.²² Further, the court concluded that even if a waiver had been consented to in the agreement, it would not have been binding in a later modification proceeding.²³ The court held, as it had with respect to agreements purportedly barring modification of alimony awards,²⁴ that a waiver of modifiability with respect to child support would be contrary to New Mexico public policy.²⁵

A second issue resolved by the court in *Spingola* was whether the trial court was correct in refusing to consider the increase in Dr.

19. *Id.*

20. *Id.* at 741, 580 P.2d at 962. The trial court also made numerous findings as to Mrs. Spingola's increase in personal income, her remarriage, and the fact that her present husband was furnishing her with support.

21. *Id.* at 745, 580 P.2d at 966.

22. *Id.* at 741, 580 P.2d at 962.

23. *Id.*

24. *Scanlon v. Scanlon*, 60 N.M. 43, 287 P.2d 238 (1955). The court, in *Spingola*, analogized the waiver of child support modification to the waiver of alimony modification, an issue previously decided in *Scanlon*. In *Scanlon*, the court held that a wife's consent to certain limitations on alimony modification in a settlement agreement incorporated in the decree was not binding on the court as it was contrary to the public policy of New Mexico, expressed in N.M. Stat. Ann. §40-4-7 (1978), that courts retain authority to modify alimony awards. The court said in *Scanlon* that the statute permitting modification of alimony was controlling over any provisions to the contrary in the agreement.

25. N.M. Stat. Ann. § 40-4-7(c) (1978) requires that courts retain authority to modify child support awards on an appropriate showing.

Spingola's income as a substantial change in circumstances which would justify an upward modification of child support. The supreme court held that it was an abuse of discretion by the trial court to have refused to consider the dramatic increase in Dr. Spingola's income as a substantial change in circumstance materially affecting the welfare of the children.²⁶ The court said that it was "ridiculous to assume that the welfare of the children would not have improved considerably by the time the father's income had doubled."²⁷

The third issue decided by the court was whether Dr. Spingola was obligated to support his children beyond a level of survival or modest comfort.²⁸ The court concluded that he was. In reaching this conclusion the court relied on *Long v. Carter*²⁹ which held that support of a child at the level of "necessities" could vary according to the circumstances and conditions of the parents. The court pointed out that the trial court must look to what the lifestyle of the children would have been had the family stayed together and the supporting parent had his present level of income.³⁰ The court also considered the supporting parent's ability to furnish the children with advantages beyond their actual needs.³¹

A fourth issue addressed in *Spingola* was the propriety of the trial court's failure to consult the Bernalillo County child support guidelines in the modification proceeding. The supreme court recognized the authority of a trial court to issue and utilize guidelines under Rule 83 of the New Mexico Rules of Civil Procedure,³² and indicated that such guidelines should be consulted in modification proceedings.³³

The supreme court noted in *Spingola* that New Mexico case law had not defined the meaning of "welfare of the child" despite the fact that support modification decisions, including those relied on in *Spingola*, had ostensibly been decided with this "welfare" in mind. Recognizing the "manifest necessity for more specific guidance in this area of the law,"³⁴ the court set forth guidelines for use by trial courts in providing for the welfare of the child in support modifica-

26. 91 N.M. at 742, 580 P.2d at 963.

27. *Id.*

28. *Id.* at 743, 580 P.2d at 964.

29. 39 N.M. 255, 44 P.2d 1040 (1935).

30. 91 N.M. at 743, 580 P.2d at 964.

31. *Id.*

32. *Id.* at 745, 580 P.2d at 966. N.M. R. Civ. P. 83 (1978) provides that: "Each district court by action of the judge of such court or of a majority of the judges thereof, may from time to time make and amend rules governing its practice not inconsistent with these rules."

33. 91 N.M. at 745, 580 P.2d at 966.

34. *Id.* at 742, 580 P.2d at 963.

tion proceedings.^{3 5} The court pointed out that the criteria it listed were not exclusive and that a trial court may consider any other circumstances relative to a parent's ability to pay support for a child's needs. Further, a change in any one of the factors is not justification for an automatic modification of child support. The decision to modify remains one for the trial court which retains its discretion to make decisions on a case-by-case basis.^{3 6}

SPINGOLA APPLIED

Three of the guidelines set forth in *Spingola* merit closer examination. They are: 1) courts should consider the lifestyle which a child

35. *Id.* at 743, 744, 580 P.2d at 964, 965. These guidelines are:

1. Courts should consider the financial resources of both parents in modification proceedings, including their income, monetary obligations and net worth. Courts must keep in mind that the mother has the same obligation to support the children as the father.

2. Courts should consider the lifestyle which the children would have enjoyed had the parents not divorced, and the non-custodial parent had his present level of income.

3. Courts should consider whether the father's income is sufficient to provide the children with advantages above their actual needs and, if so, require him to pay additional child support. Modifications should be "within reason," however, and not provide for "luxuries or fantastic notions of style . . . not normal for the stable, conservative, natural upbringing of a child according to the comfort, dignity and manner in which the father over the years has been accustomed to live."

4. The custodial parent has an obligation to encourage good relations between the children and the non-custodial parent. Failure to perform this duty is relevant to the modification of child support. If the custodial parent fails to perform this duty, then this factor may influence the court's decision regarding the amount of child support to be granted above the level of actual necessities. A punitive reduction in child support, however, should not be granted unless it can be shown that such action is in the best interests of the child.

5. Courts should consider local district court guidelines, where they exist, in proceedings for modification of child support.

6. Courts should consider the number of children for whom support is sought, as costs are higher for support of the first child than for support of each additional child.

7. Courts should consider the age, physical condition and health of both parents and children.

8. The proper education of children is of great importance. Courts should see that children are provided with the best education which parents can reasonably afford. It was not unreasonable, in this case, for Mrs. Spingola to have requested modification of child support in part to pay for the youngest child's enrollment in private school.

9. Courts should consider changes in the total number of dependents being supported by each parent.

10. Courts should consider whether a remarriage by either spouse has affected the financial resources available for child support.

36. *Id.* at 744, 580 P.2d at 965.

would have enjoyed had the family stayed together; 2) a supporting parent, if financially able to do so, should be required to pay additional support to provide his child with advantages above the child's actual needs; and 3) child support above the level of actual needs may be reduced if the custodial parent fails in his or her duty to encourage good relations between the child and the non-custodial parent. The first two criteria make possible a situation in which a supporting parent's child support payments increase as his income goes up, with no corresponding increase in the actual needs of the child. Although there is no precedent to the contrary in New Mexico, this result could be viewed as contrary to the intent of N.M. Stat. Ann. § 40-4-11 (1978)³⁷ if the statute is read to require that upward modifications of child support should be based on the actual needs of the child *as well as* the parent's ability to pay.

These criteria also present trial courts with the problem of determining the manner in which the standard of living of the family would have been altered by changes in the financial resources of the supporting parent and the degree to which an increase in the supporting parent's income will justify a modification of child support. In *Spingola* the increase in the supporting parent's income was substantial. For other families, however, the increase might not be so large or its impact so easily measured.

The parent-child relationship is in no way legally severed by divorce. As the court in *Spingola* has recognized, a child's right to support continues beyond the dissolution of his parents' marriage. Parents retain the obligation of supporting the child in a manner consistent with the family's standard of living.³⁸ Before divorce, the supporting parent naturally retains great discretion in determining the amount of income devoted to the child's support. The parent decides what is "necessary" and what is "extravagant." Upon divorce, however, the supporting parent's discretion diminishes: the court becomes the decisionmaker by exercising its supervisory authority to make a case-by-case determination of the child support award. The *Spingola* decision limits the amount of support which may be awarded above the level of actual needs of the child by requiring that trial courts provide such advantages only "within reason" and avoid "extravagant expenditures no matter what the wealth of the parents might be."³⁹

37. The statute says only that the court shall determine an amount of support which will "provide properly for the care, maintenance and education of the minor children, considering the financial resources of the parent."

38. *Long v. Carter*, 39 N.M. 255, 44 P.2d 1040 (1935).

39. 91 N.M. at 743, 580 P.2d at 964.

It would be difficult to justify a holding contrary to *Spingola* in view of the inequities which would result. A contrary decision would permit the use of child support guidelines to make initial child support awards, and then deny their use in later modification proceedings. A contrary decision would also permit courts to refuse to consider an upward modification of the child support award due to an increase in a parent's salary while permitting downward modifications because of a decrease in a parent's income.⁴⁰

The *Spingola* decision also held that child support above the level of actual necessities may be reduced if the custodial parent interferes with the non-custodial parent's relationship with the children. The value of this guideline is questionable, particularly in view of its recent application by the supreme court in *Barela v. Barela*.⁴¹ In *Barela*, failure of a custodial parent to encourage good relations with the non-custodial parent resulted in the termination of the child support obligation of a father whose former spouse interfered with his visitation rights.⁴²

BARELA v. BARELA

When the Barelas divorced, Mrs. Barela was awarded custody of the couple's two minor children. Mr. Barela was ordered to make payments for support of the children and was granted reasonable visitation rights.⁴³ Following the divorce, Mrs. Barela brought an action against her former husband for child support arrearages and a limitation of his visiting rights.⁴⁴ The trial court ordered that support arrearages be paid but relieved Mr. Barela from paying future child support until the children were permitted to visit their father.⁴⁵ The trial court found that the children refused to visit their father because of the emotional and physical influence of their mother.⁴⁶ The court also found that the mother was financially able to support the children on her own income.⁴⁷ Mrs. Barela appealed this decision to the New Mexico Supreme Court. The supreme court affirmed the decision of the trial court and held that "[w]here a custodial parent is financially able to support the children and the

40. *Fox v. Doak*, 78 N.M. 743, 746, 438 P.2d 153, 157. The court sustained a temporary reduction in the father's support obligations based on undisputed evidence that his income had been reduced because of a partial crop failure.

41. 91 N.M. 686, 579 P.2d 1253 (1978).

42. *Id.* at 688, 579 P.2d at 1255.

43. *Id.* at 687, 579 P.2d at 1254.

44. *Id.*

45. *Id.*

46. *Id.* at 688, 579 P.2d at 1255.

47. *Id.*

children refuse to visit their other parent due to the emotional influence of the custodial parent, the court in its discretion has the power to terminate future support obligations of the non-custodial parent."⁴⁸ The court relied on *Spingola* and authority from other jurisdictions for its decision.⁴⁹ The *Barela* court looked at an early New Mexico decision⁵⁰ where a father was denied modification of child support based on his ex-wife's removal of the children from the state in violation of the father's visitation rights. The court in *Barela* distinguished *Fullen* because, unlike the mother in *Fullen*, Mrs. Barela was able to support the children on her own income.⁵¹ The court emphasized that the reduction or termination of a non-custodial parent's support obligation was available as a remedy for interference with the non-custodial parent's relationship with his child only in cases where the custodial parent was capable of supporting the child.⁵²

The principle of conditioning support payments on the behavior of the custodial parent presents difficult problems of proof at the trial court level. The decisions leave unanswered the question of how much interference or influence exerted by the custodial parent on the child's relationship with the non-custodial parent is sufficient to invoke a modification of the support obligation. As a divorce without some animosity between the parties is rare, the courts are confronted with determining when such interference has reached a level sufficient to justify a modification of support as a measure of control. Furthermore, some provision should be made for the situation where a child has decided, on his own, to refuse visits with the non-custodial parent. Will support still be modified if the custodial parent is unable to convince the child that these visits are in his best interest?

The termination or reduction of child support because of alleged interference with the relationship between the child and the non-custodial parent is a coercive measure designed to influence the behavior of the custodial parent. The ultimate effect of such modification, however, is to deprive the child of optimal support. The child, an innocent third party, is denied support because of the behavior of his parents. It is unjust to punish the child for behavior over which he has little or no influence or control. The court

48. *Id.*

49. *Gannon v. Gannon*, 258 Minn. 57, 102 N.W.2d 677 (1960); *Snellings v. Snellings*, 272 Ala. 254, 130 So.2d 363 (1961); *Spurrell v. Spurrell*, 205 Cal. App.2d 786, 23 Cal. Rptr. 414 (1962).

50. *Fullen v. Fullen*, 21 N.M. 212, 153 P. 294 (1915).

51. 91 N.M. at 688, 579 P.2d at 1255.

52. *Id.*

addressed this basic unfairness in *Fullen* when it said, "where the interests of the children themselves are concerned, we can see no reason to take into consideration, at all, the faults of either or both the parents for which the children are in no way responsible."⁵³

The decision of the court to recognize a duty on the part of the custodial parent to encourage a strong relationship between the child and the non-custodial parent is no doubt in the best interest of the child. The court emphasized in *Spingola* that:

The non-custodial parent is entitled to the same love, affection, respect and companionship of the children as if the parents were not divorced, insofar as possible. The custodial parent . . . usually has a great deal of influence over the children to prevent bitterness and vindictiveness against the non-custodial parent. . . .⁵⁴

It is questionable whether modification of child support is the most just means of enforcing the custodial parent's duty with the least harmful effects upon the child. Other remedies are available to the non-custodial parent such as contempt proceedings or a verbal reprimand by the court. Cancellation of the entire child support obligation, or even a part of it, is a harsh way to enforce the rights of the non-custodial parent.

CONCLUSION

The *Spingola* decision injects guiding principles into an area of the law noted for its lack of definition. It will be particularly useful in New Mexico because of the relatively few reported cases concerning child support awards and their subsequent modification. Application of the *Spingola* guidelines will further the court's primary purpose of protecting the best interests of the child by assuring that all factors relevant to the support of the child are evaluated in a modification proceeding. The criteria outlined by the court provide a guide for trial courts in making their case-by-case determination of child support awards. This will promote greater uniformity of decision and continue the trend of placing an equal responsibility on both parents for support of their children.

—MARY F. HOFFMAN

53. 21 N.M. at 237, 153 P. at 302.

54. 91 N.M. at 743, 744, 580 P.2d at 964, 965.