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When Can Child Support Arrears be Reduced in Massachusetts?

By Carmela M. Miraglia | December 13, 2016

Child Support Family Law News

Massachusetts divorce lawyer Carmela Miraglia analyzes Rosen v. Rosen, a recent Supreme Judicial Court decision suggesting child support arrears can be retroactively reduced.

Back in 2011, Attorney James M. Lynch discussed the fact that child support obligations never go away in Massachusetts. Attorney Lynch's blog was not referring to emancipation – i.e. when child support stops due to an adult child's age. Rather, Attorney Lynch's blog was about child support *arrears*. At the time of his blog, a party who owed back child support had little help of outrunning the debt. However, a recent Supreme Judicial Court decision, Rosen v. Rosen (2016), has created a crack in the previously impenetrable shield of protection surrounding child support arrears in Massachusetts.

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The Permanency of Child Support Arrears in Massachusetts

Most parents who pay child support in Massachusetts understand that their obligation to pay will eventually end. Their kids grow up and child support stops. For parents who fall behind on child support, however, the obligation to pay continues, almost without limitation. What's worse for these individuals is that until very recently, Massachusetts courts were statutorily barred from retroactively modifying a child support order. In other words, back child support that was owed could not be changed. It could only be paid. The specific statute prohibiting Massachusetts court from modifying a child support order retroactively is G.L. c. 119A s. 13(a), which reads as follows:

> Any payment or installment of support under any child support order issued by any court … shall be on or after the date it is due, a judgment by operation of law, with the full force, effect, and attributes of a judgment of this commonwealth including the ability to be enforced … provided that said judgment shall not be subject to retroactive modification except with respect to any period during which there is pending a complaint for modification, but only from the date that notice of such complaint has been given, either directly or through the appropriate agent, to the obligee or, where the obligee is the plaintiff, to the obligor.

In *Quinn v. Quinn* (2000), the Appeals Court interpreted the statute as follows:

> [G. L. c. 119A, § 13(a)] no longer permits a judge to moot or reduce arrearages for child support except for any period during which there is pending a complaint for modification.

The statute allowed a narrow exception for a party who filed a complaint for modification: a court could adjust child support arrears, but *only for the period after the complaint for modification was filed*. For child support arrears that accrued before the complaint for modification was filed, a delinquent party was out of luck. As noted on our blog reviewing Complaints for Contempt in Massachusetts, even a written contract between the parties was insufficient to eliminate child support arrears if the parties never ratified the agreement in court:

> [T]he Quinn court also made clear that an out of court agreement by a plaintiff to accept less child support is unenforceable if the parties failed to enter the agreement as a new order of the court. Thus, child support payors should never assume that a recipient's waiver of child support will hold up in court if the recipient changes his or her mind, and later decides to collect. The Quinn court addressed the issue in plain terms: "we therefore conclude

> that the plaintiff's agreement to accept less money than provided by the court order in this case did not constitute a defense to the plaintiff's complaint for contempt."

Rosen v. Rosen: a Crack in the Armor of Child Support Arrears

After nearly two decades of iron clad precedent against the modification of child support arrears, change has come to Massachusetts. In Rosen v. Rosen (2016), the Massachusetts Supreme Judicial Court (the "SJC") created what it called an "extremely narrow exception" to the statutory prohibition on retroactively modifying child support orders. In its opinion, the SJC announced a specific and multi-pronged legal test that permits Massachusetts courts to reduce or eliminate past due child support arrears in a narrow – but not uncommon – class of cases.

In Rosen, the SJC reviewed a judgment entered by Hon. Susan D. Ricci of the Essex Probate and Family Court. In its opinion, the SJC reviewed the question of whether "a judge, in compelling circumstances of an equitable nature, and without contravening G.L. c. 119A s.13(a), may apply a credit in calculating child support arrearages to reflect payments made in a manner other than as directed by the original [child support] order." Before answering this question, the Court reviewed how other states have handled this issue. The opinion notes that other jurisdictions had recognized the concept of equitable credits. However, the Court noted that application of such credits varies from state to state, particularly with respect to what constitutes valid grounds for a credit. The Court discerned that there were three distinct primary strands of analysis:

> (1) some courts grant equitable credits when the elements of estoppel are established; (2) some courts grant an equitable credit when the support obligation has been fulfilled by an alternative method; and (3) some courts simple apply general equitable principles to determine whether an equitable credit is in order.

The SJC expressed a preference for the first approach, while recognizing value in the latter two approaches. According to Lord Alfred Denning, in the 1951 decision of Combe v Combe, equitable estoppel is defined as follows:

> The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been

> made by him, but he must accept their legal relations subject to the qualification which he himself has has introduced, even though it is not supported in point of law by any consideration, but only by his word.

In other words, if a child support recipient promises that he or she will accept less child support in exchange for some promise from the child support payor, then the recipient may be held to that promise in some situations. Even if it means retroactively modifying child support arrears.

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Payment by Another Method: When a Child Changes Homes Between Parents

In Rosen, the SJC held that "a judge is not foreclosed by G.L. c. 119A 13(a), from determining whether compelling circumstances of an equitable nature warrant the allowance of a credit for the payor's fulfillment of his or her child support obligation in a manner other than as described in the original order but which nevertheless accomplishes the maintenance of the child as envisioned by the original order." In pursuit of this mission, the Court set out a clear, rigorous, factor-based test for a Commonwealth judge and parties to follow in determining if a retroactive credit would be allowed. The Court held:

> [T]o receive an equitable credit against a child support arrearage, the support payor must demonstrate that (1) the support recipient agreed (a) to transfer custody of the child to the payor for an extended period of time not contemplated in the original custody order, and (b) to accept the payor's direct support of the child as an alternative method of satisfying the payor's child support obligation; (2) the custody transfer was not the result of duress, coercion, or undue influence exerted by the payor against either the recipient or the child; (3) the payor provided the child with adequate support and maintenance while the child was principally domiciled in the payor's home; (4) the recipient was relieved of supporting the child during the period in question; (5) the alternative support arrangement was not contrary to the child's best interests; and (6) granting a credit to the payor for his or her

direct support of the child would not result in injustice or undue hardship to the recipient.

Here is a quick example: At the time of a divorce, a child lives primarily with her mother and the father pays child support. One year later, the parents agree that the child will move to the home of her father, and the father can stop paying child support. The parties do not formalize this agreement in court. Two years later, the child moves back in with the mother. At this point, the mother demands no just the resumption of child support from the father, but also back child support – for the time the child lived at her father's house. Prior to Rosen, the father would be required to pay child support for the entire period, including the period when the child had lived with the father. After Rosen, the father can ask a court to waive the child support arrears for the period when the daughter lived with him.

Several things are notable about the SJC's test. First, the use of the word "and" is crucial. The word "and" guarantees that a party must satisfy **all** of the six prongs; failure on a single prong means defeat. Second, several of the prongs overlap. For example, prongs 5 and 6 focus on the basic fairness of reducing the arrears. Meanwhile, prongs 1 and 2 focus on the need for an actual *agreement* between the parties; the mere fact that the child changed homes may not be sufficient if the agreement did not include a specific waiver of child support. Lastly, prongs 3 and 4 measure whether the child support obligor *actually* took on the financial burden of the child.

Potential Snags in Applying the Rosen Test

It is not uncommon for children to change households between two parents, particularly in their teenage years. Even after the Rosen decision, a party who is court-ordered to pay child support may be taking a foolish risk if they (a.) take primary custody of a child, (b.) stop paying child support, and (c.) fail to obtain a court order suspending or terminating child support. After all, it easy to imagine scenarios in which applying the SJC's complex, multi-pronged Rosen test might go awry. Here are some examples:

- The parties' teenage child angrily declares he or she is changing homes. The parties follow the teenager's lead, allowing him or her to change homes, without directly addressing child support. Arguably, the parties have not satisfied prongs 1 and 2 of the test, which requires that the parties actually agree that custody will change and child support will stop. If the custody change is undertaken by one parent, unilaterally, it may be difficult to show agreement.
- The parties' child moves in with their father, who lives with his parents (i.e. paternal grandparents). The father pays the child's day-to-day costs, but he contributes little to the mortgage, which is paid for by his parents. Does the father

satisfy prong 3, which requires that he provide financial support for the child, with his parents bearing so much of the cost?

- The child becomes angry with the primary parent and demands to live with the non-custodial parent. The primary parent does not agree to the change, but does not file a complaint for contempt or any other complaint. Does the primary parent's silence equal agreement under Rosen?

A quick glance at the complex and multi-pronged test is enough to confirm that future litigation with respect to modifying child support arrears won't be as black and white as it perhaps once was. The bottom line is that the once clear black letter law, in this circumstance at least, just got a little more grey. And maybe, just maybe, child support obligations do sometimes go away in Massachusetts.

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Schedule a consultation with Carmela M. Miraglia today at (781) 253-2049 or send her an Email.

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