Creer v. Creer

Appeals Court of Massachusetts

February 4, 2014, Entered

13-P-117

Reporter
2014 Mass. App. Unpub. LEXIS 129 *; 84 Mass. App. Ct. 1133; 2 N.E.3d 202; 2014 WL 378204

JAMES E. CREER vs. DEBORAH S. CREER (and a companion case[1]).

Judges: [*1] Graham, Sikora & Hanlon, JJ.

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Deborah Creer, the former wife of James Creer, appeals from a further judgment of modification of the Probate and Family Court (including an interlocutory order after pretrial conference) and a judgment dismissing her complaint in equity for reimbursement of past college expenses in which she requested, inter alia, that the court determine the sum the husband should have paid towards the parties' children's prior college expenses. We affirm.

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[1] Deborah S. Creer v. James E. Creer.

1. The order after pretrial conference. The wife, through new counsel, argues that the judge at the pretrial conference (the first judge) violated her due process rights (i.e., her property interest consisting of past due support) by "misapplying" G. L. c. 119A, § 13(a), and dismissing, "over [her] objection, the enforcement action at law under the existing support order for the period 2003-2009 thereby forcing [her] to seek relief [unsuccessfully] under the court's general equity power."

Contrary to the wife's assertion, we do not view the statement of "preference" by her attorney at the pretrial conference as a clear or meaningful objection to the first judge's suggestion and/or [*2] intention to dismiss so much of the wife's counterclaim for modification as concerns past college expenses. See Hoffman v. Houghton Chemical Corp., 434 Mass. 624, 639, 751 N.E.2d 848 (2001). Cf. Aleo v. SLB Toys USA, Inc., 466 Mass. 398, 403 n. 11, 995 N.E.2d 740 (2013). Indeed, the wife, through appellate counsel, appeared to acknowledge at oral argument that she made no specific objection for the record. Furthermore, it is apparent from the comments of the wife's trial counsel during opening statements at trial that the wife was in agreement with the first judge that she was precluded from seeking past college expenses under G. L. c. 119A, § 13(a), and that her action for past college expenses must be brought in equity. In the circumstances, the wife is not in a position to argue now that the first judge erred by, essentially, "forcing" her to bring an action in equity.[2]

2. The equity action. Following trial,[3] a second judge of the Probate Court found, among other things, that the parties had very different memories of what, if any, discussions [*3] took place relative to the financial participation the husband should assume with respect to the children's higher education. Continuing, the judge stated that "[f]rom the brief 'discussions' they had, the parties reached an understanding that [the husband's] role was to promptly pay his weekly child support obligation and [the wife's] role was to work with the boys in choosing a school and arranging financing."[4] The second judge also stated in his rulings of

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[2] In view of the decision we reach in this case, we do not consider whether the specific provisions or orders for postsecondary education fall within the purview of § 13(a).

[3] At the time of trial, the parties three children had graduated from college. At trial, the wife sought a contribution from the husband of $50,666 for the children's college expenses.

[4] In support of this finding the judge made a number of subsidiary findings to the effect that (1) no credible evidence [*4] was presented demonstrating behavior of the wife or the children consistent with the conclusion that the husband was shirking any financial responsibility toward the family, (2) notwithstanding the parties' agreement, the wife made commitments to colleges without the husband's input or approval, (3) although the husband and wife agreed on a mechanism to resolve disputes as to how they would share the children's education costs, the wife never sought to invoke it, (4) the wife did not raise the issue of college reimbursement until February, 2011, when she filed her amended counterclaim, (5) the husband received no written communication from the wife requesting contribution until the litigation was well underway and (6) what prompted the wife to

law that "[s]ince [the wife] and [the husband] created a mechanism whereby they would discuss and agree on expense allocation for college and provided a dispute resolution clause [which included consultation with the Probation Department] to operate in the event they could not agree, [the wife] had an adequate remedy at law to obtain relief (i.e., exhausting the dispute resolution mechanism and filing a complaint for modification)."

The wife raises a number of issues challenging the second judge's dismissal, with prejudice, of her equity action. Among other things, she argues that the judge erred in dismissing her equity claim solely upon the existence of a prior remedy at law [*5] that neither party exercised, the right to seek modification of an existing child support order. The wife asserts that she was seeking enforcement of the agreement under G. L. c. 119A, § 13(a), rather than modification of the existing court order. The wife also argues, with respect to the judge's finding concerning the parties' "understanding" of their obligations under the agreement and judgment, that the parties' agreement was integrated and that the parties failed to utilize the "modification" provision of the agreement which prohibits alteration or modification of the agreement except by a written instrument acknowledged by the parties (or by court order). In addition, the wife states that there was no judicial authorization or approval of the parties' "understanding" concerning their obligations under the agreement and judgment. At the outset, certain of the wife's arguments on the appeal veer from the theories on which the wife proceeded below and the positions otherwise taken by her. See generally O'Connell v. Greenwood, 59 Mass. App. Ct. 147, 155, 794 N.E.2d 1205 (2003) (where we declined to resolve issue where it was not raised in the trial court and it was not the theory on which the case [*6] was tried); Parrish v. Parrish, 30 Mass. App. Ct. 78, 82 n. 5, 566 N.E.2d 103 (1991). As we have indicated, the wife proceeded below on the premise that she was precluded from seeking past college expenses under G. L. c. 119A, § 13(a). Moreover, counsel for both parties elicited testimony as to whether the parties had reached an "understanding" concerning their respective contributions towards the children's college expenses. The wife points to nothing to indicate that she relied at trial on the "modification" provision of the agreement. To the contrary, the judge commented during closing argument that, as the husband suggested, the parties had an agreement whereby the husband was to continue to pay support and the wife was not to bother him. The wife's counsel responded, "And if your Honor believes that, then we lose the case . . . ."

On all of the foregoing, including the judge's finding concerning the parties' understanding of their respective roles concerning the children's educational

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seek contribution was being served with the husband's complaint for modification seeking to decrease his weekly support obligation. The judge's finding is also consistent with the husband's testimony.

expenses, as well as the judge's determination that the wife, at all events, had a remedy during the college process to obtain relief via the dispute resolution mechanism of the agreement if the parties could not [*7] agree, we perceive no sound reason to disturb the judgment dismissing the equity action.

3. Conclusion. The further judgment of modification and the judgment dismissing the complaint in equity are affirmed. The husband's request for double costs and attorney's fees is denied.

So ordered.

By the Court (Graham, Sikora & Hanlon, JJ.),

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