The Legal Intelligencer
THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2016
PHILADELPHIA, TUESDAY, JUNE 21, 2016 VOL 253 • NO. 119 An ALM Publication

FAMILY LAW

$10,000 Agreement if Petition to Modify Custody Upheld

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Special to the Legal

People may remember in the fall of 2014 a state Superior Court case, *Huss v. Weaver*, C.D. No: 2013-1209, was published where the Superior Court reversed a trial court's decision to sustain preliminary objections dismissing a complaint for breach of contract when a father did not pay $10,000 to a mother after he filed a complaint for custody, as their agreement provided that he would pay the mother $10,000 anytime he filed to modify the parties' custody arrangement. However, not long after the decision from the Superior Court was handed down, the father filed a timely application for reargument before the court en banc, which was granted and the original decision of the Superior Court was withdrawn on Dec. 12, 2014. After the en banc review, in *Huss v. Weaver*, 2016 Pa. Super. 24 (Feb. 5, 2016), a similar result occurred and the court reversed the trial court and remanded the case.

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According to the en banc opinion, the facts of the *Huss* case, in part, are as follows: Amy Huss (mother) and James Weaver (father) were involved in a romantic relationship but did not get married. During their relationship, they entered into an agreement that provided that in the event their relationship "resulted in a birth of a child, [mother] would have primary physical custody and [father] would have specified visitation rights, and that if [father] sought court modification of these terms he would pay [mother] $10,000 for each such attempt." The parties had a son in 2010 and the father filed a complaint for custody. Thereafter, the mother filed a complaint alleging that the father "had failed to abide by his contractual promise to make the required $10,000 payment." The father, an attorney at a large firm, provided the mother with "legal representation in various other matters," and the father and a colleague drafted the agreement. The relevant portion of the parties' agreement regarding custody provides as follows: "In the event that either [father] or [mother] terminates the relationship with the other, whether or not they are married at the time of such termination, the legal custody of any child by this agreement shall be shared by [father] and [mother] shall have primary physical custody of such children. In the event such termination of the relationship occurs, [father] agrees that he will not pursue full

physical custody of any child by this agreement and further agrees that he will not attempt to use the fact that [mother] must work excessive hours selling real estate in order to earn large commissions to pursue custody of such child or children."

In sustaining the father's preliminary objections, the trial court stated: "Imposing a fee upon [father] to pay $10,000 if he decides to file a modification of child custody is against the public policy of assuring continuing contact between child and parent. It substantially impairs the court's power and the commonwealth's duty to determine what is in a child's best interest. 'Our paramount concern in child custody matters is the best interest of the children.' It is against public policy to impose a fee on one party in order to determine the best interest of the child."

The mother appealed the trial court's sustaining of father's preliminary objections. The first issue on appeal was whether the trial court erred in concluding the parties' agreement was not enforceable as a matter of public policy. The Superior Court stated: "Contrary to the decision reached by the trial court, we have not identified any 'dominant public policy' grounded in governmental practice, statutory enactments, or violations of obvious ethical or moral standards, which provide the basis for declaring the '$10,000 clause' in the agreement to be unenforceable as against public policy."

The trial court relied heavily on the public policy argument that parents have no power to "bargain away the rights of their children" with regard to parents being precluded from agreeing to child support "less than required or less than can be given." Though parents cannot bargain away the rights of children with regard to child support, the Superior Court in its opinion reiterated that "no similar appellate authority exists with respect to agreements between parents regarding custody and visitation." The reason for the difference between child support and custody as to the public policy argument is that the right to child support belongs to the child and the rights to custody belong to parents or guardians. As such, the Superior Court stated: "In no way, however, do custody and visitation agreements involve the bargaining rights of children, and accordingly they are not unenforceable against public policy on the same basis as are agreements regarding child support."

A custody order is always modifiable if it is in the best interest of the child.

The Superior Court then analyzed whether the $10,000 clause would act as an impediment to prevent the father from being able to seek relief and custodial rights with the court. The Superior Court found that the father "freely and voluntarily, without coercion or other compulsion" entered into the agreement and that the agreement reflected, as the parties agreed, that it was "fair, just and reasonable." The Superior Court further found that the father was an attorney capable of earning a large salary, as reflected in the parties' agreement. The mother contended that the $10,000 clause was a "defense fund in the event of litigation regarding the agreement," but, according to the opinion, it was not clear if that was the case. Because the Superior Court found that "the record does not reflect that this provision constitutes any limitation on [father's] ability to seek court intervention to modify the custody and/or visitation provisions in the agreement between these parties in the best interest of the child," the Superior Court reversed the trial court and remanded the case.

This case is an important case and may be alarming to some. It also appears to be a very fact-sensitive case. In the event such an agreement is in effect between parties where a party is unable to pay the fee if he or she seeks modification of a custody order, it would appear that such an agreement would preclude the party from seeking modification. In such an instance, the provision may be unenforceable. Regardless, a custody order is always modifiable if it is in the best interest of the child. Enforcing an agreement to pay a spouse in the event one seeks such a modification is another story. However, according to the *Huss* case, such a provision may be enforceable. •