

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DERRIK SCARPINATO,)
) No. 314, 2004
)
) Petitioner Below,)
) Appellant,) Court Below: Family Court
) of the State of Delaware in
 v.) and for New Castle County
)
 JANIFFER NEHRING,) File No. CN99-10451
)
) Respondent Below,)
) Appellee.)

Submitted: November 3, 2004

Decided: December 9, 2004

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

ORDER

This 9th day of December 2004, on consideration of the parties' briefs, it appears to the Court that:

1. Derrik Scarpinato appeals an order of the Family Court that lifted a temporary stay of alimony and set off alimony arrearages that Scarpinato owed to his former wife, Janiffer Nehring, against back child support that Nehring owed to Scarpinato. Scarpinato argues that the order was procedurally improper because there was no petition pending before the Family Court at the time the order was entered. He argues that the order violated his due process rights. Because Scarpinato has not cited any authority demonstrating a procedural impropriety, the

trial judge acted within his discretion by lifting the temporary stay and by refusing to vacate the order. Accordingly, we affirm.

2. After nearly three years of marriage, the parties were divorced on September 28, 2000. On December 18, 2001, the trial judge ordered Scarpinato to pay alimony to Nehring. An interim consent order was entered on March 4, 2002, in which Nehring agreed to pay Scarpinato \$65 a month in child support for their son, Joseph. Scarpinato had sole custody of Joseph.

3. In December 2002, the trial judge temporarily stayed the alimony order after discovering an error in the 2001 alimony calculations. Alimony had been based on Nehring's report that she paid \$300 each month in child support. Instead, she had paid only \$360 over a twelve-month period. The trial judge thus stayed the alimony order pending verification of Nehring's entitlement to alimony.

4. In April 2004, the trial judge entered a child-support order, requiring Nehring to pay \$393 a month, together with monthly payments toward the child support the Court determined to be in arrears. Nehring filed a motion to lift the temporary stay of alimony in May 2004. After Scarpinato failed to file a response, the trial judge granted Nehring's request. The trial judge then ordered a set-off of the alimony arrearages Scarpinato owed to Nehring against the back child support that Nehring owed to Scarpinato. Scarpinato then unsuccessfully moved to vacate that order. Scarpinato appeals from the denial of his motion to vacate.

5. We review questions of law *de novo* to determine whether the trial judge committed legal error.¹ A motion to vacate a judgment or order is reviewed under an abuse of discretion standard.² In determining whether there is an abuse of discretion, the Court considers whether the defaulting party has shown that, if the order were vacated, the outcome would be different from the default judgment.³

6. Scarpinato argues that the Family Court lacked jurisdiction to issue the order because no petition was then pending before the Court, and that by refusing to vacate the order, the trial judge abused his discretion. Although Scarpinato contends that the trial judge violated the requirements of procedural due process, he cites no relevant authority to support that argument.

7. Scarpinato contends that Family Court Civil Rules 3, 5, and 7 support his argument. Rule 3 provides that an action is commenced by filing a petition, Rule 5 sets forth the requirements for serving and filing the petition and all subsequent pleadings, and Rule 7 contains the standards for pleadings and motions. None of these Rules requires that, once a petition in a case is initially filed, the petition be pending before an order can be issued. Rather, Rule 7(b) provides that “an application to the Court for an order shall be by motion.” Nothing cited by

¹ *Yost v. Johnson*, 591 A.2d 178, 181 (Del. 1991).

² *Reynolds v. Reynolds*, 595 A.2d 385, 389 (Del. 1991).

³ *Id.*

Scarpinato indicates that the order lifting the temporary stay of alimony was procedurally improper.

8. Even if the order were improperly entered, Scarpinato has not shown that the trial judge abused his discretion by refusing to vacate the order. Scarpinato does not argue that the result would be different if the current order was vacated and the Family Court reconsidered whether to reinstate its alimony order. The initial alimony order was based on Nehring's assertion that she paid \$300 a month in child support. After temporarily staying that initial order, the trial judge entered a child-support order that required Nehring to pay \$393 each month. Based on that order, the Family Court reinstated its initial alimony order. Scarpinato has not shown that the alimony calculations were improper, or that the result would be different if the order were vacated.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court is **AFFIRMED**.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice