No. 12-FM-814

DISTRICT OF COLUMBIA COURT OF APPEALS

SHANITA VERNER,

Appellant,

v.

LEVI VERNER,

Appellee.

On Appeal from the Superior Court
(2011 DRM 1260)

BRIEF OF APPELLEE LEVI VERNER

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RULE 28(a)(2)(A) DISCLOSURE STATEMENT

Pursuant to D.C. App. R. 28(a)(2)(A), Appellee Levi Verner submits the following statement of interested parties:

1. Appellant-Plaintiff

    a. Party

        Shanita Verner

    b. Counsel for Appellant in the trial court and in this appeal:

        Robert Maxwell of Solutions, PLLC

2. Appellee-Defendant

    a. Party

        Levi Verner

    b. Counsel for Appellee in the trial court:

        Sonali Khadilkar

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QUESTIONS PRESENTED

(1) Whether the trial court applied the correct "substantial and material change in circumstances" standard in suspending a father's child support payment to the mother as long as the parents live together and the father acts as sole provider for the parties' five children.

(2) Whether the trial court abused its discretion in finding a substantial and material change in circumstances after the custody and support provisions of the parties' Settlement Agreement could not be performed as envisioned in the Settlement Agreement.

(3) Whether the doctrine of res judicata prevents a trial court from modifying a child support order upon a substantial and material change in circumstances.

STATEMENT OF THE CASE

This is an appeal arising from the Superior Court's order temporarily suspending Appellee Levi Verner's child support payments to Appellant Shanita Verner while they continue to reside in the same household and Mr. Verner acts as the sole provider and primary custodian for his children.

Mr. Verner and Ms. Verner are the parents of five children and were married for seven years before they divorced in 2011. When they divorced, Ms. Verner through her counsel and Mr. Verner acting *pro se* entered into a Marital Separation and Property Settlement Agreement with Dependent Minor Children ("Settlement Agreement"). The Agreement granted primary custody of the five children to Ms. Verner and liberal visitation rights to Mr. Verner, Settlement Agreement at 5-10, and required Mr. Verner, among other things, to pay a total of $800 in child support for the five children each month. *Id.* at 11 (J.A. at 10). That Agreement was incorporated but not merged by the court's June 23, 2011 Entry of Judgment of Absolute

Divorce. J.A. at 6. Despite being divorced since June 2011, however, the parties and the five children continue to reside in the same house (with Mr. Verner and Ms. Verner living in separate bedrooms). Tr. 5-6.

On January 31, 2012, Ms. Verner filed a motion to enforce the Settlement Agreement, and on February 27, Mr. Verner filed an opposition in addition to a motion to modify custody and a motion to modify child support. J.A. at 3. The Superior Court (the Hon. Alfred S. Irving) held a hearing on April 27, 2012. J.A. at 2.

At the hearing, the court applied a "material and substantial change of circumstances" standard and granted Mr. Verner's motion on child support, finding the child support provisions of the Settlement Agreement "unworkable" and suspending child support as long as Mr. Verner continued to be the sole provider of the five children and the parties continued to live together. Tr. 30-33. The court ordered Mr. Verner to expedite the sale of a house that had been held in probate in order to satisfy another condition of the Settlement Agreement, *see* Tr. 20, but ordered child support suspended until the parties could move out and reassess what appropriate child support should be. Tr. 33 (J.A. at 14). Following Ms. Verner's motion for reconsideration, the Superior Court reaffirmed its decision. J.A. at 22. Ms. Verner now appeals, arguing that the court applied the wrong legal standard and that there is no "material and substantial change in circumstances" that warrants the court's modification of Mr. Verner's child support payments. *See* App. Br. at 4-6.

STATEMENT OF FACTS

On April 21, 2004, when Mr. Verner was 18 and Ms. Verner was 19, the parties were married in the District of Columbia. J.A. at 5. Six years later, Mr. Verner and Ms. Verner began living separately but still resided within the same house. *Id.* On May 10, 2011, they entered into

a Settlement Agreement, *see* Settlement Agreement at 16 (J.A. at 11), and on June 23, 2011, the Superior Court entered a judgment of absolute divorce and incorporated (but did not merge) the Settlement Agreement. J.A. at 6. During the marriage, the parties had five biological children,[1] and at the time of the divorce, Mr. Verner, Ms. Verner, and all five children still resided in the same house. Settlement Agreement at 4 (J.A. at 8). The parties continue to live together today.

When the parties entered the Settlement Agreement in May 2011—with Ms. Verner represented by counsel and Mr. Verner, then a rookie firefighter, acting *pro se*, Tr. 25—Mr. Verner assumed a wide range of post-divorce obligations. First, under the Settlement Agreement's Marital Home provisions, Mr. Verner was obligated, within a reasonable time, to either pay Ms. Verner $200,000 or purchase her a house and make payments on that house in the amount of $200,000. Settlement Agreement at 4 (J.A. at 8). Second, Mr. Verner agreed to pay $160 per child ($800 total) per month in child support to Ms. Verner, Settlement Agreement at 11 (J.A. at 10), as the agreement specified that Ms. Verner would have primary physical custody and parental responsibility for the five children, with liberal visitation rights to Mr. Verner. Settlement Agreement at 5. In addition to (1) the $200,000 payment and (2) monthly child support, the agreement also required Mr. Verner to assume financial responsibility for: (3) payment of Ms. Verner's car insurance and (4) reasonable gas money for her car, *id.*; (5) health insurance for Ms. Verner, *id.*; (6) medical, dental, and vision insurance for the five children and all uninsured or unreimbursed medical expenses that might be incurred, *id.* at 11 (J.A. at 10); (7) life insurance until the youngest child turns 21, *id.*; and (8) *all* marital and personal debts of Ms. Verner except Ms. Verner's student loans, *id.* at 4 (J.A. at 8) (emphasis in original). Mr. Verner's salary, meanwhile, is $47,844. J.A. at 20.

[1] The birthdates of the five children are: December 3, 2003; December 23, 2005; May 30, 2007; December 23, 2008; and June 10, 2011. J.A. at 22.

Until January 2012, Mr. Verner was able to make most of the child support payments in addition to paying the household expenses, Tr. 24-25, but he quickly became unable to satisfy all of his financial obligations. Tr. 25 ("I try to make sure . . . the bills are paid so my kids can have . . . a roof over their head. But . . . my funds are stretching. They're really stretching."). In January, Ms. Verner filed a motion to enforce the Settlement Agreement. The next month, Mr. Verner responded with an opposition and filed a motion to modify custody and a motion to terminate child support, J.A. at 3. In his motion, Mr. Verner argued that there had been a "significant and material change in circumstances warranting a termination of the child support order" because Ms. Verner did not retain primary physical custody of the children and Mr. Verner had become the primary custodian due in part to his firefighter's work schedule. *See* Defendant's Motion to Terminate Child Support at 2. Mr. Verner continued to make some child support payments until April 2012. Tr. at 24-25.

At the hearing on April 27, 2012, the trial court temporarily suspended Mr. Verner's child support payments "until the parties are able to move out on their own" and found the Settlement Agreement, at that juncture, to be "unworkable." Tr. 32-33 (J.A. at 13-14). In announcing the opinion of the court, Tr. 30-34, Judge Irving stated that he was basing his decision on D.C. Code § 16-916.01(t)'s requirement of "a substantial and material change in circumstances sufficient to warrant the modification of a support obligation." Tr. 31 (J.A. at 12).

Mr. Verner's ability to make the $200,000 payment—and the parties' ability to move into separate homes—was contingent on Mr. Verner's ability to sell or generate money from the marital home, which Mr. Verner's grandfather willed jointly to Mr. Verner and Ms. Verner but the rights to which Ms. Verner relinquished as part of the Settlement Agreement. Tr. 15-16; Settlement Agreement at 4 (J.A. at 8). The court found that Mr. Verner was effectively unable to

make the $200,000 payment or purchase a separate house for Ms. Verner as long as the marital house was still in probate and Mr. Verner was acting as the sole provider for the five children. Tr. 17-22. At the time of the hearing, it was unclear how much money Mr. Verner could obtain by taking the house out of probate and selling it, given that other heirs and creditors may have had claims to at least some of the proceeds from the sale of the house. *See* Tr. 21-22, 40. Later in the hearing, when the parties addressed other ways that Mr. Verner could obtain funds for the $200,000 payment, such as a loan, the court stated:

> [E]ven if Mr. Verner can obtain a loan, you don't want him to be responsible for paying a loan and then having monies taken out of the mouths of the children. There are several children here to be cared for. And a $200 thousand loan, that is a sum of money. It would be very difficult for someone who has been [a] practicing attorney[] for a while to be able to make a $200 thousand payment and provide for five children.

Tr. 38.

The court ordered Mr. Verner to "take the steps necessary" and "do[] everything in the probate matter to speed things along" to discharge the house through probate and make funding available for the $200,000 payment to allow the parties to move into separate residences. *See* Tr. 20.

The court also found that Ms. Verner was required to find employment, Tr. 43-45. The court held that once the parties were able to live separately, it would "revisit child support with mom's earning and dad's earnings in the calculus so that [it could] assess what . . . appropriate child support should be." Tr. 33 (J.A. at 14). In its order on Ms. Verner's May 7, 2012 motion for reconsideration, the court once again found that Ms. Verner had to find employment or that the court would impute minimum wages to her. J.A. at 22-[23].[2] The court ordered Mr. Verner to continue to pay directly the full support of all his children without the double-counting of paying Ms. Verner to do the same while they lived in the same house.

[2] The final page of the Joint Appendix is unnumbered but would be J.A. 23 ordered sequentially.

STANDARD OF REVIEW

Whether the trial court applied the correct legal standard is subject to de novo review. *In re D.S.*, 52 A.3d 887, 897 n.16 (D.C. 2012). Whether there has been a substantial and material change in circumstances "is a question committed to the sound discretion of the trial court" and will only be reversed upon a clear showing of abuse of the trial court's discretion. *Burnette v. Void*, 509 A.2d 606, 608 (D.C. 1986).

SUMMARY OF THE ARGUMENT

A trial court may modify a parent's child support payment in a settlement agreement if it finds a "substantial and material change in circumstances" that warrants such modification. D.C. Code § 16-916.01(t). This is the exact standard the trial court applied. The trial court correctly found a substantial and material change from what the parties assumed would occur following their divorce and entry into the Settlement Agreement, *i.e.*, that the parties would be able to reside in separate residences and that Ms. Verner would assume primary custody for the five children. When that did not occur, the court correctly found a substantial change in circumstances. There was no abuse of discretion, and res judicata is wholly inapplicable to the temporary suspension.

ARGUMENT

I. THE TRIAL COURT APPLIED THE CORRECT "SUBSTANTIAL AND MATERIAL CHANGE IN CIRCUMSTANCES" STANDARD AND EXPLICITLY STATED THAT IT WAS APPLYING THAT STANDARD

A. The Trial Court Specifically Found Facts Establishing "Changed Circumstances" Warranting A Temporary Suspension Of Mr. Verner's Child Support Payments To Ms. Verner.

The transcript from the April 27, 2012 hearing establishes that the trial court applied the correct standard for modifying Mr. Verner's child support payments. Under the District of Columbia's Child Support Guideline, a trial court may modify a child support provision of a settlement agreement "[u]pon the occurrence of a substantial and material change in circumstances sufficient to warrant the modification," D.C. Code § 16-916.01(t), without regard to whether the agreement or settlement is entered as a consent order or is incorporated or merged in a court order. *Mazza v. Hollis*, 947 A.2d 1177, 1180 n.5 (D.C. 2008); *see Wilson v. Craig*, 987 A.2d 1160, 1162 n.1 (D.C. 2010) (internal quotations omitted). A material change under the Child Support Guidelines is "generally one which affects either the supporting parent's ability to pay or the needs of the child." *Burnette v. Void*, 509 A.2d 606, 608 (D.C. 1986).

The trial court did apply the correct "substantial and material change in circumstances" standard in ordering the temporary suspension of child support payments. Prior to the brief colloquy between the trial court and counsel for Ms. Verner (which Ms. Verner believes is demonstrative of the court's application of the wrong standard), *see* Tr. 34-35 (J.A. at 15-16), the court announced its decision by explicitly quoting and applying the correct standard under the Child Support Guideline:

> [U]pon the occurrence of a substantial and material change in circumstances sufficient to warrant the modification of a support obligation, pursuant to the child support guidelines, the judicial officer may modify any provision of an agreement or settlement relating to child support. . . .

Tr. at 31 (J.A. at 12) (citing D.C. Code § 16-916.01(t)).

Besides quoting the correct standard in reaching its decision, the trial court also cited three of this Court's cases, each of which applied a "changed circumstances" standard to a proposed child support modification. *See* Tr. 30-32 (citing *Wilson v. Craig*, 987 A.2d 1160 (D.C. 2010) (discussing child support guidelines), *Spencer v. Spencer*, 494 A.2d 1279 (D.C.

1985) (applying contractual modification standard), and *Cooper v. Cooper*, 472 A.2d 878 (D.C. 1984) (same)).

After explaining the correct standard for child support modification, the trial court applied that standard and found that the parties' inability to fulfill the Settlement Agreement constituted "changed circumstances" sufficient to warrant a suspension in child support payments. Tr. 31-32 (J.A. at 12-13) (suspending requirement for child support while the parties and five children live in the same house and Mr. Verner is the only parent providing for the children).

B. The Trial Court's Post-Ruling Colloquy With Counsel For Ms. Verner Does Not Undermine Its Application Of The Correct Standard.

Ms. Verner's argument that the trial court failed to apply the correct standard based on a brief excerpt from the April 27 transcript ignores the court's explicit statement that it was applying the correct standard and the record as a whole. *See* App. Br. 4-5. Following the trial court's ruling suspending Mr. Verner's child support payments, Tr. 32-33 (J.A. at 13-14), counsel for Ms. Verner began asking whether the court had found changed circumstances from the time the parties had entered the Settlement Agreement. *See* Tr. 34 (J.A. at 15). In response, the court stated that it found the Agreement "unworkable" given the failure of the parties to reside separately following their entry into the Agreement. *See* Tr. 34-36 (J.A. at 15-17). Upon multiple assertions by counsel for Ms. Verner that the court had to find changed circumstances to modify a child support agreement, the court agreed repeatedly. *See* Tr. 34-36 (J.A. at 15-17).

Despite the final lines of the colloquy, *see* Tr. 36 (J.A. at 17), whether the court applied the correct standard must ultimately be determined by its explicit application of the correct legal standard during its actual ruling. *See* Tr. 30-34 (applying D.C. Code § 16-916.01(t)). A courts's announcement of its decision and the legal basis for that decision must carry more weight than a

post-ruling conversation between judge and counsel. *See Kieffer v. Kieffer*, 348 A.2d 887, 890 (D.C. 1975) ("Speech shares the character of its context and an examination of the actual conduct of the trial warrants a broader scrutiny than random colloquies."). This Court should find that the trial court applied the correct standard in suspending Mr. Verner's child support payments.

II. THE TRIAL COURT WAS CORRECT IN FINDING A SUBSTANTIAL AND MATERIAL CHANGE IN CIRCUMSTANCES CONTEMPLATED BY THE AGREEMENT AND THAT WARRANTED A TEMPORARY SUSPENSION OF MR. VERNER'S CHILD SUPPORT PAYMENTS TO MS. VERNER

The record as a whole (including the Settlement Agreement and transcript of the April 27 hearing) and this Court's precedents both establish that the trial court was correct in finding a substantial and material change in circumstances sufficient to justify a suspension of Mr. Verner's child support payments to Ms. Verner. She argues, at best a semantic gimmick, that nothing has changed because the parties lived in the same house when they signed the Settlement Agreement in May 2011 and continue to live in the same house now. *See* App. Br. at 4. This overly simplistic summary misses the mark. The custody and child support provisions in the Settlement Agreement, as envisioned and agreed to by the parties, assume that the parties would be able to live separately within a reasonable time and therefore can only be satisfied when the parties are actually able to live separately. However, the Settlement Agreement did not contemplate that the parties would not be able to move out from the marital home and that Mr. Verner would remain the sole provider of the five children, in addition to paying Ms. Verner for the same support of the children. Thus, the trial court correctly found that the parties' inability to reside separately was the changed circumstance justifying a temporary modification of support and rendering the Settlement Agreement in its current form "unworkable." *See* Tr. 32-33 (J.A. at 13-14).

A. A Condition Precedent To The Performance Of Much Of The Settlement Agreement, Including Child Support, Has Not Occurred.

The trial court's determination that the Settlement Agreement is "unworkable" as long as the parties live together indicates that the parties' ability to reside in separate homes is a condition precedent to the performance of many other provisions in the Agreement. When the court found the Settlement Agreement "unworkable" because the parties continued to live in the same house and Mr. Verner could not make the $200,000 payment to Ms. Verner in addition to being the sole provider of five children, Tr. 31-33 (J.A. at 12-14), it appropriately determined that a substantial and material change in circumstances had occurred.

A condition precedent is "an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." *Washington Props. v. Chin, Inc.*, 760 A.2d 546, 549 (D.C. 2000) (quoting Restatement (Second) of Contracts § 224 (1981)); *see Brier v. Orenberg*, 90 A.2d 832, 833 (D.C. 1952) (defining a condition precedent as "a fact which must exist or occur before a duty of immediate performance of a promise arises.").

In this case, the trial court correctly recognized that much of the Settlement Agreement is contingent upon the parties' ability to live separately, which is in turn contingent upon Mr. Verner's ability to make the $200,000 payment to Ms. Verner as specified in the Agreement. *See* Settlement Agreement at 4 (J.A. at 8) ("The marital home of the parties . . . shall be occupied by both parties until such reasonable time the Husband either pays Wife $200,000 or buys wife a house in either or both parties[']names and makes payments on the House equaling $200,000."). Mr. Verner's ability to make the payment is in part contingent upon the proceeds he could obtain from the sale or financing of the marital house now in probate, preventing sale or other financing for the foreseeable future. Tr. 21-22, 40. Mr. Verner's ability to pay Ms. Verner the $200,000 for a new house for her and the Verners' five children is thus an event that must occur before

performance of other provisions of the agreement can become due.[3] *See Washington Props.*, 760 A.2d at 549.

The trial court specifically found that the parties' ability to reside in separate homes was a condition of satisfying other terms of the Settlement Agreement and that Mr. Verner's ability to generate money through the marital property was the determining factor in his ability to make the payment. *See* Tr. 20 (court ordering Mr. Verner to "make certain that [he is] doing everything in the probate matter to speed things along so that the house can be free."). Throughout the April 27 hearing, the court repeatedly found that the parties' ability to reside separately was a condition precedent to their ability to satisfy other aspects of the Agreement. *See, e.g.*, Tr. 18 (asking whether the house could be sold so that "the support order itself can be effectuated"); Tr. 32-33 (J.A. at 13-14) (ordering Mr. Verner's child support "suspended until the parties are able to move out on their own"); Tr. 36 (J.A. at 17) (concluding that Mr. Verner is "required to provide support and the [c]ourt is satisfied that the support in the way that he is electing to provide it is appropriate until the parties and the children go from dad's home to mom's home.").

Many of the provisions in the Settlement Agreement are facially contingent upon the parties' ability to leave the marital home and live separately. For instance, the provisions of the Settlement Agreement governing custody of the Verners' five children grant Ms. Verner "primary parental responsibility and physical custody" and Mr. Verner "liberal visitation rights."

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[3] A parent seeking to modify child support payments may invoke contract defenses such as "frustration of performance" either due to "strict impossibility" or "impracticability due to extreme or unreasonable difficulty or expense." *Duffy v. Duffy*, 881 A.2d 630, 639 (D.C. 2005). The impracticability of performing under the contract may be temporary rather than permanent. Restatement (Second) of Contracts § 269. The trial court's finding that the Agreement was "unworkable" is precisely the finding of "impracticability" that *Duffy* contemplated. Mr. Verner, to this point, has been unable to make a $200,000 payment to Ms. Verner by discharging the marital property in probate or selling it, and making such a payment is impracticable as long as he continues to be the only parent who is able to provide for the five children. *See* Tr. 38 (trial court finding that making Mr. Verner "responsible for paying a [$200,000] loan and then having monies taken out of the mouths of children" would be contrary to their best interests).

Settlement Agreement at 5. These custody, parental responsibility, and visitation provisions are all based on the premise that Mr. Verner and Ms. Verner would live in separate homes and that Ms. Verner would be designated the "custodial parent" in those provisions. Settlement Agreement at 5-10. However, as the trial court found, when both parents live in the same home and are responsible for the care of the children, the Settlement Agreement's designation of a "custodial parent" is inoperative until the parents live in separate homes. *See* Tr. 14-15 ("It sounds like they have access equally to the children . . . . They're living under the same roof, and it appears that [Mr. Verner is] providing for them."), Tr. 39-40 (counsel for Mr. Verner withdrawing motion to modify custody because motion was made moot by trial court's finding that both parents shared custody of the children); *see also* D.C. Code § 16-916.01(q) (creating presumption of shared physical custody under the Child Support Guideline when a child spends 35 percent or more of the time during the year with each parent).

One custodial provision of the Settlement Agreement in particular highlights why Mr. Verner's child support payments have to be suspended while the parties continue to live in the same home. The "Abatement of Support" provision, Settlement Agreement at 10 (J.A. at 9), specifies that the non-custodial parent's child support obligation must be abated by 25 percent during any visitation with the non-custodial parent of 14 consecutive days or more. That provision contemplates that Mr. Verner would be the non-custodial parent and that his support could be reduced upon extended visitation, but as the court found, he is a custodial parent, Tr. 14-15, and the notion of an "extended visitation"—like the custody and child support provisions themselves—is meaningless unless the parties are able to reside in separate homes.

B. There Was No Abuse Of Discretion Under The Child Support Guidelines And This Court's Precedents.

The trial court's modification of the child support order is consistent with the Child Support Guideline, D.C. Code § 16-916.01, and this Court's precedents. This Court has held that changes in custody arrangements can justify modifications to child support. *See Wilson v. Craig*, 987 A.2d 1160, 1165-66 (D.C. 2010). In *Wilson*, the Court affirmed the trial court's increase in child support when the parties changed from shared custody of three children to the mother having sole custody. *Id.* The Court recognized that the trial court had the authority to increase the child support even when the custodial parent did not request it. *Id.* at 1165. In the present case, the trial court found that the custody arrangement as envisioned in the Settlement Agreement granted Ms. Verner sole custody of all five children with Mr. Verner paying child support accordingly. However, because the parties in fact retain shared custody and Mr. Verner is the sole provider, the court modified Mr. Verner's child support so that he could continue acting as provider without owing additional child support payments to Ms. Verner. The trial court actually went further than Mr. Verner requested, *see Wilson*, 987 A.2d at 1165, ordering Ms. Verner to find employment so that she could help support the children financially, Tr. 43-45, holding open the option to impute minimum wages to her in the future. J.A. at 22-[23].

The trial court's modification under the Child Support Guidelines also embodies the Guidelines' "equitable approach to child support." D.C. Code § 16-916.01(c)(1) (Supp. 2010). Child support determinations cannot be "inequitable or create an extraordinary hardship" for either of the parents. *Beraki v. Zerabruke*, 4 A.3d 441, 449 (D.C. 2010) (citing legislative history and public policy reflected in the Guidelines). In this case, the trial court suspended Mr. Verner's child support payments in part because to hold otherwise would create "extraordinary hardship" for him given all of his financial obligations under the Agreement that were still valid

even with the parties' inability to reside separately. *See supra* at 3 (discussing Mr. Verner's financial obligations under the Agreement).

III. RES JUDICATA DOES NOT BAR THE TRIAL COURT'S TEMPORARY MODIFICATION OF THE CHILD SUPPORT PAYMENT TO MS. VERNER

Ms. Verner's argument that res judicata bars the modification of child support in this case is wrong. *See* App. Br. 3-4, 6. Given that child support orders are always subject to modification upon a showing of changed circumstances, D.C. Code § 16-916.01(t), and "the general rule . . . recognizing that support orders may change over time," *Sollars v. Cully*, 904 A.2d 373, 376 (D.C. 2006), res judicata simply does not block Mr. Verner's claim for modification.

Res judicata is sometimes used as a term that encompasses two types of preclusion, neither of which applies to the present case regardless of which type Ms. Verner is attempting to invoke. *See Davis v. Davis*, 663 A.2d 499, 501 & n.3 (D.C. 1995). Res judicata, often more specifically called claim preclusion, applies "when a final judgment has been entered on the merits [and] the parties or those in privity with them are barred, in a subsequent proceeding, from relitigating the same claim or any claim that might have been raised in the first proceeding." *Id.* at 501 n.3. In contrast, collateral estoppel, or issue preclusion, renders an issue of fact or law conclusive in the same or a subsequent action when "(1) the issue is actually litigated and (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; (4) under circumstances where the determination was essential to the judgment, and not merely dictum." *Id.* at 501.

Claim preclusion clearly cannot block the temporary modification of child support in this case because no court has entered a judgment with respect to the amount of child support Mr. Verner owes. Additionally, claim preclusion cannot bar litigation about changed

circumstances that were not and could not have been adjudicated in the prior judgment. *See Sollars*, 904 A.2d at 376-377 (finding res judicata did not bar a litigant from seeking modification of a child support order after the child support order had been vacated without litigation of any claims or issues).

Issue preclusion similarly does not apply in this case. Prior to the trial court proceedings that resulted in this appeal, the parties had not "actually litigated" any independent issue regarding Mr. Verner's payment of child support, nor had any court adjudicated any such issue. Issue preclusion can apply to child support cases when issues already have been litigated, such as when a daughter's claim for college tuition was defeated by issue preclusion because the parents had already litigated the payment of college tuition in a prior proceeding. *Nowak v. Trezevant*, 685 A.2d 753, 758 (D.C. 1996). However, Ms. Verner and Mr. Verner have never litigated the issue of child support in a prior proceeding and the District of Columbia clearly allows for the modification of child support orders. D.C. Code § 16-916.01(t).

In a case like this one, where the parties have not litigated the issue of child support payments in a prior proceeding and no court has entered a judgment about child support, a broadly framed "res judicata" argument is without merit. *See Sollars*, 904 A.2d at 375 ("[O]ur law expressly contemplates that the considerations underlying a support order may change during the years where a child is entitled to support.").

CONCLUSION

For the foregoing reasons, Mr. Verner urges this Court to affirm the trial court's temporary suspension of his child support payments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing brief to be delivered by first class mail postage prepaid this 26th day of February 2013 to the following:

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