

**SUPREME COURT - STATE OF NEW YORK
IAS PART:ROCKLAND COUNTY
Present: HON. ALFRED J. WEINER
Justice of the Supreme Court**

X
K. D.,

Plaintiff,

DECISION

-against-

Index No.:

R. D.,

Defendant.

X

WEINER, J.

The Plaintiff (hereinafter "wife") commenced this action for a divorce on November 1, 2005. At trial the parties stipulated that Defendant (hereinafter "husband") would not oppose Plaintiff's request for a conversion divorce pursuant to section 170(6) of the Domestic Relations Law.

The parties were married on September 25, 1996 and there are two children of the marriage - now eight and three years old. On April 26, 2004 a separation agreement was signed.

The visitation issues that arose subsequent to the execution of the separation agreement were resolved through the entry of a consent order in the Family Court Order on December 19, 2005.

The trial continued on the remaining ancillary issue of child support.

The separation agreement admitted into evidence recites the respective earnings of the parties and the Basic Child Support Obligation in compliance with the Child Support Standards Act ("CSSA"). The agreement further provides that the husband earned \$65,000 in the year preceding the execution of the agreement (2003) and that the wife was expected to soon be employed at an annual salary of \$32,000 per year. Since there are two children of the marriage the husband's CSSA monthly child support obligation was computed to be \$1,095.83. Notwithstanding the CSSA computation, the agreement provides that Defendant was to pay \$1,800 per month in child support until the oldest child is emancipated at which time his child support obligation would decrease to \$1,300 per month. The husband testified that he agreed to pay more than he would otherwise be obligated to pay because he was "... *trying to give them [the children] as much as possible even given [his] fairly tight budget at the time.*"

Since the execution of the separation agreement in 2004, the husband contends there has been an unanticipated and unreasonable change in circumstances in that he is no longer employed and that his unemployment has lasted for one and one-half years. As a consequence, he requested that he be permitted to pay child support in an amount that is less than what he previously agreed to pay in the parties' separation agreement. He has also requested that he be permitted to pay the accrued arrears over a period of time.

The wife wants the husband to pay child support in accordance with the parties' agreement. Because of Defendant's erratic payments, she requested that Defendant's child support payments be made through the Support Collection Unit. In addition, she seeks a money judgment for the child support arrears. It is not disputed that there are \$11,500 in child support arrears under the terms of the separation agreement.

The husband is 37 years of age and holds a Bachelor of Science degree in economics and a Masters of Education and Finance all from a fine University. He lived in Russia from 1996 through 2001 and stated that Russia has been a "...*core focus...*" for him.

He testified that prior to being terminated from his employment in December 2004, he worked out of the marital home as a research analyst. He continued to work as a consultant for his former employer subsequent to his termination but at a reduced compensation. He also worked as a consultant for another company that later terminated him, as well. He was earning \$85,000 annually when he signed the separation agreement. In the first three months of 2006, he earned \$8,500 as a temporary consultant.

Defendant further stated that he lives in a condominium in Rockland County that he purchased at or about the time the parties signed the separation agreement. He has not missed a mortgage payment and has been borrowing from his mother to pay the condominium carrying charges and his child support payments.

He testified that although unemployed for a year and a half he vigorously pursued every possible avenue he could think of to obtain work. In support of his claim a computer printout of confirmations from prospective employers of their receipt of his employment applications along with other computer records of transmitted cover letters and resumes was submitted into evidence. In the year and a half he has been unemployed he applied for "... *well over 3,000 jobs...*" and except for one trip to the "unemployment office", all were apparently over the Internet and all without success.

The Defendant had few job interviews in 2005 and 2006. He did not offer any details nor specify who his interviews were with. The testimony regarding his efforts to find employment was couched and broad and general terms. Notwithstanding his education and skills, Defendant also testified that he applied for jobs as a driver and delivery person.

Plaintiff is 31 years of age and worked part-time when the separation agreement was signed. She is currently employed full-time as a legal secretary earning approximately \$49,000 a year.

In general, New York has a "strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements". *Matter of Greiff*, 92 N.Y.2d 341, 344;

Bloomfield v. Bloomfield, 97 N.Y.2d 188. The terms, like any other contract clauses, are binding on the parties to the agreement. The right to enter into a contractual arrangement in matrimonial matters is expressly authorized by Domestic Relations Law §236(B)(3). This provision “authorizes spouses ... to contract out of the elaborate statutory system...in the event that the marriage ends”. *Matisoff v. Dobi*, 90 N.Y.2d 127, 132; *Christian v. Christian*, 42 N.Y.2d 63; *Matter of Davis*, 20 N.Y.2d 70; *Paruch v. Paruch*, 140 A.D.2d 418, 420.

A husband and wife, in entering into a separation agreement, may include in that agreement provisions pertaining to the support of the children of their marriage. However, the authorization for a husband and wife to enter into a contractual arrangement is not without limitations nor scrutiny. For example, an agreement as to child support must set forth the amount of child support that would be owed under the relevant CSSA guidelines and, if the amount agreed to deviates from the same, an explanation why it does is required. In addition, even if the agreement complies with the statutory requirements, the courts “retain discretion with respect to child support”. *Domestic Relations Law* §240[1-b][h]; *Matter of Gravlin v. Ruppert*, 98 N.Y.2d 1, 5; *Pecora v. Cerillo*, 207 A.D.2d 215, 217.

Where the parties have included child support provisions in their separation agreement, the Court of Appeals has held that a court should consider these provisions as between the parties as their agreed upon allocation of financial responsibility and it should not freely disregard that agreement. Absent a showing of an unanticipated and unreasonable change in circumstances, the support provisions of the parties’ agreement should not be disturbed. *Boden v. Boden* 42 N.Y.2d 210, 366 N.E.2d 791, 397 N.Y.S.2d 701, (other citations omitted).

Although a loss of employment may constitute a change of circumstances warranting a downward modification of a child support obligation, where reemployment is diligently sought (*Meyer v. Meyer*, 205 A.D.2d 784, 614 N.Y.S.2d 42), the proper amount of support payable is determined not by a parent's current economic situation, but by his assets and earning powers. *Matter of Fries v. Price-Yablin*, 209 A.D.2d 1002, 619 N.Y.S.2d 900; *Matter of Fleischmann v. Fleischmann*, 195 A.D.2d 604, 601 N.Y.S.2d 16). A downward

modification may be denied where the moving party has not made a good faith effort to obtain employment commensurate with his qualifications and experience. *Matter of Davis v. Davis*, 197 A.D.2d 622, 602 N.Y.S.2d 672; *Jones v. Marolla*, 105 A.D.2d 944, 482 N.Y.S.2d 127.

The Court finds that the child support provisions of the separation agreement complies with the requirements of Domestic Relations Law 240(1-b)(h) and, among other things, sets forth the amount of child support the husband would be obligated to pay under the relevant CSSA guidelines. The husband's agreement to pay a greater amount of child support than required by the guidelines is neither unjust nor inappropriate.

The Court further finds that this Defendant did not make a good faith effort to obtain employment commensurate with his qualifications and experience. One visit to the "unemployment office" and transmitting "3000" resumes and letters via the Internet over a one and one-half year period does not constitute a "...a good faith effort" to secure employment. *D'Altilio v. D'Altilio* 14 A.D.3d 701, 789 N.Y.S.2d 270, 2 Dept.,2005; *Yepes v. Fichera* 230 A.D.2d 803, 646 N.Y.S.2d 533, 2 Dept.,1996. The Defendant is a highly-educated person knowledgeable in the financial world with international experience. He should have soon realized that repeatedly sending employment applications and resumes to prospective employers over the Internet was not a fruitful method of securing employment. Additionally, he did not explore other methods of securing employment. Consequently, the Court further finds that Defendant has not met his burden of establishing his entitlement to pay child support in an amount that is less than he agreed to.

Accordingly, the Court DENIES Defendant's application. Defendant remains obligated to pay child support payments in accordance with the separation agreement.

Plaintiff's application that child support payments be made through the Support Collection Unit is DENIED. *Hosza-Dzielak v Hosza*, 26 A.D.3d 378, 812 N.Y.S.2d 564.

Plaintiff's request for a money judgment in the sum of \$11,500 is GRANTED.

The Family Court Visitation Order shall continue and the Family Court shall be granted concurrent jurisdiction with this Supreme Court with respect to the issues of child support, custody and visitation.

Submit proposed Judgments, Findings, Qualified Medical Child Support Order and all other necessary documents (affidavit of facts) etc., constituting Plaintiff's entitlement to a divorce.

Dated: New City, New York
 September 8, 2006

E n t e r :

HON. ALFRED J. WEINER
Justice of the Supreme Court

To:

K. D.
Plaintiff pro se

Bruce A. Rogers P.C.
Attorney for Defendant