SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CAF 18-00456

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

IN THE MATTER OF THOMAS A.R. FANIZZI,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MARYROSE DELFORTE-FANIZZI, RESPONDENT-APPELLANT.

LISA A. SADINSKY, ROCHESTER, FOR RESPONDENT-APPELLANT.

PHILIPPONE LAW OFFICES, ROCHESTER (CHRISTOPHER M. HUDAK OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (John B. Gallagher, Jr., J.), entered August 23, 2017 in a proceeding pursuant to Family Court Act article 4. The order denied respondent's written objections to the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 4, respondent mother appeals from an order denying her objections to an order of a Support Magistrate directing a downward modification of the child support obligation of petitioner father. We affirm.

Family Court "may modify an order of child support, including an order incorporating without merging an agreement or stipulation of the parties, upon a showing of a substantial change in circumstances" (Family Ct Act § 451 [3] [a]). "In addition, . . . the court may modify an order of child support where . . . three years have passed . . . or . . . there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted" (§ 451 [3] [b] [i], [ii]). We note that the grounds listed in Family Court Act § 451 (3) (b) do not require the party seeking modification to establish a change in circumstances (*see Matter of Harrison v Harrison*, 148 AD3d 1630, 1631-1632 [4th Dept 2017]). Thus, the Family Court Act provides three separate grounds upon which a party may seek to modify a child support order.

The mother contends that the father failed to establish a substantial change in circumstances (*see* Family Ct Act § 451 [3] [a]). We reject that contention. Loss of employment may constitute a substantial change in circumstances, provided that the party seeking

to modify the order shows that "the termination occurred through no fault of [his or her own] and the [party] has diligently sought re-employment" (*Jelfo v Jelfo*, 81 AD3d 1255, 1257 [4th Dept 2011] [internal quotation marks omitted]; *see Matter of Fragola v Alfaro*, 45 AD3d 684, 685 [2d Dept 2007]). Here, the father testified at the hearing that he was terminated from his position as general manager of a printing services company, which had an annual salary of $115,000, because upper management disagreed with his decision to purchase a digital printing press. He also testified that the company was in financial peril and, since his termination, the company closed one of its facilities and had barely enough work to continue operating its remaining facility. Furthermore, the father testified that he applied to more than 300 jobs in New York, Pennsylvania, New Hampshire and Utah, and contacted various employment agencies; but, without a four-year college degree, he was unable to obtain employment at his prior level of compensation. After a 19-month job search, the father ultimately accepted a position that paid less than one fourth of his prior salary. The record thus establishes that he was terminated through no fault of his own and that he diligently sought reemployment (*see Matter of Preischel v Preischel*, 193 AD2d 1118, 1118-1119 [4th Dept 1993]; *see also Matter of Smith v McCarthy*, 143 AD3d 726, 727-728 [2d Dept 2016]).

Inasmuch as the father established a substantial change in circumstances warranting a modification of child support (*see* Family Ct Act § 451 [3] [a]), we need not consider his alternative ground for affirmance, i.e., that he experienced a reduction in his gross income of 15% or more (*see* § 451 [3] [b] [ii]).

The mother further contends that the Support Magistrate erred in imputing only $64,000 in income to the father. We reject that contention. Given the father's level of education and the results of his extensive job search, we conclude that the Support Magistrate did not abuse her discretion in refusing to impute additional income to him (*see generally Hurley v Hurley*, 71 AD3d 1470, 1470 [4th Dept 2010]). Contrary to the mother's further contention, we conclude that the Support Magistrate properly deviated from the presumptive support obligation calculated under the Child Support Standards Act (CSSA) (*see generally* Family Ct Act § 413). The Support Magistrate issued written findings of fact in which she properly applied the CSSA guidelines, set forth the relevant statutory factors and reasons why it would be "unjust or inappropriate" to require the father to pay his presumptive obligation, and supported those reasons with facts in the record (§ 413 [1] [f], [g]; *see Matter of Smith v Jefferson County Dept. of Social Servs.*, 149 AD3d 1539, 1540 [4th Dept 2017]).

We have reviewed the mother's remaining contention, and we conclude that it does not compel reversal or modification of the order.

Entered: September 28, 2018

Mark W. Bennett
Clerk of the Court