

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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Submitted - December 14, 2006

A. GAIL PRUDENTI, P.J.
WILLIAM F. MASTRO
FRED T. SANTUCCI
MARK C. DILLON, JJ.

2005-04087

DECISION & ORDER

Stacey L. Brian, respondent, v
David A. Brian, appellant.

(Index No. 751/03)

Fred C. Russcol, P.C., White Plains, N.Y., for appellant.

In an action for a divorce and ancillary relief, the defendant appeals, as limited by his brief, from so much of a judgment of the Supreme Court, Dutchess County (Brands, J.), dated May 16, 2005, as, upon a decision of the same court dated March 25, 2005, made after a nonjury trial, awarded the defendant child support in the amount of only \$1,212 per month and failed to award him maintenance.

ORDERED that the judgment is affirmed insofar as appealed from, without costs or disbursements.

In determining a party's obligation to provide child support, the trial court may impute income based upon the party's past income or demonstrated earning potential (*see Nebons v Nebons*, 26 AD3d 478; *Kalish v Kalish*, 289 AD2d 202; *Zabzhanskaya v Dinhofer*, 274 AD2d 476, 477; *Mellen v Mellen*, 260 AD2d 609). Under the circumstances here, the court properly found that the plaintiff's decision to accept a full-time nursing position at a lower salary than her previous position was involuntary.

In declining to award the defendant maintenance, the court properly considered, *inter alia*, the age and health of both parties, their respective income, property, and earning capabilities, the ability of the party seeking maintenance to become self-supporting as well as his contributions to the

other party's career, tax consequences, the presence of children, and wasteful dissipation of marital assets (*see* Domestic Relations Law § 236B[6][a]; *Ferro v Ferro*, 19 AD3d 363). There was no support in the record for finding that an award of maintenance was needed to maintain the pre-divorce lifestyle (*see Hathaway v Hathaway*, 16 AD3d 458, 460).

Moreover, since the court had the opportunity to observe the parties and to assess their credibility (*see Virgintino v Virgintino*, 289 AD2d 399; *Singh v Kaur*, 294 AD2d 562), we find no basis for disturbing those determinations based on credibility.

The defendant's remaining contentions are without merit.

PRUDENTI, P.J., MASTRO, SANTUCCI and DILLON, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court