

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

D16261
X/hu

_____AD3d_____

Submitted - June 15, 2007

ROBERT W. SCHMIDT, J.P.
FRED T. SANTUCCI
GABRIEL M. KRAUSMAN
WILLIAM E. McCARTHY, JJ.

2006-02365

DECISION & ORDER

Ralph J. Fasano, appellant, v Theresa L.
Fasano, respondent.

(Index No. 28721/93)

The Sallah Law Firm, P.C., Holtsville, N.Y. (Dean J. Sallah of counsel), for appellant.

Moran, Brodrick & Elliot, Garden City, N.Y. (Thomas A. Elliot of counsel), for respondent.

In a matrimonial action in which the parties were divorced by judgment dated February 17, 1994, the plaintiff appeals from an order of the Supreme Court, Nassau County (Gartenstein, J.H.O.), dated February 8, 2006, which, inter alia, in effect, granted that branch of the defendant's motion which was for an award of child support arrears in the principal sum of \$98,379.05, consisting of the sum of \$27,166.62 in child support arrears accrued through July 1, 2005, under the judgment of divorce and the parties' separation agreement dated October 21, 1993, except for the provision in the separation agreement pertaining to cost of living adjustments, the additional sum of \$68,387.43 in child support arrears accrued through July 1, 2005, based on the provision in the parties' separation agreement pertaining to cost of living adjustments, and the sum of \$2,825 for arrears in orthodontia expenses for the parties' child, and directed that he pay the defendant the sum of \$4,419.40 per month in child support commencing August 1, 2005, subject to future cost of living adjustments, in accordance with the provision in the separation agreement pertaining to cost of living adjustments.

ORDERED that the order is modified, on the law, (1) by deleting the provision thereof, in effect, granting that branch of the defendant's motion which was for an award of child support arrears in the principal sum of \$98,379.05, consisting of the sum of \$27,166.62 in child

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support arrears accrued through July 1, 2005, under the judgment of divorce and the parties' separation agreement dated October 21, 1993, except for the provision in the separation agreement pertaining to cost of living adjustments, the additional sum of \$68,387.43 in child support arrears accrued through July 1, 2005, based on the provision in the parties' separation agreement pertaining to cost of living adjustments, and the sum of \$2,825 for arrears in orthodontia expenses for the parties' child, and substituting therefor a provision granting that branch of the defendant's motion which was for an award of child support arrears to the extent of awarding her the principal sum of \$29,991.62, consisting of the sum of \$27,166.62 in child support arrears accrued through July 1, 2005, under the judgment of divorce and the separation agreement, except for the provision in the separation agreement pertaining to cost of living adjustments, and the sum of \$2,825 for arrears in orthodontia expenses for the parties' child, and (2) by deleting the provision thereof directing that the plaintiff pay the defendant the sum of \$4,419.40 per month in child support commencing August 1, 2005, subject to future cost of living adjustments, in accordance with the provision in the separation agreement pertaining to cost of living adjustments; as so modified, the order is affirmed, with costs to the plaintiff.

In view of our determination in *Fasano v Fasano* (_____AD3d_____) [Appellate Division Docket No. 2005-04345, decided herewith], that the cost of living provision with respect to child support, as contained in the parties' separation agreement dated October 21, 1993, is invalid and unenforceable for failure to comply with Domestic Relations Law § 240(1-b)(h), we modify the order herein accordingly.

SCHMIDT, J.P., SANTUCCI, KRAUSMAN and McCARTHY, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court