

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

D24382  
C/kmg

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - June 18, 2009

REINALDO E. RIVERA, J.P.  
ANITA R. FLORIO  
THOMAS A. DICKERSON  
LEONARD B. AUSTIN, JJ.

2009-00142

DECISION & ORDER

In the Matter of Elizabeth Savini, respondent,  
v Eugene Burgaleta, appellant.  
(Proceeding No. 1)

In the Matter of Eugene Burgaleta, appellant,  
v Elizabeth Savini, respondent.  
(Proceeding No. 2)

(Docket Nos. F-3184-04, F-3186-04)

---

Kantrowitz, Goldhamer & Graifman, P.C., Chestnut Ridge, N.Y. (Reginald H. Rutishauser of counsel), for appellant.

In two related child support proceedings pursuant to Family Court Act article 4, the father appeals from an order of the Family Court, Rockland County (Warren, J.), entered December 2, 2008, which denied his objections to an order of the same court (Miklitsch, S.M.), entered April 25, 2008, which, after a hearing, inter alia, set his child support obligation at \$295.19 per week, fixed his child support arrears as of April 25, 2008, at \$92,323.82 and, upon directing him to pay counsel fees and costs to the mother in the total sum of \$20,712.05, awarded that sum to her.

ORDERED that the order entered December 2, 2008, is modified, on the law and the facts, (1) by deleting the provision thereof denying the father's objections to so much of the order entered April 25, 2008, as fixed his child support arrears as of April 25, 2008, at \$92,323.82 and substituting therefor provisions (a) granting those objections, (b) vacating the provision of the order entered April 25, 2008, fixing the child support arrears at \$92,323.84, and (c) determining that there are no child support arrears due to the mother as of April 25, 2008, (2) by deleting the provision

January 12, 2010

Page 1.

MATTER OF SAVINI v BURGALETA  
MATTER OF BURGALETA v SAVINI

thereof denying the father's objections to so much of the order entered April 25, 2008, as directed him to pay counsel fees and costs to the mother in the total sum of \$20,712.05 and substituting therefor provisions (a) granting those objections, (b) vacating the provisions of the order entered April 25, 2008, directing the father to pay counsel fees and costs to the mother in the total sum of \$20,712.05, and (c) directing the father to pay counsel fees and costs to the mother in the total sum of \$10,244.44, and (3) by adding thereto a provision dismissing so much of the mother's petition as sought to enforce the child support provisions in the parties' judgment of divorce; as so modified, the order entered December 2, 2008, is affirmed insofar as appealed from, without costs or disbursements.

As the child support provisions in the parties' judgment of divorce dated August 22, 1997, were vacated by an order of the Supreme Court, Rockland County dated May 11, 2007, which was affirmed by decision and order of this Court dated May 20, 2008 (*see Burgaleta v Burgaleta*, 51 AD3d 842), so much of the mother's petition as sought to enforce the child support provisions in the parties' judgment of divorce must be dismissed.

In a handwritten agreement dated April 19, 1997, the parties agreed, among other things, that starting with the January 28, 1998, payment the mother would accept the sum of \$200 per week as child support. The agreement provided that the mother would not "file suit for any monies that would make up the difference between the child support percentage of 29% of [the father's] weekly income and the two hundred dollar weekly payment." This agreement was a valid waiver by the mother of her right to file suit to recover child support above the sum of \$200 per week while the waiver was in effect. Since the father complied with the agreement, no arrears accrued while it was in effect. The mother validly withdrew from the agreement by filing her child support petition dated August 11, 2004 (*see Burgaleta v Burgaleta*, 51 AD2d 842; *Daratany v Daratany*, 18 AD3d 496; *Matter of O'Connor v Curcio*, 281 AD2d 100, 103; *cf. Matter of Hang Kwok v Xiao Yan Zhang*, 35 AD3d 467).

Contrary to the father's contentions, the Support Magistrate's determination of the amount of the father's weekly child support obligations accruing after the mother's August 11, 2004, filing of the support obligation petition, as well as the Support Magistrate's determinations as to other amounts owed the mother, were properly based upon the application of the 29% "child support percentage" (Family Ct Act § 413[1][b][3][iii]) to the combined parental income over \$80,000 (*see Domestic Relations Law* § 240[1-b][c][1], [2]; Family Ct Act § 413[1][b][3], [c], [f]; *Cimons v Cimons*, 53 AD3d 125, 127; *Matter of Spratt v Fontana*, 51 AD3d 1034; *cf. Zaremba v Zaremba*, 222 AD2d 500). Based upon the application of the 29% child support percentage, the father underpaid the total sum of \$2,521.32 from November 8, 1996, through January 28, 1998, the effective date of the agreement. However, the total owed by the father for child support from August 11, 2004, until the date of the Support Magistrate's order was only \$73,601.19, and the amount he actually paid during that time was \$86,590.12, leaving an overpayment of \$12,988.93. Deducting the underpaid sum of \$2,521.32 from the overpaid sum of \$12,988.93 leaves a total sum of \$10,467.61 overpaid by the defendant. Deducting that sum from the total sum of \$20,712.05 which the Support Magistrate directed the father to pay as counsel fees and costs, the father should be directed to pay the total sum of \$10,244.44 as counsel fees and costs.

The father's remaining contentions either have been rendered academic or are without merit.

RIVERA, J.P., FLORIO, DICKERSON and AUSTIN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive style with a large, looping initial "J".

James Edward Pelzer  
Clerk of the Court