

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

D32492
W/kmb

_____AD3d_____

Submitted - September 12, 2011

DANIEL D. ANGIOLILLO, J.P.
THOMAS A. DICKERSON
L. PRISCILLA HALL
ROBERT J. MILLER, JJ.

2010-00930
2010-08040
2010-08041

DECISION & ORDER

Adelaida O'Brien, respondent, v Kevin O'Brien,
appellant.

(Index No. 2309/02)

Aaronson Rappaport Feinstein & Deutsch, LLP, New York, N.Y. (Elliott J. Zucker
of counsel), for appellant.

Mark D. Stern, Goshen, N.Y., for respondent.

In an action for a divorce and ancillary relief, the defendant appeals (1), as limited by his brief, from so much of a judgment of the Supreme Court, Orange County (Giacomo, J.), dated November 30, 2009, as, upon a decision of the same court dated October 15, 2009, made after a nonjury trial, awarded the plaintiff child support in the amount of \$2,625 per month, plus child support arrears, awarded the plaintiff maintenance for a period of 10 years in the amount of \$1,375 per month, to increase as each of the parties' six children becomes emancipated, plus maintenance arrears, awarded him visitation with the parties' children only on alternate weekends, certain holidays, and on Wednesday nights for two hours, and awarded the plaintiff an attorney's fee in the sum of \$10,000, (2) from a money judgment of the same court dated May 11, 2010, which, upon the decision and the judgment, is in favor of the plaintiff and against him in the sum of \$10,000, and (3), as limited by his brief, from so much an order of the same court dated June 25, 2010, as denied his motion to vacate and modify certain portions of the judgment dated November 30, 2009.

ORDERED that the appeals from the money judgment and from so much of the order

October 11, 2011

Page 1.

O'BRIEN v O'BRIEN

as denied those branches of the defendant's motion which were to vacate and modify the portions of the judgment dated November 30, 2009, awarding the plaintiff child support and child support arrears, maintenance and maintenance arrears, and an attorney's fee are dismissed as academic in light of our determination on the appeal from the judgment dated November 30, 2009, without costs or disbursements; and it is further,

ORDERED that the judgment is modified, on the law and the facts, by deleting the provisions thereof awarding the plaintiff child support in the amount of \$2,625 per month plus child support arrears, maintenance for a period of 10 years in the amount of \$1,375 per month, to increase as each of the parties' six children becomes emancipated, plus maintenance arrears, and an attorney's fee in the sum of \$10,000; as so modified, the judgment is affirmed insofar as appealed from, without costs or disbursements, the money judgment and the provisions of the order denying those branches of the defendant's motion which were to vacate and modify the portions of the judgment awarding the plaintiff child support and child support arrears, maintenance and maintenance arrears, and an attorney's fee are vacated, and the matter is remitted to the Supreme Court, Orange County, for a recalculation of the parties' respective incomes and the amounts to be awarded to the plaintiff for monthly child support plus arrears, monthly maintenance plus arrears, and an attorney's fee, and the entry of an appropriate amended judgment thereafter; and it is further,

ORDERED that the order is affirmed insofar as reviewed, without costs or disbursements; and it is further,

ORDERED that in the interim the defendant shall continue to pay the plaintiff the sum of \$2,625 per month in child support and the sum of \$1,375 per month in maintenance.

As memorialized in a decision made after a nonjury trial in this matrimonial action, the Supreme Court found that the plaintiff former wife had an annual income of \$33,262 from all sources, and the defendant former husband had an annual income of \$115,747 from all sources. The parties were divorced by judgment dated November 30, 2009. In addition to child support of \$2,625 per month, plus support arrears, the Supreme Court awarded the plaintiff maintenance in the amount of \$1,375 per month over a period of 10 years, to increase as each of the parties' six children becomes emancipated, so that the plaintiff will receive the total sum of \$4,000 per month in combined child support and maintenance for a period of 10 years, plus maintenance arrears. The Supreme Court also awarded the plaintiff an attorney's fee in the amount of \$10,000. The plaintiff was to remain in the marital residence and pay all carrying costs.

The awards of child support, maintenance, arrears, and an attorney's fee were based upon the Supreme Court's calculation of the parties' respective incomes. The defendant correctly contends that the Supreme Court made a mathematical error in calculating the plaintiff's income. The numbers reflecting the various components of the plaintiff's annual income, as set forth by the Supreme Court in its decision, add up to a total of \$54,163, not \$33,262, as erroneously stated by the Supreme Court. A court has the inherent power to relieve a party from judgments taken through mistake or inadvertence in the interest of justice (*see Matter of McKenna v County of Nassau, Off. of County Attorney*, 61 NY2d 739, 742; *Katz v Marra*, 74 AD3d 888, 890; *Hanlon v Thonsen*, 146 AD2d 743, 744). In light of the calculation error noted above, the awards of child support,

maintenance, arrears, and an attorney's fee must be recalculated based on the correct figures.

Further, with respect to one of the components of the defendant's annual income, the Supreme Court attributed an incorrect amount. Three of the components are supported by the record: a disability pension in the annual sum of \$38,400, salary in the sum of \$49,105 annually, and annual income in the amount of \$18,000 from the defendant's video duplicating service KOBICS, formerly known as ServAssist. However, the record does not support the Supreme Court's calculation and imputation of the sum of \$15,376 in annual benefits from the defendant's employer for use of an automobile and cell phone, along with the employer's payment of expenses attributable to the use of those items. Domestic Relations Law § 240(1-b)(b)(5)(iv)(B) provides that the Supreme Court may, in its discretion, "attribute or impute income from . . . automobiles or other perquisites that are provided as part of compensation for employment to the extent [they] constitute expenditures for personal use, or . . . directly or indirectly confer personal economic benefits." Here, although the defendant's employer expended the sum of \$15,376 in 2007 for the defendant's use of an automobile and cell phone and related expenses, the amount attributable to income is considerably smaller in light of the defendant's testimony that only 10% of his use of the automobile, and only a "portion" of his use of the cell phone, were personal uses.

Upon remittal for recalculation, the discrepancy between the parties' incomes will necessarily be smaller than previously calculated, and, accordingly, the defendant's pro rata share of the basic child support obligation must be recalculated. Further, upon remittal, the Supreme Court must recalculate the award of maintenance based upon factors including the parties' respective incomes as recalculated, their pre-divorce standard of living, and the financial resources of each, considered separately, balancing the plaintiff's needs with the defendant's ability to pay (*see Kover v Kover*, 29 NY2d 408, 416; *Litvak v Litvak*, 63 AD3d 691, 692; *Berlin v Berlin*, 36 AD2d 763, 764). Moreover, the maintenance award should not provide for an automatic increase upon the prospective emancipation of each of the parties' children. Maintenance is designed to give the spouse economic independence and should continue only as long as necessary to render the recipient self-supporting. The award should meet the recipient spouse's reasonable needs while providing an appropriate incentive for the recipient to become financially independent (*see Griggs v Griggs*, 44 AD3d 710, 712; *Granade-Bastuck v Bastuck*, 249 AD2d 444, 446). The amount of the maintenance award is a discretionary determination based upon a number of interrelated facts then in existence; unless a future event is imminent and measurable, an award of maintenance should not include a provision for increase or decrease upon the happening of a particular future event (*see Majauskas v Majauskas*, 61 NY2d 481, 494-495; *Dawson v Dawson*, 152 AD2d 717, 720). Here, the provision for automatic increase of maintenance upon the emancipation of each of the parties' children ignores other factors which may come into existence at the time of each child's emancipation. Therefore, the parties' changing needs are best addressed in a future application for modification of the amount of maintenance (*see Lesman v Lesman*, 88 AD2d 153, 161; *Gallo v Gallo*, 50 AD2d 830).

Contrary to the defendant's contention, the award of visitation, which included alternate weekends and certain holidays in addition to two hours for dinner every Wednesday, had a sound and substantial basis in the record, and will not be disturbed (*see Matter of Larkin v White*, 79 AD3d 751; *Matter of Mohabir v Singh*, 78 AD3d 1056, 1056-1057).

An award of an attorney's fee is a matter for the trial court's discretion, which requires consideration of factors including the merits of the parties' positions and their respective financial circumstances (*see Raynor v Raynor*, 68 AD3d 835, 839). On the record presented, including the apparent discrepancy between the parties' income and other circumstances, the Supreme Court did not improvidently award the plaintiff an attorney's fee (*id.*; *see Sinanis v Sinanis*, 67 AD3d 773, 774; *Litvak v Litvak*, 63 AD3d 691). However, the amount of the award was premised upon an erroneous calculation of the parties' respective incomes. Upon recalculation, that discrepancy will be necessarily smaller. Accordingly, upon remittal, the Supreme Court must recalculate an appropriate award to the plaintiff of an attorney's fee.

ANGIOLILLO, J.P., DICKERSON, HALL and MILLER, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court