

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

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Submitted - September 13, 2011

MARK C. DILLON, J.P.
RANDALL T. ENG
SANDRA L. SGROI
ROBERT J. MILLER, JJ.

2010-03413

DECISION & ORDER

Alan L. Bushlow, respondent, v Abby Lynn
Bushlow, appellant.

(Index No. 16198/07)

Saltzman Chetkof & Rosenberg, LLP, Garden City, N.Y. (Lee Rosenberg and Andrea M. Brodie of counsel), for appellant.

John A. Gemelli, P.C., Forest Hills, N.Y. (David M. Gross and Emily C. Walsh of counsel), for respondent.

In an action for a divorce and ancillary relief, the defendant appeals from so much of a judgment of the Supreme Court, Queens County (Strauss, J.), dated March 19, 2010, as incorporated, but did not merge, the provisions of an oral stipulation of settlement entered into in open court on September 9, 2008, and a so-ordered stipulation of settlement dated January 26, 2009, relating to basic child support and child support “add ons,” and thereupon awarded her the sum of only \$2,300 per month in child support, directed her to pay 30% of all “statutory add-ons,” directed her to pay 30% of the children’s unreimbursed medical expenses, and directed her to pay 35% of the children’s expenses for day camp until each child reaches the age of 15, for extracurricular activities up to a maximum of \$250, and for religious school instruction.

ORDERED that the judgment is modified, on the law, (1) by deleting the provisions thereof incorporating, but not merging, the provisions of the so-ordered stipulation of settlement dated January 26, 2009, insofar as they concern the basic child support payment and “add-ons” for child care and unreimbursed medical expenses, (2) by deleting the provision thereof awarding the defendant the sum of only \$2,300 per month in child support, (3) by deleting the provision thereof directing the defendant to pay 30% of all “statutory add-ons,” insofar as the provision concerns “add-

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ons” for child care and unreimbursed medical expenses, and (4) by deleting the provision thereof directing the defendant to pay 30% of the children’s unreimbursed medical expenses; as so modified, the judgment is affirmed insofar as appealed from, with costs to the defendant, and the matter is remitted to the Supreme Court, Queens County, for a determination of the parties’ basic child support obligation, including the parties’ prorated contributions towards child care and reasonable unreimbursed health care expenses, in accordance with the Child Support Standards Act, and thereafter for the entry of an amended judgment; and it is further,

ORDERED that in the interim, the plaintiff shall continue to pay to the defendant child support in the sum of \$2,300 per month and 70% of child care and unreimbursed medical expenses, with any overpayment to be credited against future payments after entry of the amended judgment or underpayments to be debited to him and included as arrears in the amended judgment.

Contrary to the plaintiff’s contention, the parties’ so-ordered stipulation of settlement dated January 26, 2009, which was incorporated, but not merged, into the judgment of divorce, did not comply with the requirements of the Child Support Standards Act (hereinafter the CSSA; *see* Domestic Relations Law § 240[1-b][h]; *see generally* *Cimons v Cimons*, 53 AD3d 125, 127-131). The stipulation did not recite that the parties were advised of the provisions of the CSSA, and that the basic child support obligation provided for therein would presumptively result in the correct amount of support to be awarded (*see* Domestic Relations Law § 240[1-b][h]; *cf. Pellot v Pellot*, 305 AD2d 478, 480). “[A] party’s awareness of the requirements of the CSSA is not the dispositive consideration under the statute” (*Lepore v Lepore*, 276 AD2d 677, 678). Moreover, the parties’ prorated shares of child care expenses and future reasonable unreimbursed health care expenses deviated from the CSSA guidelines, since they were not calculated based upon the parties’ “gross (total) income as should have been or should be reported in the most recent federal income tax return” (Domestic Relations Law § 240[1-b][b][5][I]; § 240[1-b][c][1]; *see Cimons v Cimons*, 53 AD3d at 131; *cf. Matter of Schaller v Schaller*, 279 AD2d 525, 526). Thus, the stipulation was required to contain the additional recitals setting forth, inter alia, the amount that the basic child support obligation would have been under the CSSA (*see* Domestic Relations Law § 240[1-b][h]; *Jessup v LaBonte*, 289 AD2d 295, 295; *cf. Vernon v Vernon*, 239 AD2d 108, 109).

Since the so-ordered stipulation of settlement did not contain the specific recitals mandated by the CSSA, its provisions, insofar as they concern the plaintiff’s basic child support payment and “add-ons” for child care and unreimbursed health care expenses, are not enforceable (*see Cimons v Cimons*, 53 AD3d at 129-131). Accordingly, the Supreme Court should not have incorporated them into the judgment of divorce. However, contrary to the plaintiff’s contention, the remaining provisions of the so-ordered stipulation, and the parties’ open-court stipulation entered into on September 9, 2008, continue to be enforceable. The record does not support a finding that these provisions were closely intertwined with the basic child support provisions; (*see Baranek v Baranek*, 54 AD3d 789, 791; *Cimons v Cimons*, 53 AD3d at 131-136; *Warnecke v Warnecke*, 12 AD3d 502, 504).

In light of the foregoing, the matter must be remitted to the Supreme Court, Queens County, for a determination of the basic child support obligation, including the parties’ prorated contributions towards child care and reasonable unreimbursed health care expenses, in accordance with the CSSA (*see Cardinal v Cardinal*, 275 AD2d 756, 758).

The parties' remaining contentions are without merit.

DILLON, J.P., ENG, SGROI and MILLER, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan
Clerk of the Court