

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

D33023
C/ct

_____AD3d_____

Submitted - November 4, 2011

WILLIAM F. MASTRO, J.P.
ANITA R. FLORIO
PLUMMER E. LOTT
JEFFREY A. COHEN, JJ.

2011-00051
2011-00052
2011-01707

DECISION & ORDER

In the Matter of Laura A. Tosques, appellant, v Russell
L. Ponyicky, respondent.

(Docket No. F-4226/08)

Clifford J. Petroske, P.C., Bohemia, N.Y., for appellant.

Grundfast & Williams, Stony Brook, N.Y. (Taya N. Williams and Penny S.
Slomovitz-Glaser of counsel), for respondent.

In a child support proceeding pursuant to Family Court Act article 4, the mother appeals (1) from an order of the Family Court, Suffolk County (Hoffmann, J.), dated November 1, 2010, (2) from stated portions of an amended order of support of the same court (Fields, S.M.), dated November 24, 2010, and (3), as limited by her brief, from so much of an order of the same court (Hoffmann, J.), dated January 7, 2011, as denied her objections to stated portions of an order of support of the same court (Fields, S.M.), dated July 13, 2010, and the amended order of support dated November 24, 2010, which, inter alia, imputed income to her based on her earning capacity, and set a payment schedule for retroactive support.

ORDERED that the appeal from the order dated November 1, 2010, is dismissed as abandoned; and it is further,

ORDERED that the appeal from the amended order of support dated November 24, 2010, is dismissed, as that order was superseded by the order dated January 7, 2011; and it is further,

ORDERED that the order dated January 7, 2011, is modified, on the law, by deleting the provision thereof denying the objections to so much of the order of support dated July 13, 2010,

November 29, 2011

Page 1.

MATTER OF TOSQUES v PONYICKY

and the amended order of support dated November 24, 2010, as set a payment schedule for retroactive support, and substituting therefor a provision granting the objections to those portions of the order of support dated July 13, 2010, and the amended order of support dated November 24, 2010; as so modified, the order dated January 7, 2011, is affirmed insofar as appealed from, and the order of support dated July 13, 2010, and the amended order of support dated November 24, 2010, are modified accordingly; and it is further,

ORDERED that one bill of costs is awarded to the father, payable by the mother.

Family Court Act § 440(1)(a) provides that when an order of support is to be enforced by the support collection unit (hereinafter the SCU), the Family Court must establish the amount of retroactive support and notify the parties that the SCU will enforce that amount “pursuant to an execution for support enforcement as provided for in [CPLR 5241(b)], or in such periodic payments as would have been authorized had such an execution been issued” (Family Ct Act § 440[1][a]). The statute further provides that in such case, “the court shall not direct the schedule of repayment of retroactive support” (*id.*; see *Matter of Commissioner of Social Servs. of City of N.Y. v Daryl S.*, 235 AD2d 126, 131). Here, the Support Magistrate’s order of support dated July 13, 2010, and amended order of support dated November 24, 2010, directed that such orders would be enforced by the SCU. The mother correctly contends that the Support Magistrate erred in setting a payment schedule for retroactive support rather than establishing the amount of retroactive support owed and allowing the SCU to establish such a schedule pursuant to CPLR 5241(b). Accordingly, the Family Court should have granted her objections to those portions of the orders that set a payment schedule for retroactive support.

Contrary to the mother’s contention, however, the Support Magistrate providently exercised her discretion in imputing income to the mother based on her earning capacity (see *Matter of Rohme v Burns*, 79 AD3d 756, 757; *Matter of Kennedy v Ventimiglia*, 73 AD3d 1066, 1067; *Matter of Maharaj-Ellis v Laroche*, 54 AD3d 677). Accordingly, the Family Court properly denied her objections to so much of the orders as imputed income to her based on her earning capacity.

The mother’s contention that the Support Magistrate erred in directing the issuance of an income deduction rather than an income execution is not properly before this Court, as it was not raised in her objections to the Support Magistrate’s orders (see *Matter of Betancourt v Betancourt*, 71 AD3d 764, 765).

The mother’s remaining contentions are without merit.

MASTRO, J.P., FLORIO, LOTT and COHEN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court