

Van Luven v Van Luven

2006 NY Slip Op 30139(U)

October 31, 2006

Supreme Court, Cayuga County

Docket Number: 0020060/4321

Judge: Mark H. Fandrich

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF CAYUGA

THOMAS R. VAN LUVEN
Plaintiff,

vs.

Index No. 2006-0432

Assigned Judge:
Hon. Mark H. Fandrich

HEATHER L. VAN LUVEN
Defendant.

BEFORE: HON. MARK H. FANDRICH
Acting Justice Supreme Court
Cayuga County

APPEARANCE: ALDERMAN & ALDERMAN
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CAYUGA COUNTY CLERK

FILED

MEMORANDUM DECISION AND ORDER

Hon. Mark H. Fandrich

Plaintiff commenced this action for divorce by filing a Summons With Notice and verified Complaint with the Cayuga County Clerk on May 11, 2006. Issue was thereafter joined in this matter by defendant's filing and service of her verified Answer on June 5, 2006. Plaintiff seeks to dissolve the marriage between the parties on the grounds that they have lived separate and apart pursuant to a written agreement of separation dated March 31, 2004 for a period in excess of one year in accordance with the provisions of DRL Section 170(6). It appears that the Separation Agreement was duly filed in the Cayuga County Clerk's Office on March 31, 2004.

The Separation Agreement, Article VIII (Maintenance), provides for the payment of maintenance to the Defendant by Plaintiff in the amount of \$500.00 per month for a period of three (3) years commencing on March 1, 2004. Further, Article XII (Child Support) provides for the payment by Plaintiff to Defendant of child support in the amount of \$2,550.00 each month on the basis of income of the Plaintiff in the amount of \$100,000.00 per year and income of the Defendant in the amount of \$25,000.00 per year.

Plaintiff asserts as a second cause of action in his complaint that Article XII of the parties' agreement regarding child support fails to comply with DRL Section 240 and is, therefore, null and void.

On September 1, 2006 Plaintiff filed a Notice of Motion with the Court together with his affidavit and various exhibits in support of that application for pendente lite relief reducing the amount of his child support to be paid for the two unemancipated children in proportion to his current income. Several of the exhibits submitted to this Court by Plaintiff for its consideration include copies of the following: the Separation Agreement of the parties dated March 31, 2004, the

pleadings of the parties, ten (10) copies of Plaintiff's pay stubs from Intertek for the period March 27, 2006 to August 15, 2006, Plaintiff's Statement of Net Worth and an ETL SEMKO monthly employee contribution statement pertaining to medical, comprehensive dental, vision and employee assistance plan costs. Said motion was returnable before this Court on September 12, 2006.

On September 11, 2006 Defendant, through her attorney, filed an affidavit of Defendant in opposition to Plaintiff's motion together with a copy of Defendant's Statement of Net Worth.

After hearing and considering the initial oral arguments of counsel for both Plaintiff and Defendant the matter was scheduled for and a hearing held on September 27, 2006 at which oral testimony was taken.

The parties were married on May 8, 1993 and separated March 31, 2004. Plaintiff and Defendant are both now 36 years of age. There are two minor children of the marriage of the parties, namely, Amber Lynn VanLuven born [REDACTED] 1998 and Haley Nicole VanLuven born [REDACTED] 2001. The parties and the minor children enjoy good health. Plaintiff and Defendant share joint legal custody of the two children who presently reside with Defendant. Plaintiff holds an AAS degree in Electrical Technology and is a six year Naval veteran. Defendant has a vocational degree in cosmetology. She is the self-employed owner/operator of Heather's Hair Salon located in Weedsport, New York.

Until March 2006, Plaintiff was employed as a regional outside sales manager at Pace Electronics (Kehoe Component Sales, Inc.) located at Sodus, New York. Plaintiff's compensation in 2004 consisted of a base salary of \$50,000.00 plus commissions. In 2005 Plaintiff was paid a base salary of \$70,000.00 plus commissions. Plaintiff's total taxable income (base salary plus commissions) as reported in his 2005 Form 1040 federal personal income tax return was in the amount of \$145,949.00 (Plaintiff's Exhibit 2). The testimony indicates that in December 2005

Plaintiff met with the President of Pace Electronics Patrick Kehoe and Vice-President/CFO Allen Zimmer at which time it was revealed to Plaintiff that, effective January 1, 2006, his base salary would be reduced to \$35,000.00. The reduction in Plaintiff's base salary as well as that of two sales representatives was the result of a management decision to change the way Pace Electronic services were to be marketed. Plaintiff's salary reduction was involuntary. CFO Zimmer testified a third sales representative was terminated. Plaintiff was also advised in the December 2005 meeting that in the event he did not expand his customer base and increase sales he would be terminated.

Plaintiff testified he decided to leave his position with Pace in March 2006 on the basis of his salary reduction, the stress and pressure to increase sales, and the fact Mr. Kehoe was scrutinizing his expense account and work. Pace offered limited opportunities for advancement. Further, Plaintiff states the amount of time he was required to travel (3 or 4 days each week) and his work schedule interfered with his Thursday night visitation with his daughters and his ability to attend parent-teacher conferences and other school events. With respect to Plaintiff's expense account and work review, CFO Zimmer stated no improprieties were found nor did he believe there were any. Only one sales person remains with Pace, that being President Kehoe's granddaughter.

In April 2006 Plaintiff became employed as an account representative with Intertek ETL Semko and he continues to be employed at present. Plaintiff testified his current base pay is \$47,500.00 per year plus commissions. Although he has not worked a full year, Plaintiff estimates his total taxable income in 2006 will be approximately \$75,000.00.

Defendant owns and operated Heather's Hair Salon. She has two independent contractors that work with her and pay a combined \$440.00 each month to Defendant as rent for use of salon space. Defendant works Tuesdays, Wednesdays, Fridays and every other Saturday. When not working Defendant volunteers one day each week at Weedsport Elementary School where the minor

children are enrolled. Defendant's total taxable income as reported in her 2005 Form 1040 federal personal income tax return was in the amount of \$20,416.00 (Plaintiff's Exhibit 6).

Defendant testified she pays \$140.00 per week cash to her mother for child care services. Child care is provided for 3 hours on Tuesdays, 6 hours on Wednesdays, 3 hours on Fridays and 3 hours on Saturdays.

This Court has the statutory authority and it retains discretion to determine the appropriate amount of child support to be awarded on a temporary basis irrespective of the terms of the parties voluntary agreement. See, DRL 236(B)(7) and DRL 240. As such, the Court does not now decide or finally determine on the merits Plaintiff's second cause of action regarding the invalidity of the child support provisions of the parties agreement at this time.

Upon all of the testimony, pleadings, exhibits submitted and received in evidence, and facts of the case as presented, this Court imputes gross (total) income to Plaintiff in the amount of \$90,000.00 per year. This Court also imputes to Defendant gross (total) income in the amount of \$23,121.20 represented by annual salon rental income of \$5,280.00 together with full-time self-employment income of \$17,841.20. Plaintiff's FICA taxes on imputed income of \$90,000.00 is in the amount of \$6,885.00. Defendant's FICA taxes on imputed self-employment income of \$17,841.20 is in the amount of \$1,364.85.

Maintenance actually paid and to be paid by Plaintiff to Defendant in the amount of \$500.00 per month (\$6,000.00 per year) shall be deducted from Plaintiff's imputed income and added to Defendant's imputed income set forth above.

In accordance with DRL 240(1-b)(c) this Court determines the combined parental income to be \$104,871.35. Plaintiff's income of \$77,115.00 equals 73.5% of the combined parental income and Defendant's income of \$27,756.35 equals 26.5%. The combined parental income up to

\$80,000.00 multiplied by the appropriate child support percentage of 25% is \$20,000.00 and is pro-rated \$14,700.00 to Plaintiff and \$5,300.00 to Defendant. Upon the basis of the financial resources of the parties and the standard of living the children have enjoyed, the child support for the amount of the combined parental income in excess of \$80,000.00 shall also be 25 % ($\$24,871.35 \times .25 = \$6,217.84$) This child support shall also be pro-rated as between the parties according to their respective incomes (Plaintiff to pay \$4,570.11 and Defendant to pay \$1,647.73).

Therefore, Plaintiff shall pay to Defendant as and for temporary child support in this matter the sum of \$802.92 semi-monthly. In addition Plaintiff shall continue to maintain and pay for health, dental and vision insurance for the benefit of the minor children pending further order of this Court. The Plaintiff and Defendant shall pay for the cost of reasonable health care expenses of the minor children not covered by insurance in the same proportion as their respective incomes are to the combined parental income.

Additionally, Plaintiff and Defendant shall each pay for the cost of weekly child care expenses in the amount of \$140.00 in the same proportion as their respective incomes are to the combined parental income. That is Plaintiff shall pay the sum of \$102.90 for child care and Defendant shall pay the sum of \$37.10. Plaintiff's obligation to pay for such child care expenses shall be expressly conditioned upon Defendant obtaining from the child care provider a written receipt evidencing the actual payment of such expense.

Said child support payments shall be retroactive to the date of the commencement of this action (May 11, 2006). Plaintiff shall receive a credit for any over payment of child support actually paid to Defendant at the rate of \$50.00 semi-monthly.

Accordingly, based upon the foregoing, it is

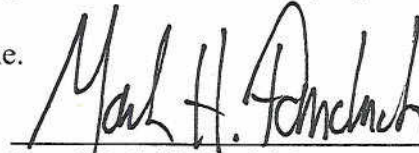
ORDERED, that retroactive to the date of Plaintiff's application he is directed to pay as and for child support the sum of \$802.92 semi-monthly; and it is further

ORDERED, that retroactive to the date of Plaintiff's application he is directed to pay as and for child care expenses the sum of \$102.90 per week; and it is further

ORDERED, that Plaintiff shall continue to maintain and pay for health, dental and vision insurance for the benefit of the minor children pending further order of this Court; and it is further

ORDERED, that Plaintiff and Defendant shall each pay for the cost of reasonable health care expenses of the minor children not covered by insurance in the same proportion as their respective incomes are to the combined parental income.

Dated: October 31, 2006



Hon. Mark H. Fandrich
Acting Supreme Court Justice