

**Husband v Wife**

2007 NY Slip Op 31785(U)

April 11, 2007

Supreme Court, Broome County

Docket Number: 0000589/2006

Judge: Jeffrey A. Tait

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At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Supreme Court, in the City of Binghamton, New York on the 28<sup>th</sup> day of March, 2007

PRESENT: HONORABLE JEFFREY A. TAIT  
JUSTICE PRESIDING

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF BROOME

**HUSBAND,**

Plaintiff,

**DECISION AND ORDER**

vs.

Index No. 2006-XXXX  
RJI No. 2006-XXXX-C

**WIFE,**

Defendant.

**APPEARANCES:**

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**HON. JEFFREY A. TAIT, J.S.C.**

This matrimonial action is before the Court on defendant WIFE's request for pendente lite relief, which she seeks by Order to Show Cause. Mrs. XXXX requests temporary custody of the parties' minor child, M (DOB XX/XX/91), child support of \$110.00 per week, an order directing that Mr. XXXX maintain any existing life insurance policies in his name with Mrs. XXXX and M named as beneficiaries, and an Order of Protection requiring Mr. XXXX to refrain from offensive conduct and to stay away from Mrs. XXXX's residence and place of work. Mr. XXXX opposes this relief, requests that Mrs. XXXX pay him child support for the parties' other child, G (DOB XX/XX/88), who currently resides with Mr. XXXX, and claims that he is entitled to claim the dependent tax deduction for G.

The motion was returnable, and counsel for both parties were heard, on March 28, 2007. The trial of all outstanding issues in this matter is scheduled for May 17, 2007 – less than two months from the return date.

As stated by Mr. XXXX's counsel, it was agreed that Mr. XXXX would not go to Mrs. XXXX's workplace to deliver support payments. As there is no apparent reason why personal delivery of support payments to Mrs. XXXX's place of employment is necessary, Mr. XXXX is directed to stay away from her place of employment and not personally contact her there.<sup>1</sup>

Following the preliminary conference, an Order dated August 31, 2006 was entered

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Other than in the event of a family emergency, such as a medical emergency involving a family member.

directing that Mr. XXXX pay Mrs. XXXX \$150.00 per week for child support for the parties' two children, who were both living with her at that time. The papers in support of and opposition to this application reveal that certain aspects of the parties' circumstances have changed. Mr. XXXX, who for a number of years worked two essentially full-time jobs, has resigned from one of them – his employment with the XXXX Central School District. According to Mr. XXXX, the resignation was based on medical reasons (i.e. phlebitis and varicose veins with ulceration) that prevent him from performing the two jobs.<sup>2</sup> He retains his employment with XXXX.

In addition, the parties' 19 year old son, G, now lives with Mr. XXXX. He is apparently no longer enrolled in school or college. Since November of 2006, and maybe earlier, he has been employed full-time at a local wholesale food supply company earning \$8.83 per hour.<sup>3</sup> As noted above, Mr. XXXX claims that he should receive child support from Mrs. XXXX for G. Mrs. XXXX counters that G is emancipated, as he works full-time.

These changes have engendered this application and the opposition to it. On the child support issue, the question is what change in the August 31, 2006 Order is appropriate in light of Mr. XXXX's claim of reduced income and need for child support for G. It does not appear from the papers submitted on the motion that either party disputes that child support due to Mrs. XXXX will be reduced by virtue of G no longer living with her.

*Pendente lite* awards of child support should reflect the reasonable needs of the parties,

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He supports this with two notes from his treating physician.

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This hourly wage is from G's pay check for the payroll period ending November 18, 2006 (see Order to Show Cause, March 5, 2007, Exhibit "C").

considered together with their financial circumstances at the time, with inequities to be dealt with at “a trial where a more exacting appraisal of the parties’ circumstances can be discerned” (*Coon v. Coon*, 29 AD3d 1106, 1111 [3d Dept 2006], citing *Sedlack v. Sedlack*, 298 AD2d 691, 693 [3d Dept 2002]).

The record here reveals that Mr. XXXX resigned from one of his two full-time jobs that he had maintained for several years. He supports this action with documentation from his physician, who states that he does not recommend prolonged standing or standing more than 8 hours per day,<sup>4</sup> and continues to work at the other job.<sup>5</sup> The parties’ 19 year old son, G, now resides with Mr. XXXX, but he is working full-time and is not enrolled in any educational program.

On this record, Mr. XXXX makes a sufficient showing that his child support obligation should be adjusted, as he has established that he is now earning less income and only one child now resides with Mrs. XXXX. Therefore, his child support obligation is adjusted as set forth below to reflect these two facts.

However, his claim for child support for G is a different matter. While G’s earnings are not substantial, they are in line with what others may earn with a high school education in an entry level position. He is undisputedly working full-time and his earnings are near those of his father. To argue that G has no ability or need to support himself or contribute to household

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The job from which he resigned was a janitorial job that Mr. XXXX states required him to stand for 8 hours or more per day.

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The annual income from that other job is approximately \$5,000.00 less than it was the previous year, which was explained at the return date as due to, among other things, doctor’s appointments.

expenses under these circumstances fails to recognize the overall finances of the family.

Mrs. XXXX's earnings from her main job at UHS were \$24,447.00 in 2006. Mr. XXXX's household income (combining his and G's earnings), even after his resignation from the XXXX Central School District job and a reduction of his XXXX job, is over \$36,000.00.

Under these circumstances, Mrs. XXXX is not obligated to pay child support to Mr. XXXX for G. Mr. XXXX is, however, obligated to support his 15 year old son M. For purposes of this pendente lite motion, Mr. XXXX's child support obligation will be calculated on his reduced income. The calculation is: \$18,593.30 less FICA of \$1,422.00, which equals \$17,171.00, multiplied by 17% (the CSSA presumptively correct percentage for one child), which yields an annual child support obligation of \$2,919.00 or \$56.13 per week.

Therefore, the amount of Mr. XXXX's weekly child support obligation for M shall be \$56.13 to be paid on Monday of each week effective March 27, 2007<sup>6</sup> and commencing on April 23, 2007. As this is a pendente lite application and determination, this Decision and Order is without prejudice to either parties' claim regarding these issues at trial. The subject of arrears is reserved for the scheduled trial.

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The date on which Mr. XXXX's Affidavit in Response to Mrs. XXXX's Order to Show Cause and Counterclaim was filed.

Mrs. XXXX's request for temporary custody of M is granted, as is her request that Mr. XXXX maintain any existing life insurance policies in his name with Mrs. XXXX and M named as beneficiaries.

Given G's circumstances as outlined above, the issue of entitlement to claim the dependent tax deduction for him, if there is such an entitlement given those circumstances, will be deferred to the trial of this matter, which is scheduled for May 17, 2007. Any remaining issues, including the medical necessity of Mr. XXXX's resignation from one job, the validity of his explanation regarding the reduction in his income from the other job, the emancipation of G and his ability or inability to support himself, and any need for a variation from the provisions of the Child Support Standards Act can be presented and determined at the trial.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: April 11, 2007  
Binghamton, New York



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HON. JEFFREY A. TAIT  
Supreme Court Justice