MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice. **TRIAL/IAS PART 8**

GREGORY BEROZA,

INDEX NO.: 203584/2001

Plaintiff,

- against -

MICHELE HENDLER,

Defendant.

By Decision and Order of the Appellate Division, Second Department, this matter was remitted to this court "for a recalculation of the plaintiff's child support obligation" (*Beroza v. Hendler*, 2010 N.Y. Slip Op. 01751, March 2, 2010).

Upon the record, and based upon submissions of counsel for the parties, the following determination is made:

Domestic Relations Law § 240 (1-b), also known as the "Child Support Standards Act," and Domestic Relations Law § 240 (subd.[c][2]), the "Child Support Modernization Act," require the trial court to follow a three step process for determining the child support obligation: (1) calculation of the *combined* (emphasis added) parental income; (2) multiplication of the combined parental income up to $80,000.00[1] by the specified child support percentage, and allocation between the parties on a *pro rata basis* (emphasis added) unless application of the percentage is deemed "unjust and inappropriate" in consideration of the factors set forth in paragraph(f) as articulated in a written order; and (3) for the amount of *combined* (emphasis

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[1]The base combined parental income amount when the original decision was issued was $80,000.00. The amount of $130,000.00 is the current base amount pursuant to statute, but in the court's opinion it cannot be used at this time due to the order of the Appellate Division would have to be at the time of the original decision.

added) parental income over $80,000.00, application of either the child support percentage or the D.R.L. §240(1-b)(f) factors, and articulation of the reasons for the methods used. See *Bast v. Rosoff*, 91 NY2d 723, 726-727; see, also, *Cassano v. Cassano*, 85 NY2d 649, 652-655; *McLoughlin v. McLoughlin*, 63 AD3d 1017, 1019.

In interpreting the statutory definition of "income" for purposes of child support, D.R.L. §240 (1-b)(b)(5)(1) defines income as "gross (total) income as should have been or should be reported in the most recent federal income tax return." Here, each of the parties' incomes have been established. By memorandum decision of this Court (Warshawsky, J.) dated February 5, 2008, plaintiff was imputed to have an annual income of $259,100. Such imputation was affirmed by the Decision and Order of the Appellate Division, Second Department. See, *Beroza v. Hendler*, 2010 N.Y. Slip Op. 01751 [March 2, 2010]. It was stipulated by the parties that defendant's annual gross income was $501,588.

Plaintiff is a self-employed veterinarian. Defendant is an anesthesiologist.

Both parties are entitled to a deduction for FICA, N.Y.C. or Yonkers tax (Domestic Relations Law §240 [1-b][b][5]. The plaintiff had income imputed to him, but said amount was not less otherwise valid deductions. The defendant is also statutorily entitled to FICA deductions. The plaintiff's income is reduced by $6,622.00 (FICA at 6.2% up to $106,800.00) and Medicare of $3,757.00 (1.45% of $259,100.00) for a total of $10,379.00. The defendant's income of $501,588.00 is similarly reduced by $6,622.00 (FICA) and $7,273.00 (Medicare), for a total of $13,895.00, thus, reducing the respective incomes to $248,721.00 for the plaintiff and $487,693.00 for the defendant.

With respect to the first step, plaintiff's annual income is now $248,721.00 and defendant's annual income is $487.693.00, equating to a combined parental income of $736,414.00. Plaintiff's pro rata share of this total is 33.7% and defendant's pro rata share is 66.3% of such total.

There being three children, the applicable child support percentage is 29%.

The Court of Appeals has held that the "and/or" language in the statute affords the Court discretion to apply the paragraph (f) factors or to apply the statutory percentages or to apply both (*Cassano v. Cassano*, 85 NY2d 649, 655). But in any event, "the hearing court must articulate its reason or reasons for doing so, which should reflect a careful consideration of the stated basis for its exercise of discretion, the parties' circumstances, and its reasoning why there should not

be a departure from the prescribed percentage" (see, *Schmitt v. Berwitz*, 228 AD2d 604, 605; *Matter of Cassano*, supra). In this instance, I have applied 29% to the first $80,000.00 of combined income and 29% to the next $175,000.00 of the combined income [total of $255,000.00] based upon the lifestyle of these children, specific evidence of the children's needs such as expenses relating to sporting activities, social activities, hobbies, educational expenses not covered by any reimbursement, and the children's otherwise comfortable lifestyle, as well as the extensive financial resources of the children. I have also considered the distributive award that the plaintiff has received here, and that the application of basic child support guidelines to income capped at $80,000.00 would not be just and appropriate (see, *Gluckman v. Qua*, 253 AD2d 267), and that the capping of the combined income at $255,000.00 (in light of a combined family income of $736,414.00) adequately reflects a support level that meets the needs and continuation of the children's lifestyle, as dictated by the past spending practices of the parties.

Accordingly, I have utilized the following computations:

29% of first $ 80,000.00	=	$23,200.00
29% of next $175,000.00	=	$50,750.00
$255,000.00		$73,950.00
X plaintiff's 33.7% pro-rata share	=	$24,921.00
Divided by 52 weeks	=	$ 479.25

The payment by plaintiff to defendant of $479.25 per week reflects proper application of the Child Support Standards Act. This amount is clearly subject to reduction, in futuro, based upon the number of unemancipated children — $413.00 per week when there are two unemancipated children and $281.00 per week when there is only one unemancipated child remaining in the house.

In the court's decision after trial, it ordered various payments to be made which were pro-rated based upon the pro-rata share previously determined by the court. They must now be modified pursuant to the above findings.

Plaintiff also requests, or, rather demands, that post-decision actions by the defendant in disregard of plaintiff's parental rights, require that the court entirely revise its prior determination. He suggests that "a more befitting determination that each party is to be solely

responsible for the expenses they independently deem necessary for summer activities for the children, which do not interfere with the parenting time of the other, is warranted."

This allegedly would be in line with a post-trial "decision" by the Hon. Timothy S. Driscoll from April 30, 2009, which denied certain child support related demands of defendant in a motion pending before him.

There is definitely something very appealing in plaintiff's suggestion. However, the matter is not before the court for such modifications. Nor will the court involve itself in what was actually the NON-ACTION of a colleague who heard all the facts and argument of both sides and then denied defendant's application for certain modifications. What is regretful is that the same conduct of pettiness and immaturity observed by the court over two years ago (preceded by seven years of similar conduct) has persisted over the years.

In each area where the court directed plaintiff to pay a pro-rata share of any child care related expense those sums are to be recalculated and the plaintiff be given a credit for the difference between 33.7% of the amount and the originally applied 40% (assuming said amounts were paid).

The areas that must be modified due to the recalculation of plaintiff's share of expenses from 40% to 33.7% are:

1. Pre-trial expenditures made by the wife for benefit of the children. Clearly, defendant cannot claim a child care tax credit for any amounts for which plaintiff pays, in futuro, or has paid for in the past. Defendant is not entitled to any percentage reimbursement from plaintiff that defendant has claimed as child care tax credits on her tax returns in the years prior to the court's decision.

2. Child support arrears. All areas where the court ordered plaintiff to pay 40% of any specific amount or amounts is also reduced to 33.7%, and plaintiff is to be credited for said difference in recalculating the arrears.

3. Health insurance. Same percentage reduction, 40% to 33.7%, of the uninsured and unreimbursed medical expenses of the children (see language of original decision, p. 33).

4. College education expenses. Same percentage reduction applies to this area (see original decision, p. 34). Language of original decision otherwise remains in place.

Any other areas to which a pro rata share had been applied in the original decision but which have not been mentioned above are to be include in any recalculation by the parties.

Plaintiff raises objections, now, after the Appellate Division decision, that go to factual issues involving health insurance reimbursement claims by defendant, as well as claims related to automobile insurance, education and recreational expenses, and that portion used on behalf of children. These are all valid arguments, but they now amount to a motion to reargue based upon what the court assumes would be a claim that the court misunderstood or overlooked the facts and to which defendant has had no opportunity to respond.

The court cannot countenance such a motion secreted within the submission which was to be based upon the remand from the Appellate Division for "recalculation" of child support.

The parties are directed to meet and confer to recalculate the prior decision and order of this court pursuant to the instant court order and the modifications found within the decision of the Appellate Division..

Submit new Judgment on Notice.

It is **SO ORDERED.**

Dated: August 24, 2010

J.S.C.