DOCKET NO: FBT-FA17-6063532 : SUPERIOR COURT

CHARLOTTE STICHTER : JUDICIAL DISTRICT OF BRIDGEPORT

V. : AT BRIDGEPORT

DAVID STICHTER : June 11, 2024

MEMORANDUM OF DECISION
MOTION FOR MODIFICATION #155

The defendant's motion for modification is DENIED, in part. GRANTED, in part.

On May 23, 2018, the Court (*Wenzel, J.*) entered a final dissolution judgment that incorporated by reference a separation agreement, dated May 23, 2018. In the separation agreement, the parties agreed to a child support order of $538 per week in current support for three minor children, Madigan L. Stichter, Maye A. Stichter and Malin P. Stichter, payable from the defendant father to the plaintiff mother.[1]

On March 27, 2023, the defendant filed a motion to modify the child support order downward. The court held a hearing on March 15, 2024 and March 18, 2024. Both parties were represented by legal counsel.

FACTUAL BACKGROUND

At the time of the divorce the defendant was unemployed. By agreement, an earning capacity of $150,000 was imputed to the defendant. Based on these imputed earnings, the child support guidelines called for an order of $538 per week for the three minor children. Prior to the divorce the defendant was employed in the shipping brokerage industry for about 18 years. The last time he worked in the shipping industry was in 2017. The $150,000 imputed earning capacity was based on his work history prior to the divorce. The defendant agreed to this earning capacity for the purpose of a child support order.

On or about November 2019 the defendant was diagnosed was anxiety and depression. Since the divorce the defendant has entered rehabilitation at least two times. On at least one occasion he received treatment at Elevate Health and Wellness after being discharged from the Stamford Hospital emergency room due to a history of major depression with suicidal ideations. He was receiving psychotherapy sessions and also assistance with medication management. On June 2, 2023 his providers at Elevate reported he was compliant with treatment and was progressing towards long term stability. *See Defendant L.* On March 2024 he reported he has been sober for about 36 days, as he was also struggling with substance abuse. As a means to an end, the defendant was renting out his home on 225 Maple Road in Easton, CT. He was also receiving financial support from family and friends. His tax returns show minimal earnings in both 2021, as well as 2022.[2]

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6/11/2024 (LH)

[1] Since the date of dissolution Madigan and Maye have reached the age of majority.
[2] *See Defendant's Exhibits H, I, & J.*

Since the divorce the defendant also had short lived jobs as a bartender and with Trinity Solar, with earnings between $1,800 and $26,000 respectively.

On or about January 2023, the defendant sold his home in Easton and received about $332,000 from the sale, as part of the equity proceeds. At the time of the divorce the projected equity in the marital home was about $50,000. The defendant relied heavily on the sale funds to pay his bills and support obligations. The defendant also moved to a new apartment in Fairfield with a reported rent of about $4850.00 per month.[3] The defendant also invested about $70,000 in a startup company, Cyrene Marine LLC. In all, the defendant has used about $275,000 of the equity funds since January 2023, as he reports he has about $48,000 left from the monies received from the sale of the home.

The defendant has not yet made any application for permanent disability and at the time of hearing was set to start a new job at Leaf Filter. His position at Leaf Filter will be 100% commission based and thus he could not report what his actual earnings would be. The defendant did report that a colleague was earning on or about $4,000 per week at Leaf Filter. The defendant is currently in an Intensive Outpatient (IOP) program where he goes about 9 hours a week, as well as 1 hour per week for one on one sessions.

In 1992 the defendant received a bachelors degree in psychology. At the present time, the defendant claims he is not capable of earning $150,000 and seeks a reduction in his child support, down to a full time minimum wage earning capacity. He states that the shipping brokerage industry is no longer a viable option. The market has shrunk making it difficult to find a job there. In 2017, he was terminated from his job within the shipping industry for lack of earnings. The defendant could not answer directly as to whether or not he was suffering from depression at that time, rather indicating he was not officially diagnosed until November 2019.

The defendant reports he had been looking for work when he could, which in fact led him to the job opportunity at Leaf Filter. He also testified that he is still working to build up his startup company with developers and that he has done so on a "full time capacity".

DISCUSSION

Conn. General Statutes § 46b-86, as well as § 46b-215 (e), states that a support order may be modified upon a showing of a substantial change in the circumstances of either party or upon a showing that the order for child support is substantially different than the child support guidelines. The moving party must prove "that circumstances have changed since the last order such that it would be unjust or inequitable to hold either party to it." *Olson* v. *Mohammadu*, 310 Conn. 665, 672, 81 A.3d 215 (2013).

Per Conn. General Statute §46b-86 the court must assess two prongs. That is, the court must assess not only if there is a substantial change of circumstances, but also if the final order for child support substantially deviates from the child support guidelines, established pursuant to CGS §46b-215a. Unless there was a specific finding on the record (at the time of dissolution) that the application of the guidelines would be inequitable and/or inappropriate, the court may entertain a motion to modify solely upon the fact that

[3] The court notes his reported mortgage payment, prior to the sale of the home, was about $3,600.00 per month.

the current guidelines substantially deviate from those issued at the time of judgment. See *Righi v. Righi*, 172 Conn.App. 427 (2017). No such finding was made in this case. Knowing this, the court must determine whether the current order substantially deviates from the presumptive guidelines, based on the parties current reported earnings. There is a rebuttable presumption that any deviation of 15% or more from the guidelines is substantial. Upon review of the current guidelines and testimonies in this case, the presumptive child support amount would be $0, as the defendant was still unemployed, at the time of the hearing. This amount deviates more than 15% from the current order.

In addition to the analysis above, if the court finds a substantial change in circumstances, separate and apart from the current guidelines, the court can modify the court order. That said, and as discussed above, upon a finding of a substantial change in circumstances the court must then make an independent determination as to whether the substantial change in circumstances makes the continuation of the prior order unfair and improper. See *Weinstein v. Weinstein*; 104 Conn.App. 482, 934 A.2d 306 (2007), cert denied, 285 Conn. 911, 943 A.2d 472 (2008).

The court does find a substantial change in circumstances since the date of dissolution.[4] At the time of dissolution, while the defendant was unemployed, he had not yet been officially diagnosed with major depression, along with suicidal ideations. Since the divorce he has also been hospitalized on at least two occasions, due to his mental health. Moreover, he also sold the martial home, which provided the defendant with well more that the $50,000 in equity the parties projected at the time of the divorce. Two of his three children have also reached the age of majority since the date of dissolution.

The question now before the court is whether in light of these changes, the defendant should pay less in child support. Upon finding a substantial change in circumstances, the court has broad equitable powers in fashioning an appropriate modification order.

The court finds that it would be inequitable and inappropriate to modify the order to the current guideline amount of $0 per week. In fact, the defendant himself is not seeking a $0 order. He is seeking a child support award equal to an imputed minimum wage earning capacity. This court disagrees to such request and finds that despite this substantial change it would not be unfair and/or improper to continue utilizing his prior, agreed to, earning capacity, however, the court shall modify the order to account for the fact that two of his children have aged out.

While the court understands that the defendant now finds it difficult to find employment in the shipping industry, nothing in the record proved to the court that the defendant could not do so. The defendant bears the burden of proof in this modification request. Since the divorce, there is no evidence that he registered with any employment agencies, other than LinkedIn. There was no evidence that he worked with a headhunter or was actively and regularly applying for jobs.

With respect to his mental health and substance abuse challenges, there was no medical records and/or expert testimonies as to how his mental health impacts his ability to work

[4] Per CGSA §46b-86 (a), modification of any child support order issued before, on or after July 1, 1990 may be made upon a showing of such substantial change of circumstances, whether or not such change of circumstances was contemplated at the time of dissolution.

at the current time and/or at the time of the modification request. The medical letter submitted to the court verified his struggle with mental health, but also shed no light as to his current work limitations. What was clearly evident to the court is that the defendant dedicated a majority of his time trying to develop his startup company. To be clear, the defendant's mental health struggles and subsequent hospitalizations are not overlooked by the court and the court does not find his mental health challenges to be fault worthy in any way. However, as stated earlier, it has not been proven to the court that these struggles prevent him from maintaining gainful employment. He testified that he was and still is trying to build up a startup company. Thus, he apparently is still capable of working and he has testified he is actively doing so with his startup. There is no question that his mental health has made his ability to keep a job difficult, but again to what extent is unclear to the court.

Moreover, even if the court finds that his mental health prevents him from working to the capacity agreed to in 2018, the court cannot overlook the fact that the defendant received $323,000 from the sale of the home in January 2023.

In *Gay vs. Gay*, 266 Conn. 641, 835 A.2d 1 (2003), the Supreme Court analyzed whether capital gains from marital property sale can be considered income, for the purpose of modification of an alimony award. The court found that capital gains are not income for purposes of modification of an order, if those gains do not constitute a steady stream of revenue. The court also clarified that while capital gains may not be considered income under CGS§ 46b-82, it does not mean that the value of such property may never be taken into consideration by the court. Id at 648.[5]

In this case, the defendant testified that he has regularly used funds from the sale of the home to sustain himself financially, thus the court may consider these funds to be income available to him for the payment of support. Also, even if not income the court can consider the value of these funds. In March 2023, shortly after the sale of the home, the defendant did begin to make regular support payments. Aside from making current support payments, the defendant used the sale funds to invest in his startup, among other charges, and in leasing an apartment costing $1250 more per month than his previous mortgage. Interestingly the defendant testified that he sold his home because he could no longer afford the house, however, he is now leasing a much more expensive apartment.[6] In all, he has spent about $275,000 in a little over a years' time, with about $30,000 of these funds going towards his support obligations. Under these circumstances, and considering he still owes a significant amount in back child support, these expenditures are deemed to be extravagant and neglectful and per *Sanchione* precludes a threshold showing of a substantial change that would justify a modification downward.[7]

In *Sanchione v. Sanchione*, 173 Conn. 397 (1977), the Supreme Court held that culpable conduct precludes a threshold showing of a substantial change in circumstances on a motion for modification. Specifically, the court found that the proclaimed inability to pay

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[5] Whether or not the $323,000 received by the defendant can be deemed income for the purpose of child support is not addressed in *Gay v. Gay*, but *McKeon v. Lennon* does make it clear that the determination of a parent's child support obligation must account for all of the income that would have been available to support the children had the family remained together. See *McKeon v. Lennon*, 321 Conn. 323 (2016).

[6] The defendant also recently purchased a puppy costing him about $1,800.00.

[7] At the time of the hearing, the defendant owed over $80,000 in back child support.

must be excusable and not brought about by the defendant's own fault. There must be a determination as to whether the inability to pay was a result of the defendant's own extravagance, neglect, or misconduct. The court also questions why the court should modify the support order to a minimum wage earning capacity when the defendant is expected to work at Leaf Filter, potentially making way above minimum wage earnings.

In all, the unique facts of this case do not justify disrupting the current support order in place. That is, after considering all the evidence and caselaw, the court cannot find that it would be unjust or inequitable to hold the defendant to an earning capacity of $150,000. This is the earning capacity he agreed to in 2018, despite his lack of work, and he has failed to meet his burden of proof to justify a modification of that agreement.

That said, it is undisputed and clear to the court that two of his children have reached the age of majority and thus, he is entitled to a modification to one child, versus three. The court shall modify the support order to $288 per week, which reflects the guideline amount for one child, Malin Stichter, utilizing the same earning capacities for both parties as was originally used on the date of dissolution. *See Court Exhibit D.* The court also enters an arrearage order of $58 per week, pursuant to the guidelines. The arrearages owed by the defendant to the plaintiff are found to be $86,933.00 as of March 15, 2024.

Per CGSA §46b-86, this order shall be retroactive to the date of service, April 20, 2023.

All other orders from the original judgment not modified by this decision remain in full force and effect.

NIEVES, JUDGE