

DOCKET NO. FBT-FA-21-5025335-S

**FILED**

SUPERIOR COURT

GARCIA, KATHY

JUDICIAL DISTRICT

MAY 28 2024

V.

OF BRIDGEPORT

DIAZ, VICTOR

SUPERIOR COURT  
BRIDGEPORT

MAY 28, 2024

**MEMORANDUM OF DECISION**  
**RE DEFENDANT'S MOTION FOR MODIFICATION, POST-JUDGMENT (#127.00)**

This opinion addresses the defendant's post-judgment motion for modification (Entry No. 127.00), dated August 28, 2023, of existing custody orders, and the plaintiff's objection (Entry No. 135.00), dated October 16, 2023, to the motion. The court had a hearing and heard testimony on May 22, 2024. The defendant father was represented by counsel and filed proposed orders (Entry No. 142.00). The plaintiff mother represented herself, agreed to some of defendant's proposed orders and articulated proposed orders (where in dispute) during her testimony. The parties were witnesses along with a Department of Children and Families (DCF) case worker who was subpoenaed by the defendant.

In reaching the decisions reflected herein, the court has fully considered the rules of practice, the court file, evidence presented, proposed orders, arguments of counsel, pertinent statutory law, in particular General Statutes §§ 46b-56 (custody, care, education, visitation and support of children) and 46b-215a (child support guidelines), and the relevant case law. The court further considered the demeanor of all witnesses at trial and assessed credibility accordingly. As financial matters were in dispute, the court unseals the financial affidavits pursuant to Practice Book § 25-59A (h).

The court hereby grants the motion for modification as follows:

Judicial Reporter  
Kathy Garcia, Pro Se  
Law Offices of Thomas Piscatelli LLC  
Office of Child Support Services  
Mailed to:  
5/29/2024  
(LH)

## FINDINGS OF FACT AND DISCUSSION

The court makes the following findings of fact by a preponderance of evidence.

The parties have three minor children together: Yamilex ("Yami") Diaz born on November 16, 2006 (currently seventeen years old, and will be eighteen in a few months), Victoria Diaz born July 16, 2009 (fourteen years old), and Jomar Diaz born May 30, 2011 (twelve years old, and will be thirteen years old this week).

On December 9, 2021, the parties entered into a custody agreement and parenting plan (Entry No. 114.00), which was accepted and made an order of the court (Entry No. 114.10). The parties had joint legal custody with the children residing with the plaintiff. The defendant has alternating weekend parenting time with the children. The defendant was also responsible for pick up and drop off for his parenting time. The defendant also agreed to pay \$183 weekly to the plaintiff, which was the presumptive child support amount calculated by the Child Support Guidelines Worksheet (Entry No. 113.00). Related expenses for the children also followed the worksheet. The unreimbursed health care expenses were 70 percent to the plaintiff and 30 percent to the defendant, and childcare expenses were 80 percent to the plaintiff and 20 percent to the defendant. Child support was paid by an immediate income withholding order, where weekly child support was deducted out of the defendant's paycheck. At the time the parties' entered into the 2021 agreement, the plaintiff mother resided in Stratford with the children attending school in Stratford. The defendant father resided in Stamford.

In early 2023, an incident occurred where the oldest child, Yami, was allegedly sexually assaulted by Joel Martinez, who is the brother of the plaintiff mother's live-in boyfriend. DCF became involved, and by agreement (Entry No. 129.00) of the parties, Yami moved in with the defendant. Parenting time with the plaintiff was as mutually agreed upon by the parties with

Yami's preferences taken into consideration. The parties also agreed that all three children would engage in individual counseling or therapy. Since August 28, 2023, Yami has resided solely with the defendant and has not exercised her option to see the plaintiff.

The defendant filed proposed orders (Entry No. 142.00), where the plaintiff agreed to a majority of the orders, except for three specific areas (paragraphs 4 (b) and (d) and paragraph 9), concerning increased parenting time and changes to child support. Those proposed orders that remain in dispute are:

4. The defendant shall have parenting time with two of the children, Victoria and Jomar, as follows:
  - b. The defendant shall have parenting time during the entirety of the children's winter and spring breaks. However, the holiday parenting access, as previously agreed upon, shall be treated separate and apart.
  - d. During the children's summer recess, the parties shall follow a shared parenting schedule such that the defendant shall have parenting time on week one and the plaintiff shall have parenting time on week two. Weeks shall be defined as Friday through Friday, with the week commencing at 4:00pm for the defendant's week and 7:00pm for the plaintiff's week. During the summer recess, each party is responsible for the pick-up during his/her respective parenting time.
  
9. The defendant shall pay \$71.00 per week in child support retroactive to 8/28/2023 and be responsible for 46% of the minor children's qualified work-related daycare and unreimbursed medical expenses pursuant to the Connecticut Support Guidelines. The plaintiff shall be responsible for 54% of the minor child's qualified work-related daycare and unreimbursed medical expenses. The defendant shall be entitled to a credit of \$4,368.00 for retroactive child support (39 weeks x \$112.00) which shall be paid by the plaintiff to the defendant within thirty days. For reimbursement under this section, the party incurring the expense shall send a bill, receipt, invoice, or other evidence of payment, to the other party for reimbursement.

The court finds there has been a substantial change in circumstances and that the best interests of the child guides the court in resolving the disputed issues. The defendant withdrew his proposed order in paragraph 11 for the plaintiff to provide him with Yami's health insurance

information. The defendant's remaining proposed orders that the plaintiff agreed to on the record will be made orders of the court.

A. RELEVANT CASE LAW

"Nothing in our law is more elementary than that the trier is the final judge of the credibility of witnesses and of the weight to be accorded their testimony." *Morande v. Newman Lincoln-Mercury, Inc.*, 5 Conn. App. 423, 423, 499 A.2d 78 (1985), citing *Morgan v. Hill*, 139 Conn. 159, 161, 90 A.2d 641 (1952). "The factfinding function is vested in the trial court with its unique opportunity to view the evidence presented in a totality of circumstances, i.e., including its observations of the demeanor and conduct of the witnesses and parties, which is not fully reflected in the cold, printed record which is available to [appellate courts]." *Lupien v. Lupien*, 192 Conn. 443, 445, 472 A.2d 18 (1984).

"When presented with a motion to modify child support orders on the basis of a substantial change in circumstances, a court must first determine whether there has been a substantial change in the financial circumstances of one or both of the parties . . . . Second, if the court finds a substantial change in circumstances, it may properly consider the motion and . . . make an order for modification . . . . A party moving for a modification of a child support order must clearly and definitely establish the occurrence of a substantial change in circumstances of either party that makes the continuation of the prior order unfair and improper." (Internal quotation marks omitted.) *Marcus v. Cassara*, 223 Conn. App. 69, 81, 308 A.3d 39 (2023) (quoting *Robinson v. Robinson*, 172 Conn. App. 393, 400–401, 160 A.3d 376, cert. denied, 326 Conn. 921, 169 A.3d 233 (2017)).

"It is statutorily incumbent upon a court entering orders concerning custody or visitation or a modification of such order to be guided by the best interests of the child." (Internal

quotation marks omitted.) *McKechnie v. McKechnie*, 130 Conn. App. 411, 420, 23 A.3d 779, cert. denied, 302 Conn. 931, 28 A.3d 345 (2011). In determining a child's best interests, the court "may consider, but shall not be limited to, one or more of the . . . factors" in General Statutes § 46b-56 (c). "The trial court is vested with broad discretion in determining what is in the child's best interests." *Schult v. Schult*, 241 Conn. 767, 777, 699 A.2d 134 (1997).

Section 46b-56 sets forth seventeen factors that the court may consider in making or modifying any order:

"(1) The physical and emotional safety of the child; (2) the temperament and developmental needs of the child; (3) the capacity and the disposition of the parents to understand and meet the needs of the child; (4) any relevant and material information obtained from the child, including the informed preferences of the child; (5) the wishes of the child's parents as to custody; (6) the past and current interaction and relationship of the child with each parent, the child's siblings and any other person who may significantly affect the best interests of the child; (7) the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders; (8) any manipulation by or coercive behavior of the parents in an effort to involve the child in the parents' dispute; (9) the ability of each parent to be actively involved in the life of the child; (10) the child's adjustment to his or her home, school and community environments; (11) the length of time that the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity in such environment, provided the court may consider favorably a parent who voluntarily leaves the child's family home *pendente lite* in order to alleviate stress in the household; (12) the stability of the child's existing or proposed residences, or both; (13) the mental and physical health of all individuals involved, except that a disability of a proposed custodial parent or other party, in and of itself, shall not be determinative of custody unless the proposed custodial arrangement is not in the best interests of the child; (14) the child's cultural background; (15) the effect on the child of the actions of an abuser, if any domestic violence, as defined in section 46b-1, has occurred between the parents or between a parent and another individual or the child; (16) whether the child or a sibling of the child has been abused or neglected, as defined respectively in section 46b-120; and (17) whether the party satisfactorily completed participation in a parenting education program established pursuant to section 46b-69b."

“The court is not required to assign any weight to any of the factors that it considers, but shall articulate the basis for its decision.” General Statutes § 46b-56 (c).

“[I]n matters involving child custody, and, by implication, visitation rights, [although] the rights, wishes and desires of the parents must be considered it is nevertheless the ultimate welfare of the child which must control the decision of the court.” (Internal quotation marks omitted.) *Ridgeway v. Ridgeway*, 180 Conn. 533, 541, 429 A.2d 801 (1980). “The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [the child's] environment.” (Internal quotation marks omitted.) *In re Ryan R.*, 102 Conn. App. 608, 625-26, 926 A.2d 690, cert. denied, 284 Conn. 923, 924, 933 A.2d 724 (2007).

## B. INCREASED PARENTING TIME AND CHILD SUPPORT

### *i. Relevant Facts and Discussion*

The plaintiff continues to reside in an apartment in Stratford with her boyfriend and two of the children, Victoria and Jomar. As of mid-January 2024, the plaintiff was laid off from a notary job, where she was an independent contractor. She is currently unemployed and actively searching for employment.

The defendant resides in Stamford with the other child, Yami, his girlfriend, a one year old child shared with the girlfriend, and the girlfriend's two additional children. The defendant has worked for a tick control company for over a decade. The defendant purchased a 4-bedroom home in Stratford, with a closing date of June 21, 2024. The move will allow him to have a significant amount of space for his current family dynamic and more parenting time with all of his children.

All of the children's activities, such as extracurriculars or therapy sessions, are held locally in the Stratford area. Jomar is the only child who currently has a weekly extracurricular in boxing. Both children (Jomar and Victoria) will likely be placed in extracurriculars during the summer recess. Both parties have acknowledged the desire to support the children during their activities and therapy sessions.

*ii. Increased Parenting Time During Winter & Spring Breaks and Summer Recess*

There is no dispute as to parenting time relating to one of the children (Yami). The disputed issues relate to an increase in parenting time concerning the other two children (Victoria and Jomar) during their winter and spring breaks and summer recess. Both parties acknowledge that the children have expressed a desire to live primarily with the plaintiff but to have increased parenting time with the defendant.

As it relates to the winter and spring breaks, the defendant sought to have parenting time during the entirety of those breaks. The plaintiff proposed sharing parenting time during the break. The court finds and concludes that it is in the best interests of the children to have parenting time during those breaks shared between their parents.

As it relates to the summer recess, the defendant sought a shared parenting schedule with alternating weeks. The plaintiff proposed that the defendant have only two weeks during the summer recess because she intends to have the children in activities and wants them to continue with their therapy sessions uninterrupted. She also voiced concerns that the defendant lacked the appropriate housing space to accommodate the children for a longer period of time. The plaintiff's concern about the defendant's living arrangement is misplaced. The DCF social worker testified that she visited both parties' residences and found both homes were suitable to accommodate all the children. Furthermore, the defendant already has the children every other

weekend within that space without any issue. Nonetheless, the defendant will be moving to Stratford and in a much larger space. It will also be easier for the defendant to maintain the children's schedule and any appointments during his parenting time. The court finds and concludes that it is in the best interest of the children to have shared parenting time during the brief summer recess in a 2-2-3 parenting schedule.

As it relates to transportation during parenting time, the defendant admits that he has been responsible for the transportation associated with his parenting time while the children lived with the plaintiff. The parties have already agreed to paragraph 4 (c) of the defendant's proposed orders where the defendant is responsible for all of the transportation for the exchanges of the minor children during the school year. It would not be in the children's best interest to change the consistency in that routine for a brief period during the summer recess. Therefore, the court finds and concludes that it is in the best interests of the children to have the defendant continue to be responsible during the summer recess for all of the transportation for the exchanges of the children.

*iii. Modification of Child Support Amount in light of Change in Primary Physical Custody of One Child*

At the outset, the parties agreed that the defendant would have primary physical custody of the oldest child, Yami, who will turn eighteen in November 2024. The court finds and concludes there has been a substantial change in circumstances that would allow it to consider the defendant's request to modify the child support order. The defendant wants a modification to lower the amount in support he contributes since one of the children now lives with the defendant. As expressed, the plaintiff does not dispute that the defendant now has primary physical custody of one of the children.



The plaintiff's financial affidavit, filed on November 8, 2023, (Entry No. 136.00) had her weekly income at \$650 (gross)/\$604 (net).<sup>1</sup> The defendant's financial affidavit, filed on November 8, 2023, (Entry No. 138.00) had his weekly income at \$681 (gross)/\$622 (net). The Child Support Guidelines Worksheet filed on November 8, 2023, (Entry No. 137.00) reflects that the presumptive child support amount payable by the defendant father to the plaintiff mother is \$71 per week, with childcare and unreimbursed medical expenses allocable at 54 percent to the plaintiff and 46 percent to the defendant.

As of mid-January 2024, the plaintiff was laid off from her notary job, where she was an independent contractor. She has been collecting unemployment since February 2024 at \$296 per week, which is at a rate below the minimum wage. The plaintiff acknowledged that she should be able to find new employment at minimum wage, which is pretty close to her November 2023 income. The defendant's employment and income remain unchanged from November 2023. On May 22, 2024, the day of the hearing, the Child Support Guidelines Worksheet (Entry No. 147.00) was recalculated based on the plaintiff working forty hours at a minimum wage rate, which is \$628 (gross)/\$519 (net). It reflected the presumptive child support amount payable by the defendant father to the plaintiff mother is \$74 per week, with childcare and unreimbursed medical expenses allocable at 53 percent to the plaintiff and 47 percent to the defendant.

In entering the orders below, the court relies upon and incorporates herein by reference the Child Support Guidelines Worksheet filed with the court on May 22, 2024 (Entry No. 147.00) to support a reduction of child support now that the plaintiff has physical custody of two children and the defendant has physical custody of one child. The court finds no basis

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<sup>1</sup> The plaintiff had included child support in her worksheet. The court derives the gross and net by subtracting the child support amount and calculating her gross based on making \$16.25 hourly for 40 hours a week.

upon which to deviate from the presumptive guidelines amount. The court enters child support orders accordingly, which it finds to be fair and equitable under all of the facts and circumstances as presented.

*iv. Retroactivity of Modified Child Support*

The final issue for the court's consideration is when the modified child support should take effect. The defendant is seeking a retroactive modification dating back to August 28, 2023, which is when one of the children began to reside with him. However, service on the motion to modify was an issue until October 5, 2023, when the plaintiff was before the court and waived service of the motion for modification (see court order at Entry 127.10). Therefore, if the court were to allow a retroactive application, the earliest date would be October 5, 2023. See *Lesueur v. Lesueur*, 172 Conn. App. 767, 780, 162 A.3d 32 (2017) (noting that retroactive child support is within discretion of trial court, but court may not order retroactive child support earlier than the date on which the motion was served).

The defendant was paying \$183 in weekly child support, which has been reduced to \$74 weekly. He overpaid weekly in the amount of \$109. Considering a retroactive date of October 5, 2023, the defendant overpaid in the amount of \$3597 (33 weeks x \$109 difference). Since the defendant is currently paying child support directly thru an immediate income withholding order, the court will suspend the child support payments made to the plaintiff until the \$3597 credit is paid off. It would take forty-eight weeks for the credit to be paid off at the modified amount of \$74, which would reactivate weekly payments to the plaintiff on May 5, 2025. The court enters child support orders accordingly, which it finds to be fair and equitable under all of the facts and circumstances as presented.

v. *Parenting Program*

Neither party has completed the parenting education program. To assist the parties with furthering their communication skills in a healthy manner and consistent with the court's notice of automatic court orders, the court enters an order requiring the completion of the parenting education program within a reasonable time from the entry of judgment.

**ORDERS**

1. Primary Physical Custody and Visitation:

- a. Yamilex Diaz (DOB: 11/16/2006): The defendant father shall have primary physical custody of the minor child. The plaintiff mother shall have parenting time with the minor child as mutually agreed upon by the parties, taking into consideration the minor child's preferences. The plaintiff mother shall be responsible for all of the transportation associated with her parenting time with the minor child.
- b. Victoria Diaz (DOB: 08/16/2009) and Jomar Diaz (DOB: 05/30/2011): The defendant father shall have parenting time with the minor children as follows:
  - i. During the school year, the defendant shall have parenting time every other weekend from Friday at 4 p.m. through Sunday at 6 p.m. Said weekend access shall be extended until Monday at 6 p.m. should the children have the day off from school.
  - ii. During the children's winter and spring breaks, the defendant shall equally share in parenting time with the plaintiff on a 2-2-3 schedule, where the children will reside two days with the plaintiff, two days with the defendant, and then alternate the three-day weekend ("2-2-3

schedule”). The plaintiff will have parenting time on Mondays and Tuesdays, and the defendant will have parenting time on Wednesdays and Thursdays. The parties will maintain their existing alternating weekend schedule. However, the holiday parenting access, as previously agreed upon, shall be treated separate and apart.

iii. During the children’s summer recess, the defendant shall equally share in parenting time with the plaintiff on the 2-2-3 schedule. However, the holiday parenting access, as previously agreed upon, shall be treated separate and apart.

iv. The defendant shall be responsible for all of the transportation for the exchanges of the minor children associated with his parenting time.

c. During her parenting time, the plaintiff shall ensure that all three of the children have no contact whatsoever with Joel Martinez under any circumstances.

d. The parties shall ensure they take the children to their scheduled medical appointments, including therapy during his/her respective parenting time.

e. Neither party shall disparage the other party to the children or in the presence of the children. The parties shall use their best efforts to promote and foster the children’s relationships with each of the parties.

f. The parties agree that the children shall continue in individual counseling or therapy.

g. Neither party shall inform the children of the court related matters or parental issues.

- h. The schedule for parenting time may be modified by agreement of the parties. The parties shall make every effort to accommodate the other parent regarding reasonable requests for changes to this schedule.
- i. Each party shall ensure the children's safety and will notify the other if the child is seriously injured or becomes seriously ill when in that party's care.

2. Child Support: Commencing immediately, the defendant father shall pay to the plaintiff mother the amount of \$74 per week for child support. This amount reflects the presumptive weekly amount of child support and is consistent with the Child Support Guidelines Worksheet (Entry No. 147.00). However, the defendant is entitled to a \$3597 credit for overage in payments made to the plaintiff since October 5, 2023. Child support is hereby suspended immediately and will reactivate on May 5, 2025.

a. Unreimbursed Medical Expenses: The defendant father shall pay 47 percent and the plaintiff mother shall pay 53 percent of any unreimbursed and/or any uncovered medical and dental expenses for the minor child. This modified allocation is consistent with the presumptive percentages in the Child Support Guidelines Worksheet (Entry No. 147.00).

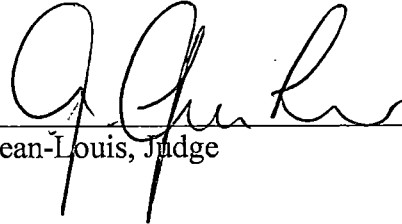
b. Child Care Contribution: The defendant father shall pay 47 percent and the plaintiff mother shall pay 53 percent of any work related child care expenses. This modified allocation is consistent with the presumptive percentages in the Child Support Guidelines Worksheet (Entry No. 147.00).

3. Parenting Education Program: The parties are ordered to complete the parenting education program and file a certificate of completion with the court within ninety days of the issuance of this decision.

4. Unsealing Financial Affidavits: Because financial matters were in dispute during the hearing, the automatic sealing of the parties' sworn statements of income, expenses, assets, and liabilities filed with the court pursuant to Practice Book § 25-30 is terminated in accordance with Practice Book § 25-29A (h) with respect to all such sworn statements now on file with the court.

All existing orders not modified herein shall remain in full force and effect.

Unless otherwise specifically set forth herein, these orders are effective immediately.

  
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Jean-Louis, Judge