41 Misc.3d 1227(A)
Unreported Disposition
(The decision of the Court is referenced
in a table in the New York Supplement.)
Supreme Court, Westchester County, New York.

D.C., Plaintiff,
v.
C.C., Defendant.

No. 012567/97.
|
Aug. 9, 2013.

Opinion

COLLEEN D. DUFFY, J.

***1** On June 18, 2012, Plaintiff D.C. ("Plaintiff") filed an order to show cause, affidavit, net worth statement, affirmation of Elizabeth D. Hudak, Esq., and exhibits thereto (the "Order to Show Cause"), seeking an order of contempt against Defendant C.C. ("Defendant") contending that Defendant has refused to comply with the provisions of the parties' Judgment of Divorce, dated March 2, 1998 ("Judgment of Divorce"), and Stipulation of Settlement, dated January 19, 1998 ("Settlement Agreement), which was incorporated but not merged into the parties' Judgment of Divorce, which required Defendant to maintain life insurance in the amount of $200,000.00 designating the parties' child (the "Subject Child") as irrevocable beneficiary and Plaintiff as trustee for the Subject Child. Plaintiff also is seeking an upward modification of child support for the Subject Child as well as attorney's fees.

On July 20, 2012, Defendant filed a notice of cross motion, affidavit in opposition to Plaintiff's Order to Show Cause, affirmation of Erik Kristensen, Esq., and exhibits thereto ("Cross Motion"), and memorandum of law, seeking attorney's fees and costs incurred in connection with Plaintiff's Order to Show Cause and for such other and further relief as the Court may deem just and proper.

On August 10, 2012, Plaintiff filed an affidavit and exhibits thereto in response to Defendant's opposition to the Order to Show Cause and in opposition to Defendant's Cross Motion.

On August 14, 2012, Defendant filed an affidavit and memorandum of law in reply to Plaintiff's opposition to the Cross Motion and in further opposition to Plaintiff's Order to Show Cause. [1]

On December 14, 2012, the Court received a copy of a letter, dated December 13, 2012, and attached term life insurance policy, from Erik Kristensen, Esq., counsel for Defendant, to Elizabeth Hudak, Esq., counsel for Plaintiff.

On July 31, 2013, Plaintiff filed, *pro se,* an Emergency Order to Show Cause seeking a Temporary Restraining Order, affidavit and exhibits thereto, against Defendant for payment of the Subject Child's college costs on or before August 22, 2013, pursuant to the parties' Settlement Agreement, and attorney's fees (if Plaintiff retains counsel for the proceeding). That matter is not yet fully submitted and has a scheduled court date of August 30, 2013. The Court has not considered it or addressed it in this Decision and Order.

CONCLUSIONS OF LAW

A. ***Proof of Life Insurance Claim is Denied as Moot***

There is no dispute that Article XII of the parties' Settlement Agreement and Judgment of Divorce requires that Plaintiff maintain a life insurance policy in the amount of $200,000.00, designating the Subject Child as irrevocable beneficiary and Defendant as trustee for the Subject Child. The Settlement Agreement also requires Defendant to provide proof of same, upon request by Plaintiff.

Pursuant to a letter and attachment from Defendant's counsel, dated December 13, 2012, to Plaintiff's counsel, it appears that Defendant has provided proof of the requisite life insurance, albeit only after the litigation was commenced.

***2** Plaintiff does not dispute Defendant's contention that, from February 2005 until December 2011, Defendant did not make any request or mention seeking such proof of a life insurance policy. Moreover, Plaintiff does not dispute that, in response to her December 2011 request, Defendant responded promptly, although, according to Plaintiff, Defendant's response did not provide the information that she sought and which the Judgment of Divorce and Settlement Agreement required.

As the documentation now has been submitted to Plaintiff, this claim is denied as moot. The Court admonishes the parties to ensure their full and timely compliance with this, and all other provisions, of the parties' Stipulation of Settlement and Judgment of Divorce.

B. ***Plaintiff's Application for an Order of Contempt is Denied***

For the reasons set forth below, the Court denies Plaintiff's application for an order of contempt against Defendant.

Pursuant to Article 19 of the Judiciary Law, this Court may exercise its contempt powers when a party violates a clear and explicit mandate, judgment or order of the Court. *Raphael v. Raphael,* 20 AD3d 463, 463 (2d Dept.2005); *Ottomanelli v. Ottomanelli,* 17 AD3d 647, 648 (2d Dept.2005). Pursuant to DRL § 245, in a matrimonial proceeding, a contempt finding is available only when other remedies—income execution, sequestration, etc, are unavailable or futile. *See also* New York Law of Domestic Relations, § 24.16 (other enforcement remedies must be futile or unavailable before contempt procedure is employed). The Court also must consider whether the failure to comply with such order or mandate of the Court was designed to impede or prejudice Plaintiff's rights. *See* New York Law of Domestic Relations, § 24.20 (act must be contrived to defeat or impair or prejudice rights of other party).

Here, although the Plaintiff has contended that Defendant failed to comply with certain provisions of the parties' Settlement Agreement regarding the specifications pertaining to the life insurance policy, there has been no showing that such actions were designed to impede or prejudice Plaintiff's rights or that other remedies were unavailable. *Id.*

Indeed, Plaintiff does not dispute Defendant's contention that, from February 2005 until December 2011, Plaintiff did not make any request or mention seeking such proof of a life insurance policy. Moreover, Plaintiff does not dispute that, in response to her December 2011 request, Defendant responded promptly, although, according to Plaintiff, Defendant's response did not provide the information that she sought and which the Judgment of Divorce and Settlement Agreement required.

Based upon the Court's review of documents submitted by Plaintiff in support of her application for contempt, the Court finds that, although it appears that Defendant did not comply with the specific requirements for the life insurance policy until on or about December 2012, any such failure to do so was not willful nor was it designed to impede, defeat, impair or prejudice Plaintiff's rights.

***3** Accordingly, Plaintiff's application for a finding of contempt is denied.

C. ***Plaintiff Has Not Met the Requisite Standard for a Change in Child Support***

For the reasons set forth below, Plaintiff's application for an upward modification of child support is denied.

The rights and obligations of the parties with respect to child support are set forth in Article X of the parties' Settlement Agreement, which provides, in relevant part:

> (b) The parties agree that the Court would find the application of [the Child Support Standards Act guidelines] to be unjust and/or inappropriate and have reached agreement as to an amount of child support which each believes to be just and appropriate.
>
> * * *
>
> (j) Notwithstanding the foregoing, the parties intend and agree that the Child support obligations of the parties be governed by this Agreement. In this Agreement the provisions for Child support have been set in a fair amount based on many considerations, including the other financial provisions of this Agreement and the present economic condition of both parties.
>
> (k) As set forth above, the parties believe that the figure set forth above has little or no applicability to the terms of this Stipulation for various reasons, including but not limited to:
>
> (I) The parties are sharing certain expenses for the Child;
>
> (ii) The parties' combined parental income for the last year in which a tax return was filed exceeded $80,000.00 and it is unclear as to whether or not such excess is to be included in the calculation and the parties do not desire

to incur the expenses each would bear in resolving such dispute; and

(iii) The parties agree that even if a calculation could be made as envisioned in the [Child Support Standards Act guidelines], such a result would be unjust or inappropriate.

(l) To the extent permitted by law, each of the parties waives any rights he or she may have pursuant to the said Acts, as they presently exist or may be amended in the future, and instead agrees to be bound by the terms and conditions of this Stipulation. As such, the parties intend that this Article be deemed to be a waiver as contemplated by DRL Section 240(1–b)(h).

(m) Until the Child's emancipation as defined in Article XIII hereafter, [Defendant] shall pay Child support to [Plaintiff] as follows: Commencing on January 1, 1990, and continuing on the fifth day of each month thereafter, [Defendant] shall pay to [Plaintiff] as and for Child support, the monthly sum of $1,750.00. All payments shall be made so as to be received by [Plaintiff] by the ninth day of the month.

(n) In addition to the aforesaid monthly payment, [Defendant] shall also pay to [Plaintiff] amounts equal to:

(I) 75% of reasonable child care and summer camp (in lieu of child care during summer camp) expenses and unreimbursed medical, dental, orthodontic, prescription, psychological, or psychiatric or optical expenses; and

(ii) 50% of extracurricular activities, up to 2 such activities per semester, plus after-school Catholic religious instruction.

***4** (iii) [Plaintiff] shall send copies of all invoices for child care and/or extracurricular activities to [Defendant] upon receipt. Each party will pay his or her respective share of the aforesaid expense directly to the provider timely.

* * *

(p) In addition to the foregoing, [Defendant] shall maintain in full force and effect his current hospitalization and major medical and dental coverage (or the maximum coverage available from either [Defendant's] or [Plaintiff's] employer, whichever coverage is more economical, at [Defendant's] expense and at [Defendant's] election for the benefit of the Child until her emancipation ("Emancipation" as hereinafter set forth).

(q) [Defendant] will contribute 75% of the cost of the undergraduate college education of the Child, up to a maximum of 75% of the cost of college expenses for attendance at the State University of New York ("SUNY"). College expenses shall be defined to include application and registration fees, tuition, room, board, books, laboratory, and library fees. It is specifically understood and agreed that the Child shall apply for all grants, tuition assistance, awards, scholarships, etc., and that the parties shall cooperate in the application processes for same. The obligation of the parties to contribute to the college education of the Child as herein above set forth shall remain after the application of the aforesaid forms of financial assistance to defray those expenses.

* * *

Settlement Agreement, Article X.

The terms of a separation agreement incorporated but not merged into a judgment of divorce operate as contractual obligations binding on the parties. *Gravlin v. Ruppert,* 98 N.Y.2d 1, 5 (2002), *citing Merl v. Merl,* 67 N.Y.2d 359 (1986). Where, as here, the parties have intentionally opted out of the provisions of the Child Support Standards Act, Family Court Act § 413 ("CSSA"), in order to provide for child support within a separation agreement, a court will assume that the parties have anticipated and adequately provided for the child's future needs and the terms of the agreement "should not be freely disregarded." *Id.* at 5, *citing Boden v. Boden,* 42 N.Y.2d 210, 212–13 (1977).

Where there is a written agreement between parties as to child support, an upward modification of that child support will not be made unless a party can establish one of the following three bases: (1) when it appears, under a best interests analysis, that the needs of the child are not being met (*Brescia v. Fitts,* 56 N.Y.2d 132, 141 (1982)), or (2) unless there has been an unforseen change of circumstances and a concomitant showing of need (*Boden* at 213; *Gravlin* at 5–6), or (3) that the agreement was unfair or inequitable when made. *Id.*

Here, there is no allegation that the agreement was unfair or inequitable when made. Moreover, under the circumstances of this case, the Court finds that Plaintiff has not alleged any basis for her contention that the best interests of the Subject Child are not being met nor for her contention that Defendant's reduction in access time with the Subject Child constitutes an unforseen change of circumstance warranting an upward modification of the child support agreed to be the parties in their Settlement Agreement. [2]

***5** With respect to the best interests of the Subject Child, Plaintiff has wholly failed to articulate any factual basis to show that the Subject Child's needs are not being met. Plaintiff's itemization of costs, e.g., gas, electricity, condominium fees, mobile telephone service, car insurance, that have increased over the years since the parties' executed their Settlement Agreement, does not identify, in any way, how such increase in costs have prevented the Subject Child's needs from being met. [3] *Murrin v. Murrin,* 186 A.D.2d 567, 567 (2d Dept.1992) (steady increase in income and increased costs do not warrant upward modification when there is no showing that the needs of the child are not being met); *Brevetti v. Brevetti,* 182 A.D.2d 606, 607–08 (2d Dept.1992) (courts generally will not modify an agreement based on increased needs of growing child).

Here, Plaintiff has informed the Court that the parties' 17 year old daughter has her own car. Plaintiff's affidavit in support of Order to Show Cause, dated March 26, 2012, ¶ 41 ("Plaintiff's Aff ."). Plaintiff also has admitted that the Subject Child's "lifestyle and expenses have increased measurably since the date of [the parties'] divorce." Plaintiff's Aff.,¶ 48. Thus, the Court is unable to find that the best interests of a teenager who has her own car, and whose lifestyle has increased measurably, are not being met. *Murrin* at 567. Accordingly, under a "needs of the child" analysis, Plaintiff's claims are denied.

To the extent that Plaintiff claims that the increase in the cost of living and increased needs of the Child constitute an unanticipated substantial change in circumstance, such claim is denied as well.

Indeed, Plaintiff's contention that it goes without saying that the needs of [the Subject Child], who was two years old when we entered into [the Judgment of Divorce and Settlement Agreement] and who is now 17 years old, have increased ..." is incorrect. First, it is axiomatic that Plaintiff must assert factual allegations to support such a contention as Plaintiff bears the burden of establishing an unforeseen or unanticipated change of circumstances. *DiGiorgi v. Buda,* 26 A.D. 434, 435 (2d Dept.2006) (unanticipated substantial change in circumstances not established by generalized allegations); *Stromnes v. Stromnes,* 201 A.D.2d 981, 982 (4th Dept.1994) (error to increase child support where movant failed to show amount previously paid was insufficient to meet child's needs). Here, not only is Plaintiff's contention wholly unsupported by any factual assertions, it may not even be correct. Although the Subject Child's needs have likely changed since the parties entered into the Settlement Agreement and the Judgment of Divorce was issued, that does not mean her needs have increased. In sum, Plaintiff's conclusory contentions, without any factual basis, fail. *Id.*

Likewise, Plaintiff's contention that Defendant's failure to exercise all of his access time with the Subject Child constitutes a substantial and unforseen change of circumstances warranting an upward modification of the child support agreed to by the parties, under the facts of this case, also fails.

***6** Although Defendant has disputed Plaintiff's calculations regarding his access time to the Subject Child, even if the Court were to accept Plaintiff's calculations, Plaintiff has asserted no facts, and the parties' Settlement Agreement does not list any terms, that would evidence that Defendant's access time with the Subject Child was a factor considered by the parties in calculating child support or in their decision to deviate from CSSA guidelines with respect to such calculation of child support. *Compare Gravlin* 98 N.Y.2d at 7 (parties' agreement to opt out of CSSA guidelines directly intertwined two discrete support obligations by that parent to provide support to the child during that parent's continued visitation with the child).

Moreover, Plaintiff has alleged no facts that show that any decrease in Defendant's access time with the Subject Child somehow translated into a significant reduction of money that Defendant was required to spend on the Subject Child. In fact, Plaintiff has not even alleged that there has been any reduction of money that Defendant was required to spend on the Subject Child.

In short, the facts as alleged here simply do not fall within the ambit of cases where a substantial change of circumstances was created when the party's obligation to pay child support was either eliminated or significantly reduced by a reduction in the party's access time with the child at issue. *See Gravlin* at 6 (unanticipated change in circumstances when complete breakdown in visitation arrangement effectively extinguished party's support obligation); *McCormick v. McCormick,* 947 N.Y.S.2d 609 (2d Dept.2012) (substantial reduction in access time significantly reduced amount of money party was required to pay for the child).

Accordingly, Plaintiff's claim for an upward modification under this type of change of circumstances analysis also is denied.

D. ***Each Party's Request for Counsel fees is Denied***

With respect to Defendant's cross motion for counsel fees and costs pursuant to 22 NYCRR § 130–1.1, the Court denies such application. The Court also denies Plaintiff's application for attorney's fees.

With respect to Defendant's application, although the Court has determined that Plaintiff has not asserted any basis for the Court to modify the terms of child support agreed upon by the parties, the Court does not find the motion frivolous. *Hae Sook Moon v. City of New York,* 255 A.D.2d 292, 292 (2d Dept.1998) (no frivolous conduct within the meaning of 22 NYCRR § 30–1.1); *Mitchell, et al v. Andrus La Barge, et al.,* 257 A.D.2d 834, 834 (3d Dept.1999) (although parties' contentions lacked merit, no finding of frivolous conduct to warrant sanctions or costs). Accordingly, Defendant's application for cost and attorney's fees is denied.

With respect to Plaintiff's application for attorney's fees, although it is within the Court's discretion to award counsel fees in post-judgment proceedings involving enforcement (Domestic Relations Law § 237; *De Cabrera v. DeCabrera–Rosete,* 70 N.Y.2d 879, 881 (1987), here, the Court finds no such award is warranted.

***7** The standard for awarding counsel fees includes an inquiry into the nature and extent of services, the performance of counsel under the circumstances, the difficulty of the case, the results achieved and counsel's reputation in the legal community. *Id. Barnes v. Barnes,* 54 A.D.2d 963 (2d Dept.1976); *McCann v. Guteri,* 100 A.D.2d 577 (2d Dept.1984). The party seeking the requested fees does not need to prove an inability to pay the fees, although the Court is guided by the relative financial circumstances of the parties and the merits of the matter before the Court. *DeCabrera* at 881.

Here, the Court notes that it dismissed, as moot, the claim regarding the insurance policy. Moreover, upon a review of documents submitted by Plaintiff, the Court finds that Plaintiff has not shown that Defendant failed to comply with his obligation to maintain an insurance policy designating the Subject Child as beneficiary and Plaintiff as trustee of the child. To the extent that the policy obtained or maintained by Defendant did not contain provisions to effectuate the goal of the parties as set forth in the Settlement Agreement, the documents submitted by Plaintiff show that Defendant made efforts to ensure that it did. And, although Plaintiff contended that Defendant's disclosure, upon her request, of the policy was inadequate, there was no showing that he did not respond to the request. According, the Court finds that no award of attorney's fees is warranted.

The Court considered the following submission by the parties: Plaintiff's Order to Show Cause, dated June 18, 2012, affidavit, net worth statement, affirmation of Elizabeth D. Hudak, Esq., and exhibits thereto; Defendant's Notice of Cross Motion, dated July 20, 2012, affidavit in opposition to Plaintiff's Order to Show Cause, affirmation of Erik Kristensen, Esq., and exhibits thereto, and Memorandum of Law; Plaintiff's Affidavit, dated August 10, 2012 and exhibits thereto, in Response to Defendant's Opposition to the Order to Show Cause and in Opposition to Defendant's Cross Motion; Defendant's Affidavit and memorandum of law, dated August 14, 2012 in Reply to Plaintiff's Opposition to the Cross Motion and in Further Opposition to Plaintiff's Order to Show Cause; Letter, dated December 13, 2012, and attached term life insurance policy, from Erik Kristensen, Esq., counsel for Defendant, to Elizabeth Hudak, Esq., counsel for Plaintiff.

This constitutes the Decision and Order of the Court.

All Citations

41 Misc.3d 1227(A), 981 N.Y.S.2d 634 (Table), 2013 WL 6038489, 2013 N.Y. Slip Op. 51852(U)

Footnotes

1 To the extent that Defendant's August 14, 2012 is in further opposition to Plaintiff's order to Show Cause, the Court notes that Defendant did not seek permission of the Court to submit such supplemental affidavit. *DeSimone v. Accettola,* 2009 N.Y. Slip Op. 30530U, 2009 N.Y. Misc. Lexis 3710, *8 (Sup.Ct., Richmond Co.2009) (unauthorized surreply will not be considered); *see also* CPLR § 2214 (no statutory provision allowing supplemental replies); Post Judgment Matrimonial Part Rules, Colleen D. Duffy, Supreme Court Justice, Supreme Court, Westchester County. However, as the affidavit and memorandum of law also constitute a reply to Plaintiff's opposition to Defendant's cross motion, in this case the Court has considered the August 14, 2012 affidavit and memorandum of law in deciding the matters.

2 The Court notes that Plaintiff does not contend that the Settlement Agreement was unfair when it was agreed to in 1998.

3 To the extent that Plaintiff is claiming that the cost of living increases that she has experience somehow constitute an unanticipated or unforeseen change of circumstance (Plaintiff's Aff., ¶ 42), the Court rejects such contention. Without a concomitant showing that the needs of the child are not being met, the claim is meritless. *Boden* at 210; *Jan S. v. Leonard S.,* 26 Misc.3d 243, 254 (Sup.Ct., New York Co.2009) (inflation is reasonably foreseeable at time of entry of divorce).