

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. EDWARD A. MARON, J.S.C.

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V.P.W.,

Plaintiff

-against-

S.D.W.,

Defendant.

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**Trial/IAS Part 16
Index No.: 202XXX-14**

**Motion Seq.: 001, 002
Submission Date: 2/20/15**

Papers Submitted

Order to Show Cause, Affidavit, Affirmation, Exhibits Annexed.....X
Notice of Cross Motion, Affidavit in Opposition, Affirmation, Exhibits Annexed.....X
Reply Affidavit, Exhibits Annexed.....X
Reply Affidavit.....X

Plaintiff (“Wife”) moves by Order to Show Cause dated December 9, 2014 seeking an Order a) directing Defendant (“Husband”) to continue to pay 100% of the carrying charges and expenses related to the marital residence, including but not limited to the mortgage, home equity loan, property taxes, homeowner’s insurance, gas, electric, telephone, water, cable, internet on-line service, pool, alarm, landscaping, and repairs and to immediately pay and bring current any and all arrears that may exist with respect to any of the foregoing charges and expenses; b) directing Husband to pay \$5,233.00 per month in child support to Wife pursuant to the Child Support Standards Act, retroactive to the date of this application; c) directing Husband to pay \$5,414.00 per month in non-taxable spousal maintenance to Wife, retroactive to the date of this application; d) directing Husband to continue to pay the college education expenses for the parties’ children; e) directing Husband to continue to pay for family dental and optical visits as needed; f) directing Husband to continue to pay for medical co-payments, including but not limited to, the psychologist and physical therapy as

incurred; g) awarding Wife exclusive use and enjoyment of a certain 2013 Jeep Wrangler automobile; h) directing Husband to pay all of the costs associated with the operation and maintenance of certain 2013 Jeep Wrangler automobile including, but not limited to, lease payments, gas, insurance, repairs and maintenance; i) directing Husband to pay all of the costs associated with the operation and maintenance of a certain 2013 Honda Civic automobile used by the children, including, but not limited to, lease payments, gas, insurance, repairs and maintenance; j) directing Husband to pay 100% of the interim forensic accountant Retainer Fees to Gettry Marcus, CPA., in the sum of \$7,500.00, to determine Husband's income stream and to value Husband interest in certain businesses, for the purposes of support and equitable distribution; k) directing Husband to pay interim real estate appraisal fees to Standard Valuation Services, Inc., in the sum of \$6,500.00, to determine the value of Husband's interest in certain commercial properties for the purposes of equitable distribution; and l) directing Husband to pay interim counsel fees on behalf of the Wife in the sum of \$15,000.00, without prejudice to future applications for additional awards, if warranted.

Husband moves by Notice of Cross Motion dated January 15, 2015 seeking an Order 1) awarding Husband the counsel fees he incurred with respect to opposing Wife's instant *pendente lite* Order to Show Cause, or in the alternative; offsetting said counsel fees against any interim counsel fee awarded to Wife; and 2) awarding Husband the costs and disbursements of this application.

BACKGROUND

The parties were married on August 29, 1992, and there are three children of the marriage, to wit: Z., born September XX, 1993; J., born, January XX, 1995; and M., born July XX, 1997. Z. is a senior at college, and J. is a sophomore at college. The parties continue to reside together in the marital residence located at XXX, Woodbury, New York 11797 ("Marital Residence"). This action for divorce was commenced on August 12, 2014 by the filing of a Summons and Verified Complaint with the Nassau County Clerk.

It is unrefuted that Husband has been and agrees to continue to pay all of the expenses listed in branches "'a", "d", "e", "f", "h" (with the exception of Wife's gas, tolls, and parking) and "i" of Wife's motion. In fact, Wife does not allege that there has been any lapse in the payment of any of those expenses. Husband further consents to the relief sought in branch "g" of Wife's motion.

Wife is 51 years old, reports to be in good health, and has an Associate's Degree which she received in 1994. Wife has not had any meaningful employment outside of the home during the

majority of the marriage, however, in consideration of her age, health, and education, the Court will impute income to her in the amount of \$18,200.00 per year. After a careful review of her Statement of Net Worth and considering the marital and family expenses that Husband has been and will continue to be obligated to pay, the Court finds that her reasonable monthly expenses total approximately \$3,275.00, which includes expenses for gas, tolls, parking, grooming, groceries for the household, dining out, entertainment, fitness and nutrition, gifts, clothing for herself, gifts and charitable contributions, but does not include the costs of vacations, veterinary expenses, religious dues or allowances for the children.

Husband is 53 years old, reports to be in good health, has a high school diploma, is the Vice President of M.P., Inc., and his gross income from M.P., Inc. in 2013 was \$180,580.00, and his gross income from B.T.M. in 2013 was \$28,700.00. While Husband argues that the Court should deduct \$24,538.00 and \$684.00 from his gross wages for Medical Insurance Premiums and Personal Usage of the Business Vehicle, the Court declines to do so as such perquisites are permissibly included in his "income from all sources". While Husband submitted what he purports to be a year-end paystub from M.P., Inc. for 2014, neither party has submitted a filed 2014 Income Tax Return nor has Husband submitted any W-2 Forms for 2014. Accordingly, the Court will use the Husband's 2013 income for support calculation purposes.

DECISION AND ORDER

Based upon the consent of the Husband, branches "'a", "d", "e", "f", "h", and "i" of Wife's motion are **GRANTED** as follows, *pendente lite*:

i) Husband shall continue to pay the following: 100% of the following expenses for the Marital Residence: mortgage, home equity loan, property taxes, homeowner's insurance, gas, electric, telephone, water, cable, internet on-line service, pool, alarm, landscaping, domestic help (capped at \$250.00 per month) and repairs and to immediately pay and bring current any and all arrears that may exist with respect to any of the foregoing charges and expenses, as well as the religious dues for the family as was customary throughout the marriage, and Husband shall pay for appropriate clothing for the children as was customary throughout the marriage (monthly cap of \$200.00 per child);

ii) Husband shall continue to pay the college education expenses for the parties' children, including tuition, room and board, books, lab equipment, necessary and customary supplies, any other expenses related to the college education, as well as provide directly to each of the children a weekly allowance in an amount as was customary as of the date of commencement of the action;

iii) Husband shall continue to pay for family dental and optical visits as was customary and is necessary for the Wife and the parties' children;

iv) Husband shall continue to pay for medical co-payments for the Wife and the parties' children, including but not limited to, the psychologist and physical therapy, and Wife shall within five (5) days of incurring the expense send to the Husband a copy of the invoice and proof of payment of such expenses (if it has been advanced by the Wife), and Husband shall within five (5) days of receiving the invoice, pay the service provider (if not yet paid) or reimburse the Wife (if she has provided proof of payment);

v) Husband shall pay all of the costs associated with the operation and maintenance of the parties' 2013 Jeep Wrangler automobile including, but not limited to: lease payments, insurance, necessary repairs and routine maintenance, and Wife shall be responsible for her gas, tolls and parking expenses for such vehicle; and

vi) Husband shall pay all of the costs associated with the operation and maintenance of the parties' 2013 Honda Civic automobile used by the children, including, but not limited to: lease payments, gas, insurance, necessary repairs and routine maintenance.

In actions commenced on or after October 12, 2010, applications for temporary spousal maintenance must be determined by the court by employing the statutory formula set forth in D.R.L. §236 B (5-a). The statute, however, gives courts the authority to deviate from the formula where it is determined that "the presumptive award is unjust or inappropriate" (D.R.L. §236 B [5-a][e][1]). The court may adjust the presumptive award of temporary maintenance as it finds proper, based upon its consideration of seventeen enumerated factors set forth in that section of the statute.

The presumptive award of temporary spousal maintenance is calculated using the formula set forth in D.R.L. §236 (B)(5-a)(c)(1), which in the instant action is as follows:

I INCOME

Party	Income		Income over \$543,000.00
Plaintiff	\$ 18,200.00	Imputed Income	NA
Defendant	\$ 216,566.00	Net of FICA and Medicare Tax	NA

II CALCULATIONS

Basic Calculation	Amount	Formula
Calculation A	\$61,329.80	30% of Payor's Income minus 20% of Payee's Income.
Calculation B	\$75,706.40	40% of Combined Income minus Payee's Income.
Guideline Amount	\$61,329.80	

Low Income Calculation (If Applicable)

Payor Income minus Guideline Amount	\$155,236.20
Low Income Amount	\$0.00

Adjustment of Award: The court may adjust the award if it finds the award is unjust or inappropriate based on its consideration of the 17 factors set forth in D.R.L. §236(B) (5-a)(e)(1).

In this instance, Husband has been directed to pay marital and family expenses as more specifically set forth herein above, which total approximately \$11,000.00 per month, and the Court has also considered and quantified Wife's reasonable and customary monthly expenses, as well as imputed a modest income to her, all as is more specifically set forth herein above. Accordingly and based upon the foregoing, branch "c" of Wife's motion is **GRANTED TO THE EXTENT THAT** the Court directs an award of temporary maintenance in the sum of \$2,000.00 per month (\$24,000.00 per year), which deviates from the Guideline Amount for the reasons set forth above (D.R.L. §236[B][(5-a)[e][1][q])). The first payment of temporary maintenance and arrears shall be made on May 1, 2015, and then on the first of each month thereafter. The award of spousal support is retroactive to the original date of service of this application. Retroactive sums due by reason of this award shall be paid at the rate of \$100.00 per month, in addition to the sums awarded until all arrears have been satisfied, however, Husband shall be entitled to credits for spousal maintenance payments made as of the date of this application.

The Court notes that after payment of the Court-ordered obligations as set forth herein above, Husband has approximately \$60,000.00 (deducting the medical insurance premiums which is not available to him in liquid funds) per year remaining from which to pay own expenses.

In considering applications for temporary child support, it is well-within the Court's discretion to apply the Child Support Standards Act. In this instance, the Court must deny branch "b" of Wife' motion in light of the following, *inter alia*: the parties continue to reside together in the Marital Residence with their youngest child; the two older children are in college and Husband is obligated to pay their room and board, plus provide allowance and pay for clothing; Husband is also obligated to pay all of the expenses for the children's reasonable needs, as more specifically set forth

herein above; and there has been no temporary or permanent order of custody.

Branch “g” of Wife’s motion is **GRANTED** upon the consent of the Husband.

The Court reserves decision on branch “j” of Wife’s motion and refers the issue to a conference to be held with this Court on May 5, 2015,

Branch “k” of Wife’s motion has been rendered **MOOT** by the Short Form Order of this Court dated March 31, 2015.

The recent amendment to the Domestic Relations Law §237 provides “there shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In exercising the court’s discretion, the court shall seek to assure that each party shall be adequately represented and that where fees are to be awarded, they shall be awarded on a timely basis, *pendente lite*, so as to enable adequate representation from the commencement of the proceeding.” The statute further states that “[b]oth parties ... shall file an Affidavit with the Court detailing the financial agreement between the party and the attorney. *Such Affidavit shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses*” [emphasis added]. Annexing a retainer agreement is insufficient. Accordingly, branch “l” of Wife’s motion is **DENIED** without prejudice to renew upon proper papers, based upon her failure to set forth in her Affidavit the information required by the statute. The Court further finds that 70% of Wife’s motion was completely unnecessary as all of the marital expenses and children’s expenses have been paid and she provided no proof that there were any expenses unpaid or needs unmet. She is advised that upon her renewal of her request for interim counsel fees and/or fees for this application, the Court will reduce any award of counsel fees incurred for this application by 70%, and she will not be granted fees for any application for renewal of her application interim counsel fees.

Branch “1” of Husband’s motion is **MOOT** in light of the foregoing, and branch “2” is **DENIED**.

All matters not decided or requests for relief not granted herein are hereby **DENIED**.

This constitutes the decision and order of this Court.

Dated: April 23, 2015
Mineola, New York

ENTER:

EDWARD A. MARON, J.S.C.