

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss

PROBATE & FAMILY COURT
DOCKET NO.

FATHER ,)
Plaintiff,)
)
v.)
)
MOTHER ,)
Defendant,)

MEMORANDUM
IN SUPPORT OF REQUEST FOR CHILD SUPPORT ADJUSTMENT
DUE TO A MATERIAL CHANGE IN CIRCUMSTANCES

A. Brief Statement of Facts

On _____ the parties submitted current financial statements to the court for a determination of child support. Plaintiff questioned the accuracy of Defendant’s expenses as reported on her financial statements. Among numerous discrepancies Defendant states \$140.00 per week in expenses for “Savings account.” Defendant refused to negotiation a reduction in Child Support knowing that Plaintiff’s salary decreased from \$180,000 to \$150,000.

Prior to trial, on July 15, 2007 on two occasions the attorneys were called into Judge _____ chambers to discuss *inter alia*, child support reduction. Based on child support guidelines, the court ordered a reduction and the Mother to pay Father for overpayment in the amount of \$6,000. In reaching the court’s decision, the court concluded that the current order of \$535.00 was still above guidelines based on Father’s salary of \$150,000.

In January 2008, Defendant was aware that Plaintiff lost his employment altogether and had no salary income. Defendant refused to discuss a reduction in Child Support and made Plaintiff continue to pay \$535.00 based on a salary of \$150,000 which was over the guidelines per the Court’s own admission.

B. Discussion

The Plaintiff requests the court apply the laws of the Commonwealth of Massachusetts and reduce his child support according to The Child Support Guidelines per the U.S. Department of Health and Human Services regulations which require guidelines to be “based on specific descriptive and numeric criteria and result in a computation of the support obligation.” 45 C.F.R. § 302.56.

The Massachusetts General Laws Chapter 208 § 28

In determining child support obligation, or in approving the agreement of the parties, the court **shall apply the child support guidelines** and there shall be a rebuttable presumption that the amount of the order which would result from the application of the guidelines is the appropriate amount of child support to be ordered. If, after taking into consideration the best interests of the child, the court determines that a party has overcome such presumption, the court

shall make specific written findings indicating the amount of the order that would result from application of the guidelines;

“Orders of maintenance and for support of minor children shall be modified if there is an inconsistency between the amount of the existing order and the amount that would result from application of the child support guidelines.” M.G.L.c.208 § 28.

Under Federal and Massachusetts law child support must be based on specific descriptive and numeric criteria and result in a computation of the support obligation. The Child Support Guidelines **I.A Income Definition** lists 26 forms of “income” and no-where does it mention assets of the parties. Opposing Counsel begins with citing Guideline II-H because at the time of the ruling, the Plaintiff was not earning any income as defined by the guidelines in I-A. Currently, the Plaintiff is making what amounts to \$110.00 per week (\$5,720.00 annually) in self employment wages and approximately \$116 in interest income (approximately \$6,000 yearly); both of which are far less than the August 18, 2008 agreement bases its Child Support upon (\$100,000 salary and half of the yearly interest income of \$23,000) and does not apply the Child Support Guidelines as required per M.G.L.c.208 § 28.

The Child Support Guidelines II-H

Section II-H of the guidelines is clearly intended to prevent Fathers from becoming intentionally underemployed in order to seek a lower child support obligation. Consequently, Section II-H was not intended to punish Fathers that, due to external circumstances, find themselves in the unenviable position of being unemployed. In fact, in order to prove “earning capacity” factual evidence of the Father’s employment history is required to demonstrate that the Father is currently underemployed. The facts of this case will show the Plaintiff has paid child support in the amount of \$900.00, \$735.00, \$535.00 and \$360.00 per week, all of which are above guidelines. Additionally, Father has never been previously unemployed and is actively seeking employment and can provide substantiating proof of such.

The Court’s written findings **must include the guidelines amount**, the specific facts of the case that justify the deviation and the conclusion that deviation is consistent with the best interests of the child. M.G.L.c.208 § 28, *Department of Revenue v. Foss*, 45 Mass.App.Ct., 452 (1998).

The party seeking deviation, namely the Defendant, has the burden of rebutting the presumption that the guidelines amount applies. G.L.c.208, § 28.

C. Child Support Case Law

Canning v. Juskalian, 33 Mass.App.Ct. 202, 206 establishes that the earning capacity rather than the actual income of a parent may be considered in determining child support orders. However, on page 206, the court states, “The concept of joint parental responsibility for child support is well established.” M.G.L.c.208 §28. Furthermore, the court states that, “There is no question that M.G.L.c.208 §28 imposes a duty of child support on the wife as well as the husband.” *Id.* at 206 citing *Silva v. Silva*, 9 Mass.App.Ct.339, 341 (1990). “Accordingly, a wife’s assets and income, if any, must be considered in assessing a complaint for modification.” *Silva* at 342.

The Defendant’s August 2008 income was well above the median household income at \$90,000. The Defendant owns a \$500,000 house in the very desirable community of Lynnfield

free any mortgages. She has a new car with retail value of \$35,000 and other substantial investments, stocks, checking accounts. The Defendant worked full time during the marriage as an established court record, has earning capacity of over \$150,000. Defendant's income has continued to increase over time and she receives benefits including, but not limited, stock options, medical, employer 401k contribution, payment for her parking in downtown Boston and reimbursement for her cell phone and Blackberry use. Additionally, Defendant uses many services that others, including myself, cannot afford – including: snow removal, lawn care and house cleaning.

The marital assets were equitably distributed, despite being a short term (3 year) marriage, pursuant to the Separation Agreement dated July 15, 2005. The court records will show that the vast majority of the assets were made solely by me through the previous ownership and sale of my business. The Agreement, supported by financial statements meticulously reviewed by Opposing Counsel's counsel, Opposing Counsel, awarded Defendant assets totaling well over \$600,000 (totaling approximately 45% of the marital assets) including \$250,000 in cash and the marital home which had appreciated \$93,000. At the time the house had a mortgage less than \$250,000. Between selling the house for \$404,000 and the \$150,000 from her parents, Defendant had cash totaling over \$550,000. She chose to purchase a home for \$500,000 (free of any mortgage), a new car, and refurbished her entire downstairs bathroom at a considerable (approximately \$15,000) cost. This home improvement increases the value of her home.

Additionally, Defendant's boyfriend has recently moved into her home. Plaintiff assumes that since the boyfriend is employed he contributes to the expenses of the home.

“Totality of the Circumstances” HISTORICALLY BAD ECONOMY (Highest Unemployment in 27 Years) – Relief of Contractual Obligations/Agreements – August 18, 2008

After giving due deference to M.G.L.c.208 §28 which mandates that the Child Support Guidelines must apply, the court has discretion to look at the “totality of the circumstances” to determine if applying the guidelines would not be in the best interest of the child.

Under a true “totality of the circumstances” approach, this Court will find that the economy alone supports the Plaintiff's request for relief from the August 18, 2008 Judgment and his current Child Support payments

Croak v. Bergeron, 67, Mass.App.Ct.750, 754 (2006) states that a court has discretion to contemplate the “totality of the circumstances” for assistance in determining child support guidelines. However, the court's factual analysis of the “totality of the circumstances” actually favors the Plaintiff's position and weakens the Defendants.

In *Croak v. Bergeron* the court found the Father “carefully orchestrated his periods of unemployment to coincide with court appearances so that he could report that he was unemployed at that point in time and thereby evade the payment of guidelines support.” *Croak v. Bergeron* at 752. “The judge found the Father had a pattern of nondisclosure and evasion with respect to finances and, as we have indicated that he carefully orchestrated his periods of unemployment to coincide with court appearances so that he could evade the payment of guidelines support.” *Id.* at 755. Citing also, *Crowe v. Fong* (judge entitled to draw inferences adverse to an evasive party from uncertainties attending that party's financial affairs) and *Salten v. Ackerman*, (in determining the amount of child support, the judge could take into account the husband's evasiveness as to finances).

Applying the totality of the circumstances approach to this case would clearly establish that the Plaintiff has been extremely forthright and diligent about his impending unemployment and has been actively and aggressively pursuing a job commensurate with his education and professional skill-sets. The totality of the circumstances approach MUST consider the historically bad economic conditions we all face including a 27 year high in unemployment rates.

All the courts found that under the “totality of the circumstances” the Father had been evasive as to his finances. In fact, Croak v. Bergeron found, “A consideration of resources would seem particularly appropriate in the instant matter in view of Croak’s use of his assets to support himself (and for other purposes beneficial to him) during, as found by the judge, his orchestrated periods of unemployment, while Bergeron (his ex-wife) and the children struggled to defray their living expenses.” Croak v. Bergeron at 758.

The Croak v. Bergeron court actually evaluated the totality of the specific factual circumstances in reaching their ruling. *Inter alia*, “The judge found that the Wife’s total combined earned income, alimony, and unemployment income reported by her on her 2000, 2001, and 2002 tax returns was \$64,339. See footnote 14, Croak v. Bergeron at 758.

Also as previously addressed, under M.G.L. c. 208 § 28, “There is no question that M.G.L.c.208 §28 imposes a duty of child support on the wife as well as the husband.” Silva v. Silva, 9 Mass.App.Ct.339, 341 (1990). “Accordingly, a **wife’s assets** and income, if any, **must** be considered in assessing a complaint for modification.” *Silva* at 342.

Double Counting Cases: Croak v. Bergeron; Champion v. Champion; Sampson v. Sampson; Adlakha v. Adlakha; Dalessio v. Dalessio

The topic of “double-counting” is part of a court’s discretion when contemplating the “totality of the circumstances.” Specifically, Croak v. Bergeron the court states that double counting occurs when “property (assets) is awarded to one spouse in an equitable distribution of marital assets and is then also considered as a source of income for purposes of imposing child support obligations.” Citing Champion v. Champion.

The Child Support Guidelines **I-A. Income Defined** intentionally list 26 forms of income. If Federal Government and the Massachusetts legislatures intended for the equitable distribution of assets to be considered as part of I-A Income Definition, they could have done so. The Child Support Guidelines were specifically mandated by Federal regulation to address three deficiencies in the traditional case-by-case method for child support amounts: inconsistent awards for similarly situated parties; lack of predictability, which discourages negotiated settlements (as is clearly evident in this case); and orders inadequate to meet the basic financial needs of children. Child Custody and Support, Linda Ouellete, page 491. No-where do the guidelines reference assets as part of income to be used in assessing child support.

The Child Support Guidelines II-D(2) Visitation states:

“These guidelines recognize that children must be allowed to enjoy the society and companionship of **both parents to the greatest extent possible**.” The court may adjust the amount of child support by **2%** based, *inter alia*, on the parties’ actual time sharing with the child.

The Plaintiff believes that it is in his daughter's best interest to be with each parent equally. The Defendant vehemently disagrees and has gone to great lengths to prevent this despite indicating under oath that she believes the Plaintiff is a good father. Specifically, the Defendant fabricated stories to the GAL about his daughter, reported the Plaintiff to the Lynnfield police on two separate occasions in June 2007, and made mention that she was "in fear of her safety" on numerous occasions without once substantiating any of these allegations. On June 3, Defendant's father verbally assaulted the Plaintiff in front of his daughter and later stated in his deposition that he believed the Defendant was "in fear of her safety." Both the Defendant and Defendant's father have made statements that I should be lucky that I am not paying child support in the amount of \$900.00 per week, per the previous order.

The Plaintiff requests that since the Defendant does not believe that the daughter "must be allowed to enjoy the society and companionship of both parties to the greatest extent possible," the court should use its discretion in further reducing the child support obligation an additional 2% per the Child Support Guidelines II-D(2).

For the following Reasons this Court Should Apply Massachusetts Law in Addressing the Plaintiff's Request for Child Support Modification:

1. Plaintiff is currently unemployed due to external factors and has been since January 1, 2008.
2. Plaintiff filed a Complaint for Modification of Child Support that was served on the Defendant on March 17, 2009.
3. Plaintiff's current child support is \$360.00 per week and is depleting his equitable distribution of assets per the Separation Agreement dated July 15, 2005.
4. Plaintiff has established his diligent efforts at procuring gainful employment.
5. Plaintiff recently established a new profession as a solo practitioner in addition to seeking gainful employment to augment his earning potential.
6. It is well established that it can take up to three (3) years for solo practitioners to "establish themselves" and begin earning profits.
7. Defendant has substantial assets, income and earning potential to maintain the current standard of living for the child even with a child support modification.

Respectfully Submitted,

Plaintiff's Counsel