# SUPREME COURT OF THE STATE OF NEW YORK
## *Appellate Division, Fourth Judicial Department*

**1660**

**CA 08-02613**

PRESENT: SCUDDER, P.J., HURLBUTT, SMITH, AND CENTRA, JJ.

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THOMAS FILIACI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JERI-LYNN FILIACI, DEFENDANT-RESPONDENT.

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ANGELO T. CALLERI, P.C., ROCHESTER (ANGELO T. CALLERI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JAMES J. PIAMPIANO, ROCHESTER, FOR DEFENDANT-RESPONDENT.

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Appeal from a supplemental judgment of the Supreme Court, Monroe County (David D. Egan, J.), entered September 22, 2008 in a divorce action. The supplemental judgment, among other things, awarded defendant maintenance for a certain period.

It is hereby ORDERED that the supplemental judgment so appealed from is unanimously modified on the law by providing in subdivision (D) of the 10th decretal paragraph that plaintiff's proportionate percentage of combined parental income is 87.97% and defendant's proportionate percentage of combined parental income is 12.03% and in subdivision (E) of that decretal paragraph that plaintiff's child support obligation is $16,879.24 per year or $324.60 per week, by providing in the 11th decretal paragraph that plaintiff shall pay child support to defendant in the amount of $324.60 per week, by providing in the 15th decretal paragraph that plaintiff's pro rata share of the uninsured health care expenses of each child is 87.97% and defendant's pro rata share of the uninsured health care expenses of each child is 12.03%, by providing in the 17th decretal paragraph that defendant shall be entitled to maintenance for a period of six years commencing October 24, 2007, until the death of either party, or until defendant's valid or invalid marriage, by vacating the amounts awarded for attorney's fees and expenses in the 25th and 26th decretal paragraphs, and by vacating the interim amounts awarded for fees and expenses to defendant's attorney, the Law Guardian and the court reporter and as modified the supplemental judgment is affirmed without costs, and the matter is remitted to Supreme Court, Monroe County, for a hearing in accordance with the following Memorandum: Plaintiff appeals from a supplemental judgment of divorce that directed him to pay defendant the sum of $332.09 per week in child support and the sum of $300 per week in maintenance for a period of six years. In addition, plaintiff was directed to pay defendant a total of $26,264, representing defendant's one-half share in the proceeds from the sale of stock, the cost of computer training programs and the parties' 2006

income tax refunds. Defendant also received an award of attorney's fees and plaintiff was held in contempt of court for his failure to pay maintenance pursuant to an interim order. We reject plaintiff's contention that Supreme Court erred in imputing income of $90,000 per year to plaintiff and $10,000 per year to defendant in determining plaintiff's child support obligation. The court's determination was based upon the parties' employment histories and, "[i]n determining a party's child support obligation, 'a court need not rely upon the party's own account of his or her finances, but may impute income based upon the party's past income or demonstrated earning potential' " (*DeVries v DeVries*, 35 AD3d 794, 795; *see Rosenberg v Rosenberg*, 44 AD3d 1022, 1025; *Spreitzer v Spreitzer*, 40 AD3d 840, 842). We agree with plaintiff, however, that the court erred in calculating his child support obligation based on pro rata shares of 90% for plaintiff and 10% for defendant. The basic child support obligation is calculated by multiplying "the combined parental income . . . by the appropriate child support percentage and . . . prorat[ing such amount] in the same proportion as each parent's income is to the combined parental income" (Domestic Relations Law § 240 [1-b] [c] [2]). Thus, plaintiff's actual pro rata share is 87.97%, and defendant's pro rata share is 12.03%, resulting in a child support award to defendant of $324.60 per week. Because the same pro rata shares are applicable to uninsured health care expenses (*see* § 240 [1-b] [c] [former (5)]; *Linda R.H. v Richard E.H.*, 205 AD2d 498, 501), the court also erred in directing plaintiff to pay 90% of the uninsured health care expenses for the children. We therefore modify the supplemental judgment accordingly.

We reject plaintiff's further contention that the court abused its discretion in awarding defendant maintenance for a period of six years. Rather, the court should have provided that defendant is entitled to maintenance for a period of six years, until the death of either party, or until defendant's valid or invalid marriage (*see* Domestic Relations Law § 236 [B] [1] [a]; [6] [c]; *McLoughlin v McLoughlin*, 63 AD3d 1017, 1018; *Haines v Haines*, 44 AD3d 901, 903). We therefore further modify the supplemental judgment accordingly.

We conclude that the court properly awarded defendant one half of the proceeds from the sale of certain stock and one half of the costs of the computer training programs purchased by plaintiff. The record does not support plaintiff's contention that the stock and computer programs were purchased with funds from plaintiff's separate property. The court also did not abuse its discretion in awarding defendant one half of the parties' 2006 federal and state income tax refunds.

We further agree with plaintiff, however, that the court erred in directing him to pay defendant's attorney's fees and expenses in its interim orders and in the supplemental judgment. The court issued an interim order on May 15, 2007 that, inter alia, directed plaintiff to pay the Law Guardian a retainer of $1,000 and defendant's attorney the sum of $4,000 from an escrow fund. The court issued a second order on October 24, 2007 that, inter alia, directed plaintiff to pay defendant's attorney the sum of $6,972.53 and to pay the court reporter deposition fees in the sum of $1,451.60 from the escrow fund.

The court issued a third order on November 30, 2007 that directed plaintiff to pay an additional $2,800 to the Law Guardian from the escrow fund. The supplemental judgment directed plaintiff to pay defendant's attorney the sum of $8,203.05 from the escrow fund, as well as an additional sum of $13,206.05. The three orders and supplemental judgment are not supported by affidavits from which the court could "determine the nature, quality and reasonableness of the services rendered" (*Cooper v Cooper*, 179 AD2d 1035, 1036; *see Mulcahy v Mulcahy*, 170 AD2d 587, 588). Although defendant's attorney submitted an affidavit in support of defendant's order to show cause seeking, inter alia, the attorney's fees awarded in the May 15, 2007 interim order, that affidavit merely alleged in a conclusory manner the total numbers of hours that the attorney had expended to date, and defendant failed to submit any other affidavits concerning attorney's fees. We therefore further modify the supplemental judgment accordingly, and we remit the matter to Supreme Court for a hearing to determine the reasonable amount of fees and expenses to be awarded to defendant's attorney, the Law Guardian and the court reporter (*see Stanley v Hain*, 38 AD3d 1205, 1207).

Finally, plaintiff contends that the court erred in holding him in contempt for failing to comply with an interim maintenance order because the court failed to comply with the procedural requirements of Judiciary Law § 756, as mandated by Domestic Relations Law § 245. We reject that contention. Domestic Relations Law § 245 is applicable only where contempt is sought as a means of enforcing a court order, and that is not the case here. Rather, the court made a finding of criminal contempt pursuant to Judiciary Law § 750 based on defendant's willful failure to pay maintenance in violation of an interim order, and the court imposed no sanction for that contempt.

Entered: December 30, 2009

Patricia L. Morgan
Clerk of the Court