

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 12, 2012

512325

PAUL D. SMITH,

Respondent,

v

MEMORANDUM AND ORDER

LORI ANN SMITH,

Appellant.

Calendar Date: November 22, 2011

Before: Mercure, Acting P.J., Rose, Lahtinen and Garry, JJ.

Friedman & Molinsek, P.C., Delmar (Michael P. Friedman of counsel), for appellant.

Cynthia Feathers, Glens Falls, for respondent.

Rose, J.

Appeal from an order of the Supreme Court (O'Connor, J.), entered March 3, 2011 in Ulster County, which, among other things, granted plaintiff's motion for a downward modification of a prior support order.

Pursuant to a 2002 judgment of divorce, defendant (hereinafter the mother) was awarded sole custody of the parties' four children. Pursuant to the Child Support Standards Act (see Domestic Relations Law § 240 [1-b]), plaintiff (hereinafter the father) was directed to pay \$2,887 per month in child support based on his imputed income of \$160,000 as the sole proprietor of a veterinary practice. The mother, who had no income, was awarded durational maintenance. In 2007, the father was seriously injured in a motor vehicle accident and, in 2009, he sought a downward modification of his child support payments,

alleging that there had been a substantial change in circumstances because, among other things, his injuries severely limited his ability to resume his veterinary practice and to perform veterinary services. After a hearing, Supreme Court granted the motion and recalculated the father's monthly child support payments under the Child Support Standards Act to be \$634.96 based on the mother's present income of \$49,605 from her work as a part-time dental hygienist and the father's income of \$24,877.20 from his limited practice and his Social Security disability benefits.

The mother appeals, contending that, despite the father's injuries and disability, the motion for a downward modification should have been denied because the father could provide support through some other type of veterinary practice. She did not, however, present any evidence contradicting the father's proof of his limited ability to work or supporting her claim that he could hire other veterinarians to assist in running his practice. While a request for a downward modification of child support based on a loss of employment due to injury or illness may be denied where the parent seeking the modification still has the ability to provide support through some other type of employment (see Matter of Aranova v Aranov, 77 AD3d 740, 740-741 [2010]; Matter of Bukovinsky v Bukovinsky, 299 AD2d 786, 787 [2002], lv dismissed 100 NY2d 534 [2003]), Supreme Court credited the father's testimony that he is no longer able to work full time at his own practice, cannot afford to hire another person to assist him in his practice and is not employable at another practice because of his condition. Giving deference to Supreme Court's credibility determinations (see Matter of Wilson v LaMountain, 83 AD3d 1154, 1156 [2011]; Matter of Bianchi v Breakell, 48 AD3d 1000, 1002 [2008]), we find no basis to disturb its determination that the father demonstrated a significant change in circumstances warranting a downward modification of his child support obligation (see Matter of Silver v Reiss, 74 AD3d 1441, 1442 [2010]; Matter of Fuller v Fuller, 11 AD3d 775, 777 [2005]).

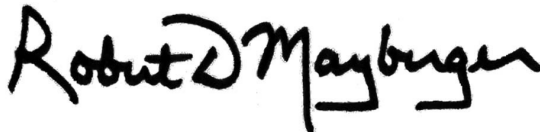
Nor are we persuaded that the presumptively correct amount of child support is unjust or inappropriate and that, as a result, the father's personal injury settlement should have been considered in determining his child support obligation (see

Domestic Relations Law § 240 [1-b] [f]). We note that the children receive derivative Social Security benefits (see Matter of Weymouth v Mullin, 42 AD3d 681, 681-682 [2007]), and the evidence established that most of the father's settlement had already been used to pay the father's child support arrears, continue his child support payments and otherwise mitigate his financial problems (compare Matter of Walker v Gilbert, 39 AD3d 1112, 1114 [2007]; Matter of Cody v Evans-Cody, 291 AD2d 27, 33 [2001]).

Mercure, Acting P.J., Lahtinen and Garry, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court