NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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August 8, 2018

LETTER OPINION

Mr. Donald Shay
1532 Lincoln Way, #102
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Defendant / Petitioner Pro Se

Mr. Richard J. Colten
Ms. Mary C. Huff
Ms. Virginia F. Shevlin
Blankingship & Keith, P.C.
4020 University Drive, Suite 300
Farfax, VA 22030
Counsel for Plaintiff / Respondent (Ms. Olivia Byrne)

Re: *Olivia Byrne v. Donald Shay*
Case No. CL-2010-8541

Dear Mr. Shay and Counsel:

This matter is before the Court on Respondent's ("Mother") motion to strike the evidence offered in support of Petitioner's ("Father") Motion to Modify Child Support respecting the two children they have in common. This case presents the fundamental question of whether evidence of the current needs of the children and of the court order

sought to be modified, must be formally admitted at trial for the Petitioner to sustain his burden of proving a material[1] change in circumstances before the Court may consider an alteration of child support obligations. This Court holds the Petitioner has no such burden.

Mother posits Father's case must be stricken because he failed to present evidence in his case-in-chief of the needs of the children. Mother maintains further that this Court may not take judicial notice of its own prior order as a baseline from which to determine financial circumstances have changed materially. The interpretation of the law urged by Mother would upend the typical manner by which modification of child support proceedings are conducted in the Commonwealth. Judges would be prevented from considering any modification of child support absent evidence of the needs of children and of the formal introduction of the court orders being modified. Mother cites to precedent, which is at first blush enticingly supportive of her stated bars to Father's claim for modification. This Court, however, holds that failure to present evidence of the current

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[1] The concept of what is "material" is a mixed question of law and fact, necessarily bracketed in precedent by the circumstances at hand in application of the sound discretion of the Court. The term does not impart the Court is to unduly bolt the doors of access to justice, but rather, states an attenuated burden for Petitioner to meet. The Court discerns a primary purpose for the prerequisite petitioners show a "material change in circumstances" is to limit consideration of evidence to that of proper sway to the outcome of potentially meritorious cases. The requirement thus serves as a filter to exclude adjudication of claims that are trivial, irrelevant, inconsequential, of insufficient importance, or otherwise legally barred.

> Materiality is a measure of the importance of an issue, question, fact, statement, or any other thing, in the context of some conduct or question, in that the thing must either influence someone in fact or be sufficiently likely to influence someone to the degree that the person would be reasonable in forming an opinion or deciding to act or not to act as a result of knowledge of the thing. Thus, a material fact to an issue at law is both relevant to that issue and of sufficient potential influence that the fact is likely to affect the outcome of that issue.

Materiality, The Wolters Kluwer Bouvier Law Dictionary Desk Edition (2012).

needs of the children is only a bar to modification of a support decree in the narrow instance involving application of a formula outside the statutory Child Support Guidelines, which prescribe a presumptive level of need. The Court further holds it may take judicial notice of its prior decree sought to be modified, for it constitutes an intrinsic basis of Petitioner's claim. Alternatively, the Court holds it need not decide whether it may take judicial notice of its own order as a basis for establishing a material change in circumstances, for the Court opts to exercise its discretion in the interest of justice to reopen the evidence to admit such decree.

The sparse evidence presented by Father nevertheless establishes a substantial change in the current income of Mother when compared with her claimed income in the original support decree incorporating an agreed Property and Support Separation Agreement ("PSSA"). The Court further finds it was in error to exclude the proffered evidence of Father's almost tenfold increase in payments towards a life insurance policy he is required to maintain in favor of his children by virtue of said PSSA and incorporating court order. The payments were fixed contractually in the PSSA outside the confines of child support, and thus may only be set aside if deemed unconscionable. The amounts expended, however, remain relevant to establishing whether there has been a material change in circumstances and to whether Father is entitled to a deviation from the Child Support Guidelines. Father will thus be permitted to reopen his case to present evidence of the cost of his life insurance premiums in 2010 and currently. Mother may in turn elect to present her evidence. The Court will thereafter proceed to consideration of Father's unusual claims challenging the legality of an agreed automatic child support escalator

clause, and his prayer the children's Social Security retirement benefits be in some fashion credited against his parental support obligation.

BACKGROUND

Father, appearing *pro se*, has solicited this Court grant him relief to reduce his current child support obligation, complaining it has risen by almost half due to an automatic escalator clause in the PSSA. He further asserts his ability to pay is constricted by an almost tenfold increase in the cost of a life insurance policy in favor of his children, maintenance of which is required by the parties' 2008 PSSA incorporated in their 2010 decree of divorce. Father also seeks his support requirement be credited with dependent Social Security retirement payments his children receive derivative from his status as a retiree.

Though Father presented an extensive opening statement, which he was warned by the Court was not evidence, his introduction of evidence at trial was scant in content. He called Mother to the stand but failed to ask her about the current needs of the children who are in her sole legal and physical custody. He neglected to introduce the Court's 2010 final decree of divorce incorporating the income stated in the 2008 PSSA, as the relevant basis from which child support was calculated and subject to a yearly 5% escalator clause, which judgment order he now seeks to modify. He did introduce Mother's 2016 tax return reflecting an income almost double from that she represented in the 2008 PSSA. He further adopted as his own testimony Mother's claimed income in a trial demonstrative aid, showing her income in 2018 had more than doubled from the figure in the 2008 PSSA.

Mother asserts the Court may not reach any issues of modification of child support, citing *Hederick v. Hederick*, 3 Va. App. 452, 350 S.E.2d 526 (1986), for the proposition Father failed to present evidence of the current needs of the children, and therefore that his claims are procedurally barred. Mother avers additionally and irrespective of *Hederick* that the Court may not find there is a material change in circumstances because the decree to be modified was not introduced in evidence, and that by precedent, the Court may not take judicial notice of such judgment. In addition, Mother argues the escalation of the cost of Father's life insurance obligation is a matter of contract, which the Court may neither modify nor consider in any determination of current support. At trial, Mother persuaded the Court to exclude such insurance evidence, the soundness of which ruling the Court now revisits herein. As trial had in any event to be continued to another date as the allotted available contiguous days on the Court's docket were exhausted by unforeseen extensive argument, the Court now has the unusual luxury to rule on the motion to strike by means of this Letter Opinion.

ANALYSIS

I. Absence of evidence of the "needs of the children" is no bar to sustaining a finding of a material change in circumstances when modification of child support is sought in application of the Virginia statutory Child Support Guidelines.

Mother contends Father's claims are barred by the alleged requirement stemming from *Hederick* that his failure to present evidence of the needs of the children prohibits a finding of a material change in circumstances. Indeed, there was no evidence presented in Father's case-in-chief as to the needs of his children, despite the fact he called Mother

to the stand and could have asked her questions establishing those needs, as she is the sole legal and physical custodian of the children.

Mother's reliance on *Hederick* for the proposition the Court must first have evidence of the needs of the children in *every* case of child support modification before proceeding to the merits is misplaced. It is true that *Hederick* states such requirement within the framework of that case:

> The trial court's interpretation of the property settlement agreement also created a prospective modification of child support. This, however, may be done only upon a showing of a material change of circumstances. *Featherstone v. Brooks*, 220 Va. 443, 446, 258 S.E.2d 513, 515 (1979). *We find that the husband failed to provide sufficient information upon which a material change in circumstances could be found.* He did present evidence that his income had greatly increased since the time of the property settlement agreement. *He presented no testimony, however, as to the present needs and circumstances of the children.* Without this information, the court was not entitled to assume that the needs of the children had not changed since the entry of the Illinois decree six years earlier. Their needs may or may not have increased commensurately with the husband's salary. *Therefore, we find it was error for the trial court to modify the child support formula without giving any consideration to the present needs and circumstances of the children.*

Hederick, 3 Va. App. at 458, 350 S.E.2d at 529 (emphasis added). Mother cites the holding in *Hederick* as one of broad application, when by context it applies only narrowly. The facts in *Hederick* involved enforcement of an agreement incorporated in an Illinois decree for the husband to pay the wife "35% (thirty-five percent) of his net take home [pay] as and for child support [.]" *Id.* at 453-54, 350 S.E.2d at 527.

Unlike in *Hederick,* the instant case does not involve enforcement of a child support formula prescribed by the parties to the exclusion of Virginia's Child Support Guidelines found at Virginia Code § 20-108.2. This Court holds the *Hederick* case inapplicable in this cause. The Court finds *Hederick* only applies where the Guidelines are not invoked in a

child support modification. The application of Child Support Guidelines inherently includes a rebuttable presumption of a child's basic needs, so that proof of the actual needs is not required. To hold the Court must require evidence of the child's needs before it may consider a material change in circumstances is contrary to legislative intent, for that would unlawfully interpose a common law prerequisite to the enforcement of the statutory guidelines scheme. Thus, in the instant case, Father need not present evidence of the children's current needs in order for the Court to find a material change in circumstances upon which to base a modification of his child support obligation.

II. The Court may take judicial notice of its own prior, governing support order as a baseline for establishing a material change in circumstances, and alternatively has the discretion in the interest of justice to reopen the evidence to admit formally such decree.

Mother cites *Barnes v. Barnes*, 64 Va. App. 22, 763 S.E.2d 836 (2014), for the proposition the Court may not take judicial notice of its decree of 2010, even though it is the order governing current child support. The impact of such a rule in this case would mean there is no adduced evidence of Mother's implicit 2010 baseline income upon which support was originally set, as stipulated in the parties' PSSA incorporated by reference into such decree. Mother relies on the proposition that "[t]rial courts 'will not take judicial notice of [their] records, judgments and orders in other and different cases or proceedings, *even though such cases or proceedings may be between the same parties and in relation to the same subject matter.*'" *Id.* at 31, 763 S.E.2d at 840 (quoting *Fleming v. Anderson*, 187 Va. 788, 794, 48 S.E.2d 269, 272 (1948) (emphasis in original). The *Barnes* decision, somewhat puzzlingly, implies its holding applies without exception. The

Fleming case upon which the citation to *Barnes* is based, however, qualifies the cited rule, albeit in the context of a demurrer:

> [I]t is a well-recognized exception to this rule, particularly in recent cases, that where the plaintiff refers to another proceeding or judgment, and specifically bases his right of action, in whole or in part, on something which appears in the record of the prior case, the court, in passing on a demurrer to the complaint, will take judicial notice of the matters appearing in the former case.

Fleming, 187 Va. at 794-95, 48 S.E.2d at 272. If the order in another proceeding to which the litigants were the parties is a basis for the right of action in the instant proceeding, *Fleming* suggests taking judicial notice of such judgment might be appropriate. Irrespective, in this case, the decree in question is not from another court or proceeding. The decree is the Court's own order, which Father now seeks to modify.

In *Barnes,* the trial court was affirmed in its refusal to take judicial notice, not of its own order, but of a written opinion of the Court of Appeals of Virginia:

> [I]n the present case, appellant could have moved for this Court's opinion in *Barnes*, 16 Va. App. 98, 428 S.E.2d 294, to be admitted into evidence before the trial court, but he did not. Rather, he asked the trial court to take judicial notice of an adjudicated fact from that opinion, which might have been dispositive in the case at bar. While trial courts generally have discretion regarding whether to take judicial notice, a trial court has no discretion to take judicial notice of an adjudicated fact *from another case* unless that case is offered into evidence. As such, the trial court in the present case did not err when it declined to do so.

Barnes, 64 Va. App. at 32, 763 S.E.2d at 841 (emphasis added). *Barnes,* applied in the context of this cause, suggests this Court is able to take judicial notice of the contents of its own order sought to be modified. "It is well-settled that both trial courts and appellate courts will take judicial notice of the case records in the proceeding at bar." *Id.* at 31, 763 S.E.2d at 840 (citing *Peterson v. Haynes*, 145 Va. 653, 658, 134 S.E. 675, 676 (1926)).

This Court thus unequivocally rejects that it must blind itself to its own orders contained in its files, and in particular, to avert thereby the gaze of its eyes from view of the support order sought to be modified in the instant case. Such judgment forms an intrinsic basis for the claim of the Petitioner. Thus, the Court finds it is appropriate to take judicial notice of its prior support order Father now seeks to modify.

Even if the Court were to be mistaken in its view that it may take judicial notice of its own decree, the Court does alternatively retain the discretion to reopen the evidence and admit such order where appropriate to enable a just determination of the cause. This is a long held rule of Virginia jurisprudence.

> When all the testimony in the trial of a case has been concluded and the witnesses for the respective parties have been excused from their attendance upon court, whether the court will allow the introduction of other testimony is a question addressed to the sound discretion of the trial judge, "* * * and unless it affirmatively appears that this discretion has been abused this court will not disturb the trial court's ruling thereon."

Mundy v. Commonwealth, 161 Va. 1049, 1064, 171 S.E. 691, 696 (1933) (quoting *Bishop* v. *Webster,* 154 Va. 771, 778, 153 S.E. 832, 834 (1930)). This Court thus need not decide whether the interposed *Barnes* objection is sound in order to allow Father to reopen his evidence to perform the perfunctory step of formally introducing into evidence the base decree sought to be modified. In these proceedings, Father *and the Court* operated under the assumption the Court would be referring to the baseline decree sought to be modified to determine whether a revision is warranted. It would be unfair now for the Court to disregard abruptly its own file, sitting inches before it, as a basis for denying a hearing on the merits in this cause, particularly when the content of the relevant decree is of no surprise to Mother.

In this case, the PSSA incorporated in this Court's 2010 decree established an income roughly half of that which Mother now enjoys as the baseline from which child support was calculated. The "primary consideration" in modification of child support is a material change in "the financial circumstances of both parties," thus establishing a sufficient basis to go forward with consideration of the merits of Father's claim for a modification. *Yohay v. Ryan*, 4 Va. App. 559, 567, 359 S.E.2d 320, 325 (1987).

III. Escalating life insurance payment obligations under a separation agreement are admissible to establish an independent basis for a material change in circumstances, and to show whether Father is entitled to a deviation from the statutory Child Support Guidelines, even though such contractual requirements are not subject to being set aside absent a finding of unconscionability.

Father complains of the cost of a life insurance policy in favor of his children, which has risen almost tenfold since the execution of the PSSA in 2008. This circumstance does not itself allow for the casting aside of that obligation. Maintenance of life insurance is a contractual term of the PSSA, which may only be vitiated under narrow circumstances, such as if unconscionable.

> "Unconscionability is concerned with the intrinsic fairness of the terms of the agreement in relation to all attendant circumstances." *Philyaw v. Platinum Enters.*, 54 Va. Cir. 364, 367 (2001). A contract is said to be unconscionable "if no person in his senses would make it on the one hand and no fair and honest person would accept it on the other." *Id.* (citing *Hume v. United States*, 132 U.S. 406, 10 S. Ct. 134, 33 L. Ed. 393 (1889)). In practice, this means a court will not enforce a contract or contract provision if [...] it is both procedurally and substantively unconscionable. See, e.g., *Boatright v. Aegis Def. Servs., LLC*, 938 F. Supp. 2d 602, 608 (E. D. Va. 2013) (applying Delaware law); *Dan Ryan Builders, Inc. v. Nelson et al.*, 230 W. Va. 281, 289, 737 S.E.2d 550 (2012). "Procedural unconscionability arises from inequities, improprieties, or unfairness in the bargaining process and the formation of the contract . . . . Substantive unconscionability involves unfairness in the terms of the contract itself . . . ." *Dan Ryan Builders*, 230 W. Va. at 289.

Sanders v. Certified Car Ctr., Inc., 93 Va. Cir. 404, 405-06 (2016). Father proffered no evidence which legally supports grounds to set aside his life insurance obligation. His payments, though, potentially restrict the amount of income at his disposal to meet his support obligations. Such evidence, independent of the income of the parties, is another conceivable basis for Father to establish there has been a material change in his financial circumstances. Moreover, the escalating and accelerating cost of life insurance paid by Father is relevant to consideration of whether he is entitled to a deviation from the Child Support Guidelines, particularly because the money expended for life insurance is for the sole benefit of his children. Va. Code Ann. § 20-108.1(B)6. As such, this Court reverses, as improvidently rendered, its trial ruling excluding presentation of evidence of the amount Father's insurance premium has risen since entry of the 2010 decree sought to be modified.

CONCLUSION

The Court has considered Mother's motion to strike the evidence offered in support of Father's Motion to Modify Child Support respecting the two children they have in common. This case presents the fundamental question of whether evidence of the current needs of the children and of the court order sought to be modified must be formally admitted at trial for the Petitioner to sustain his burden of proving a material change in circumstances before the Court may consider an alteration of child support obligations. This Court holds the Petitioner has no such burden.

Mother posits Father's case must be stricken because he failed to present evidence in his case-in-chief of the needs of the children. This Court, however, holds that

failure to present evidence of the current needs of the children is only a bar to modification of a support decree in the narrow instance involving application of a formula outside the statutory Child Support Guidelines, which prescribe a presumptive level of need. The Court further holds it may take judicial notice of its prior decree sought to be modified, for it constitutes an intrinsic basis of Petitioner's claim. Alternatively, the Court holds it need not decide whether it may take judicial notice of its own order as a basis for establishing a material change in circumstances, for the Court opts to exercise its discretion in the interest of justice to reopen the evidence to admit such decree.

The sparse evidence presented by Father nevertheless establishes a substantial change in the current income of Mother when compared with her claimed income in the original support decree incorporating the agreed PSSA. The Court further finds it was in error to exclude the proffered evidence of Father's almost tenfold increase in payments towards a life insurance policy he is required to maintain in favor of his children by virtue of said PSSA and incorporating court order. The payments were fixed contractually in the PSSA outside the confines of child support, and thus may only be set aside if deemed unconscionable. The amounts expended, however, remain relevant to establishing whether there has been a material change in circumstances and to whether Father is entitled to a deviation from the Child Support Guidelines. Father will thus be permitted to reopen his case to present evidence of the cost of his life insurance premiums in 2010 and currently. Mother may in turn elect to present her evidence. The Court will thereafter proceed to consideration of Father's unusual claims challenging the legality of an agreed

automatic child support escalator clause, and his prayer the children's Social Security retirement benefits be in some fashion credited against his parental support obligation.[2]

AND THIS CAUSE CONTINUES.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

[2] Father challenges a child support escalator clause contained in his PSSA. Father also advances that his children receive Social Security *retirement* benefits derived from his status as a retiree, and that he ought to be credited with such payments to reduce the amount of his support. While the Court does not prejudge the viability of Father's claims, it is axiomatic that claims affecting the quantum of child support due may at least be considered on the merits once the petitioner has, as Father here, survived the bar of a material change in circumstances. Resolution of whether any credit towards the child support obligations of Father is to be afforded by virtue of the children's Social Security retirement benefits, and of Father's challenge to the automatic child support escalator clause he agreed to in 2008 in his PSSA, is left for another day to afford the parties a full opportunity to be heard and brief the issues as they may deem fit.