

STATE OF NEW YORK

FAMILY COURT

SARATOGA COUNTY

In the Matter of

CHARLES E. COLLINS, III,

Petitioner

-against-

ARLENE COLLINS (CARELLA)

Respondent.

PRESENT: HONORABLE L. FOSTER JAMES
Family Court Judge

APPEARANCES: JEROME FROST, ESQ.
Attorney for Petitioner
68 Second Street
Troy, New York 12180

NICHOLAS MORSILLO, ESQ.
Attorney for Respondent
723 State Street
Schenectady, New York 12307

With pleadings filed in this Court December 2, 1987, the Petitioner interposed a cross petition to an action previously commenced by his former wife, and in his cross petition, the Petitioner asked that relief prayed for in the petition be denied, for an order relieving him of the payments directed to be made in prior orders of this Court, including an Order of Commitment, and for such other and different relief as may be just, proper and equitable. At a hearing held January 7, 1988, John A. Simone, Acting Family Court Judge

COPY

DECISION
AND

ORDER

Docket No. F-60-85

presiding, parties were present with their attorneys; a trial was conducted and Judge Simone rendered a Decision dated January 25, 1988. Thereafter, the Petitioner appealed that Decision and a Decision of this Court dated April 15, 1987. The Decision of the Appellate Division held that the Appeal to the April 1987 Decision Order was untimely, but found that "his appeal from the Commitment Order may be pursued on the ground that he is financially unable to comply with the support obligations"; The Court ordered "a new trial on the issue of Petitioner's support obligations". On April 26, 1989, the taking of proof commenced. There were several appearances scheduled thereafter at which the Petitioner did not appear, however, he did appear in Court with his attorney on August 8, 1989 and the taking of testimony resumed. In the meantime, the Respondent's attorney filed an affidavit by his client, with a proposed Order to Show Cause, asking that the Court find that the Petitioner had failed to comply with the provisions of the Court's earlier order and further asking that the Petitioner be committed to Saratoga County Jail because of that failure, for fifteen (15) weekends.

At the FACT-FINDING HEARING, the Court received into evidence a number of documents, including a Separation Agreement as amended, tax returns, financial

affidavits of both parties, a number of editions of a local newspaper, particularly the help-wanted ads, tax withholding forms issued to Mr. Collins, and a copy of the Order made by Hearing Examiner Warner, dated March 12, 1987.

Giving all of the above careful consideration, THE COURT FINDS AS FOLLOWS:

That the Petitioner and the Respondent were married in June of 1975 and were divorced in the Summer of 1981. There were three children of the marriage, namely, Charles, b. 1/5/75, Amy, b. 9/17/78 and Everett, b. 4/25/80. The parties separated in 1979 or 1980 and a Separation Agreement was signed by the parties in October of 1980. The document was prepared by Ms. Carella's attorney, and Mr. Collins was unrepresented. An amendment was prepared and signed in March of 1981 and again preparation was by Ms. Carella's attorney and Mr. Collins had none. At that time, Mr. Collins was working in a local department store making approximately \$15,000.00 a year and the agreement required that he pay to his wife, \$24.00 per week maintenance and \$27.00 a week for each child. At the time of the April hearing and at the time of the August hearing in 1989, Mr. Collins was unemployed and receiving \$157.00 per week as unemployment benefits. He testified that he last worked in February of 1989 at a local retail store which

specialized in ski equipment and his employment terminated when the season ended in the late Winter of 1989.

Considerable testimony was taken on examination and cross-examination regarding Mr. Collin's efforts to find work and he testified that he consulted the local newspapers, that he was listed with a number of employment agencies and that in the recent past, he had sent out fifty or more resumes and participated in a number of interviews, all of which were unsuccessful in producing employment.

One of the jobs that Mr. Collins held prior to being employed by the ski equipment store, was employment with a retail outlet owned by his step-father's family.

The Petitioner, Collins, has a Bachelor of Science Degree in business management from the University of Denver, which he obtained in 1973. Sometime during the 70's, Mr. Collins was a beneficiary of an inheritance left by his late Father in the amount of \$200,000.00, which he subsequently lost through poor business investments and sometime during the recent past, in either the late 1970's or early 1980's, he applied for protection under the Federal Bankruptcy Laws.

In 1984, with the assistance of his mother and her husband, Mr. Collins purchased a residence in Saratoga

County and turned possession of it over to his ex-wife so that she might occupy it with the children of the marriage. She and the children have lived in that dwelling since. Presently, Mr. Collins lives in his mother's residence, but at one time, he had an apartment of his own in the Albany County/Saratoga County area, from which he was evicted for non-payment of rent. Currently, Mr. Collins listed debts in excess of \$25,000.00, which consisted primarily of loans and credit card balances from several banks in the Capital District, all of which he alleges to be delinquent.

In 1988, Mr. Collins obtained a job with the Brooks Drug Store Chain, which paid approximately \$350.00 per week. Testimony was taken from his former Supervisor, who informed the Court that Mr. Collins was a satisfactory employee, was likely to be considered for promotion, with an earning potential of \$400.00 to \$450.00 per week, but who was discharged because of an unexplained and an unauthorized absence of several weeks duration. Mr. Collins testified that he left work and left the area because of a nervous disorder, which he relates was stress-created by his matrimonial problem and that upon his return, he attempted to be re-employed by the drug store, but was unsuccessful.

Mr. Collins further testified that in 1986, he deeded his interest in the aforementioned residence,

occupied by his ex-wife, to his mother. Mr. Collins also indicated that he has the use of a 1984 Volvo automobile, title to which he transferred to his mother some time ago.

Under cross-examination, Mr. Collins testified that he failed to appear at several scheduled hearings in this Court because he "went camping at Lake George". This issue was not pursued by either attorney.

At the August 8th date, when Mr. Collins was subjected to cross-examination, he indicated that he continued to receive unemployment benefits and did not know when those benefits would cease. He further testified that his highest annual income in recent years was \$20,000.00.

Ms. Carella testified and indicated that she is employed full time by a law firm in Albany, New York and earns approximately \$20,000.00 per year with a weekly take home pay of \$319.00. She listed debts exceeding \$75,000.00, which included about \$25,000.00 in debts which were excused when she and her husband went through bankruptcy at an earlier time and that all of her accounts payable are in arrears, including utilities.

The Court notes that no testimony was offered or received regarding the earning potential of a white male in his 30's who holds a four year degree in business management and had approximately fifteen years of

experience in retailing.

Based on all of the above, THE COURT CONCLUDES AS FOLLOWS:

Family Court Act Section 455 (2) provides that a Court, "if satisfied by competent proof that the Respondent is financially unable to comply with [a support] order may, upon a showing of good cause until further order of the Court, modify such order and relieve the Respondent from the commitment ordered". Thus, the issue before this Court under the aforesaid provisions of Family Court Act Section 455 (2), as well as by the decision of the Appellate Division, is the respondent's ability to comply with the previous order of support issued in this matter and whether or not such order should be modified.

Based on all of the evidence received, the Court finds that the Petitioner's earning potential is \$20,000.00 per year. The Court further finds that the Respondent is gainfully employed on a full time basis as a legal secretary and also earning approximately \$20,000.00 per year.

A parent's obligation to support his or her children is determined by the financial status of both parents and the needs of the child. (VanOrder v. Hawley, 34 AD2nd 591, 308 NY2nd 112 (3rd Dept., 1970)). No evidence was offered to establish the needs of the

children and the Court therefore takes Judicial Notice of the generally accepted notion that the cost of raising a child is, in this area, at least \$80.00 per week. The Court must now determine the parties capabilities of meeting such needs based upon the parties income or, in certain cases, income capabilities.

Applying these general rules to the case at hand the Court finds that the Petitioner is now, and since 12/2/87 when his cross-petition was filed, has been capable of making child support payments in the amount of \$120.00 per week. The Court notes that this amount is only slightly higher than the amount which would be calculated under the formula contained in the Child Support Standards Act of 1989 which will become law on September 15, 1989.

Accordingly, it is HEREBY ORDERED AND DIRECTED that the Petitioner pay to the Respondent as and for child support the amount of \$120.00 per week retroactive to 12/2/87. In conjunction therewith the Saratoga County Support Collection Unit is directed to calculate an arrears amount due for the period 12/2/87 to present and to communicate that amount to the parties and their attorneys. Arrears are established in the amount calculated. It is FURTHER ORDERED AND DIRECTED that the Petitioner pay the additional amount of \$30.00 per week until such

COLLINS, ARLENE (Respondent)

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time as the established arrears have been paid in full.

IT IS FURTHER ORDERED AND DIRECTED that any and all outstanding requests for counsel fees are HEREBY DENIED due to the comparable income of the parties.

Finally, those petitions filed by the Respondent on June 27 and June 29, 1989 and by the Support Collection Unit on July 25, 1989 are merged herein and dismissed on the merits.

DATED: September 9, 1989

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L. Foster James
HON. L. FOSTER JAMES
Family Court Judge

NOTICE OF ENTRY
PLEASE TAKE NOTICE that the within is a true copy of an order entered in the office of the Clerk at the Family Court of the State of New York in the County of Saratoga.

SEP 8 1989

L. Foster James
Chief Clerk of the Court