STATE OF NEW YORK COUNTY OF SCHENECTADY

FAMILY COURT

.....

In the Matter of a Proceeding for Support
Under Article 4 of the Family Court Act

ARLENE COLLINS,
Petitioner

-against-

DECISION

Docket # 672-F-86

CHARLES E. COLLINS, III,
Respondent

.....

APPEARANCES: Nicholas Morsillo, Esquire
723 State Street
Schenectady, NY 12305
On Behalf of Petitioner
Cynthia LaFave, Esquire
524 Broadway
Albany, NY 12205
On Behalf of Respondent

John J. Warner, Jr., Hearing Examiner

This proceeding was originated in Saratoga County, and was transferred to Schenectady County for trial upon the disqualification of the Saratoga County Hearing Examiner who had represented Mr. Collins (hereinafter the respondent) in Saratoga County.

The trial of the pending petitions took place on May 16, 1986, June 20 and 23rd, 1986, July 18, 1986, August 11, 1986, September 8, 1986 and October 3, 1986. Attorneys for the parties were directed to submit proposed findings of fact to the Court by October 31, 1986 and decision was reserved pending receipt of those proposals.

The Court was unable to adopt either of the proposed findings and found it necessary to review the prior testimony and the hundreds of exhibits introduced during this lengthy trial, neither side having clearly proven or disproven the

other's allegations. The Court was therefore left with the job of deciphering the myriad exhibits and the confused testimony of the parties to determine an appropriate order.

The problem of determining adequate support was compounded by the fact that petitioner and the children reside in a home purchased by the respondent, his mother and her husband. The current principal, interest and taxes on this property total $967.02 per month. Respondent is under existing order of Judge James to continue to provide this or a substantially similar residence for his minor children.

While admittedly such payment cannot be ignored by the Court in fixing an appropriate support order, it must also be recognized that Mr. Collins is building equity in this real estate which will ultimately inure to his benefit. It is, in reality, an investment in his own future.

Section 439(a) the Family Court Act precludes a Hearing Examiner from considering a question of exclusive possession of the home. I am therefore without authority to require the parties to seek less expensive housing and apply the difference to the other needs of the children.

Moreover, since the legislature intended that support be based on the standard of living enjoyed by the children prior to the separation of the parties (in so far as the standard is determineable by the Court), it is probably fitting that the children should remain in this home even though it may require great sacrifice from both parents.

In addition, the prior order of the Court directed that Mr. Collins pay the utilities on the children's residence which were estimated at $150.00 per month. No utility bills were offered or received in evidence by either party to prove or disappovesuch alleged expense. This figure is consistent with average utilities costs seen in the majority of cases handled by this Court and will be accepted for purposes of determining expenses of the infants.

Mr. Collins is the chief executive office and sole stockholder of Amchev Corporation.

This Corporation operates Everette's Mini Mart, 1600 Western Avenue in the Town of Guilderland, Albany County. This is a convenient style grocery store. Although gasoline is sold on the premises Mr. Collins testified that that operation is separate and distinct from the grocery business and is operated by King Fuels, Inc. which owns the real property on which both businesses are conducted.

He is also an employee of the Corporation and derives his income from it as both an officer and an employer. As such he can exercise great control over the assets of the Corporation as seen by the fact hat he doubled his salary as an employee (draw) from the Corporation in order to meet his Court ordered support obligations, from $7,200 in 1982 and 1983 to $15,000 in 1984.

Mr. Collins also significantly increased his compensation as an officer of the Corporation from $4,600 in fiscal year 1982-83 to $12,200 in fiscal 1983-84 and to $12,050 in fiscal 1984-85. (1985-86 figures not available at time of trial).

For each of the fiscal years examined by the Court the Corporation reported losses of $18,631.33 in 1982, $8,545.70 in 1983 and $21,193.92 in 1984. While the Corporation's gross sales have more that doubled since 1982, his yearly operating loss as reported to the IRS remains approximately the same. It is worth noting that the records of Amchev Corporation admitted in evidence (Petitioner's # 36,37 & 38) show the following gross sales and gross profits:

PERIOD	GROSS SALES	GROSS PROFITS
8/17/82 to 7/31/83	$ 208,379.59	$ 42,630.36
8/1/83 to 7/31/84	$ 413,410.11	$ 87,515.04
8/1/84 to 7/31/85	$ 467.629.07	$ 81,192.43

Note: 1985 corporate tax return not yet prepared by close of trial.

It is not unusual for businesses to report net operating losses in successive tax years and continue operating. This Court does not believe that Mr. Collin's support payments are the cause of such losses especially in light of the fact that that he reported such losses at a time when his support payments per his Separation Agreement were fixed at $105.00 per week. There was uncontroverted testimony that this figure was agreed to by the parties so that the petitioner and the children would qualify for medicaid and food stamps under then existing guidelines.

Considering the fact that petitioner was required to pay rent from such minimal support payments this family was undersupported to an exaggerated degree. Their participation in what approximates welfare fraud cannot be condoned and seems somewhat indicative of the conduct of both parties to this proceeding either through design or ignorance. This conduct, bordering on criminality, was evidenced further by Mr. Collins' check floating schemes and Mrs. Collins' purchase of groceries with a check not covered by sufficient funds.

The doubt cast on the truth and veracity of both parties by their actions and the inability of the petitioner to recall details of major events in her recent past including when and where, or even whether or not she was employed make it extremely difficult for this Court to determine if and when a violation of the previous order occurred.

During the time petitioner testified that she was not receiving support, respondent testified that he was paying all household bills and/or providing food for petitioner and the children from his store, in value approximating the order. During this same period of time petitioner made regular deposits into her checking accounts and withdrew money from those accounts. Some but not all of these deposits were explained by petitioner as loans from her mother, her brother and her fiancee Al Brewington. On Cross-examination she admitted that from December 1984 to April 1985 the respondent paid all bills in lieu of making his support payments (her testimony June 23, 1986).

Since entry of the temporary order effective May 3, 1985 except for an occassional delay in making the payment, respondent has made regular weekly payments of $110.00 plus the mortgage, taxes, and utilities on the residence shared by petitioner and the children. In addition, since the children attend parochial school in Saratoga and petitioner has not received a bill for their tuition, either Mr. Collins or someone acting on his behalf is meeting that need.

The provision of the separation agreement requiring respondent to pay for parochial education if elected by the mother was modified by the subsequent amendment (pet # 3) to allow for election of parochial education by both parties. Although respondent indicated in Court a preference against it, the couple's children have continously been enrolled in parochial schools and the tuition is apparently being paid by Mr. Collins or someone on his behalf. At this time it appears that the children should continue to receive a parochial education as part of their total support package. Respondent is, however, absolved of any liability for monies owed to Kenwood Academy on behalfof Everett. This debt is properly the petitioner's and should be satisfied by her since he clearly elected not to continue Everett's enrollment there after May 1985.

The separation agreement (Pet # 1) provided:

> "5. That the husband agrees to ensure (sic) coverage of the parties' children and the Wife and be responsible for any and all medical and/or dental insurance plans offered by his employer or place of work. Should the parties obtain a divorce, then the husband shall provide such insurance for the wife should the wife not remarry and not be able to be so insured by a private or public system of insurance."

The intention of the parties regarding the provision of insurance coverage for petitioner is unclear except that public insurance probably refers to Medicaid. The agreement is also silent as to how non-covered expenses were to be handled.

This Court is unable to determine from the evidence submitted at the trial whether petitioner was "not able to be so insured" and is therefore constrained to find that respondent should have continued to provide medical coverage for petitioner until she obtained coverage on her own behalf.

While future medical expenses should be minimal since both parties indicated that they are provided insurance coverage for themselves and the children through their respective employers, the Court must still address past due medical expenses.

Petitioner's statement of net worth included a Schedule A which listed total medical bills of $1,548.44. Exhibits received at trial contained charges for medical and pharmaceutical services which approximated $1,600.00. In the absence of a provision in the Separation Agreement concerning apportionment of non-covered expenses, I hereby order that each party shall be responsible for one half of this amount. Respondent to pay petitioner $800.00 as his share of past due medical expenses to petitioner within 30 days of entry of the order on this petition. She is responsible for the payments to the service providers on these past due accounts.

Future medical and or dental expenses on behalf of the children which are not covered by insurance, are to be paid 71% by respondent and 29% by petitioner, including the cost of orthodontia for Aimee estimated at $1,325.00. Respondent to arrange for direct payment to the provider of his portion of this expense as soon as a determination of insurance coverage is made by petitioner's insurer.

As best this Court can determine, the following monthly needs were established at trial:

mortgage and taxes	$967.00
utilities	150.00
food	645.00
telephone (allowed	30.00
garbage	10.00
clothing (allowed	100.00
laundry	20.00
medical insurance	30.00
	$1,952.00

These expenses include petitioner and three children. Assuming a quarter of these expenses to be attributable to petitioner, this figure should be reduced by that amount:

$$\$\ 1,952.00 \times \frac{3}{4} = \$1,464.00$$

Added to this figure is the cost of parochial education for the children

$5,000 ÷ 12 = $250.00 per month and a modest $25.00 per month for

recreation and miscellaneous expenses. Since petitioner is expected to maintain full time employment, she will need to provide for child care for all three children which will cost a minimum of $200.00 per month. The total of these expenses is:

	$ 1,464.00
	250.00
	60.00
	200.00
	$ 1,974.00

Mr. Collins is found to be responsible for 71% of this amount, or $1,401.54 per month. For simplicity's sake, I believe it appropriate to require respondent to continue to make the monthly mortgage/tax payment plus the utilities. His weekly payment to petitioner is, however reduced to $66.00 per week effective on the third Friday in February 1987, to petitioner.

In light of the adjustment regarding past due medical and dental expenses and the allegations of non-payment under the Separation Agreement and because any adjustment would be complicated by the varying amounts paid on the mortgage by the respondent, this reduction is not being applied retroactively. Respondent's violation is found to have been technical rather than willful and accordingly the request of petitioner's attorney for counsel fees is denied. Each party to be responsible for their own counsel fees. The Court felt this to be appropriate in light of its decision regarding the denial of retroactivity of the reduction in support which might have required petitioner to reimburse respondent for payments made in excess of the permanent order made herein. Since Judge James reserved on the prior request for counsel fees, he may be willing to entertain a request for fees for services rendered in Saratoga County prior to transfer.

Respondent's attorney to submit order in accordance with this decision within ten days on notice to petitioner's attorney.

JOHN J. WARNER, JR.
Hearing Examiner

DATED: March 5, 1987