

2004. The defendant's financial affidavit of June 26, 2007 reflects an annual income of \$211,000.44, an increase of \$21,500.00. While the separation agreement precludes a modification upon the receipt of an increase of \$25,000 in income by either party, the plaintiff claims that by virtue of payments of rent by the defendant's "significant other" the defendant's income is indeed and has increased of \$39,500.00. (The plaintiff's brief, p.3), making the parties eligible for a modification. The court does not find a substantial change in circumstances sufficient to warrant a modification.

The defendant claims that his motion for modification is based on the plaintiff's cohabitation pursuant to Conn. Gen. Stat. § 46b-86b. Cohabitation of the plaintiff with Mr. Wayne Bullock is admitted. However, this cohabitation is "merely of convenience." There is no romantic involvement, merely a strained relationship of indefinite terminance to allow the parties to continue in residence in New Canaan, Connecticut to benefit their respective children. At any time, this mutual residence could end. There is no significant benefit to the plaintiff.

The court finds that neither party sustained their burden of proof on their respective motions for modification. The court is fully aware of the plaintiff's difficulties in maintaining a residence in New Canaan, Connecticut but is not satisfied that the defendant has met the core requirement for modification under the separation agreement. Similarly, the court is not persuaded that the plaintiff is "cohabitating" as defined by the statute. Accordingly, both motions are denied. So ordered.

*Decision entered in accordance
with the foregoing 12-18-2007.
All Counsel notified 12-18-2007,
E.A. Roberts/Asst
Clerk*

THE COURT

Black
M. BLACK, J.

DOCKET NO. FA 03-0196075 S ✓

PATTY E. MONTET

V.

ROBERT J. HALDERMAN

SUPERIOR COURT

J.D. OF STAMFORD/
NORWALK

AT STAMFORD

JULY 17, 2007

SUPERIOR COURT
STAMFORD-NORWALK
JUDICIAL DISTRICT

2007 JUL 17 P 4: 32

**PLAINTIFF'S POST HEARING BRIEF ON
MODIFICATION MOTIONS**

INTRODUCTION:

This is the Plaintiff's Memorandum of Law following the June 26, 2007 hearing on the Plaintiff's Motion for Modification dated May 8, 2007, and the Defendant's Motion for Modification dated January 29, 2007.

FACTUAL BACKGROUND:

The parties' marriage, which produced two minor children, was dissolved on April 13, 2004, and their separation agreement was incorporated into the judgment. By the terms of the parties' agreement the term of the defendant's obligation to pay alimony, a ten-year obligation, was non-modifiable. The defendant was obligated to pay unallocated alimony and child support in the annual amount of \$81,600, which represented approximately 43% of his gross annual income of \$189,500 as represented on his financial affidavit dated April 13, 2004.

LEGAL DISCUSSION:

POINT ONE

- A. **There has been a substantial change in circumstances since the date of dissolution,**

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When presented with a motion for modification of alimony, a court must first determine whether there has been a substantial change in the financial circumstances of one or both of the parties, and if the court finds a substantial change in circumstances, it may properly consider the motion and, on the basis of statutory criteria, make an order for modification. C.G.S.A. § 46b-82(a).

There clearly has been a change in the circumstances of the parties substantial enough to give the court jurisdiction to grant Plaintiff's Motion for Modification. First, the Defendant's earned income has gone up significantly. His April 13, 2004 financial affidavit shows gross earnings from his CBS employment at \$189,500. His June 26, 2007 financial affidavit shows his CBS earnings have increased to \$211,000.44 annually, an increase of \$21,500. While the parties' incorporated Separation Agreement discounts the first \$25,000 of employment, his total income far exceeds this. He receives rental income of \$18,000 per year (apparently non-taxable) – by virtue of the \$1,500 per month he is receiving from his live-in girlfriend, Stephanie Birkitt. In addition to this, the Defendant has purchased a home, giving him tax deductions and lower housing costs than at the time of dissolution. The Plaintiff's financial situation, however, has deteriorated, because she has been forced to deplete her savings from the sale of the marital residence to meet the high cost of living in New Canaan. These facts alone, and certainly in combination, support a finding of a substantial change in circumstances for purposes of an upward modification of support payments.

B. The Court should exercise its discretion by granting Plaintiff an upward modification of support payments.

The Court should exercise its discretion to modify the existing unallocated alimony and child support by increasing the monthly support payment by \$450 per month. This increased tax-deductible amount to Defendant represents a small fraction of the \$39,500 annual increase in combined earnings and rental income the Defendant has experienced. It will only slow, not stop, the deterioration in the Plaintiff's financial situation, but it will assist her in trying to stay in New Canaan for the schools, and to be available to the children for routine chauffeuring and emergency situations. This is in the best interest of the children and also, ironically, in the best interest of the Defendant.

What must have clearly emerged from the hearing for this Court is an understanding of the opposing financial directions of each party as a consequence of the 2004 judgment of dissolution of marriage.

Mr. Halderman has been employed at CBS News for 25 years and continues to receive generous yearly raises. His present salary is \$214,000.00, and he has stated in court that his four-year contract stipulates a 3% increase for the next three years. At that time, he will have the right to negotiate even more generous terms with his employer. In any case, he will be earning \$234,000.00 (This does not include the money he receives from Ms. Birkitt, an additional and tax-free \$18,000.) Moreover, Mr. Halderman has a healthy 401K account and continues to make contributions to it. In 6 years his alimony payments to Ms. Montet will cease, and he should have close to 1 million dollars in his retirement plan if the current trend of appreciation in that asset continues. He will only be 56 years old and earning approximately \$250,000.00. Ms. Montet will be 62 and quite possibly no longer employed, as her employability at age 62 is speculative at best.

Mr. Halderman took the money he received from the sale of the marital home and bought a house in Norwalk. On the other hand, because both parties wanted their children to continue to benefit from the New Canaan school system, Ms. Montet remained in New Canaan. Ms. Montet could not afford to buy and has been renting for the past four years. Mr. Halderman pays less than \$1000 as his share of his mortgage. His claim that the money is not rent and that he has a "loose arrangement" with Ms. Birkitt is belied by regular deposits of \$1500.00 into his account, albeit occasionally two or three months are paid together. Mr. Halderman states that he bought a house for well-known financial reasons: it allows him to reduce his tax liability and, rather than give money to a landlord, each month he increases his equity and net worth. He states he recently spent a few thousand dollars in improving his deck. This is an investment in home improvement that will increase the value of his home.

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Mr. Halderman claims he is struggling financially, but it is difficult to see what, other than mismanagement and extravagant spending, is the reason for this. Looking at his revised financial affidavit (the initial, sworn document he provided at his deposition omitted the \$1500.00 contribution made monthly by his live-in girlfriend,) we see that his major expenses are not housing and food but credit card payments and repaying a loan to himself from his 401K. This amount, \$890.00 per month is a contribution to his retirement, not a net loss to him, and should not be considered a legitimate expense. After meeting his obligation to Ms. Montet (an obligation that will terminate in 7 years) and taking into account the money he receives from Ms. Birkitt, he has \$150,000.00 gross annual income (which will increase by \$6,000.00 +for at least the next three years).

In the two months following the March 30 deposition, Mr. Halderman has increased his credit card debt by \$40,000.00, \$20,000.00 of which he states represents a cash advance. The timing of this substantial increase in debt is suspicious, and we would argue that Mr. Halderman is merely seeking to show on his financial affidavit that his expenditures are greater than his income. This became necessary when he was forced to include the \$1500.00 monthly contribution from Ms. Birkitt. At the June 26 hearing, when Attorney Stewart questioned him as to where this money had gone, Mr. Halderman stated that a couple of thousand was spent on improving his house and as for the rest: "I don't know. My life costs money." In two months Mr. Halderman spent a \$20,000 cash advance and put another \$20,000 on a new credit card. All this money was spent in addition to his salary. Mr. Halderman receives health coverage from his employer. He has no other children and makes no significant contribution to any charity, as shown by his tax returns (edit).

His mortgage payment of less than \$1000.00 represents an astonishingly low 8% of his income. In comparison, Ms. Montet's rent of \$2700.00 (one-half the cost of the four bedroom rental in New Canaan) represents 30% of her total income. And year after year, that rent is directed into the bank account of a landlord, not into increasing equity in her own home.

Mr. Halderman's total increased income is \$38,000.00, which gives Ms. Montet the basis to request modification. Because the high cost of housing in New Canaan forced her to withdraw her entire savings of \$85,000 to meet expenses from Aug. 2003 until June 2006, and because she will need to acquire her own medical insurance by the end of this year, when Mr. Halderman will no longer be obligated to cover her (see dissolution

judgment), she is seeking additional funds. She respectfully requests the court to modify alimony payments from \$6800.00 per month to \$7250.00.

POINT TWO: THE COURT SHOULD DENY THE DEFENDANT'S MOTION FOR MODIFICATION.

A. The Court under 46b-86(b) has no authority to modify unallocated support payments.

The Defendant's motion for modification is based upon Connecticut General Statute Section 46b-86(b). This statute provides, in pertinent part, that the Court has authority in its discretion" to suspend, reduce or terminate the payment of periodic alimony..."

By relying on this statute, the Defendant is constrained by its limitations. One such limitation is that the statute grants to the Court discretion only to modify "periodic alimony." In this case, there was no specific award of periodic alimony. As it is Defendant's burden of proof as the moving party under this statute, it was incumbent upon him to first move for an allocation of the support payments. Failing that, the Defendant has failed in its burden of proof. The Defendant has not cited to the Court one case where this statute was successfully invoked to reduce "unallocated alimony and child support" payments because, apparently, no such case exists. Connecticut General Statute 46b-86(b) grants no authority whatsoever to a court to reduce child support payments based upon "cohabitation," and in fact to do so arguably violates public policy. The Court should deny the Defendant's motion based solely on this weakness in his case.

B. The Defendant failed to prove the Plaintiff's financial needs have been altered by sharing rental payments.

While it was not contested at the hearing that Plaintiff was living with another

person , i.e. Wayne Bullock, it is very much contested that this circumstance caused "such a change of circumstance as to alter the financial need of [the Plaintiff]" . The testimony at the hearing disclosed the ascending financial circumstances of the Defendant and the descending financial circumstances of the Plaintiff. He is six years younger than the Plaintiff , has a secure job of 25 years with CBS making well over \$200,000 annually with benefits. His 401k had increased dramatically since the dissolution. This contrasts sharply with Plaintiffs financial situation; she is hanging by her fingernails trying to keep her children in the New Canaan school system, while her savings and 401K dissipate, and while the clock ticks her into her sixties, when her parental responsibilities to minor children will finally end, but her employability will be questionable.

C. Alimony payments should not decrease under an analysis applying the statutory guidelines.

In accordance with G.S. Section 46b-86b, before the payment of alimony can be modified or terminated, two requirements must be established. First, it must be shown that the party receiving the alimony is living with another individual. If that is proven (and it is conceded here) , the party seeking to alter the terms of the alimony payment must then establish that the recipient's financial needs have been altered as a result of the living arrangements. If there is no adequate proof that the living arrangement resulted in an alteration of the actual financial needs of the alimony recipient, no modification is justified.

Furthermore, and of great significance, even if the court finds a living together arrangement and an alteration in the financial needs of the party receiving alimony, the court, when modifying alimony, must consider the statutory factors

governing original awards of alimony. Gervais v. Gervais, 91 Conn.App. 840, 882 A.2d 731 (2005) i.e., length of marriage, cause of the dissolution, the age, health, station, occupation, amount and sources of income, vocational skills, employability, etc. Under that analysis, the court should exercise its discretion to deny the motion because it would be inequitable to decrease payments.

It is acknowledged that two people sharing the expense of a house can live more economically than living alone, and after three years of paying more than half her income in rent, Ms. Montet had a desperate need to economize. Her financial affidavit shows that, despite the house sharing arrangement she has with Mr. Bullock, she is still struggling to meet her expenses, and, after depleting her savings to pay initial legal fees, she has no funds to draw from for any emergency.

Ms. Montet was 52 years old at the time of the divorce, and her skill as a Russian interpreter has diminished over time and, in any case, is far less marketable now than in the 1980s. It is unrealistic of Mr. Halderman to think she could make up for those years of marriage when she was no longer in the workforce.

Opposing counsel has not shown that Ms. Montet's financial situation has improved. On the contrary, though her housing costs have dropped to a more manageable 30% of her income, she depleted her savings during those years when she paid 60% of her gross income for rent. Her only asset now is her 401K of \$230,000, which is less than what she received from the divorce settlement. By all economic measures, Ms. Montet is in a worse financial position now than when her marriage to Mr. Halderman was dissolved.

Any reduction in alimony would compel Ms to draw down from her 401K before she reaches the minimum age for withdrawal without penalty. In accordance with the divorce agreement, Mr. Halderman will already see a reduction of \$966.00 in monthly payment to Ms. Montet after seven years, i.e. in May 2011.

POINT THREE: THE COURT SHOULD AWARD PLAINTIFF HER COUNSEL FEES.

This court has the authority to award attorney fees incurred in defending and prosecuting Motions for Modification. Benson v. Benson, 5 Conn.App. 95, 497 A.2d 64 (1985). Pursuant to General Statute Section 46b-62, "In any proceeding seeking relief under the provisions of this chapter...the court may order either spouse or, if such proceeding concerns the ...support of a minor child, either parent to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in Section 46b-82..." No evidence is required to support an attorney's fees award where the court has conducted the hearing itself. "(T)he court [can] rely on its knowledge of what had occurred before it to supply evidence to support an award of attorney's fees. Passamano v. Passamano, 28 Conn.App. 854, 860, 612 A.2d 141. The court heard testimony that consumed several hours on June 26, 2007. During the course of the hearing, testimony was adduced that both parties' depositions were taken. The court can note that both the taking of depositions and the conduct of the hearings before the court require preparation time. The defendant's financial affidavit shows as a liability—prior to the hearing—\$3,016.17 in attorney's fees owed to his attorneys, Cohen and Wolf. The plaintiff respectfully requests an award of this amount for her attorney's fees plus \$1,500 for the day of hearing, a total of \$4,500.

SUMMARY:

The Court has jurisdiction to exercise its discretion by granting the Plaintiff's Motion for Modification and increasing payments by the modest amount she requests. The most salient point that comes out of the contested hearing on the two modifications motions is that the Plaintiff's financial situation has deteriorated significantly since the dissolution, while the Defendant's, in sharp contrast, has prospered. The Defendant has not yet turned 50, his is a world of golf trips, vacations, increasing 401K assets, comprehensive benefits, security of employment, earnings as an Emmy award winning producer for CBS, and home ownership. In less than seven years his alimony obligations terminate altogether. In her mid-fifties, Plaintiff's world is one occupied by concerns for her children, both of this marriage and of a former marriage. Having given up her career for child raising, and constrained to a part-time job because it is necessary to be available on short notice for the parties' children. She has seen her assets steadily erode, and her concerns about her financial future rise. It is in the best interest of the children, and thus, in reality, the Defendant, that she stay in New Canaan. She is barely able to do that now, and only by eating into her savings. It is respectfully submitted that the Defendant has failed to sustain his burden of proof on his Modification motion. It is within the Court's discretion to grant the Plaintiff's motion, and to award her a contribution toward her counsel fees, and the Court should do so.

CONCLUSION:

The Court should grant the Plaintiff's motion for modification and increase the unallocated alimony and child support payments by \$450 per month for the remaining

non-modifiable term of seven years. The Court should award Plaintiff \$3,500 toward her attorneys fees. Finally, the Court should deny the Defendant's Motion for Modification.

THE PLAINTIFF,
PATTY B. MONTET

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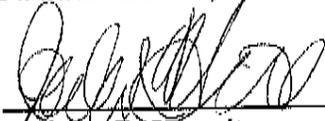
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NO.: FA 03 0196075S : SUPERIOR COURT
PATRICIA MONTET : J.D. OF STAMFORD/NORWALK
VS. : AT STAMFORD
ROBERT HALDERMAN : JUNE 26, 2007

DEFENDANT'S CLAIMS FOR RELIEF

The Defendant respectfully requests that this Court modify downward the Defendant's obligation to the Plaintiff on the basis of the Plaintiff's cohabitation. The Defendant specifically requests that his monthly obligation to the Plaintiff be modified such that his present obligation to pay unallocated alimony and child support of \$6,800 per month is terminated, retroactive to February 26, 2007. The Defendant's new obligation to the Plaintiff shall be \$2,039 per month in child support (or \$471 per week) consistent with the Connecticut Child Support Guidelines.

THE DEFENDANT, ROBERT HALDERMAN

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