IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

J.W.,	:	
Plaintiff	:	
	:	
v.	:	No. 99-20,871
	:	
D.W.,	:	
Defendant	:	

OPINION and ORDER

This matter involves exceptions to the Master's Report issued on June 11, 2003, which denied Husband's request to modify or terminate the spousal support he pays to Wife.

The parties were married on June 2, 1979; separated on September 22, 1993; and divorced on February 21, 1997. The parties have two children: C.W., born on December 16, 1990 and P.W., born on February 10, 1993. On November 14, 1996, the parties entered into a Property Settlement Agreement providing, among other things, that Wife would receive $425.00 per month alimony/spousal support in addition to other sums, such as $1150.00 per month in child support, 45% of Husband's military benefits, and $150 per month for her health insurance. The agreement set no ending date for the alimony/spousal support, merely stating the court is permitted to modify the amount upon "a material change of circumstances." The agreement was incorporated but not merged into the Divorce Decree.

Since the Agreement and Decree were entered in Virginia, Virginia law applies in this case. The Master applied Va. Code Ann §20-109(B), which permits the court to modify an award if "there has been a material change in the circumstances of the parties, not reasonably in the contemplation of the parties when the award was made," or "an event which the court anticipated would occur during the duration of the award and which was significant in the making of the award, does not in fact occur through no fault of the party seeking modification."

Applying §20-109(B) was wrong for two reasons. First, that statute explicitly states that it applies only to initial spousal support orders entered after July 1, 1998, and that statute may not be applied retroactively. Hering v. Hering, 33 Va. App. 368, 533 S.E.2d 631 (Va. App. 2000). And second, Va. Code Ann. §20-109(C) expressly limits the court's authority to modify an agreement to the terms stated in the agreement. The court does not have the authority to modify the amount except as provided in the agreement. *See* Martin v. Martin, 2002 Va. App. LEXIS 39 (2002); Pendleton v. Pendleton, 471 S.E. 2nd 783 (Va. App. 1996).

Here, the parties have given the court the authority to modify the award based upon "a material change of circumstances," and the court is limited to that language. The court cannot impose a requirement that the change must be one which was not reasonably in the contemplation of the parties when the award was made. That would be an improper infringement upon the parties' right to contract.

Husband offered seven reasons for a modification of the award. Five of them clearly do not apply, as they do not constitute a material change of circumstances, and we agree with the Master's reasoning regarding those items. However, two of the reasons warrant discussion, since the Master based her decision primarily on the basis that the changes were in contemplation of the parties when they signed the agreement. The two issues are: (1) Both children are now in school full-time, and (2) Wife was not employed at the time of the Decree, but has since become employed.

Regarding the school issue, when the parties entered into the Agreement the children were three and five. Now, they are ten and twelve. It was clear from the testimony that both parties anticipated and desired that Wife stay home with the children, at least until they both entered school full-time. However, once that occurred

Wife was free to work, which she eventually did.[1] The court finds this to be a material change in circumstances.

Regarding the work issue, Wife has a B.S. degree in Secondary Education in Spanish, and in the spring of 2000 she began substituting. The Warrier Run School District awarded her an Emergency Certificate to substitute on any grade level and any subject. In 2000, she earned $3,189.00; in 2001, she earned $8,544.00; in 2002, she earned $10,390.00. Wife testified that her wages will be less in 2003 because she has not been granted an emergency certificate this year. It was also clear, however, that Wife has not even attempted to substitute in another school district. Instead, she chose to substitute only in the Warrior Run School District so that her work schedule would match that of her children's as much as possible. This is a luxury few working parents even dream about. Similarly, Wife has not taken the steps necessary to obtain an "add-on" degree or get a master's degree in a different area, because she wanted to wait until her youngest son moved to the middle school so that the two boys' schedules would match. The essence of the matching schedules is that school will start a mere half hour later for both boys once the youngest enters middle school. In short, it was clear from the testimony that after both children entered school Wife was in no hurry to re-enter the workforce in a serious manner, or obtain another degree which would make her more employable. At this point, Wife has been receiving alimony for well over six years, after a fourteen-year marriage. Moreover, Wife receives a substantial amount in addition to the $425.00 in alimony (almost $1000.00 per month in Husband's military benefits and $1150.00 per month in child support).

The court is aware that Husband's income has also increased since the signing of the Agreement (from $60,000 to $83,000). The court is also aware that the parties used an imputed income for Wife of $680.00 per month to calculate child support in the

[1] Wife, however, waited two to three years from the time the youngest child entered first grade to begin working.

parties' Separation Agreement. Wife has argued her current income is not much greater than that, and therefore there is no substantial change. The court disagrees. The fact that the parties imputed an income to her for child support calculation does not mean they did so for alimony purposes. Moreover, even if they imputed an income to her, the record is clear that neither party wanted or expected her to work while at least one child was at home. The fact that both children are in school, and that Wife can now work and is indeed working, constitutes a material change in circumstances.

After considering all the circumstances, the court believes that a reduction of $150.00 per month is in order at this time, reducing the alimony to $275.00 per month, retroactive to July 17, 2002, the date Husband filed to petition to modify. Husband's credit shall be applied by further reducing the amount by $75.00 per month until the credit is used up.

O R D E R

AND NOW, this ____ day of September, 2003, for the reasons stated in the foregoing opinion, the Request for Modification or Termination of Spousal Support, filed on July 17, 2002, is granted and it is ordered that the spousal support/alimony obligation shall be $275.00 per month, effective July 17, 2002. Any credit Husband has built up shall be used by deducting $75.00 per month from each monthly payment, until the credit is consumed.

BY THE COURT,

_____

Clinton W. Smith, P.J.

cc: Dana Jacques, Esq., Law Clerk
Hon. Clinton W. Smith
Matthew Zeigler, Esq.
Joy McCoy, Esq.
Family Court
Gary Weber, Esq.