

**At the Matrimonial Term, Part 00,
of the Supreme Court of the
State of New York, held in and for
the County of New York, at the
Courthouse thereof, 60 Centre
Street, New York, New York, on
the 10th day of August, 2010**

PRESENT: HON. JANE JUDGE

-----X
JANE DOE,

Plaintiff,

-against-

JOHN DOE,

Defendant.
-----X

Decision and Order

Index No. 555555/ 2010

Recitation as required by C.P.L.R. 2219(a), of the papers considered in the review of this motion confirming the Report of the Special Referee, money judgments, an award of counsel fees and Cross-Motion for an award of counsel fees and sanctions.

Papers	Numbered
Plaintiff's Order to Show Cause and Exhibits:	1-4, 1-10
Plaintiff's Order to Show Cause for Contempt and Exhibits:	1-4, 1-16, 1-14
Plaintiff's Affidavit in Opposition and Reply (May 10, 2010):	1-11
Plaintiff's Affidavit in Opposition and Reply (May 23, 2010):	1-6
Defendant's Order to Show Cause and Exhibits:	1-7
Defendant's Opposition and Cross-Motion and Exhibits:	1-12
Defendant's Affidavit in Reply and Exhibits (May 14):	1-5
Defendant's Affidavit in Reply and Exhibits (May 24)	1-7
Defendant's Affidavit in Opposition and Cross Motion and Exhibits:	1-8

In this action for divorce and ancillary relief, the plaintiff (hereinafter “Wife”) seeks, *inter alia*, orders confirming in part and rejecting in part the report of the Special Referee issued on March 23, 2010. Specifically, the Wife requests this Court reject the Referee's division of the marital debt, and set defendant's (hereinafter “Husband”) share at 75% of the marital debt; reject the Referee's allocation of child support and increase the ordered support to \$3,400; reject the Referee's report with regard to how child support “add on” expenses are paid, and order the Husband to be responsible for 75% of such costs for the parties minor child, Peter Michael Doe, born, January 24, 2003; and reject the Referee's determination that an award of counsel fees for the plaintiff as inequitable. Additionally, the Wife seeks an order directing the defendant to pay his portion of the marital debt, and setting a specific payment schedule for the \$45,500 distributive award proposed in the Referee's report. The Wife also seeks a money judgment for temporary maintenance and child support arrears totaling \$26,100, plus statutory interest; and an order holding Mr. Doe responsible for 100% of any medical expenses incurred during the period that insurance has lapsed for their minor child. The plaintiff further asks for the imposition of sanctions pursuant to 22 N.Y.C.R.R. part 130 Section 130- 1.1 for the Husband's “frivolous” emergency application seeking injunctive relief; a \$5,000 award of counsel fees for costs incurred in response to the motion; and an order preventing the defendant from filing any more “frivolous” applications. Moreover, the Wife moves for an order of contempt against Mr. Doe for his repeated failure to pay court ordered temporary maintenance and child support, as well as failure to comply with the court's Order directing him to provide insurance for the parties' minor child.

Mr. Doe opposes and seeks to reject in part the Referee's report, specifically the defendant seeks, *inter alia*, rejection of the Referee's equitable distribution division, and opposes the designation of \$14,100 as a direct loan from the plaintiff's separate property, resulting in a

reduction of the distributive award from \$45,500 to \$31,400. Although Mr. Doe seeks to confirm the Referee's allocation of the marital debt, he asks this Court to determine the specific dollar amount and list where the debts arise from. Further, he cross-moves for reimbursement of counsel fees; an order imposing sanctions against the Wife; relief from the Court's order to provide health insurance for the plaintiff; and an order "halting" Ms. Doe's attempts to enforce court orders.

REFEREE'S REPORT

The Special Referee heard testimony, reviewed the evidence submitted by the parties, and issued her report to this Court on January 12, 2010. The report gave detailed findings regarding the issues of equitable distribution, child support, and counsel fees. Pursuant to CPLR 4403, with regard to the Special Referee's report, this Court confirms in part, rejects in part, and issues the following additional findings.

Equitable Distribution

The Referee's report is confirmed and the Husband is ordered to repay \$45,500 of the plaintiff's separate funds due to his defalcations during the marriage.

The Referee's report made several findings regarding the equitable distribution of the marital property and recommended an award of \$45,500 to the Wife. The Special Referee cited the enumerated factors in DRL §236(B)(5)(d) as the basis for her recommendation and found that the plaintiff was entitled to repayment of sums paid throughout the marriage from her premarital separate funds because of the defendant's defalcations. The Referee's award was based on finding a \$26,000 contribution from the Wife of premarital separate property to the Husband's SEP IRA account; an outright loan to the Husband in the amount of \$14,100 made from her separate property; and a \$6300 payment for security of the marital apartment. The

basis for the Referee's award was the sum of these amounts less, \$900 of marital money contributed to the Wife's 401k retirement account.

There is sufficient evidence in the record to support the Referee's recommendation with regard to equitable distribution. The defendant argues that there is no basis for the designation of the \$14,100 amount as an outright loan. Mr. Doe contends no such loan agreement ever existed between the parties. This argument is unpersuasive. The Special Referee, as the trier of fact, found Ms. Doe's testimony to be credible. In the record of previous proceedings the defendant's credibility has been called into question. (*See* Court Transcript of proceeding before Justice Jones, December 4, 2008 pps. 27-30 re: Husband's compliance with parties' interim agreement.) The Referee's designation of \$14,100 as a loan is confirmed. As such, the \$45,500 award to the Wife is likewise confirmed.

The plaintiff seeks an order directing a transfer of \$26,000 (the portion of the \$45,500 award derived from Mr. Doe's SEP IRA) to the Wife's retirement account within 15 days of the Notice of Entry. Ms. Doe further asks that a specific payment schedule be set for the remainder of the \$45,500 distributive award. The defendant contends that in order to make a tax free disbursement from his SEP IRA he must first receive a Qualified Domestic Relations Order (QDRO). Federal Code 26 U.S.C.A. § 408(d)(6) does require a court order for a non-taxable transfer to a spouse or former spouse. Therefore, it is ordered that within 15 days of the entry of this Order, the defendant shall roll-over the \$26,000 from his SEP IRA to the plaintiff's retirement account. Any costs for such transfer shall be paid by Mr. Doe. The remaining \$19,500 shall be paid by the Husband to the Wife within 90 days of the Notice of Entry.

Mr. Doe seeks an order altering the Referee's equitable distribution division, due to what he alleges are "excessive" awards in previous orders from this Court. No basis for this motion

has been pled or proven. *See* CPLR 2214; DRL §236(B)(9)(b). Therefore, this portion of the defendant's cross motion is denied.

The Court confirms the Referee's finding that the marital debt totaling \$133,502 should be shared equally by the parties. The Referee's report states, "With regard to the debts of the parties it is equitable that they be shared equally." The Wife asks this Court to reject the Referee's equal division of the marital debt and have the Husband pay a greater portion based on a finding by the Referee that Mr. Doe has been the main wage earner throughout the marriage. The defendant asks the Court to confirm the Referee's allocation of the debt, to designate a specific dollar amount, and declare exact sources of the marital debt.

The total amount of marital debt is \$133,502. The Referee's report states that at present there are ten credit card accounts with outstanding balances. Of this debt \$80,731 is in the Wife's name, \$48,479 is in the Husband's name, and \$4,292 is held jointly. The Court finds no basis to further delineate the indebtedness of the parties.

The plaintiff has further requested that in the event the Referee's report is confirmed as to the division of marital debt, the defendant should be ordered to assume a greater portion of the debt incurred throughout the marriage in the plaintiff's name alone, so as to equalize the interest rates attributed to each party. She also requests that the Court provide a mechanism for such payments to avoid further litigation. Despite the designation by the various financial institutions of amounts attributable to either party, \$133,502 has been found to be the total amount of marital debt. The debt solely in the Wife's name is held at a higher interest rate than that held jointly or in the Husband's name alone.

Expenses incurred prior to the commencement of an action for a divorce are marital debt to be equally shared by the parties upon an offer of proof that they represent marital expenses. *See* DRL §236(B)(1)(c); *Gelb v. Brown*, 163AD 2d 189, (1st Dept. 1990). Additionally, the

Supreme Court is given broad discretion in allocating the assets and debts of the parties to a marriage, and may consider the entirety of the marital estate in apportioning responsibility therefore. See *Corless v. Corless*, 18AD3d 493, (2nd Dept. 2005). The Referee sets out in her report all of the statutory factors enumerated in DRL § 236 (B)(5)(d) and clearly explains the reasoning for allocating the marital debt equally. In light of the \$45,500 distributive award to the plaintiff, and the stated reasons for the Referee's findings, the Court finds no basis to modify the Referee's decision with respect to the parties' debt.

Child Support

The Special Referee recommends that child support payments be made by the Husband as the non-custodial parent with superior earning power. The Referee determined that the defendant's income considering imputable amounts, including funds he receives as a consultant in his own business, is \$240,000, while Ms. Mogul's actual income is \$80,000. The Referee relies upon the CSSA guidelines in determining the amount of child support with respect to the combined income of the parties up to \$130,000 (the statutory “cap”). Considering the income above the statutory limit, the Referee applies the same statutory calculation to an additional \$110,000. Ms. Doe requests an increase in the amount of child support based on the Husband paying his pro rata share of support, calculated by applying the guidelines to the entire combined annual income of the parties, \$320,000.

With respect to combined parental income over \$130,000 the court has the option of either applying CSSA guidelines, or the ten factors set forth in DRL § 240(1-b)(f), or a combination of both. See DRL §240. The court need only articulate how the income above the statutory limit is being considered and why. See, *Kent v. Kent*, 291 AD2d 258 (1st Dept. 2002). The Referee's report states, “the Husband continues to have superior earning power and a burgeoning career while the Wife who has taken time out for the benefit of the child has put her

career on hold. She hopes to go to law school but this plan will require time for career development.” This articulation of the parties’ current and future economic status satisfies the standard in *Kent*.

After determining the parties combined income to be \$320,000, the Special Referee applied the CSSA guidelines to the first \$130,000 (the statutory cap), and then applied the same formula to the next \$110,000 without delineating her reasons for choosing that amount. This Court finds it appropriate to apply the CSSA guidelines to the entire remaining portion of the parties' combined income, \$190,000. The Referee's calculation is modified to reflect 17% of the remaining \$190,000 or \$32,000, and Mr. Doe is responsible for his pro rata share (75% percent of \$32,000 or \$24,225 annually). This amount will be added to the amount calculated based on the first \$130,000 (\$16,575). As a result, Mr. Doe's child support payments shall be this combined total of \$40,800 per year, to be paid monthly in the amount of \$3,400. This award shall be retroactive, effective as of January 31, 2010.

The court confirms the Referee's Report with respect to “add-on” expenses for the parties' minor child.

The plaintiff asks this court to reject the Referee's report recommendation that each parent be responsible for the additional expenses they may incur for Peter not covered by the allocated child support. Ms. Doe argues that because of the Husband's unwillingness to make payments for the child since the commencement of this divorce action, he should be responsible or a greater share of “add on” expenses.

The Referee does not designate any specific expenses to be paid above and beyond the basic child support payments. The main point of contention amongst the parties regarding extraordinary expenses (those not covered by basic child support) is the cost of Peter's private school tuition. New York law states that private school tuition may be considered an “add on”

expense, which is to be paid over and above the basic allowance. *See Cohen v. Rosen*, 207AD2d 155 (3rd Dept. 1995). It is within the court's discretion, however, whether or not to assign such a payment to either party. *See Manno v. Manno*, 196 AD 2d 488 (2nd Dept.1993). This point was illustrated in *Gering v. Tavanov* 50 AD 3d, (1st Dept. 2008), where the Appellate Division of the First Department found, “the court's determination not to require plaintiff to pay for the children's private school or college education was not an improvident exercise of discretion.” *See Gering v. Tavanov* 50 AD 3d 299, (1st Dept. 2008); *Manno v. Manno*, 196 AD 2d 488 (2nd Dept.1993). There is no reason to reject the Referee's decision to hold each parent accountable for the extraordinary expenses that they unilaterally choose for their minor child. The Special Referee's report is confirmed with respect to “add on” expenses; the parent that incurs any expenses beyond those covered by basic child support will be responsible for payment in full. Therefore, if Ms. Doe should unilaterally decide to enroll Peter in private school, despite Mr. Doe's objections to the affordability, she shall be responsible for the cost of tuition.

Health Insurance

The March 23, 2010 Referee's Report recommends that Mr. Doe provide health insurance for the parties' minor child, Peter beginning May 1, 2010 (the date when the Wife's COBRA coverage expired.) The defendant asserts his attempts to secure coverage through Child Health Plus were thwarted by the plaintiff's refusal to assist him in completing the insurance application. Ms. Doe insists that there was and remains no need for her assistance in the completion of such forms. At this time Peter does not have comprehensive medical coverage, but the defendant has secured some medical coverage through Blue Cross Blue Shield.

Domestic Relations Law§240(2)(ii) states that where a child is not covered by health insurance benefits, and both parents have health insurance available to them (if it is affordable), the Court shall order either parent, or both, to provide health insurance coverage for the child.

The Equitable Distribution Law empowers the Court to direct one spouse to purchase, maintain or assign an insurance policy covering "health and hospital care and related services" for the other spouse or the children for as long as maintenance, child support or a distributive award is being paid. DRL § 236(B) (8)(a); *See Sinha v. Sinha*, 17 AD 3d 131,(1st Dept. 2005). Health insurance benefits are considered to be available where the cost of obtaining them is reasonable and the benefits are reasonably accessible to the child. *See* DRL § 240(B).

The defendant is directed to obtain comprehensive medical insurance for the parties' minor child Peter, and to incur all costs related to such coverage. To the extent the plaintiff's participation is required for the completion of the insurance application, the Husband shall provide the applicable documents to the Wife within 7 days of this order, and the plaintiff shall complete any portion that requires her signature or personal information (as the insured's mother), etc., and return the completed portions to Mr. Doe within 7 days. To clarify, Ms. Doe is not required to "assist" the defendant with any portion of the insurance application that requires only information which can be provided by the payor (the Husband).

The parties are also in dispute as to who should be responsible for any medical expenses incurred while Peter's coverage has lapsed. DRL § 240 (i) provides, "Upon a finding that a legally responsible relative willfully failed to obtain health insurance benefits in violation of a court order, such relative will be presumptively liable for all health care expenses incurred on behalf of such dependents from the first date such dependents were eligible to be enrolled to receive health insurance benefits after the issuance of the order of support directing the acquisition of such coverage." The defendant has not provided any support for his claim that he was prevented from obtaining coverage for Peter due to the plaintiff's refusal to cooperate in assisting in completing the insurance applications. In fact, Mr. Doe's Reply, submitted May 24 shows that he was able to obtain the major medical coverage through Blue Cross Blue Shield

without any aid from the plaintiff in the application process. Any uncovered medical expenses incurred during the period Peter was without comprehensive coverage, including therapy and OT sessions, are the obligation of the Husband to pay in full.

The Court confirms the Referee's report ordering the defendant to provide comprehensive medical coverage for the parties' minor child, and further orders Mr. Doe to be responsible for any unpaid medical expenses incurred during times Peter is without comprehensive coverage.

Counsel Fees

The Court confirms the Referee's report with respect to counsel fees. The plaintiff contends that it is the Husband's obligation to pay the cost of the Wife's counsel due to the defendant's superior earning capacity and his “intentional” acts to prolong and frustrate this litigation. The Referee's report cites Domestic Relations Law §237(a), and provides an adequate basis for her decision under *De Cabrera v. De Cabrera*, 70 NY2d 879, (1987). The Referee notes that the plaintiff's assets alone elevate her economic position above that of the defendant's. Additionally, the Referee finds that the Husband's choices in representation, coupled with his superior income, are not a sufficient basis for shifting the cost of the litigation. The court agrees with the Referee's findings.

For the above reasons the Referee's report is confirmed in part and rejected in part.

Contempt

The Wife seeks an order of Contempt, alleging that the Husband's failure to pay and failure to comply with the Referee's Report have substantially prejudiced her. The plaintiff contends that Contempt is the proper remedy because ordinary enforcement measures have failed. At this time there are money judgments against the defendant that have been filed with the New York County Clerk in the aggregate sum of approximately \$21,671.37. Ms. Doe asserts

that she is unable to execute upon these judgments because she is unable to identify property held by the defendant with enough value to attach a lien upon. The Defendant asserts that he is unable to abide by the court orders because of a change in circumstances regarding his contract employment with various companies.

The Defendant cannot be placed in contempt without a full evidentiary hearing. Due process requires that an evidentiary hearing be held to resolve conflicting claims before one can be adjudged in contempt. *See Singer v. Singer*, 52 AD 2d 774, 382 N.Y.S.2d 793 (1st Dept. 1976). However, a hearing is not proper at this time. Before a finding of contempt can be made, the Court must be satisfied that the movant has exhausted all other available and less drastic enforcement remedies. *See Haynes v. Haynes*, 19 AD 3d 153 (1st Dept. 2005); *MacKinnon v. MacKinnon*, 277 AD 2d 636 [3rd Dept. 2000]; *Farkas v Farkas*, supra) including money judgments (Domestic Relations Law § 244), sequestration (Domestic Relations Law §243), income execution (CPLR 5241) or income deduction (CPLR 5242), or that such remedies would be ineffectual. *See Domestic Relations Law §245; Farkas v. Farkas*, supra. That is, it must appear "presumptively, to the satisfaction of the court" (Domestic Relations Law §245) that payment cannot be enforced by any less drastic alternative. *See Haynes v. Haynes*, supra; *Mastrantoni v. Mastrantoni*, 242 AD 2d 825 (3rd Dept. 1997); *Farkas v. Farkas*, supra.

Ms. Doe has not yet provided proof that she has exhausted all less drastic remedies, or that such remedies would be ineffectual. The plaintiff is allowed to renew her motion upon a showing of her further efforts to collect on the existing judgments.

The Wife makes various allegations as to why the Husband should be found in contempt for failure to comply with the findings of the referee's report. These arguments are unpersuasive because the Referee's Report is not a "lawful order of the court" as defined in Domestic

Relations Law §245. *See McCain v. Dinkins*, 84 NY2d 216 (1994); *Kawar v. Kawar*, 231 AD 2d 81 (2nd Dept. 1996); *Graham v. Graham*, 152 AD 2d 635 (2nd Dept. 1989).

Sanctions

The Wife asks this court to impose sanctions on the defendant for filing an Emergency Order to Show Cause on May 4, 2010. The Husband filed an Emergency Order to Show Cause seeking to restrain the Wife from suspending their minor child's therapy sessions. The restraining order was subsequently denied by this Court.

“Pursuant to 22 NYCRR part 130 Section 130- 1.1, sanctions may be imposed against a party or the attorney for the party for frivolous conduct (*See* 22 NYCRR 130-1.1[b]). Conduct is frivolous if it is completely without merit in law or fact and cannot be supported by a reasonable argument for the extension, modification, or reversal of existing law; it is taken to primarily delay or prolong the resolution of the litigation, or harass or maliciously injure another; or asserts material factual statements that are false (*see* 22 NYCRR 130-1[c]; *Mascia v. Maresco*, 39 AD 3d 504 (2nd Dept. 2007); *Greene v. Doral Conference Ctr. Assocs.*, 18 AD 3d 429 (2nd Dept. 2005)).” *Joan 2000 Ltd. v. Deco Construction Corp.*, 66Ad3d 841(2nd Dept. 2009).

The Court, in its discretion will not impose sanctions against the defendant for his Order to Show Cause, dated May 4, 2010. The Husband's motion, although denied, does not rise to the level of frivolous conduct for purposes of imposing sanctions pursuant to 22 NYCRR part 130-1.1.

Additionally, the plaintiff seeks \$5,000 in counsel fees for the cost of defending Mr. Doe's May 4, 2010 motion. After a review of the facts presented, the Court declines to award counsel fees for that motion.

FINAL JUDGMENT OF DIVORCE

The parties have stipulated that the plaintiff is entitled to a divorce on the grounds of abandonment. The parties have entered into an interim agreement resolving issues of custody, visitation and decision making pursuant to Domestic Relations Law §236(B)(3). This agreement shall be incorporated but not merged into the final judgment of divorce. All other remaining issues have been resolved by this order confirming in part and rejecting in part the Referee's report.

CPLR 4403 states that where no issues remain to be tried the court shall render a decision directing judgment in the action. Therefore, the plaintiff is directed to settle the Judgment of Divorce on notice together with the Findings of Fact and Conclusions of Law and if applicable, any minutes within sixty (60) days. The failure to settle the Judgment within 60 days may result in this action being deemed abandoned and dismissed pursuant to 22 NYCRR 202.48. This matter shall appear on the Part 20 calendar on September 22, 2010.

Based on the foregoing the Court finds it is hereby:

ORDERED, that the Referee's report is confirmed with regard to the equitable distribution and the defendant is ordered to repay \$45,500 of the plaintiff's separate funds due to his defalcations during the marriage; and it is further

ORDERED, that within 15 days of the entry of this Order, the defendant shall roll-over the \$26,000 from his SEP IRA to the plaintiff's retirement account. Any costs for such transfer shall be paid by the defendant; and it is further

ORDERED, that \$19,500 shall be paid by the Husband to the Wife within 90 days of the Notice of Entry; and it is further

ORDERED, that the Referee's finding that the marital debt totaling \$133,502 should be shared equally by the parties is confirmed; and it is further

ORDERED, that the defendant's child support payments shall be this combined total of \$40,800 per year, to be paid monthly in the amount of \$3,400. This award shall be retroactive, effective as of January 31, 2010; and it is further

ORDERED, that the Referee's Report with respect to "add-on" expenses for the parties' minor child is confirmed. Each parent shall be responsible for the additional expenses they incur for the child above and beyond the allocated child support; and it is further

ORDERED, that the Referee's report is confirmed with regard to the child's health insurance. The defendant shall provide comprehensive medical insurance for the parties' minor child beginning May 1, 2010; and it is further

ORDERED, that any uncovered medical expenses incurred during the period Peter was without comprehensive coverage, including therapy and OT sessions, are the obligation of the Husband to pay in full; and it is further

ORDERED, that the Referee's report with respect to counsel fees is confirmed. The plaintiff's motion for counsel fees is denied; and it is further

ORDERED, that the plaintiff's motion for contempt is denied. She is allowed to renew her motion upon a showing of her further efforts to collect on the existing judgments; and it is further

ORDERED, that the plaintiff's motion to impose sanctions on the defendant is denied; and it is further

ORDERED, that the defendant's motion for counsel fees is denied; and it is further

ORDERED, that the plaintiff shall settle the Judgment of Divorce on notice together with the Findings of Fact and Conclusions of Law and if applicable, any minutes within sixty (60)

days. The failure to settle the Judgment within 60 days may result in this action being deemed abandoned and dismissed pursuant to 22 NYCRR 202.48. This matter shall appear on the Part 20 calendar on September 22, 2010; and it is further

ORDERED, that any relief requested not specifically addressed herein is deemed denied; and it is further

ORDERED, that counsel for the plaintiff shall serve a copy of the instant Decision and Order, with Notice of Entry, upon counsel for the plaintiff within ten (10) days from the date of entry.

This constitutes the Decision and Order of this Court.

E N T E R:

HON. JANE JUDGE

J.S.C.