

SUPREME COURT
STATE OF NEW YORK COUNTY OF MONROE

[REDACTED]

Plaintiff,

DECISION & ORDER
INDEX # [REDACTED]

v.

[REDACTED]

Defendant.

This matter was referred to the undersigned by the Honorable [REDACTED] Supreme Court Justice, and a hearing was held on November 10, 2008; having considered the allegations and proof of the respective parties on those dates and due deliberations having been had thereon, I do hereby make the findings of the essential facts which I deem established by the evidence and reach the following conclusions of law as to the issue of maintenance.

FINDINGS OF FACT

1. The parties were married on November 26th, 2005 in the Ukraine, in a civil ceremony.
 2. Subsequently, the parties were married a second time on June 20th, 2006, in the Town of Greece, County of Monroe, State of New York, in a civil ceremony.
 3. Both parties have resided in the State of New York for at least a year prior to commencement of the divorce action and the grounds for this action arose in the State of New York.
 4. The marriage of the parties has never been altered or dissolved by any judgment of divorce, annulment or dissolution of the marriage issued by any court of competent jurisdiction.
 5. This is the third marriage for the defendant.
 6. No other action is pending in any court of competent jurisdiction which seeks the same or **similar relief as that which is sought herein.**
 7. Neither party is a member of the military forces of the United States or any other nation, nor was either of them so employed at the time when this action was commenced.
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8. A Divorce Summons with Notice was filed in the Monroe County Clerk's Office on behalf of plaintiff on October 16, 2007; said Summons was subsequently served on defendant; and the Affidavit of Service was filed in the Monroe County Clerk's office on October 29, 2007.

9. A Notice of Appearance was interposed by defendant's attorney, [REDACTED] [REDACTED] Esq., of counsel, on January 25, 2007. A Complaint dated January 29, 2008, was served on defendant's attorney, who served an Answer.

10. At the trial, the defendant withdrew his answer to the divorce complaint as to the issue of grounds, allowing this matter to proceed by default as to the issue of grounds for this divorce action.

11. Plaintiff has filed the requisite statement, and /or testified at trial relative to the removal of barriers to the defendant's remarriage in accordance with the requirements of the Domestic Relations Law § 253, stating that prior to the entry of final judgment in this action, plaintiff has taken or will take all steps within plaintiff's power to remove any barriers to defendant's remarriage subsequent to the entry of the judgment herein.

12. The applicable statute of limitations had not elapsed as of the commencement of this action.

13. There are no children of this marriage.

14. Plaintiff was born on March 23, 1955; defendant was born on June 30, 1940.

15. The parties lived together as husband and wife in Monroe County from before December 2005, until plaintiff moved out of the marital residence on June 17th, 2007.

16. After defendant withdrew his answer with respect to the grounds for divorce, the parties agreed to limit the hearing to the single issue of maintenance. Additionally, plaintiff requested

an award of attorney's fees.

17. Plaintiff testified that prior to her marriage to the defendant, she resided in the Ukraine.

18. While living in the Ukraine, she was employed as an accountant for a local company.

19. She testified that she was familiar with the accounting principles and procedures as utilized in the Ukraine.

20. While working, she was employed in a supervisory position and was in charge of several employees.

21. She further testified that she graduated from an Economic Institute.

22. She testified that her license wasn't valid in the United States.

23. She testified that she first came into contact with defendant in the Spring of 2005, when he contacted her through an internet dating service.

24. Their relationship began by exchange of emails.

25. While plaintiff's English was rather poor, she was able to exchange emails with defendant by utilizing assistance of friends and family members, as well as translation software available on the internet.

26. The relationship eventually progressed to the point where defendant made several telephone calls to plaintiff and made arrangements to visit her in the Ukraine.

27. The visit took place in summer of 2005.

28. After the visit, the parties continued to exchange emails and telephone calls.

29. Thereafter, defendant asked plaintiff to marry him and to move to the United States.

30. At this time, defendant began the process of obtaining a visa for plaintiff so she would be able to come to the United States.

31. Defendant returned to the Ukraine in November of 2005, and the parties were married there on November 26th, 2005.

32. Concurrently, defendant continued to work on obtaining a United States entry visa for the plaintiff.

33. As a part of the process, plaintiff was obligated to sign and file an affidavit of support which obligated him to support plaintiff financially.

34. Defendant testified that he prepared and signed such affidavit and that he undertook this obligation in order to bring his wife-to-be to the United States.

35. Once the parties were married in the Ukraine, plaintiff's entry visa for the United States was finalized and the parties came to Rochester.

36. Eventually, plaintiff obtained her immigration status as a result of the marriage and currently possesses a green card which gives her a right to reside in the United States.

37. At the time of her entry to the United States, plaintiff was entirely dependent upon the defendant for all of her financial needs.

38. Further, at the time of her entry to the United States, plaintiff barely spoke any English.

39. The parties were married a second time on June 20th, 2006 in the Town of Greece.

40. Defendant engaged in a pattern of emotional and physical abuse directed toward defendant.

41. Defendant's repeated physical assaults upon plaintiff, caused her to leave the marital residence on June 18, 2007.

42. Subsequent to leaving the marital residence, plaintiff obtained an Order of Protection against the defendant from the Monroe County Family Court.

43. Plaintiff was granted a two year order of protection against defendant.

MAINTENANCE

44. Plaintiff is presently residing in an apartment in the City of Rochester.

45. She is receiving benefits from the Monroe County Department of Social Services, commonly known as welfare, and is a public charge.

46. Plaintiff's welfare benefits amount to a free apartment, \$175.00 in food stamps and \$19.00 cash allowance.

47. She is also receiving Medicaid.

48. Since she left the marital residence as a result of domestic violence, she has not received any financial support from the defendant.

49. Plaintiff testified that she is disabled, due to a number of health problems.

50. Plaintiff takes medication for her health conditions.

51. She further testified that based on her health conditions, she would have qualified for Supplemental Security Income, commonly known as SSI, but since she lacks the United States citizenship, she is ineligible to receive SSI.

52. Plaintiff submitted into evidence a copy of the letter she received from the Social Security Administration which stated that she would qualify for SSI in the basis of her health but cannot receive SSI since she lacks United States Citizenship. (See plaintiff's Exhibit 8)

53. Plaintiff stated that she is unable to work due to her physical conditions of depression, dizziness, loss of hearing, and tinnitus.

54. Plaintiff stated she constantly hears noise which prevents her from sleeping or concentrating.

55. Plaintiff has other medical conditions; in general, she is in very poor health.
56. Plaintiff is unable to work to support herself financially. (See plaintiff's Exhibit 7)
57. Plaintiff's Net Worth Statement, Exhibit 7, shows monthly total expenses in excess of her welfare benefits.
58. While plaintiff would like to obtain employment, she is not able to do so in part due to the language barrier.
59. While her English has improved since her arrival in the United States, she cannot speak English beyond a level of a social conversation.
60. Further, since she does not have any accounting training or experience in the United States, she is unable to work in the accounting field.
61. Further, in order to work in that field she would have to obtain both language and professional training.
62. Plaintiff testified as to her work history and her attempt to improve her English language skills.
63. She testified that she cannot sustain any significant period of time at school or a job.
64. She further testified that she would have to spend a significant amount of time in school to improve her English and to obtain professional training.
65. Defendant testified that he is retired from Eastman Kodak Company.
66. Defendant testified that he met plaintiff on-line and that he asked her to marry him and come to the United States.
67. Defendant admitted signing an affidavit of support for plaintiff, and also admitted that he was aware that he was assuming the responsibility of supporting plaintiff financially when he

brought her to the United States after the parties' marriage in the Ukraine.

68. Defendant testified that while the parties were residing together, plaintiff was dependent on him financially.

69. He testified that he is receiving Social Security Benefits and a pension from Eastman Kodak.

70. He also testified that he has financial assets and investments.

71. His 2007 income amounted to \$28,034.00 in pension and investment income, and also \$15,120.00 in Social Security payments, with total income exceeding \$43,000.00 per year. See Exhibit 2, defendant's 2007 income tax return.

72. Defendant's Net Worth Statement, Exhibit 5, dated February 7, 2008 shows defendant's assets and liabilities, and shows net worth of \$273,290.00.

73. Defendant owns his residence, appraised at \$150,000.00.

74. Defendant's Statement of Net Worth shows that defendant has many more assets and liabilities than does plaintiff.

75. Defendant admitted that after plaintiff left the marital residence, he did not provide her with any financial support.

76. Plaintiff testified that during the marriage she was entirely dependent on defendant financially.

77. Plaintiff has no sources of income or financial assets except for her welfare benefits.

LEGAL ANALYSIS

In consideration of the issue of maintenance the court must consider the eleven factors set forth in Domestic Relations Law §236 (B) (6) (a) which provides as follows "except where the

parties have entered into an agreement pursuant to subdivision 3 of this part providing for maintenance, in any matrimonial action the court may order temporary maintenance or maintenance in such an amount as justice requires, having regard for the standard of living of the parties established during the marriage, whether the party in who's favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs and whether the other party has sufficient property or income to provide for the reasonable needs of the other and the circumstances of the case and of the respective parties. Such Order shall be effective as of the date of application therefore, and any retroactive amount of maintenance due shall be paid in one sum or periodic sums, as the court shall direct, taking into account any amount of temporary maintenance which has been paid. In determining the amount and duration of maintenance the court shall consider:

1. *The income and property of the respective parties including marital property distributed pursuant to subdivision 5 of this part;* the defendant testified that his annual income presently is the sum of \$43,154.00. There will also be an increase in the defendant's social security commencing in January 2009. The plaintiff is unemployed and has no income and receives Department of Social Services benefits in the form of an apartment subsidy, food stamps in the sum of \$175.00 per month, and a \$19.00 monthly cash allowance.
2. *The duration of the marriage and the age and health of both parties;* the parties were married on November 26, 2005; the health of the defendant is fair and the health of the plaintiff is poor;
3. *The present and future earning capacity of both parties;* the defendant will continue to receive pension benefits and social security benefits and his income will remain fairly constant

although he will be entitled to cost of living increases from the Social Security Administration on a yearly basis. The plaintiff has no income at this point and time. She speaks very little English and although she was trained in Ukraine as an accountant she will not be able to obtain employment as a result of her inability to understand English and her various health problems.

4. *The ability of the party seeking maintenance to become self supporting and if applicable, the period of time and training necessary therefore;* the plaintiff is unlikely to ever become self supporting since she has health problems which affect her ability to attend college in order to learn English and to learn any skills in employment and/or to improve her skills in employment. Therefore non-durational maintenance is appropriate in this case.

5. *Reduced or lost life-time earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage;* this factor is inapplicable in this case.

6. *The presence of children of the marriage in the respective homes of the parties;* this factor is inapplicable in this case since there are no children of the marriage.

7. *The tax consequences to each party;* maintenance is taxable to the plaintiff and deductible by the defendant on their respective federal and state income tax returns.

8. *Contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;* the plaintiff contributed homemaker services to the defendant.

9. *The wasteful dissipation of marital property by either spouse;* this factor is inapplicable in this case.

10. *Any transfer or incumbrance made in contemplation of the matrimonial action without*

fair consideration; this factor is inapplicable in this case.

11. *Any other factor which the court shall expressly find to be just and proper*; in order for the defendant to obtain a visa for the plaintiff to enter the United States he was compelled to sign an affidavit of support indicating that he would provide full support for the plaintiff when she entered the United States of America. In *Dunnann v. Dunnann*, 261 AD2d 195 (1st Dept. 1999) the court directed the plaintiff to pay the defendant permanent life time maintenance and stated “the trial court, in determining maintenance, appropriately considered the payee spouse’s reasonable needs and pre divorce standard of living in the context of the other enumerated statutory factors, and then, in the sound exercise of it’s discretion established a fair and equitable maintenance award in the amount of \$5,000.00 per month. In *Zelnik v. Zelnik*, 169 AD2d 317 (1st Dept. 1991) the court directed payment of monthly maintenance in the sum of \$2,500.00 to the wife until she remarried or died. The court held that a time limitation on maintenance should be imposed only to enable the dependant spouse to obtain training to become financially independent or to allow such spouse to restore his or her earning power to a previous level. The court went on to further state “there was, however, no such durational limitation with respect to the wife’s maintenance. Such a limitation should not be imposed where the needy spouse is unlikely to be completely self supporting (*see Malamut v. Malamut*, 133 Ad2d 101).” In *Recuppio v. Recuppio*, 246 AD2d 342 (1st Dept. 1998), the court increased the spousal maintenance award under New York Domestic Relations Law §236 (b) (6) (a) and made it permanent. The court held that an award of spousal maintenance is exceptionally low and warrants a substantial increase as well as permanent status where the trial court’s award falls well below the plaintiff’s monthly expenses for bare necessities and falls below the marital standard of living. The award should be permanent where

the record is devoid for any basis for assuming that the plaintiff might become financially self sufficient in the foreseeable future. In *Jones v. Jones*, 133 AD2nd 217 (2nd Dept. 1987) the court held that the trial court did not err in finding that the wife was unemployable and in awarding her maintenance for an unlimited time. The courts stated “therefore, the trial court properly awarded maintenance for an unlimited time based upon it’s finding that the defendant wife was incapable of becoming self supporting due to her age, lack of advanced education, her poor mental health and her spotty employment record since the onset of her psychiatric problems.” In *DiFilippo v. DiFilippo*, 262 AD2d 1070 (4th Dept. 1999) the court held that the decision to limit the duration of the maintenance period was not in accord with the intent of New York Domestic Relations Law § 236 (B) (6). The court ruled that the defendant husband’s obligation to provide maintenance would continue until the death of either party or upon plaintiff’s remarriage or until modified by court order. In *Green v. Green*, 13 AD3rd 1178 (4th Dept. 2004) the court held that maintenance shall terminate upon the death of either party or the marriage of the defendant or until modified by court order. In *Moody v. Moody*, 2007 NYSLPOP 947 (4th Dept. 2007) the court stated “pursuant to eight U.S.C.S. § 1183 (a) (e) (1), an action to enforce an affidavit of support could be brought in any appropriate court by a sponsored immigrant, with respect to financial support. Thus, the wife, a sponsored immigrant, had independent standing to enforce the husband’s obligation in any federal or state court. In said case in July of 1999 the plaintiff executed a federal affidavit of support from I-864, in which he agreed, *inter alia*, to support defendant at or above 125% of the federal poverty line until the occurrence of a qualifying terminating event.

In the instant case the plaintiff has no future earning capacity due to her inability to obtain

employment and her status as a welfare recipient. Her lack of knowledge of the English language is a barrier to the plaintiff's ability to obtain employment as well as her poor health condition. The plaintiff is enduring a substandard existence since she has been relegated to receiving social services benefits and the defendant has provided no support for her. The plaintiff is well below the pre-divorce standard of living at the present time and the court must consider said pre-divorce standard of living in making a maintenance award.

Since the plaintiff is a public charge and in poor health she most certainly is entitled to maintenance. The defendant has an obligation to support the plaintiff and to not allow her to become or remain a public charge. Under similar circumstances the trial court ordered life-time maintenance for the immigrant spouse who had never worked and was unable to find suitable employment. (*see, Rocano v. Rocano*, 12 Misc 3rd 1169 (A) [Supreme Court King's County 2006]).

The defendant is bound by the affidavit of support that he provided to the immigration authorities indicating that he would be completely liable for the plaintiff's support once she had obtained a visa which allowed her to enter the United States. (*see, 8 U.S.C. § 1182 [a]*).

ATTORNEY FEES

1. The plaintiff has made an application for counsel fees and plaintiff's counsel supplied an affidavit of services indicating a request for counsel fees in the sum [REDACTED]. Domestic Relations Law § 237 provides that in an action for a divorce the court may award counsel fees "to enable a spouse to carry on or defend the action or proceeding, as, in the court's discretion, justice requires, having regard to the circumstances of the case and the respective parties.
2. The Court of Appeals and its ruling in *Decabrera v. Decabrera-Rosete*, 70 NY2d 879

(1987), has held that indigence is not a prerequisite to an award of counsel fees pursuant to Domestic Relations Law § 237. In considering an application for an award of counsel fees the court shall consider “equities in circumstances” of the case before it. (*Vasile v. Vasile*, 122 AD2d 759).

3. The respective financial circumstances of the parties are of paramount importance in determining whether an award of counsel fees should be granted. In analyzing the financial circumstances of the parties, the court must look at both the respective resources of the parties’ and the parties’ income. However, either disparate assets or income can justify an award of counsel fees to the economically disadvantaged litigant. In the case of *Weinstein v. Weinstein*, 18 AD3d 246 (1st Dept. 2005), the court considered one partie’s “substantial resources” in that he was “far more able - - - to pay legal fees” when awarding mother counsel fees in a custody litigation.

4. When looking at the parties’ incomes in the case of *Yarinsky v. Yarinsky*, 25 AD3d 1042 (3rd Dept 2006), the court awarded attorney fees where the financial circumstances were “vastly disproportionate.” Similarly, in *Kaplan v. Kaplan*, 28 AD3d 523 (2nd Dept 2006) counsel fees were awarded to the spouse who did not have the “substantial annual income” of her spouse. In the present case the financial resources of the defendant are far superior of those of the plaintiff and the defendant has substantial income whereas the plaintiff has no income. As a result thereof, the plaintiff is entitled to an award of counsel fees from the defendant.

CONCLUSIONS OF LAW

1. The plaintiff is entitled to a decree of absolute of divorce based upon the cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so

endangered the physical and mental well being of the plaintiff as rendered it unsafe or improper for the plaintiff to co-habit with the defendant.

2. The plaintiff is entitled to non-durational maintenance from the defendant in the sum of \$1,100.00 per month which shall be paid by the defendant to the plaintiff until such time as the plaintiff dies, remarries, or by further order of this court. Maintenance payments are retroactive to the date of the commencement of the divorce proceeding which was October 16, 2007.

3. The plaintiff is entitled to counsel fees in the sum of [REDACTED] to be paid by the defendant to the plaintiff within 30 days from the date of the entry of this Decision and Order. The plaintiff shall be entitled to judgment without further notice to the defendant along with interest at the rate of 9% per annum within 30 days from the date of the entry of the Decision and Order herein. This is the Decision and Order of the Court.

Dated: Rochester, New York
February 3, 2009

[REDACTED]
[REDACTED], Esq.
Court Attorney Referee