

EXAMINER'S ANALYSIS OF QUESTION NO. 9

Faith should prevail because her arguments are far more consistent with applicable Michigan law. As an initial matter, the court has the authority to amend its previous judgment as to support. The moving party, however, must allege and prove a proper cause or a change in circumstances. MCL 722.27(1)(c). A significant change in incomes of the payer and recipient of support can establish proper cause or a change in circumstances. Compare *Maier v Brablec*, 125 Mich App 511, 514 (1983); *Sayre v Sayre*, 129 Mich App 249 (1983). Moreover, Faith is correct that the setting of support is primarily determined by the Michigan Child Support Guidelines. MCL 552.605. The hallmark of the Guidelines' support formula is the net incomes of the payer and recipient of the child support, together with the number of children eligible for support. "Income" can include gambling winnings from state-sponsored lotteries. MCL 552.602(o)(iii); 2017 MCSF 2.01(C)(5).

In the face of these cogent arguments, Larry simply maintains the children "had all they need." While, at best, this is an extreme stretch to an argument that there should be a downward deviation from the figure called for under the guidelines, this barren, subjective assertion does not establish a legal basis for deviation. See MCL 552.605(2)(a)-(d) and *Burba v Burma*, 461 Mich 637 (2000). Finally, Larry's argument ignores Faith's reduction in income.

Accordingly, Faith is likely to prevail on getting support raised to an amount called for by the guidelines based on the parties' expressed positions.

On the question of retroactivity of any increase in support, Larry is correct - but only partially so: Michigan limits the retroactivity of modifications in child support. MCL 552.603(2) states in pertinent part:

Retroactive modification of a support payment due under a support order is permissible with respect to a period during which there is pending a petition for modification, but only from the date *notice of the petition was given* to the payer or recipient of support. (Emphasis added.)

Support may be modified retroactively, but only from the date of service on the non-moving party of the petition to modify. See *Waple v Waple*, 179 Mich App 673, 677 (1989); *Harvey v Harvey*, 237

Mich App 432, 437, 438 (1999); *Cipriano v Cipriano*, 289 Mich App 361, 374 (2010); and *Malone v Malone*, 279 Mich App 280, 286 (2008).

Applying the foregoing to the facts yields the conclusion that neither Larry nor Faith are fully correct. Support may be retroactively modified in contrast to what Larry maintains, but not to the date Larry got his first lottery check, as Faith requests. Rather, it is retroactive only to August 1, 2019, the date Larry was served with Faith's request.

On Faith's third request - for Larry to pay towards her attorney fee bill - Larry's position is not well-taken. His contention that he would not be obligated to pay Faith's bill because they are not married ignores MCR 3.206 and the cases interpreting it. In pertinent part, MCR 3.206(D) states:

(1) A party may at any time request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, *including a post-judgment proceeding*. (Emphasis added.)

(2) A party who requests attorney fees and expenses must allege facts sufficient to show that

(a) the party is unable to bear the expense of the action, . . . and that the other party is able to pay, [.]

Clearly from the foregoing, Larry's argument that he need not pay toward Faith's fees because they are no longer married holds no water in light of MCR 3.206(D)(1)(a). See also *Smith v Smith*, 278 Mich App 198, 207 (2008). Accord, *Colen v Colen*, Michigan Court of Appeals No. 345318, released for publication February 4, 2020. (Award of attorney fees for post-judgment action authorized under MCR 3.206[D][1][a] based on parties' financial circumstances, but requesting party must make factual showing.)

As the applicant for an attorney fee award, Faith's argument must still satisfy subsection (D)(2)(a) of MCR 3.206. In this regard, she must demonstrate her lack of sufficient funds to pay her attorney and Larry's ability to pay. Faith establishes both of the rule's demands.

As to her lack of funds, Faith has submitted a minimal budget that reveals she has but \$25 per month in disposable, discretionary income. She had to borrow a portion of the retainer fee and still owes her lawyer \$2,500. This sum is more than she makes in a month. And her personal financial situation is not soon to improve, given

her pay reduction is permanent. On the second component, Larry is able to pay, given he has gained a 150% increase in monthly income, and it is locked in for thirty years. Should he be ordered to pay the \$2,500 to Faith's lawyer, this would represent a small fraction of just one month of his lottery income, as contrasted by the same sum wiping out a month of Faith's entire wages. Finally, Larry has not remarried nor had more children. The facts provide nothing to conclude there are other demands on his income, underscoring his financial ability to pay Faith's attorney fees.

Faith should prevail on her attorney fee request.