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FAMILY COURT OF THE STATE OF NEW YORK

COUNTY OF CAYUGA

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MICHELLE DAVIS, : Index No. F1568-95

Petitioner, :

-against- :

LEROY LEUBNER, JR., :

Respondent. : Modify Support

-----x

Cayuga County Courthouse  
Auburn, New York

April 12, 1996

B e f o r e :

HON. PETER E. CORNING,

Justice

A p p e a r a n c e s :

SAMUEL P. GIACONA, ESQ.

Attorney for Department of Social Services  
Cayuga County Office Building  
Auburn, New York 13021

Lisa M. Clark  
RPR, RMR, CSR

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THE COURT: Okay. This is Michelle Davis?

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MS. DAVIS: Yes, sir.

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THE COURT: And Leroy Leubner?

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MR. LEUBNER: Yes, sir.

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THE COURT: Michelle has moved to modify the support and I referred it to the Hearing Examiner.

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How did it get back to me I wonder? Do you know?

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THE CLERK: Judge, I'm looking here. I'm not -- no. It's, must be a mistake.

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THE COURT: What are you asking here for, Michelle?

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MS. DAVIS: I had the three issues that we adjourned, Your Honor, were income execution, modification of support and a tax deduction modification.

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THE COURT: Okay, and, Leroy, how did you feel about those?

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MR. LEUBNER: Well, first of all, we came here last year to Mr. Shamon about because she didn't like the way I was paying my support.

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THE COURT: I'm sorry?

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MR. LEUBNER: She had me back here last

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2 year to try to get me to garnish my wages  
3 because she didn't like the way I was paying my  
4 support and a schedule was imposed as of that  
5 time by your own hand. I have kept that  
6 schedule. I don't want to be garnished.

7 THE COURT: Are you paying \$740 a month?

8 MR. LEUBNER: Yes, I am.

9 THE COURT: Is he?

10 MS. DAVIS: Yes, he is, Your Honor. I  
11 simply do not want to deal -- I don't think I  
12 should be forced to deal with him on a personal  
13 level to collect child support. I want it --

14 THE COURT: What happens? Tell me.

15 MS. DAVIS: We do not get along very well.

16 THE COURT: I understand that.

17 MS. DAVIS: We have disagreements and  
18 there are threats of repercussions and I -- he  
19 does pay me but he pays me very late in the  
20 evening after 8:30. Last payment came not on  
21 the schedule date, the date after, but he try --

22 THE COURT: But Social Services it will  
23 come a month after.

24 MS. DAVIS: That's fine with me. I am  
25 requesting not to have to be forced to deal with

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it.

THE COURT: If I order him to pay Social Services will they automatically enter a wage deduction?

MR. GIACONA: I think so, Judge, unless you order otherwise. You're the Judge.

THE COURT: Well, I'll order otherwise.

MR. GIACONA: Okay. Seven hundred and forty dollars a month?

MR. LEUBNER: Yes, 1st and 15th; 370 1st, 370 in the 15th. That's the Court-imposed schedule.

THE COURT: Okay. What I'm saying to you, Roy, is this. I'm not going to enter a garnishee but make your payments to Social Services.

MR. LEUBNER: That'll be fine. Give me a place to pay it and I'll pay it.

THE COURT: We'll give you the little card here. So it's 315 -- 335?

MR. LEUBNER: It's 370.

THE COURT: Oh, it's 370?

MR. LEUBNER: Yeah.

THE COURT: Okay.

MR. LEUBNER: First and 15th.

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THE COURT: No problem on that then.

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MR. GIACONA: So it would be 370 biweekly?

4

THE COURT: Yeah.

5

MR. LEUBNER: First and 15th. It's not quite biweekly.

6

7

THE COURT: First and 15th.

8

Okay. What else do you want?

9

MS. DAVIS: There -- it will be no modifications, Your Honor? I believe this figure is well below the basic child support --

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THE COURT: Standards Act?

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MS. DAVIS: -- obligation. Yes.

14

THE COURT: How much do you earn, Roy?

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MR. LEUBNER: I have my W-2 here, sir.

16

THE COURT: May I see it?

17

MR. LEUBNER: Sure (handing).

18

MR. GIACONA: Wasn't this referred to the Hearing Examiner?

19

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MR. LEUBNER: Yeah, it was referred to the Hearing Examiner.

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THE COURT: What happened? How did we get back here I wonder?

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MR. LEUBNER: I don't know if -- I thought we were going to see Mr. Shamon.

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THE COURT: Well, maybe that's where you're probably supposed to be.

MS. DAVIS: Yes, I think so.

THE COURT: Is he still working? Is he still there?

MR. GIACONA: It's on your calendar, Your Honor.

THE COURT: Huh? It's on my calendar?

MR. LEUBNER: However, though, first of all, we just got divorced last year. It's not time yet for a raise.

Second of all, I have the minutes from the divorce proceedings and her lawyer allowed me a slightly less, lower payment because of the fact that I gave away \$25,000 in equity in the house.

THE COURT: Okay. Is there a divorce decree?

MR. LEUBNER: Yeah, there's divorce decree.

MR. GIACONA: I'm not involved.

THE COURT: Okay. Well, if there's a divorce decree and you agreed to it, how are you going to change it?

MR. LEUBNER: I have the minutes.

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MS. DAVIS: According to New York State Department of Social Services there is no law that says that I have to wait a specified amount of time. I was not aware of his earnings at the time of our divorce, Your Honor.

THE COURT: Did you have a lawyer?

MS. DAVIS: They are significantly below --

THE COURT: Did you have a lawyer?

MS. DAVIS: Yes, I did but --

THE COURT: Who was your lawyer?

MS. DAVIS: Patricia Lawler.

THE COURT: Were you given \$25,000?

MS. DAVIS: No.

MR. LEUBNER: In equity in the house. I signed the house over.

MS. DAVIS: We had a home equity loan and I had to take over double of the amount he had to take over. I don't believe that has any bearing on --

THE COURT: Sure it does. When you sign, when you agree to something, it's a contract. You can't agree to something and say, yes, I will, here's my hand, I'll sign it and then turn around the next day and say, oh, I didn't really

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mean to sign it or I don't want to sign it.  
That's the law. This is the decree. This is an  
order of the Court.

MS. DAVIS: Um hum.

THE COURT: This is what binds him,  
period.

Now unless there's something in there that  
is improper, that if Miss Lawler wants to come  
in here and say he committed fraud or something  
and did not, was not aware of his income, that's  
fine; but otherwise, that was what the agreement  
was.

MS. DAVIS: And there's no -- you cannot  
modify that?

THE COURT: Maybe later on with a change  
of circumstances you might be able to modify it  
but absolutely no, the answer is no. I mean,  
what does an agreement mean if you don't have to  
live by it?

MS. DAVIS: Your Honor --

THE COURT: That's what the term means,  
contract.

MS. DAVIS: Your Honor, I'm not arguing  
over \$50. I'm arguing over hundreds of dollars.

1  
2 THE COURT: I don't care what you're  
3 arguing over. You appeared in court in front of  
4 Judge Contiguglia. Let's see. Mr. Chirco: Two  
5 changes, Judge. I believe there's an amendment  
6 or change in the separation agreement. Then you  
7 see he will now pay \$745 -- \$740 and that they  
8 presently own property at 5706 West Lake Road.  
9 Mr. Leubner will turn over all right, title and  
10 interest in and to the property to Michelle  
11 Leubner.

12 "With respect to the child support, it  
13 does comply substantially with the Child Support  
14 Standards Act. Mr. Chirco has provided me with  
15 a copy of Mr. Leubner's 1993 W-2 form which  
16 indicates his gross income was 35,211. There  
17 are three children. The Child Support Standards  
18 Act would call for \$181.35 a week or 785 a  
19 month. Seven eighty-five a month substantially  
20 complies with the Child Support Standards Act."

21 Now you were going to give me a W-2 form?

22 MR. LEUBNER: I, I believe you have it,  
23 sir. I gave it to the bailiff or to the deputy.

24 THE COURT: Okay. Just a matter of me  
25 finding it obviously.

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Okay. So now, so '93 was 35,000. Now it's forty. Where do you work, sir?

MR. LEUBNER: I work at the prison, sir.

THE COURT: Okay.

MR. LEUBNER: As part of that agreement I had re-financed part of the home equity loan. I pay \$135 a month on a personal loan I was forced to take out to cover that balance of the loan.

MS. DAVIS: And I did \$11,000 of that loan.

MR. LEUBNER: So I pay 740 a month support, 135 for that loan. So I'm almost up to that level there with the two, with the compensation.

MS. DAVIS: Your Honor, I make \$18,000 and I had to take \$11,000 of that home equity loan where he had to take under five.

I also have three children that live with me that I support, that I pay everything. I mean, I took a lot more debt load than Mr. Leubner did and I make \$18,000, and I have a W-2 if you'd like that.

THE COURT: What is the law, Sam, on the, on the re -- I know now --

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MR. GIACONA: Every --

THE COURT: -- under the law every three years or something?

MR. GIACONA: Every three years, right, but there has to be an unanticipated, substantial --

THE COURT: Change in circumstances?

MR. GIACONA: -- substantial change in circumstances.

THE COURT: Yeah.

MS. DAVIS: I have this chart if you need it, Your Honor.

THE COURT: I know what the chart is. The point is you entered into an agreement and it, it, it is anticipated that when someone enters an agreement, the other person will live by it.

You just can't enter into an agreement and then say, okay, I want a change. This is the agreement. That's the law. You had an attorney. She was well aware of his income. He wasn't hiding his income.

Now she -- and based upon that, the agreement was entered into. It becomes the law of the case and it cannot be changed unless, as

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Mr. Giacona states, you come forward with an unanticipated change of circumstances which would justify the Court in looking into it, and --

MS. DAVIS: So the basic child support obligation is not --

THE COURT: -- if it were entered into. No, it's not the law. It is, it is a guide and certainly the -- it is subject to all the other laws of the State of New York, including the laws of contract.

Now as I understand it under the new provisions every three years it has to be reviewed, and is it brought up to date? Does that include divorce decrees too?

MR. GIACONA: Everything, Your Honor, as I understand it.

THE COURT: So it would be a three-year period that it would be reviewed?

MR. GIACONA: Right.

THE COURT: And at that time presumably it would be --

MR. GIACONA: Adjusted.

THE COURT: -- reviewed and adjusted, but unless you can show an unanticipated change of

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2 circumstances which would -- either a downward  
3 side for you or an upward side for him or a  
4 change in necessities or something like that,  
5 the law of the case becomes the, the decree of  
6 divorce.

7 Now what was your third item?

8 MS. DAVIS: Tax deductions.

9 THE COURT: Well --

10 MR. LEUBNER: That's part of the divorce  
11 decree too, sir.

12 THE COURT: Yes, it is.

13 MS. DAVIS: For four years I have allowed  
14 him to take two of my children.

15 THE COURT: You've agreed to it. Did you  
16 agree to it? I don't know. He says you did.  
17 Let's see.

18 MS. DAVIS: I did, Your Honor, but I  
19 didn't understand that this could never be  
20 changed.

21 MR. LEUBNER: It's in the separation  
22 agreement.

23 THE COURT: Well, this is only a year  
24 later.

25 MS. DAVIS: I support my children. No,

1  
2 this is since the separation in '91. I have  
3 allowed him to take two of the children. I  
4 support my children. My children live with me.  
5 I provided over three quarters of their support.  
6 I think that I'm custodial parent, I should be  
7 able to claim more than one child on my taxes at  
8 the end of the year.

9 Mr. Leubner claims two of them. They  
10 don't live with him.

11 THE COURT: Yeah, but he's paying \$740 a  
12 month.

13 MS. DAVIS: Yeah, two hundred and  
14 something dollars under the basic child support  
15 obligation, and I, I called this Department of  
16 Social Services and they weren't aware of any  
17 law that prohibits modification of any type of  
18 court order. They told me if that was the case  
19 we wouldn't have --

20 THE COURT: They are not lawyers, Ma'am.  
21 Why don't you hire a lawyer.

22 MS. DAVIS: I didn't think I needed one,  
23 Your Honor. I thought that --

24 THE COURT: Well, why don't you get a, and  
25 let him tell you what the law is.

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MR. LEUBNER: I --

MS. DAVIS: I thought it was the basic child support.

THE COURT: And it was at the time you entered the agreement.

Okay. Thank you.

MR. GIACONA: Your Honor, I think your file contains some of his, his decree and the transcript.

THE COURT: (handing).

Now I believe at the end of three years, Miss Leubner (sic), the matter would be reviewed under the present situation.

MR. GIACONA: Your Honor, he's to make those payments directly to Support Collection but in the event he misses three consecutive payments, we will start garnisheeing --

MR. LEUBNER: Yeah. That won't happen.

MR. GIACONA: -- his wages.

That's where you make the payments (handing).

MR. LEUBNER: Yeah. Thanks.

MS. DAVIS: So I need to seek legal advice to change this document, is that what you're

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telling me, Your Honor?

THE COURT: Are you -- do you listen? I'm trying to tell you what the law is.

MS. DAVIS: Yes, I do.

THE COURT: Do you listen?

MS. DAVIS: For the rest --

THE COURT: Just listen to me. You entered into an agreement. That becomes a contract. He is entitled to rely on that contract. Now forget -- that's number one.

Number two, if you came in without any agreement or any contract and you filed for support, the Court would consider the guidelines. Now that's -- guidelines are exactly that, guidelines.

Now the fact that he's paying money, and I don't understand the ramifications of this equity loan, but that may enter into the situation; but the point is that when he -- the guidelines were taken into consideration at the time you entered this divorce decree, which is a contract.

Pat Lawler made specific reference that the guidelines were, in fact, followed; and

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based upon that, that becomes a contract on which he can rely.

Now in the old days it would go on indefinitely, but now under the rules and regulations after three years it is reviewed or can be reviewed to be updated; but barring that, it becomes the law of this case and, and, and that's the way it is.

Now if you have a hard time understanding that, what I'm saying is, consult with an attorney and get his opinion.

MS. DAVIS: Three years from the separation or the divorce decree, Your Honor?

**THE COURT:** Three years from the date of -- the decree was entered into.

MS. DAVIS: Okay.

**THE COURT:** 'Cuz that was modified at that time.

Now the second thing is that if there were an unanticipated change of circumstances, let's say -- I mean, it would be fairly well anticipated in 1994 that he would be getting certain raises, as all -- most state employees do, whatever the case may be or working some

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2 overtime. So that's not unanticipated, but  
3 let's say he got -- he won the lottery. That's  
4 certainly unanticipated.

5 At that point you could come in and say,  
6 Judge, this is an unanticipated change of  
7 circumstances which would justify you in  
8 reviewing this matter.

9 Or let's say you lost your job or  
10 something like that --

11 MS. DAVIS: I don't really care about the  
12 support. I did really want a couple of my  
13 children every other year at tax time. I didn't  
14 think that was unreasonable since they do live  
15 with me and I do pay three quarters of their  
16 support.

17 THE COURT: Well, the point is --

18 MS. DAVIS: I mean, I didn't think that  
19 was --

20 THE COURT: -- legally and monetarily they  
21 are probably worth more to him than they are to  
22 you, but I don't know that. I'm not a tax  
23 lawyer, but again, you entered into this  
24 agreement and maybe you should talk to Miss  
25 Lawler about it.

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Okay. Thank you.

MS. DAVIS: Thank you.

MR. LEUBNER: Thank you.

\* \* \* \*

## REPORTER'S CERTIFICATION

I, Lisa M. Clark, do hereby certify that I am an Official Court Reporter of the County Court at Auburn, New York, duly appointed.

That I reported in stenotype shorthand the Modify Support had before the HON. PETER E. CORNING, Family Court Judge, on the 12th day of April, 1996, in the matter of MICHELLE DAVIS, PETITIONER, vs. LEROY LEUBNER, JR., RESPONDENT; and

That the transcript herewith numbered pages 1 through 19 is a true, accurate and correct transcript of those stenotype shorthand notes.

DATED AT: Auburn, New York

this 5<sup>th</sup> day of August, 19 97,

*Lisa M. Clark*