

Who is the less monied spouse?
By Joel R. Brandes

Domestic Relations Law §237 and 238 provide that in certain matrimonial actions, such as an action for a divorce, the court may direct either spouse to pay counsel fees and expenses of experts to the other spouse. Since 2010 both statutes contain “a rebuttable presumption that counsel fees shall be awarded to the less monied spouse.”¹ As a consequence of the amendment counsel fee cases decided prior to 2010 may no longer be authoritative.

Before Domestic Relations Law §237 and 238 were amended in 2010, it had been held that an award of attorney's fees to the monied spouse was not proper under Domestic Relations Law §237. In *Silverman v. Silverman*,² a case which preceded the 2010 amendment, the Supreme Court awarded the husband \$50,000 in attorney's fees, noting that this award was based upon the dilatory conduct of both the wife and her then counsel. This conduct was principally founded upon her adherence, through the litigation, to the contention that the husband had secret offshore assets, which she was ultimately unable to prove, although it also included other acts by her that the court considered to have substantially increased the amount of fees he had to incur in the course of litigation.

The Appellate Division reversed,³ holding that this award of attorney's fees to the monied spouse was not proper because it did not comport with the purpose and policies of that part of Domestic Relations Law Section 237 (a) which permits the court to direct either spouse to pay counsel fees to the other spouse “to enable that 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 of the respective parties.” It pointed out that the intent of the provision is to ensure a just resolution of the issues by creating a more level playing field with respect to the parties' respective abilities to pay counsel, to make sure that marital litigation is shaped not by the power of the bankroll but by the power of the evidence. It noted that the statute's reference to “having regard to the circumstances of the case and of the respective parties” permits consideration of many factors, but focuses primarily upon the paramount factor of financial need. Here, the husbands earning capacity going forward was substantially higher than the wife's, such that he would be capable of maintaining or approximating the lifestyle the couple previously enjoyed, while she would not. An award of counsel fees to him would not level the playing field, but would serve merely to the wife for what the court viewed as wasteful, frivolous litigation conduct. The Court observed that while it is conceivable that a counsel fee award to which a nonmonied spouse might otherwise be entitled could be reduced to the extent that party's conduct was considered to be frivolous or wasteful, it held that it is improper to direct the nonmonied spouse to pay a portion of the other's fees under Domestic Relations Law §237.

¹ Laws of 2010, Ch 329, effective October 12, 2010.

² 304 A.D.2d 41, 47-49, 756 N.Y.S.2d 14 (1st Dep't., 2003)

³ Id.

Since the enactment of the rebuttable presumption that counsel fees shall be awarded to the less monied spouse the First Department has held that an award of counsel fees under Domestic Relations Law § 237 cannot be made merely to punish a less monied spouse for litigation conduct.⁴

The First Department has also held that where neither party is the less monied spouse, and both are able to pay their own counsel fees, the appropriate remedy where a party's inappropriate litigation conduct has adversely affected the other party is a sanction. In *Roddy v Roddy*,⁵ the court reversed an order of the Supreme Court which directed that the husband to pay a portion of the wife's counsel fees. The court awarded legal fees to the husband based upon its consideration of the merits of the wife's positions in the parties' custody litigation. The court also adopted the special referee's findings that neither party was the "monied spouse," and that each was capable of paying his or her own counsel fees." The Appellate Division held that under these circumstances, the award of counsel fees under the Domestic Relations Law was improper. It held that where a party's inappropriate litigation conduct has adversely affected the other party but both are able to pay their own counsel fees, the appropriate remedy may be a sanction under 22 NYCRR 130-1.1, not an award of attorneys' fees. *Roddy* appears to have impliedly overruled the First Department's earlier holding in *Lammers v Lammers*⁶ which held that the award of attorneys' fees to the monied spouse was proper because it primarily compensated the husband for delays in the trial caused by the wife, the penalizing component, if any, being secondary.

Prior to 2010 the Second Department adopted the rules established in *Silverman in Hathaway v. Hathaway*⁷ where it held that Supreme Court erred in directing that the plaintiff's "outstanding legal fees ... and those fees paid previously from her separate property ... be paid to plaintiff's counsel and reimbursed to plaintiff, respectively, from the marital assets prior to the distribution to the parties." This provision effectively made the defendant-husband, the non-monied spouse, pay a substantial portion of the counsel fees of the monied spouse, the wife, who was worth over \$1 million, in violation of Domestic Relations Law § 237 and, therefore, was improper.

However, the Second Department has not embraced the First Department rule that an award of counsel fees under Domestic Relations Law § 237 cannot be made merely to punish a less monied spouse for litigation conduct.⁸ It has held that a court may award sanctions and counsel fees where a party has engaged in frivolous conduct pursuant to 22 NYCRR 130-1.1.⁹ It has also held, where the wife's income was higher than the husband's income, that the court providently exercised his discretion in determining that the wife was entitled to attorneys' fees, based on the finding that the

⁴ *Wells v. Serman*, 92 A.D.3d 555, 938 N.Y.S.2d 439 (1st Dep't., 2012)

⁵ *Roddy v Roddy*, 161 A.D.3d 441, 76 N.Y.S.3d 141161 A.D.3d 441 (1st Dept., 2018)

⁶ 227 A.D.2d 255, 255-56 (1s Dept., 1996)

⁷ 16 A.D.3d 458, 460-61, 791 N.Y.S.2d 631, 634 (2d Dep't., 2005)

⁸ *Wells v. Serman*, supra, n.4

⁹ *Weissman v. Weissman*, 116 A.D.3d 848, 985 N.Y.S.2d 93 (2nd Dep't., 2014)

husband's conduct delayed the litigation.¹⁰ It is impossible to reconcile the Second Department decisions which affirm counsel fee awards to the monied spouse, rather than the less monied spouse, with those of the First Department.

Who is the less monied spouse? In determining who is the monied spouse courts look in the first instance to the income of the parties and their respective financial circumstances at the time it renders the decision.¹¹ However, it has been held that the shift in financial resources that results from a child support award rebuts the presumption of the payor spouse being the "monied" spouse. In *Scott M. v. Ilona M.*,¹² the Supreme Court found that the mandatory pendente lite counsel fee statutes should be deviated from where the calculations will result in the payee spouse having more monies available than the payor spouse as a result of the child support guidelines calculation. The Court determined that the shift in financial resources that results from the guideline calculation rebutted the presumption of the payor spouse being the "monied" spouse.

Recently, the Appellate Division First Department held that in determining who is the less monied spouse the Court should weigh the historical and future earning capacities of both parties, and the value of their assets.¹³ In *Sanders v Guberman* the Court held that the applications for interim counsel fees were improperly denied. The court erred by failing to designate defendant as the less monied spouse. The court's analysis unduly relied on the current incomes of the parties and did not sufficiently consider the value of their assets. Instead of focusing simply on their current incomes, the court should have also weighed the earning history and earning potential of both parties. Although plaintiff was unemployed at the time the motions were made, she earned considerably more than defendant during the course of their relationship, and according to the court's own finding, expected to earn more than defendant upon finding new employment. While the court recognized that plaintiff had more assets than defendant, it reasoned that the assets were "unlikely to produce an income that is equal to [defendant's]" and mistakenly exempted them from its analysis. It pointed out that, as it did here, excluding assets merely because they do not generate income can severely distort the financial positions of the parties.

In *Matter of Brookelyn M.*,¹⁴ the court denied the mother's request for counsel fees because, among other reasons, she retained private counsel although she was unemployed at the onset of the litigation. At the time the decision was rendered, she earned an annual gross income of \$44,000, and the father was unemployed. The court also found that the conduct of the parties throughout the custody matter did not support an award of counsel fees because it found no evidence that the father unnecessarily

¹⁰ *Odermatt v. Odermatt*, 119 A.D.3d 754, 989 N.Y.S.2d 335 (2d Dep't., 2014)

¹¹ See, for example *Gaetano D. v. Antoinette D.*, 37 Misc. 3d 990, 955 N.Y.S.2d 752 (Sup. 2012)

¹² 31 Misc. 3d 353, 915 N.Y.S.2d 834 (Sup. 2011); To the same effect see *Margaret A. v. Shawn B.*, 31 Misc. 3d 769, 921 N.Y.S.2d 476 (Sup. 2011); *Gaetano D. v. Antoinette D.*, supra.

¹³ *Saunders v. Guberman*, 130 A.D.3d 510, 511, 14 N.Y.S.3d 334 [1st Dept., 2015]

¹⁴ *Matter of Brookelyn M., v Christopher M.*, 161 A.D.3d 662, 77 N.Y.S.3d 390(1st Dept. 2018).

prolonged the litigation or that he caused undue fees to accrue in the litigation. The Appellate Division reversed and remitted for a hearing. It found that in its dismissal of the mother's motion for counsel fees, the court unduly relied upon the financial circumstances of the parties at the time it rendered its decision rather than weighing the historical and future earning capacities of both parties. Here, although the father was unemployed at the time the court's decision was rendered, and the mother had secured employment, the father earned considerably more than the mother during the course of their relationship and had significantly more expected earning capacity than the mother.

Conclusion

There is no uniform rule a court may apply to determine who is the less monied spouse. Is the less monied spouse the spouse who earns less or the spouse with less assets? Does the shift in financial resources that results from a child support award rebut the presumption that the spouse with a greater income is the "monied" spouse? Is the less monied spouse the one whose historical earnings are less, or the one whose future earning capacity is less? The legislature intended to level the playing field with respect to the party's respective abilities to pay counsel by adopting the presumption that counsel fees shall be awarded to the less monied spouse. Until a uniform rule is established for determining who is the less monied spouse the "playing field" will not be level.

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