

New York Law - Counsel Fee Awards ¹

Counsel Fee Awards - Authority to Make Award and Rebuttable Presumption that Monied Spouse Pay Counsel Fees

Counsel fee awards are made in the court's discretion. Their primary purpose is not to reward or punish a spouse, but to enable a needy person to carry on or defend an action or proceeding so that the parties are as close as possible to being economic equals in the action, and one spouse does not have greater leverage during the litigation process. ²

The Equitable Distribution Law acknowledged the great need for economic equality between spouses with regard to counsel fees in order to ensure a fair and equitable decision. As one court stated: "should one spouse have substantially greater economic leverage during the litigation (and negotiation) process than the other, the fact may have a profound effect on the ultimate resolution both because of its psychological impact on the parties and because of its effect on their ability to finance the litigation."³

The authority to award counsel fees in a matrimonial action is derived from statute, not from the common law. ⁴ Thus, the court may award counsel fees only in certain actions where specifically authorized by statute, and then the statute is to be strictly construed. Counsel fee awards are not authorized by any provision of the Domestic Relations Law in actions or proceedings to obtain maintenance or a distribution of marital property following a foreign judgment of divorce in actions commenced before October 10, 2010.

In determining the amount of legal fees to be awarded to an attorney the court may not rely on documents that constitute inadmissible hearsay, such as statements

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² Hinden v. Hinden, (1983) 122 Misc 2d 552, 472 NYS2d 248.

³ Hinden v. Hinden, (1983) 122 Misc 2d 552, 472 NYS2d 248.

⁴ 3. Romaine v. Chauncey (1892) 129 NY 566, 29 NE 826; Kagan v. Kagan (1986) 21 NY2d 532, 289 NYS2d 195, 236 NE2d 475; Caldwell v. Caldwell (1948) 298 NY 146, 81 NE2d 60; Erikenbrach v. Erikenbrach (1884) 96 NY 456; Griffin v. Griffin (1872) 47 NY 134.

from his client's former attorney who previously represented the client in the action.⁵

Counsel Fee Awards in Actions Commenced On or After October 10, 2010

Domestic Relations Law §§ 237 and 238 were amended in 2010 to create a rebuttable presumption⁶ that counsel fees shall be awarded to the "less monied spouse,"⁷ and actions to obtain maintenance or distribution of property after a foreign judgment of divorce have been added to the list of actions in which such fees shall be awarded.

In exercising the court's discretion, under Domestic Relations Law §§ 237 and 238 the court is required to seek to assure that each party is adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis pendente lite, so as to enable adequate representation from the commencement of the proceeding.⁸

In addition the court is specifically authorized to order expert fees to be paid by one party to the other to enable the party to carry on or defend the action.⁹

The parties and their attorneys are required to submit an affidavit to the court with

⁵ Matter of Denton v Barr, --- N.Y.S.2d ----, 2011 WL 5922992 (N.Y.A.D. 1 Dept.); (cf. Seinfeld v. Robinson, 300 A.D.2d 208, 209 [2002]).

⁶ In Scott M v Ilona M., 31 Misc.3d 353, 915 N.Y.S.2d 834 (Sup. Ct 2011) the Supreme Court found that the shift in financial resources that results from the maintenance guideline calculation rebuts the presumption of the payor spouse being the "monied" spouse.

⁷ Laws of 2010, Ch 329, § 1, effective October 12, 2010. Laws of 2010, Ch 329, §3 as amended by Laws of 2010, Ch 415, § 1 and applicable to actions and proceedings commenced on or after such effective date.

⁸ Domestic Relations Law §§ 237 and 238. Laws of 2010, Ch 329, § 1, effective October 12, 2010.

⁹ Domestic Relations Law §§ 237 and 238. Laws of 2010, Ch 329, § 1, effective October 12, 2010.

financial information to enable the court to make its determination. The monied spouse is required to disclose how much he has agreed to pay and how much he has paid his attorney. The affidavit must include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses.¹⁰

Prior law placed an onus upon the party in a matrimonial action seeking counsel fees pendente lite, to show why the interests of justice require it. The burden is now on the “more-monied” spouse to show why, in the interests of justice, a counsel fee award should not be made.

Neither Domestic Relations Law § 237 nor Domestic Relations Law § 238 define the term “less monied.”¹¹ This uncertainty as to the definition of “less monied” will certainly spawn legal arguments that the “less monied” spouse should be defined as (1) the party with less assets; or (2) the party with a lower net worth; or (3) the party with less liquid assets; or (4) the party with less income available to pay his or her own counsel fees.¹²

According to the sponsor’s memorandum these amendments require that in a matrimonial action an order for pendente lite counsel fees and expenses should be granted at the outset of the case to ensure adequate representation of the less monied spouse from the commencement of the proceeding. Nothing precludes an award of counsel fees to a nonprofit legal service organization, where the organization provides legal services without charge to a party who is eligible for counsel fees. The amendment is not intended to preclude a court’s discretionary power to award counsel fees for services and expenses incurred before the action

¹⁰ Domestic Relations Law §§ 237 and 238. Laws of 2010, Ch 329, § 1, effective October 12, 2010.

¹¹ The word “monied” does not appear in Blacks Law dictionary, nor in other dictionaries, except as a variant of “moneyed.”

¹² In *Scott M v Ilona M.*, 31 Misc.3d 353, 915 N.Y.S.2d 834 (Sup. Ct 2011) the Supreme Court found that the mandatory pendente lite maintenance guidelines and pendente lite counsel fee statutes enacted by the legislature 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 calculation.

begins.¹³

Counsel Fee Awards in Actions Commenced On or After October 10, 2010 -
Domestic Relations Law §237

Domestic Relations Law §237 provides¹⁴ as follows:

(a) In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to declare the validity or nullity of a judgment of divorce rendered against a spouse who was the defendant in any action outside the State of New York and did not appear therein where such spouse asserts the nullity of such foreign judgment, (5) to obtain maintenance or distribution of property following a foreign judgment of divorce, or (6) to enjoin the prosecution in any other jurisdiction of an action for a divorce, the court may direct either spouse or, where an action for annulment is maintained after the death of a spouse, may direct the person or persons maintaining the action, to pay counsel fees and fees and expenses of experts directly to the attorney of the other spouse to enable the other party 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. There shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, pendente lite, so as to enable adequate representation from the commencement of the proceeding. Applications for the award of fees and expenses may be made at any time or times prior to final judgment. Both parties to the action or proceeding and their respective attorneys, shall file an affidavit with the court detailing the financial agreement between the party and the attorney. Such affidavit shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses. An unrepresented litigant shall not be required to file such an affidavit detailing fee arrangements when making an application for an award of counsel fees and expenses; provided he or she has submitted an affidavit that he or she is unable to afford counsel with supporting proof, including a statement of net worth, and, if available, W-2 statements and income

¹³ See NY Legis Memo., Laws of 2010, Ch. 329.

¹⁴ Laws of 2010, Ch 329, § 1, effective October 12, 2010. Laws of 2010, Ch 329, §3 as amended by Laws of 2010, Ch 415, § 1 and applicable to actions and proceedings commenced on or after such effective date.

tax returns for himself or herself. Any applications for fees and expenses may be maintained by the attorney for either spouse in his or her own name in the same proceeding. Payment of any retainer fees to the attorney for the petitioning party shall not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under this section.¹⁵

(b) Upon any application to enforce, annul or modify an order or judgment for alimony, maintenance, distributive award, distribution of marital property or for custody, visitation, or maintenance of a child, made as in section two hundred thirty-six or section two hundred forty of this article provided, or upon any application by writ of habeas corpus or by petition and order to show cause concerning custody, visitation or maintenance of a child, the court may direct a spouse or parent to pay counsel fees and fees and expenses of experts directly to the attorney of the other spouse or parent to enable the other party to carry on or defend the application or proceeding by the other spouse or parent as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. There shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, pendente lite, so as to enable adequate representation from the commencement of the proceeding. Applications for the award of fees and expenses may be made at any time or times prior to final judgment. Both parties to the action or proceeding and their respective attorneys, shall file an affidavit with the court detailing the financial agreement, between the party and the attorney. Such affidavit shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses. Any applications for fees and expenses may be maintained by the attorney for either spouse in counsel's own name in the same proceeding. Payment of any retainer fees to the attorney for the petitioning party shall not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under this section.¹⁶

Counsel Fee Awards in Actions Commenced On or After October 10, 2010 - Domestic Relations Law §238

¹⁵ Laws of 2015, Ch. 447, effective November 20, 2015. § 2. This act shall take effect immediately and apply to all actions whenever commenced. NY LEGIS 447 (2015), 2015 Sess. Law News of N.Y. Ch. 447 (A. 7221)

¹⁶ Laws of 2010, Ch 329, § 1, effective October 12, 2010. Laws of 2010, Ch 329, §3 as amended by Laws of 2010, Ch 415, § 1 and applicable to actions and proceedings commenced on or after such effective date.

Domestic Relations Law § 238 provides as follows:

238. Expenses in enforcement and modification proceedings. In any action or proceeding to enforce or modify any provision of a judgment or order entered in an action for divorce, separation, annulment, declaration of nullity of a void marriage, declaration of validity or nullity of a judgment of divorce rendered against a spouse who was the defendant in any action outside the state of New York and did not appear therein where such spouse asserts the nullity of such foreign judgment, or an injunction restraining the prosecution in any other jurisdiction of an action for a divorce, or in any proceeding pursuant to section two hundred forty-three, two hundred forty-four, two hundred forty-five, or two hundred forty-six of this article, the court may in its discretion require either party to pay counsel fees and fees and expenses of experts directly to the attorney of the other party to enable the other party 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. There shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In any such action or proceeding, applications for fees and expenses may be maintained by the attorney for the respective parties in counsel's own name and in counsel's own behalf. In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis pendente lite, so as to enable adequate representation from the commencement of the proceeding. Applications for the award of fees and expenses may be made at any time or times prior to final judgment. Both parties to the action or proceeding and their representative attorneys, shall file an affidavit with the court detailing the financial agreement between the party and the attorney. Such affidavit shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses. Payment of any retainer fees to the attorney for the petitioning party shall not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under this section.

Counsel Fee Awards in Actions Commenced On or After October 10, 2010 -
Relevant Case Law

In *Silverman v. Silverman*,¹⁷ the IAS 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 the wife's adherence, throughout the litigation, to the contention that the husband had secret offshore assets, which contention she was ultimately unable to prove, although it also

¹⁷ 304 AD2d 41, 756 N.Y.S.2d 14 (1st Dept., 2003)

included other acts by the wife that the court considered to have substantially increased the amount of fees the husband had to incur in the course of litigation. The Appellate Division held that the award of attorney's fees was not proper under Domestic Relations Law § 237, because awarding attorney fees to the monied spouse does not comport with the purpose and policies of that section of the Domestic Relations Law. Furthermore, although the ruling may be better characterized as a sanction rather than an attorney fee award under section 237, under the Rules of the Chief Administrative Judge, Part 130.1 (22 NYCRR 130-1.1), such a sanction may only be awarded where the procedures set forth in Part 130 are followed. Those procedures were not followed here. Section 237(a) 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." The intent of the provision is to ensure a just resolution of the issues by creating a more level playing field with regard 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". Therefore, where the parties' respective financial positions gives one a distinct advantage over the other, the court may direct the monied spouse to pay counsel fees to the lawyer of the non-monied spouse . 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.

The Second Department adopted this rule in *Hathaway v Hathaway*¹⁸ where the Appellate Division 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, the non-monied spouse, pay a substantial portion of the counsel fees of the monied spouse, the plaintiff who was worth over \$1 million, in violation of Domestic Relations Law § 237 and, therefore, was improper.

The application for counsel fees in a matrimonial action must be made prior to the entry of the final judgment. In *Redgrave v Redgrave*,¹⁹ the Supreme Court granted defendant's motion to dismiss the complaint at trial. Thereafter it granted defendant's application for counsel and expert fees. The Appellate Division rejected plaintiff's contention that Supreme Court lacked the jurisdiction to award the fees because the action was terminated by dismissal of the complaint prior to defendant's fee application. It held that in a divorce action, the court is authorized to direct a party to pay the

¹⁸ 16 AD3d 459, 791 N.Y.S.2d 631 (2d Dept,2005)

¹⁹ 304 AD2d 162, 759 NYS2d 23 (3d Dept.,2003)

counsel fees and expenses of the other spouse, provided that direction is "made prior to final judgment" (citing Domestic Relations Law §237 [a]). That language has been interpreted to permit the court to direct payment of fees and expenses "at any time after the start of the action up through the entry of final judgment". Here, defendant made his application eight days after the oral dismissal of the complaint, which was several months prior to the entry of the final order dismissing the action, and under such circumstances, Supreme Court was authorized to entertain the application. The Appellate Division agreed with plaintiff's argument that it was error for Supreme Court to award counsel and expert fees without a hearing in the absence of a stipulation consenting to a determination upon written submissions, despite her failure to request a hearing.²⁰ It made it clear that this was now the rule in the Third Department (as it is in the other Departments), stating that "[T]o the extent that other decisions of this Court have held to the contrary, they should no longer be followed."

Where, as a result of an equitable distribution or distributive award, a spouse will have sufficient funds to pay his or her own attorney's fees, it is an abuse of discretion to award counsel fees.²¹

Obstructionist tactics and lack of merit can result in the denial of a counsel fee award or a small award to a client pursuant to Domestic Relations Law § 237. For example in *Meyn v. Meyn*,²² the Appellate Court reversed an order which awarded the wife counsel fees in connection with her successful motion to vacate an uncontested divorce that had been granted under Domestic Relations Law 170(6). The court vacated the judgment because "it was based on outright perjury", when it was obvious that the parties lived together after the agreement was signed and the wife participated in the fraud perpetrated upon the court. This court held that the case was not an instance where justice required an award of counsel fees. It is not an abuse of discretion on the part of the trial Court to deny a party or his attorney a counsel fee award based on the

²⁰ citing *Carlson-Subik v. Subik*, 257 AD2d 859, 862; see also *Matter of Flynn v. Rockwell*, 295 AD2d 672, 675; *Ott v. Ott*, 266 AD2d 842; *Stricos v. Stricos*, 263 AD2d 659; *Sim v. Sim*, 248 AD2d 781, 781, 782.

²¹ In *Rodgers v. Rodgers*, (1983, 2d Dept) 98 App Div 2d 386, 470 NYS2d 401 the court held that since the wife had sufficient funds it was not an abuse of discretion to deny her counsel fees. In *Basile v. Basile*, (1986, 2d Dept) 122 App Div 2d 759, 505 NYS2d 448, the Appellate Division overturned the counsel fee award to the wife. In view of the assets the wife was to retain she demonstrated no need for an award of counsel fees.

²² 119 App Div 2d 645, 501 NYS2d 88 (2nd Dept, 1986)

fact that a spouse engages in delaying and obstructionist tactics.²³

In *Johnson v Chapin*,²⁴ the Court of Appeals held that pursuant to Domestic Relations Law § 237 (a), a court in a divorce action may award counsel fees to a 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.” When “exercising its discretionary power to award counsel fees, a court should review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions. Here, when awarding the fees, the court considered the parties' financial positions as well as the delay incurred as a result of husband's obstructionist tactics. Thus, it declined to disturb those awards.

Counsel Fee Awards - Right to a Hearing

A party is entitled to a hearing on the issue of counsel fees and may not be compelled to have the issue determined upon the submission of affirmations or affidavits. In *Sadofsky v Sadofsky*,²⁵ the Second Department held that the husband was entitled to an evidentiary hearing on the wife's attorney's request for counsel fees, so that the extent and value of respondent's services could have been scrutinized in an adversarial context by the trial court and intelligently reviewed by the appellate court. Although counsel fees may be fixed on affidavits, the final fixation of counsel fees

²³ *Stern v. Stern*, 67 App Div 2d 253, 415 NYS2d 225 (1st Dept 1979) ; *Riportella v. Riportella* (1980, 1st Dept) 75 App Div 2d 503, 426 NYS2d 738; *Schussler v. Schussler* (1985, 2d Dept) 109 App Div 2d 875, 487 NYS2d 67; *Lohmiller v. Lohmiller*, NYLJ, 9-16-86, p 15, col 2, Sup Ct, West Co, (Buell, J). In *Chamberlain v Chamberlain*, 24 A.D.3d 589, 808 N.Y.S.2d 352 (2 Dept. 2005) the Appellate Division held that a party who has engaged in conduct resulting in unnecessary litigation may properly be denied an award of an attorney's fee, and a party who was thereby caused to incur legal fees that otherwise would have been unnecessary may recover such fees The record supported the Supreme Court's determination to deny the plaintiff's request for an award of an attorney's fee and grant the defendant's request for an award of an attorney's fee on this basis.

²⁴ 12 N.Y.3d 461, 909 N.E.2d 66, 881 N.Y.S.2d 373 (2009)

²⁵ 78 A.D.2d 520, 431 N.Y.S.2d 594 (2d Dept.,1980); See also *Rubin v Rubin* 119 AD2d 852, 506 NYS2d 44 (1st Dept.,1986); *Mc Cauley v Drum*, 217 AD2d 829, 629 NYS2d 838 (3d Dept.,1995)

should be based on testimonial or other trial evidence unless the parties stipulate otherwise. There was no binding stipulation, and absent an evidentiary hearing, the husband had no meaningful way of testing the respondent's claims relative to time and value.

Time for Application

The application for counsel fees in a matrimonial action must be made prior to the entry of the final judgment. In *Redgrave v Redgrave*,²⁶ the Supreme Court granted defendant's motion to dismiss the complaint at trial. Thereafter it granted defendant's application for counsel and expert fees. The Appellate Division rejected plaintiff's contention that Supreme Court lacked the jurisdiction to award the fees because the action was terminated by dismissal of the complaint prior to defendant's fee application. It held that in a divorce action, the court is authorized to direct a party to pay the counsel fees and expenses of the other spouse, provided that direction is "made prior to final judgment" (citing Domestic Relations Law §237 [a]). That language has been interpreted to permit the court to direct payment of fees and expenses "at any time after the start of the action up through the entry of final judgment". Here, defendant made his application eight days after the oral dismissal of the complaint, which was several months prior to the entry of the final order dismissing the action, and under such circumstances, Supreme Court was authorized to entertain the application. The Appellate Division agreed with plaintiff's argument that it was error for Supreme Court to award counsel and expert fees without a hearing in the absence of a stipulation consenting to a determination upon written submissions, despite her failure to request a hearing.²⁷ It made it clear that this was now the rule in the Third Department (as it is in the other Departments), stating that "[T]o the extent that other decisions of this Court have held to the contrary, they should no longer be followed."

²⁶ 304 AD2d 162, 759 NYS2d 23 (3d Dept.,2003)

²⁷ citing *Carlson-Subik v. Subik*, 257 AD2d 859, 862; see also *Matter of Flynn v. Rockwell*, 295 AD2d 672, 675; *Ott v. Ott*, 266 AD2d 842; *Stricos v. Stricos*, 263 AD2d 659; *Sim v. Sim*, 248 AD2d 781, 781, 782.