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Reduction in income Not Necessarily A Change in Financial Circumstances

In Carr v Carr, 2005 WL 1413395 (N.Y.A.D. 3 Dept.) petitioner's income, as reported in his tax returns from 1999 through 2003, fluctuated widely due to the dissolution of his law firm. His 1999 return, upon which the initial child support calculation was based, reported income of only \$44,620. In July 2000, he obtained employment at an annual salary of \$135,000, which remained unchanged. The former wife petitioned for an increase in monthly child support. It was reduced by the Appellate Division to \$2,336.02. His 2001 return reported income of \$277,566 and his 2002 tax return showed income of \$60,116, which included his salary and losses attributable to the law firm dissolution. His 2003 petitioner's return showed income of \$141,415, including his salary and interest income. At the time of his application he lived in the marital residence, which had been valued at \$650,000 at the time of the divorce. He claimed net annual income of approximately \$80,000, which included a monthly payment of \$750 from a woman who was living with him. He asserted that his income had been supplemented by the liquidation of assets, and he acknowledged that the value of his retirement accounts had increased by \$200,000 during the past year. Petitioner claimed annual expenses of approximately \$130,200, including annual payments of \$41,500 to a former wife, as well as nearly \$10,000 for country club expenses and \$9,800 for lawn care and pool maintenance, which was approximately half the amount of his expenses in 2001. Petitioner claimed little debt other than the mortgage on his residence and amounts owed to his attorney. Based solely upon his income in 2003, petitioner sought to have his monthly child support obligation reduced to \$240.68. The Appellate Division held that a petitioner seeking a downward modification of a prior order of support must demonstrate a substantial change in circumstances warranting a downward modification. A reduction in a payor's net income, while a primary element of the analysis, does not limit Family Court's ability to examine the financial circumstances at the time of the prior order and the financial circumstances at the time of the application for modification and to consider whether the payor has the means or ability to comply with the prior order of support. It found that Petitioner's argument would improperly narrow the required showing of a substantial change in financial circumstances to a showing of a substantial change in reported income, which would invite petitions for modification any and every time there was a bump or dip in a payor's income, without regard to whether the payor has assets and/or earning capacity that are not reflected in the payor's tax return in a particular year. "This is not the law, nor should it be." The Court held that notwithstanding the undisputed reduction in income as reflected in his 2001 and 2003 tax returns, petitioner did not establish that his financial circumstances had deteriorated such that he lacked the means to pay monthly child support in the amount of \$2,336.02. His income remained substantial, as did his assets, and his significant expenditures on luxuries such as country club fees and lawn care belied any claim that he could not afford his child support obligation. The court could not agree that petitioner's volitional depletion of his savings to maintain his prior standard of living should be ignored in favor of a reduction in child support, particularly where, as here, petitioner conceded that he typically billed no more than 18 hours per week at work. While the parties' income will be used to establish the "basic child support obligation", a reduction in petitioner's income does not necessarily constitute a change in financial circumstances warranting a downward modification of child support.

Factors Considered in Maintenance Award

In Gubiotti v Gubiotti, 2005 WL 1489502 (N.Y.A.D. 3 Dept.) the parties were married in 1972 and had three emancipated sons. At the time of the hearing plaintiff was 50 and defendant was 53. Plaintiff had a high school education and spent the greater part of the marriage as a homemaker. At times during the marriage, plaintiff worked outside the home in a variety of menial

jobs and also babysat for other people's children. In 1995, she began to run a licensed day-care center in the marital home from which she reported a gross income of \$18,901 in 2002. Defendant, who earned an MBA during the marriage, was a Life Insurance Company agent. Defendant's average gross income for 2000, 2001 and 2002 was \$165,227, while his tax returns for those years reported an average net income of \$58,962. Supreme Court distributed the marital estate and awarded plaintiff maintenance of \$3,000 per month for seven years and \$1,500 per month thereafter until plaintiff's death or remarriage or the death of defendant. On appeal Defendant asserted that the durational award of maintenance was excessive in that he will have to pay annual maintenance of \$36,000 despite the fact that his income was only approximately \$59,000. He contended that the durational maintenance award constituted 62% of his income, and left him with annual income in the amount of \$17,250, after taxes. In making its factual findings pursuant to Domestic Relations Law 236(B)(6)(a), Supreme Court appeared to have used the figure of \$59,000 in determining defendant's income, but also made findings suggesting that the award of maintenance was based in part upon income and perquisites of defendant not reflected in that \$59,000 figure. There was evidence in the record to support both the \$59,000 figure or a higher level of income, but a lack of detail in Supreme Court's express factual findings precludes the Appellate Court from determining whether the award of \$3,000 per month for seven years was excessive. Defendant further contended that Supreme Court erred in awarding plaintiff nondurational maintenance because it was a de facto redistribution of his pension, and because it would require him to continue working into the years during which he intended to retire. Although these narrow, conclusory arguments lacked merit, the court had to remit the issue of nondurational maintenance to Supreme Court. It held that nondurational maintenance may be appropriate where, as here, plaintiff's energies during the marriage were primarily devoted to homemaking and child rearing to the detriment of her ability to become self-sufficient and maintain the predivorce standard of living. An award of nondurational maintenance is among the issues to be resolved in the sound discretion of the trial court after consideration of the pertinent factors set forth in Domestic Relations Law 236(B)(6)(a), the payee spouse's reasonable needs, and the predivorce standard of living. Among the many specific considerations underlying an award of nondurational maintenance and the amount thereof is the present and potential future income of each of the parties. As with the award of durational maintenance in the amount of \$3,000 per month, Supreme Court's findings of fact regarding defendant's income lacked sufficient detail to permit review of the nondurational maintenance award. Inasmuch as the evidence may support Supreme Court's maintenance award, but was insufficient to afford the Appellate Court the capability to make appropriate findings the Court declined to exercise its authority to consider the issue of the amount and duration of maintenance de novo.

Child Support Award Increased on Appeal

In *Hammack v Hammack*, 2005 WL 1644788 (N.Y.A.D. 3 Dept.) the parties were married in 1976 and had four children. If the statutory formula were strictly applied to the total combined parental income, defendant's obligation would have been \$103,002. Supreme Court applied the statutory percentage to the first \$80,000, fixing defendant's initial support obligation at \$22,568. The court then tacked on an additional \$8,000 per year (to be used for the limited purpose of contributing to the hockey costs for two of the children), thus making defendant's total child support obligation about \$30,000 per year, which was approximately \$73,000 less than that which a strict application of the statutory formula would call for. Defendant was also ordered to continue paying his proportionate share of up to \$23,000 per year for the college expenses of the oldest child, his share of college expenses for the other three children up to an amount equal to tuition, room and board at the State University of New York, up to \$6,000 per year for private school expenses for two of the boys, and his share of medical insurance and the cost of unreimbursed health related expenses for all of the children. The Appellate Division found that the award was insufficient. Although the trial court observed that the family's lifestyle was not lavish or extravagant, it was substantially more comfortable than that which would be permitted by the support obligation set forth by the court. While agreeing with Supreme Court that a \$103,000 support obligation, based on a strict application of the combined parental income, appeared to be manifestly unjust and inappropriate, it also found this to be true of a \$30,000 support obligation where the noncustodial parent earns in excess of \$300,000 per year. Applying the facts to the factors found in DRL 240(1-b)(f), the Appellate Division found that while the financial resources of the parents had for the most part been equalized as of the time the judgment was rendered, defendant's financial resources would continue to grow, increasing the disparity in the parties' incomes. Supreme Court overlooked the increasing needs of the children as they grow older, as well as their entitlement to share in their father's post-2003 standard of living. It found that a child support percentage of 12% of the combined parental income which exceeds \$80,000 would be more appropriate and defendant's total annual child support obligation was increased to \$4,475 per month. The additional \$8,000 per year for hockey costs was terminated. The remainder of Supreme Court's judgment with regard to the costs involved in the children's educational expenses and healthcare expenses remained unchanged.

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