



New York Divorce and Family Law™ - nysdivorce.com brandeslaw.com

The definitive site on the web for New York Divorce and Family Law.

Thursday, December 1, 2005

Bits and Bytes™

Volume 1, Number 20

Welcome to *Bits and Bytes™*, our bimonthly electronic newsletter published for attorneys registered with New York Divorce and Family Law. This electronic newsletter will be sent to you by email each a month to keep you up to date on important developments in New York Divorce and Family Law. If you do not wish to receive it or are receiving it in error, please send an email to unsubscribe@nysdivorce.com, with the words "unsubscribe" in the subject line.

Joel R. Brandes

Joel R. Brandes Consulting Services, Inc., 155 Washington Street, Jersey City, New Jersey, 201-434-6614, and 2881 NE 33rd Court, Ft. Lauderdale, Florida, 954-564-9883. Websites: New York Divorce and Family Law at www.brandeslaw.com and www.nysdivorce.com, and Florida Divorce and Family Law at www.flsddivorce.com. Send mail to: joel@nysdivorce.com.

Did you know that you can find past issues of Bits and Bytes™ in our Archives on our website at www.brandeslaw.com?

Obligation to Pay Home Equity Loan Is Not Open-ended Obligation

In **Popelaski v Popelaski** --- N.Y.S.2d ----, 2005 WL 2781147 (N.Y.A.D. 3 Dept.) Supreme Court, inter alia, awarded the plaintiff maintenance of \$1,583 per month for 10 years, directed him to pay a home equity loan on the former marital residence, granted the plaintiff a credit for the entire reduction of principal for the mortgage on the marital premises, awarded the plaintiff a credit of \$4,657.11 based on allocating to him the sum of \$8,000 for marital funds he expended for his personal use, and directed that the plaintiff was entitled to declare the parties' three children as dependents on her income tax return. The judgment was modified by reducing the maintenance to \$1,300 per month for 7 years, and granting the plaintiff a credit for 50% of the reduction of the principal of the mortgage on the marital premises. The Appellate Division held that the obligation to pay a home equity loan on the marital residence did not constitute an improper, open-ended obligation since it entailed specific monthly payments and had a predetermined duration. The Supreme Court erred in determining that the plaintiff was entitled to declare all three of the parties' children as dependents on her income tax returns. Where a noncustodial parent meets all or a substantial part of a child's financial needs, a court may determine that the noncustodial parent is entitled to declare the child as a dependent. Both parents were wage earners who each contributed toward the support of their three children. The Appellate Division held that the father may claim the parties' two youngest children as dependents on his income tax returns, while the mother may claim their oldest child as a dependent. The award of \$15,000 counsel fees was an improvident exercise of its discretion. Given the defendant's child support and maintenance obligations and considerable debt burden, much of which was incurred for the legitimate purpose of mounting a legal defense to the action and ancillary proceedings, it was clear that the defendant, even with the additional income imputed to him by the court, lacked the ability to pay the plaintiff's counsel fees.

Counsel Fees Reduced On Appeal Even Though Defendant Use Obstructionist Tactics

In **Daniel v Friedman** --- N.Y.S.2d ----, 2005 WL 2787217 (N.Y.A.D. 2 Dept.) Supreme Court directed the husband to pay maintenance of \$2,500 per month for three years, directed him to pay child support of \$4,000 per month until the emancipation of the parties' first child and, upon emancipation of the parties' first child, to pay child support of \$3,317.08 per month until the emancipation of the parties' second child, and awarded counsel fees to the plaintiff of \$165,000. The Appellate Division modified the judgment by reducing the award of counsel fees to \$70,089.63. It held that courts have discretion to value 'active' assets such as a professional practice on the commencement date of the action, while 'passive' assets such as securities, which could change in value suddenly based on market fluctuations, may be valued at the date of trial but such formulations should be treated as helpful guideposts and not immutable rules. Although an economic downturn between the date of commencement of the action and the date of trial had an effect upon the value of the defendant's business, the evidence at trial demonstrated that the business had rebounded significantly and that there were signs of potential positive growth for the future. The Appellate Division held that the trial court's determination to use the date of commencement of the action as the valuation date for the defendant's business was a provident exercise of discretion. It also held that the trial court providently exercised its discretion in awarding the plaintiff maintenance in light of the disparity in the parties' incomes and the wife's ability to become self-supporting in the future as a result of her new career. It appeared to the Appellate Division that the defendant's obstructionist tactics substantially contributed to the protracted nature of the litigation. However, in consideration of all the relevant factors, including the complex nature and extent of the marital property, a prior pendente lite award of counsel fees to the plaintiff paid by the defendant of \$25,000, the defendant's payment of the parties' expert fees of

approximately \$78,000, and the plaintiff's ability to pay some of her own counsel fees, the Appellate Division reduced the award of counsel fees to \$70,089.63, the amount actually due and owing at the time of her application.

Modest Contributions of Wife Warranted Reduction to 20% of Husband's Enhanced Earning Capacity

In **Schiffmacher v Schiffmacher**, 801 N.Y.S.2d 848 (4th Dept. 2005) defendant contended on appeal that Supreme Court erred in awarding plaintiff 70% of the value of the parties' investment and savings accounts. The record established that the court properly considered the factors set forth in DRL 236(B)(5)(d), including the fact that plaintiff's contributions to the parties' investments were significantly greater than defendant's contributions. It rejected the contention of defendant that the court erred in determining the value of his master's degree in business administration. The value of the degree may be measured by comparing the average lifetime income of a college graduate and the average lifetime earnings of a person holding such a degree and reducing the difference to its present value. Plaintiff's expert utilized that method in determining the value of defendant's degree, and defendant presented no expert testimony that would support a different valuation. The Appellate Division held that court erred in awarding plaintiff one half of the value of defendant's enhanced earning capacity arising from the degree. In light of plaintiff's modest contributions to defendant's degree, the court should have awarded plaintiff only 20% of the value of defendant's enhanced earning capacity and it modified the judgment accordingly.

Income Imputed to Husband Who Intentionally Withheld Information As to Income

In **Robbins-Johnson v. Johnson**, 20 A.D.3d 723, --- N.Y.S.2d ---, (N.Y.A.D. 3 Dept.) the parties were married in 1993 and had no children. Supreme Court ordered defendant to pay maintenance in decreasing weekly amounts over a period of eight years, starting with \$800 in the first year and ending with \$100 in the last. Supreme Court also granted plaintiff counsel fees of \$1,500 for services rendered in opposing a second motion by defendant for reduction of temporary maintenance. The Appellate Division affirmed. At the time of trial, defendant was 58, plaintiff was 46 and both were in good health. Although plaintiff had worked during some of the marriage, she lost her employment, along with attendant health and retirement benefits in 1996 when defendant restricted the hours she could work. Supreme Court imputed income to the parties greater than they claimed, attributing an annual income of \$20,800 to plaintiff and \$100,000 to defendant. Defendant's income was calculated using his admitted salary and then augmented based on Supreme Court's finding that he had intentionally withheld information concerning the actual amount of his income. The court also noted that defendant owns far more separate property than does plaintiff. Supreme Court considered these factors, as well as the living expenses of the parties and the evidence of their predivorce standard of living, and awarded plaintiff a decreasing share of defendant's annual income. Supreme Court detailed the parties' separate and marital property, finding a total net worth of \$677,346, and valuing their vehicles and other marital property at \$136,663.44. The court awarded plaintiff \$16,500 of these assets and, to balance the division of marital property, directed defendant to pay plaintiff \$50,000 as a distributive award. Thus, plaintiff received approximately 48% of the marital property. The nearly equal distribution was appropriate in light of the parties' circumstances, including the 10-year duration of the marriage, loss of pension rights and liquidity of the assets. Defendant argued that a separate hearing was required because the counsel fee award was imposed as a sanction for frivolous conduct. The record showed that plaintiff did not make her request pursuant to 22 NYCRR 130-1.1 and the court did not treat plaintiff's request for counsel fees as a motion for costs or sanctions. Supreme Court's award was adequately supported by the affidavit of plaintiff's counsel setting forth the agreed-upon hourly rate for his services and the hours spent opposing defendant's motion. Further, plaintiff's counsel requested these fees and submitted his affidavit more than one month before the second day of the four-day trial and defendant then failed to question plaintiff or present any evidence concerning fees. Even though the issue was raised again at the end of the trial, defendant did not submit an answering affidavit or request a separate hearing on fees. Under these circumstances, defendant had ample opportunity to be heard on this issue and there was no abuse of Supreme Court's discretion in awarding counsel fees.

Hague Convention - Grave Risk of Harm Exception

In **Didur v Viger**, 392 F.Supp.2d 1268 (D. Kansas, 2005) the District Court held that the father established that the child's return to his mother's custody in Canada would expose him to grave risk of physical or psychological harm. The Canadian child welfare authorities documented incidents in which the mother repeatedly drove while drunk with the child, the mother was drunk in public with the child alongside her, the mother was intoxicated repeatedly while pregnant with the child's younger sibling, the mother refused to parent the child, and the mother suffered from mood swings and depression, the child was unable to obtain counseling in Canada, the mother sought to have her parents obtain custody of child, and the Canadian authorities recommended against returning the child to Canada and stated that he would be placed in foster care if he was returned.

Bits and Bytes™ is published bimonthly by Joel R. Brandes Consulting Services, Inc., 155 Washington Street, Jersey City, New Jersey, 201-434-6614, and 2881 NE 33rd Court, Ft. Lauderdale, Florida, 954-564-9883. Send mail to: joel@nysdivorce.com. Websites: www.brandeslaw.com. www.nysdivorce.com. and www.flstdivorce.com. Notice: The information in this publication pertains to New York law only and is offered as a public service. It is not intended to give legal advice about a specific legal problem, nor does it create an attorney-client relationship. Due to the importance of the individual facts of every case, the generalizations we make may not necessarily be applicable to any particular case. This information is provided with the understanding that if legal advice is required the services of a competent attorney should be sought. Copyright © 2005 New York Divorce and Family Law™ and Joel R. Brandes Consulting Services, Inc., All Rights Reserved.