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Equitable Estoppel Requires Best Interest Hearing

In *Matter of Westchester County Department of Social Services, o/b/o Melissa B. v. Robert W.R.*, 803 N.Y.S.2d 672 (2 Dept. , 2005) the Appellate Division held, considering two issues of first impression, that Family Court Act 516-a (b) requires the Family Court to conduct a hearing before ordering a genetic marker test to determine issues of fraud, duress, or material mistake of fact upon receiving a challenge to an acknowledgment of paternity brought more than 60 days after its execution. It also held that where a party meets his burden of establishing fraud, duress, or material mistake of fact, the Family Court is then required to conduct a hearing regarding the best interests of the child before ordering a genetic marker test. The court noted that the doctrine of equitable estoppel may be invoked to preclude a father from denying paternity to avoid support obligations where the invocation of the doctrine is in the best interests of the child and the purpose of the hearing is to determine whether the doctrine should be applied.

Master Electrician License is Marital Property

In *Hlinka v Hlinka*, --- N.Y.S.2d ---, 2005 WL 2542864 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed a judgment which awarded the defendant wife maintenance of \$2,500 per month for five years and \$1,500 per month for an additional five years, and awarded the defendant wife \$898.88 monthly for 14 years and 10 months as equitable distribution of the plaintiff husband's enhanced earnings as a licensed master electrician.

Distributive Awards May Not Include Payments Which Are Taxable As Ordinary Income to the Recipient

In *Carman v Carman*, --- N.Y.S.2d ---, 2005 WL 2781147 (N.Y.A.D. 3 Dept.) the parties were married in 1978 and the divorce action was commenced in 2001. Supreme Court, inter alia, awarded plaintiff maintenance of \$1,000 per month for 30 months, determined that 20% of the value of defendant's license as a certified public accountant was marital property, valued defendant's interest in his business and equally divided the marital property between the parties. The Appellate Division held that Supreme Court appropriately determined defendant's child support obligation with regard to combined parental income in excess of \$80,000. Although the Child Support Standards Act does not provide for nor permit the inclusion or deduction of a distributive award when calculating parental income because "a distributive award to be paid by one parent to the other pertains to the financial resources of the parties," it is an appropriate factor to be considered by the court when determining the appropriate amount of child support for income in excess of \$80,000. Based on the parties' modest predivorce standard of living, the lack of any special needs of the children, plaintiff's ability to return to work because the children were in school, and the substantial assets available to plaintiff through distributive awards, the court did not abuse its discretion when it determined that only half of the combined parental income over \$80,000 should be utilized in calculating the parties' child support obligations. The Appellate Division held that Supreme Court properly considered 20% of defendant's CPA license as marital property. Before the marriage, defendant completed a Bachelor's degree and almost one year of the required two years of practice. During the marriage, he finished the remaining practice period, took an exam preparation course and passed all portions of the CPA exam. The court reasonably accepted the expert's 20% figure, representing one sixth of defendant's education and practical experience with a slight increase for exam preparation and successful completion, as the marital portion of defendant's enhanced earning capacity related to his CPA license. Where only modest contributions are made by the nontitled spouse toward the other spouse's attainment of a degree or professional license, and the attainment is more directly the result of the titled spouse's own ability, tenacity, perseverance and hard work, it is appropriate for courts to limit

the distributed amount of that enhanced earning capacity. Defendant obtained his college degree and completed almost half of his two-year practice requirement before the marriage. He completed the second year of practice during the marriage, but that experience was earned through a job where he was gainfully employed, earning money to support the parties as a couple. The exam preparatory course lasted less than two months and was a review of his college work. During this time, plaintiff was also employed full time. While plaintiff performed household chores and provided an environment for defendant to study, this can be seen more as overall contributions to the marriage rather than an additional effort to support defendant in obtaining his license. As plaintiff's testimony indicated that she did not substantially alter her schedule due to defendant's studying for his CPA exam and licensure, it would be inequitable to award plaintiff half of defendant's enhanced earning capacity related to his CPA license. Based on plaintiff's limited contribution to defendant's acquisition of this asset, her equitable share of the marital portion of defendant's CPA license was 20%.

Considering all of the appropriate factors, Supreme Court properly divided the remaining marital assets equally, including defendant's interest in his business. The marriage was of long duration, the parties were relatively young, both parties had college degrees, they had no assets at the time of the marriage, plaintiff had primary physical custody of the two minor children, and both parties worked initially but plaintiff stayed home to care for the children after the youngest child was born. The increase in value of defendant's annuity account was correctly classified as marital property because Defendant used his financial planning and accounting expertise to manage that account, even if only a few times a year, directly and actively contributing to the appreciation in value of that account. Regarding defendant's claim that he was entitled to a credit for moneys that plaintiff borrowed against the home equity line of credit after the commencement of the divorce action, plaintiff testified that this money was not for personal expenses but was expended on marital expenses such as the children and marital residence. Because defendant was ordered to pay retroactive child support and maintenance, which presumably would have been applied toward these marital expenses, he was entitled to a credit for half the amount of funds borrowed from the home equity line of credit. The Appellate Division found that Supreme Court failed to consider all of the tax impacts to the parties. Courts are required to consider the tax consequences in fashioning equitable distribution but distributive awards may not include payments which are taxable as ordinary income to the recipient. While Supreme Court correctly ordered distribution of a portion of defendant's year-end bonus for the year of commencement defendant should have been ordered to pay plaintiff the after-tax amount of her portion, or \$20,790, because he already paid the taxes on that bonus. Similarly, the court did not address the tax consequences associated with the distribution of defendant's business, despite statements in the expert's report noting that, depending on the method of distribution, it may be appropriate to discount the business's value 25% to 40% due to taxes. The Appellate Division remitted for the court to consider the tax impact of its awards, as well as to reevaluate the equitable distribution of assets in light of its modification of Supreme Court's distribution. Supreme Court's maintenance award was appropriate. "[M]aintenance should be designed to provide temporary support while the recipient develops the skills or experience necessary to become self-sufficient". The record supported Supreme Court's finding that the parties lived a modest lifestyle despite defendant's substantial earnings. The court acknowledged that defendant earned considerably more than plaintiff, probably more than she will ever earn. But plaintiff was healthy, relatively young, obtained a Bachelor's degree, worked full time in the past, ran her own part-time bookkeeping business as well as working part time for another business, received a sizeable distributive award, and could return to full-time employment because the children were in school and the youngest was 10 years old. As plaintiff did not entirely sacrifice her employment opportunities during the marriage and was capable of finding gainful employment, \$1,000 was a fair amount and 30 months was a reasonable time period to allow her to reestablish her earning power. Based on the expert's testimony and report, it appeared that the court's maintenance award was partly based on defendant's untapped earnings, namely his income that remained after subtracting the amount attributable to his CPA license. The amount and duration of the award were not excessive considering defendant's remaining assets. While Supreme Court correctly determined that plaintiff could afford her own counsel fees, based on her distributive award plaintiff also should have equally shared the joint costs of litigation, such as fees for the parties' jointly retained expert and appraiser.

Arbitration of Child Support Permissible

In *Frieden v Frieden*, 802 N.Y.S.2d 727 (2d Dept, 2005) the plaintiff sought a divorce from the defendant with whom she had one child. They entered into a settlement agreement which required disputes over child support to be subject to arbitration. After the defendant lost his job, he requested a reduction of child support payments, but the parties could not reach an agreement. The defendant requested arbitration pursuant to the agreement, but the plaintiff refused to arbitrate the dispute. Thus, the defendant moved before the Supreme Court to compel arbitration. The Supreme Court determined that child support matters were beyond the reach of arbitration. The Appellate Division reversed on the law. It held that Child support issues may be subject to arbitration. (citing *Schneider v. Schneider*, 17 N.Y.2d 123, 128, 269 N.Y.S.2d 107, 216 N.E.2d 318; *Sheets v. Sheets*, 22 A.D.2d 176, 178, 254 N.Y.S.2d 320). Arbitration of child support issues does not violate the objectives of the Child Support Standards Act because an arbitration award is subject to vacatur if it fails to comply with the CSSA and is not in the best interest of the child. Accordingly, the defendant's motion to compel arbitration should have been granted.

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