



## New York Divorce and Family Law™

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Monday, February 14, 2005

*Bits and Bytes*™

Volume 1, Number 1

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**Welcome** to the first issue of *Bits and Bytes*™, our monthly newsletter published for attorneys registered with our website. This electronic newsletter will be sent to you by email once 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 send us an email with the words "unsubscribe" in the subject line.

### *2004 Court of Appeals Family Law Roundup*

In *Frankel v Frankel*, 2 NY 3d 601, 781 NYS2s 59 (June 29, 2004) the Court of Appeals held that a divorce lawyer discharged without cause by one spouse can still make an application for counsel fees against the other spouse pursuant to Domestic Relations Law §237(a) after the discharge. The wife retained a law firm which represented her in the parties divorce action for more than three years. She then fired her attorneys and hired different counsel, who negotiated a settlement with the husband, which stipulated that each side would be responsible for its own legal fees. The wife's former attorneys, owed some \$94,000, moved under §237(a) for a counsel fee award from the husband. The Second Department held that the Domestic Relations Law was drafted to protect the non-monied client, not the non-monied client's former lawyer. It held that the statute applies only to the current attorney of record and that "former counsel has no standing to pursue the adversary spouse within the matrimonial action" (309 AD2d 65, 69 [2d Dept 2002]). The Court of Appeals reversed. Judge Albert M. Rosenblatt, writing for the Court, said a decision to the contrary would undermine public policy and legislative intent by giving the more affluent spouse an upper hand. He pointed out that Domestic Relations Law § 237 (a) provides, in pertinent part, that "[i]n any action or proceeding ... for a divorce ... the court may direct either spouse ... to pay such sum or sums of money directly to the attorney of the other 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 statute goes on to say that "[a]ny applications for counsel fees and expenses may be maintained by the attorney for either spouse in counsel's own name in the same proceeding." Although the provision is silent as to whether an attorney who has been discharged without cause has the right in the same proceeding to seek counsel fees, reading the provision in light of precedents and the policy interests surrounding the statute, the Court held that Domestic Relations Law § 237 (a) allows an attorney who was discharged without cause to proceed against the other spouse in the matrimonial litigation.

In *Holterman v Holterman*, 3 NY 3d 1, 781 NYS2s 458 (2004) the New York Court of Appeals, in a 5-2 opinion, held that the Supreme Court did not err by declining to adjust defendant's child support obligation to account for the distributive award payments he was obligated to pay plaintiff for her share of the future enhanced earnings attributable to his medical license. The majority, in an opinion by Judge Graffeo, agreed with the Appellate Division, and found no statutory authority for deducting enhanced earning contributions from the child support calculus. The opinion held that "... the husband's proposed reallocation formula -- or any formula that requires a deduction of a distributive award paid over a period of years from the licensed spouse's income for purposes of calculating child support -- is impermissible under the CSSA," the Child Support Standards Act. Judge Graffeo wrote, "Had the Legislature intended to make distributive awards deductible from one parent's income and includable in the other's, it could easily have so provided." Notably, the Court agreed with husband that a distributive award to be paid by one parent to the other pertains to the financial resources of the parties and is an appropriate paragraph (f) factor that the trial court may consider, in determining whether the application of the child support guidelines amount is "unjust or inappropriate" when awarding child support. Here, in determining whether to apply the child support percentage of 25% to all income in excess of \$80,000, Supreme Court expressly indicated that it considered the distributive award and maintenance obligations, the substantial disparity in gross income between the parties, as well as the upper middle-class lifestyle the children would have enjoyed had the parties not divorced. The family had taken frequent vacations, the children received allowances and engaged in extracurricular pursuits, and the daughter, who is musically talented, had taken private music lessons and had traveled with the Empire State Youth Orchestra. Under these circumstances, The Court could not say Supreme Court abused its discretion by applying the statutory percentage of 25% to husband's income in excess of \$80,000. Judge Robert S. Smith dissented in an opinion with Judge Susan Phillips Read. He said : "It makes no sense at all to calculate child support as if

no such distribution had occurred -- as though the transferring spouse still owned the asset and received the income it generated," \*\*\* "Yet the majority concludes that this irrational procedure is required by the CSSA -- as indeed it would be, except that the CSSA expressly permits departure from its formula to avoid an 'unjust or inappropriate' result."

In *Wilson v McGlinchey*, 2 NY3d 375, 779 NYS2d 159 (2004) the Court of Appeals affirmed an order which granted the parents' request to terminate grandparents visitation based on a change in circumstances, because it agreed with the Appellate Division that terminating visitation was in the child's best interest. Judge Graffeo, writing for the Court, stated that although there are benefits which devolve upon the grandchild from grandparent visitation, which cannot be derived from any other relationship, that interest must yield where the circumstances of the child's family including the worsening relations between the litigants and the strenuous objection to grandparent visitation by both parents render the continuation of visitation with the grandparents not in the child's best interest. The Court noted that in light of its ruling it did not address the Petitioners' argument challenging the constitutionality of Domestic Relations Law § 72.

*Grandparents given "custody rights"*. New York's Domestic Relations Law was amended effective January 5, 2004 to give the grandparent or the grandparents of a child residing in New York state custody rights where the grandparent or grandparents can demonstrate the existence of "extraordinary circumstances". An "extended disruption of custody" constitutes an extraordinary circumstance. "Extended disruption of custody" is defined to include a prolonged separation of the respondent parent and the child for at least twenty-four continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the petitioner grandparent or grandparents. The court may find that extraordinary circumstances exist where the prolonged separation has lasted for less than twenty-four months, and based upon other circumstances. (DRL § 72 , subdivision 2 as added by L.2003, c. 657, § 2, eff. Jan. 5, 2004.)

### ***Trial Evidence Bits and Bytes***

#### ***Separate Property Presumed to Become Marital Property Where Commingled***

*Garner v Garner*, AD2d , 761 NYS2d 414 (3rd Dept.,2003) [personal injury recovery deposited into a joint account of the parties is presumed to be marital property]

*Chiotti v Chiotti*, 785 NYS2d 157 (3d Dept.,2004) [Separate property which is commingled with marital property or subsequently titled in both names is presumed to be marital property. Once converted to marital property the property does not resume its status as separate, even if all the marital funds are removed from the account. ]

#### ***Separate Property Becomes Marital Property For No Apparent Statutory Reason***

*Dashinaw v Dashinaw*, 11 AD3d 732, 783 NYS2d 93 (3d Dept.,2004) [Wife made significant economic and noneconomic contributions sufficient to render rental properties given to husband by his father and brother marital assets.]

*Parise v Parise*, \_\_\_AD3d\_\_\_, 2004 WL 2952731 (2d Dept.,2004) [ Proper to award wife share of appreciation of husbands separate residential real estate where he failed to satisfy his burden of establishing that the wife's indirect efforts did not contribute, in some degree, to the appreciation.]