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Bits and Bytes™

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"Income" For Child Support Award Includes Maintenance Where Judgment Contains Future Adjustment

In *Nichols v Nichols*, 2005 WL 1368068 (N.Y.A.D. 3 Dept.) the Appellate Division held that where defendant earned \$96,910 annually while plaintiff received only \$18,056 annually from a disability retirement pension and earnings from part-time employment, given plaintiff's age and poor health, the gross disparity between the parties' incomes and the unlikelihood of plaintiff becoming self-supporting, Supreme Court did not abuse its discretion in fixing maintenance at \$350 per week until she was 62, a period of six years. The Appellate Division also held that Supreme Court should have included the maintenance award in its calculation of defendant's share of unreimbursed health expenses and college expenses. The percentage of unreimbursed health care costs for the marital children is pro rated in the same proportion as each parent's income is to the combined parental income and the same formula is generally used in computing each parent's share of the children's future educational expenses. In computing the combined parental income, the spouse obligated to pay maintenance is entitled to have that amount deducted from his or her income while the spouse in receipt of the maintenance will experience an increase in income. After reducing defendant's salary by \$18,200, the annual amount of his \$350 weekly maintenance obligation, defendant's income for purposes of his unreimbursed health care obligation was \$78,710. In turn, plaintiff's income was increased by \$18,200. Thus, defendant's percentage of the combined parental income (\$114,966) was 68.5%, requiring that defendant's pro rata obligation for their son's college expenses and unreimbursed health care expenses should have been reduced from 88.5% to 68.5%. The Appellate Division also held that Supreme Court erred in granting plaintiff counsel fees. For an award of counsel fees to be justified, there must exist a sufficient evidentiary basis for the court to evaluate the value of the services rendered. Although both counsel agreed to submit affidavits of services rendered, no proof was submitted. The award of counsel fees was vacated and the matter remitted for a redetermination.

Acknowledgment Not Necessary on Modification Agreement Where Parties Not Married

In *Penrose v Penrose*, 793 N.Y.S.2d 579 (3d Dept. 2005) the parties 1985 separation agreement was incorporated but not merged into a judgment of divorce. By an "Agreement and Waiver" dated August 2, 1993, plaintiff waived all of her rights under the divorce decree in exchange for specific bequests as then set forth in a will executed by defendant that same day. In 2003, plaintiff brought an application for enforcement of certain terms of the divorce decree. The Appellate Division held that her attempt to enforce the provisions of the 1985 separation agreement was time barred. Moreover, since the parties were no longer married at the time of its execution it rejected plaintiff's contention that the 1993 agreement should have had a notarized acknowledgment in order to be valid.

Unacknowledged Custody Agreement Valid and Enforceable

In *Kelly v Kelly*, 2005 WL 1377954 (N.Y.A.D. 4 Dept.) defendant argued on appeal that Supreme Court erred in awarding custody of the parties' children to plaintiff. At trial, defendant stipulated to an award of custody to plaintiff, and the court denied his subsequent request to withdraw that stipulation. On appeal, defendant relied on Domestic Relations Law 236(B)(3) in

support of his contention that the stipulation was invalid. The Court held that his reliance was misplaced because the requirements of Domestic Relations Law 236(B)(3) pertain to stipulations which effect the equitable distribution of marital property. Here, the stipulation pertained to custody and was binding pursuant to CPLR 2104.

Request For Custody Not Necessary in Custody Proceeding

In *Miller v Orbaker*, 793 N.Y.S.2d 840 (4th Dept.,2005) the Appellate Division rejected petitioner's contention that Family Court erred in awarding sole custody of the child to respondent because respondent did not file a cross petition seeking that relief. Because petitioner sought sole custody, the issue of an award of custody to any party was properly before the court. In a child custody proceeding, a court has the authority to "enter orders for custody ... as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child" (Domestic Relations Law § 240[1][a]).

Exception to Fraudulent Transfer Rule

In *Bernstein v Bernstein*, 795 NYS2d 733 (2d Dept. 2005) the Appellate Division held that where jointly-held property is transferred for the purpose of defrauding creditors, the transferor may not then share in the value of the transferred asset for purposes of equitable distribution. Nevertheless, where the plaintiff expressly acknowledged that she knowingly encouraged and benefitted from the transfer, the asset properly was subject to equitable distribution to the defendant .

Parent's Share of Add-on's Not Limited to \$80,000.00 Cap

In *Matter of D'Avanzo v Papa*, 796 NYS2d 106 (2d Dept. 2005) after a hearing Family Court directed the father to pay basic child support in the sum of \$2,008 per month and 79% of child care expenses and unreimbursed medical, dental, and optical expenses. The Appellate Division modified to substitute a provision directing the father to pay 92% of child care expenses and unreimbursed medical, dental, and optical expenses. It held that the Family Court's determination of basic child support was proper. Since the combined parental income exceeded \$80,000, the court, in its discretion, could apply the applicable percentage, in this case 17% for one child, or the factors set forth in Family Court Act 413(1)(f) or both to the parental income in excess of \$80,000. The Support Magistrate, applying the factors set forth in Family Court Act 413(1)(f), properly considered \$150,000 of the father's gross income in determining basic child support. However, the Support Magistrate improperly determined that the father was only responsible for 79% of child care expenses and unreimbursed medical, dental, and optical expenses. A parent's share of such expenses is computed by prorating the parent's income to the combined parental income (see Family Ct Act 413[1][c][4], [5]). The \$80,000 cap has no application to this calculation.

Pendente Lite Counsel Fees Awarded For Non-Matrimonial Proceedings

In *Soifer v Soifer*, 794 N.Y.S.2d 20 (1st Dept. 2005) the Appellate Division affirmed an Order of the Supreme Court which awarded defendant wife interim attorneys' fees in the total amount of \$178,646.99, consisting of payment to defendant's attorneys of \$59,156.49 for outstanding legal fees charged through July 21, 2004, reimbursement to defendant for \$44,490.50 she paid to her attorneys, and \$75,000 as an advance on anticipated future services. It modified a subsequent order which upon renewal, awarded defendant additional interim attorneys' fees of \$63,522.98 for that period, to reduce the award to \$18,520, and otherwise affirmed. It held that the first order "appropriately redresses the parties' economic disparity, and is adequately supported by evidence of the nature and extent of the legal services rendered and anticipated and defendant's attorneys' time records and hourly rate. The attorneys' bills were properly redacted so as to safeguard defendant's attorney-client privilege. However, the legal work performed between August 8 and September 25, 2004 mostly related to the then separate Family Court article 10 proceeding brought against defendant. Since fee awards for services rendered in an article 10 proceeding are not authorized by Domestic Relations Law 237 it modified the first order so as to include only the services rendered before August 8, 2004. The Appellate Division held that fees for services related to the article 10 proceeding rendered after the October 18, 2004 court-ordered transfer of that proceeding to Supreme Court for joint trial with the divorce action were reimbursable. It also held that the award for future services in the first order was an appropriate advance on those and other anticipated fees.

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