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Welcome to *Bits and Bytes*™, our bi-monthly 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](mailto:unsubscribe@nysdivorce.com), with the words "unsubscribe" in the subject line.

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### College Credit Limited By Second Department (in dicta)

In *Lee v Lee* 2005 WL 1107377 (NYAD 2 Dept) the Second Department held that the trial court should provide in the judgment a method of reducing the overall child support obligation as each child is 21 or emancipated, based on the diminishing statutory percentages. In dicta it stated that college expenses paid on behalf of a child could properly serve as a credit only with respect to so much of the overall child support obligation as relates to the particular child. The credit should be based solely on those expenses associated with the cost of room and board, or other similar expenses that child support is intended to defray. Such a credit should not be based on the cost of college tuition. Cases which reflect the reduction of a parents child support obligation based upon the parents payment of tuition expenses do not reflect the general rule. Life insurance was awarded for wife's benefit because she will be depending on husband for substantial maintenance and child support and would be severely prejudiced in the event of his death.

### Oral Modification of Divorce Judgment

In *Kayser v Kayser*, 2005 WL 1022959 (N.Y.A.D. 2 Dept.) the defendant moved for a money judgment for child support arrears by reason of defendants failure to pay those items, as required by the parties' judgment of divorce. In opposition, the plaintiff contended that there here was an oral modification of the judgment of divorce pursuant to which the defendant waived those items in exchange for the plaintiff's waiver of his equitable distribution award. The Appellate Division held that the Supreme Court properly denied the defendant's motion because the plaintiff showed consideration to support the alleged oral modification and that the conduct of the parties was unequivocally referable to the oral modification.

### Child Support Waiver Void Ab Initio

In *Smith v Smith*, 2005 WL 1007635 (N.Y.A.D. 4 Dept.) pursuant to a prior consent order entered in a paternity proceeding petitioner father was "responsible for providing for the needs of the child[ ] and [would] not seek support from [respondent] mother, for child support or child care expenses...." Petitioner, who had joint custody and physical residence of the child, subsequently commenced a proceeding seeking child support under article 4 of the Family Court Act. Following a hearing, the Hearing Examiner issued an order that required respondent to pay child support and contribute to child care costs. The Appellate Division held that petitioner was not required to establish a basis to set aside or modify the prior order. The prior order did not comply with Family Court Act 413(1)(h) because it failed to set forth the presumptive child support amount or the court's reasons for deviating from that amount. The provisions of section 413(1)(h) may not be waived by either parent, and the failure of petitioner to contend that the prior order failed to comply with that section is of no moment. Because the prior order failed to comply with section 413(1)(h), it was void ab initio, and the court was required to disregard it and to address the child support issue de novo.

### Unacknowledged Agreement Enforceable In Other Actions

In *Matter of Sbarra*, 2005 WL 975858 (N.Y.A.D. 3 Dept.) decedent created a tax deferred pension plan trust naming respondent, his wife, as sole beneficiary. He later purchased life insurance and established individual retirement accounts also naming her as beneficiary. In 1998 decedent and respondent stopped living together and executed a separation

agreement. This agreement provided that respondent would receive certain marital assets valued at \$650,000, retain approximately \$300,000 worth of assets that had been held in her name alone and waive any right that she had "to share as beneficiary of any life insurance proceeds, death benefits, retirement benefits, or to share in any other death benefits payable under any contract or otherwise." In their subsequent divorce action, respondent asserted that the separation agreement had been properly executed and was fair and reasonable. When the judgment of divorce was issued on May 10, 1999, the separation agreement survived and a Qualified Domestic Relations Order was later entered directing the transfer of certain pension plan assets to respondent pursuant to the agreement. After decedent's death and the admission of his will to probate, a dispute arose between petitioner and respondent over the remaining pension plan assets and the other assets of which respondent was the named beneficiary. Supreme Court held that respondent had waived her rights to the remaining assets and awarded them to petitioner. The Appellate Division rejected Respondent's assertion on appeal that, although she signed the separation agreement, she did not acknowledge her signature to the notary public who signed it later, making it unenforceable as a waiver of her rights to decedent's pension plan and other assets. It held that while a separation agreement must be properly acknowledged in order to be enforceable in a matrimonial action since respondent did not deny that she signed the separation agreement and it survived the judgment of divorce, the agreement was enforceable in other types of actions despite the alleged insufficiency of the acknowledgment. Moreover, Since respondent affirmatively alleged in the divorce action that the separation agreement was valid, she was judicially estopped from challenging its validity. Having received the benefit of the Separation agreement's provisions for division of marital property in the earlier divorce action, respondent could not now assume a contrary position here simply because her pecuniary interests had changed.

#### ***Court Imputing Income Must State Source and Actual Dollar Amount***

In *Matter of Kristy Helen T. v. Richard F.G.*, 2005 WL 957960 (N.Y.A.D. 2 Dept.), the Support Magistrate imputed income to the father in calculating his basic child support obligation pursuant to the Child Support Standards Act. The Appellate Division noted that a Support Magistrate is permitted to impute income in calculating a support obligation where it finds that a party's account of his or her finances is not credible. However, in exercising the discretion to impute income to a party, a Support Magistrate is required to provide a clear record of the source from which the income is imputed and the reasons for such imputation. As the Support Magistrate failed to specify the sources of income imputed and the actual dollar amount assigned to each category, the record was not sufficiently developed to permit appellate review. The matter was remitted to the Support Magistrate to specify the sources of income imputed and the actual dollar amount assigned to each category, and the appeal was held in abeyance pending receipt of the report.

#### ***Personality Disorder is Not Extreme Hardship***

In *Malaga v Malaga*, 2005 WL 958023 (N.Y.A.D. 2 Dept.) the parties divorce judgment incorporated, but did not merge their stipulation of settlement which provided that the defendant would pay maintenance to the plaintiff in the sum of \$800 per month for a period of eight months. In 1999 the plaintiff filed a motion in the original matrimonial action pursuant to Domestic Relations Law 236(B)(9)(b) to modify the judgment dated August 21, 1990, so as to award her maintenance. After a psychiatric evaluation and a hearing, the Supreme Court found that she established "extreme hardship" in that, inter alia, her personality disorder precluded her from being self-supporting. The Supreme Court awarded lifetime maintenance in the sum of \$2,000 per month. The Appellate Division reversed. It held that were a separation agreement or stipulation of settlement has been incorporated, but not merged, into a judgment of divorce, a court is authorized to modify maintenance obligations even after the term for durational maintenance in the stipulation has expired. However, it may only grant such a modification, either upward or downward, upon the showing of "extreme hardship" (Domestic Relations Law 236[B][9][b]). The record did not support the conclusion of the Supreme Court that the plaintiff established "extreme hardship". She testified to monthly expenses totaling approximately \$750, including a purported \$250 per month for groceries, and costs associated with a new car she purchased with the \$14,000 net proceeds of a lawsuit that she settled. Her monthly income, including a \$989 pension from a former employer, with or without her social security payment of \$604 and social security disability payment of \$48, among other subsidies, more than sufficiently covers her outlays. Thus, she failed to prove "extreme hardship" and failed to justify the resumption of the defendant's obligation to pay her maintenance in any amount.