New York Divorce and Family Law ™

nysdivorce.com brandeslaw.com

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

Thursday, June 16, 2005 | ***Bits and Bytes*** ™ | **Volume 1, Number 9**

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. Send mail to: joel@nysdivorce.com. Websites: www.brandeslaw.com. www.nysdivorce.com. and www.flsdivorce.com.

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

Income For Child Support Calculation Does Not include Maintenance Award

In Lee v Lee, 795 NYS2d 283 (2d Dept. 2005) the Appellate Division held that Supreme Court erred in considering the maintenance to be received by the wife as her income for purposes of performing the CSSA calculations and that it should have provided for a method for reducing the defendant's overall child support obligation as each child reaches the age of 21 or is otherwise emancipated. The parties had four minor children as of the time the action was commenced, and it held that the defendant's overall child support obligation should be diminished as each child reaches the age of majority. In the particular circumstances of this case, it found that as the number of children that the defendant is obligated to support diminishes from four to one, upon the date that each child, in succession, becomes (or already has been) emancipated, the amount of child support owing should be based on the figure of $200,000, against which the diminishing statutory percentages pertaining to the number of children that the husband is obligated to support, i.e., 29%, 25%, and 17%, should be applied. In dicta the court stated that it is not the defendant's overall child support obligation, which in this case encompassed his duty to support four children, that might properly be reduced on account of his payment of "college expenses" on behalf of one or more of those children; rather, the "college expenses" paid on behalf of one particular child, or on behalf of some particular children, could properly serve as a credit only with respect to so much of the defendant's overall child support obligation as relates to such particular child or children. In respect to any credit against child support that might be granted in connection with the defendant's payment of "college expenses," any such credit should be calculated based solely on those expenses that are associated with the cost of room and board, or on other similar expenses of the kind that "child support" is normally intended to defray. Such a credit should not be calculated based on the cost of college tuition, which is beyond the realm of what is normally considered "child support." Those cases in which, in one context or another, the courts have approved of the reduction of a parent's child support obligation based on that parent's payment of tuition expenses did not, in its view, reflect the general rule.

Cannot Enforce Counsel Fee By Conditional Preclusion Order

In Singer v Singer 16 A.D.3d 666, 792 N.Y.S.2d 541(2d Dept. 2005) the Appellate Division affirmed an order which granted the wife's motion for an award of an interim counsel fee in the sum of $100,000, but reversed that part as directed that if such payment was not made within 20 days of the date of the order, he would be precluded from proffering any testimony or evidence as to claims of separate property or equitable distribution at trial. The court providently exercised its discretion in awarding the wife an interim counsel fee in the sum of $100,000 based upon, inter alia, the financial disparity between the parties, the husband's obstreperous conduct which unnecessarily protracted the litigation, and the quality of the representation afforded the wife by her counsel. However, a conditional order of preclusion is not an available mechanism to enforce an order directing payment of an interim counsel fee award.

Attorney Has Right to Represent Self in Divorce Action

In Nimkoff v Nimkoff, 2005 WL 1216034 (N.Y.A.D. 1 Dept.) the Appellate Division held that the IAS court erred in barring the defendant from representing himself (citing Walker & Bailey v We Try Harder, Inc., 123 AD2d 256), which held that an attorney has a statutory and constitutional right to represent himself and the advocate-witness rule does not apply when an attorney represents himself or his partnership). Although the right to represent oneself is not absolute, any restriction must be carefully scrutinized. Even where a self-represented attorney-litigant is held in contempt due to misconduct during court appearances, a deprivation of the right to self-representation must be extremely well supported. The court's out-of-hand denial of defendants' application for overnight visitation, which he made when the child was two years old, constituted an improvident exercise of discretion. There was no indication that defendants' relationship with the child was such that overnight visitation would not be in the child's best interest. The court's observations of defendants' demeanor and conduct in court should not be the focus when considering the visitation arrangement. The focus must be solely on the child's best interest, which is normally best protected by allowing the development of the fullest possible healthy relationship with both parents.

Modification of Custody Order Requires a Two-Step Analysis

In Matter of Griffen v Griffen, 2005 WL 1119595 (N.Y.A.D. 3 Dept.) the Appellate Division, Third Department, held that where a party seeks to modify a prior order of custody, he or she must demonstrate a sufficient change in circumstances to warrant alteration of the existing custody arrangement in order to ensure the continued best interests of the children. Only when such a change in circumstances has been demonstrated may Family Court properly proceed to undertake a best interest analysis.

Pendente Lite Maintenance and Counsel Fee Award Affirmed

In Susskind v Susskind, 795 BYS2d 315 (2d Dept. 2005) the Appellate Division affirmed an order which directed the husband to pay pendente lite support of $4,000 per month for the wife and the parties' two children, interim counsel fees in the sum of $35,000, all carrying charges on the marital residence, all educational and extracurricular expenses of the parties' two minor children, all unreimbursed in-network medical expenses of the plaintiff and the two minor children, all costs associated with the plaintiff wife's motor vehicle, and conditionally precluded him from introducing evidence as to his finances at trial based upon his failure to comply with court-ordered discovery, unless he fully responded to the plaintiff wife's discovery demands within 30 days of the date of the court's order. It held that: "Pendente lite awards should reflect an accommodation between the reasonable needs of the moving spouse and the financial ability of the other spouse with due regard for the parties' preseparation standard of living" (***). "An appellate court will rarely modify such an award, unless exigent circumstances exist, such as where a party is unable to meet his or her own financial obligations or justice otherwise requires" (***) Here, the husband failed to demonstrate the existence of such circumstances. Therefore, modification of the award is unwarranted. "Rather, perceived inequities in pendente lite orders are best addressed via a speedy trial at which the parties' economic circumstances may be thoroughly explored"(***). The Court also held that given the financial circumstances of the parties the Supreme Court properly exercised its discretion in directing the husband to pay one-half of the wife's counsel fees. The wife was not required to exhaust her own capital in order to qualify for an interim counsel fee award. However, since the wife failed to demonstrate that she lacked sufficient funds of her own to compensate counsel at this state of the litigation, the Supreme Court properly awarded her only half of the attorney's fees sought.

Agreement Waiving Child Support Upheld

In Daratany v Daratany, 2005 WL 1109435 (N.Y.A.D. 2 Dept.) the parties 1986 judgment incorporated but did not merge the terms of a 1986 oral stipulation of settlement. Both the stipulation and the judgment provided, inter alia, that the defendant pay the plaintiff maintenance and child support for the parties' three children, and provided for the immediate listing and sale of the former marital residence, for equal division of the net sale proceeds between the parties and that, pending sale thereof, the plaintiff would have sole occupancy of the former marital residence. They signed a modification agreement in 1994 which provided, in substance, that in exchange for the defendant's conveyance of his remaining interest in the former marital residence, his obligation for child support "past and future" was terminated. The defendant delivered a deed in July 1994 conveying his interest in the former marital residence to the plaintiff and her present husband. In 2003 the plaintiff asserted that she was owed child support arrears. In response, the defendant brought this motion. As to the defendant's support obligation which allegedly accrued before June 1994, the Judicial Hearing Officer determined that the conveyance pursuant to the modification agreement satisfied such obligation in toto. The Appellate Division held that here, as in Matter of O'Connor v. Curcio (281 A.D.2d 100, 103), the parties identified the consideration, to wit, the defendant's interest in the former marital residence, paid by the defendant to the plaintiff for the plaintiff's relinquishment of future child support. The 1994 modification agreement was not executory but fully performed and the parties are bound by its terms. Accordingly, the defendant's child support obligation should have been vacated as to the period after June 1994.

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.flsdivorce.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.**