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Bits and Bytes™

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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, with the words "unsubscribe" in the subject line.

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We are pleased to report that "Interest on A Distributive Award" by Bari Brandes Corbin, appears in the May 2005 issue of the New York Family Law Monthly® at http://www.ljnonline.com/issues/ljn_nyfamily/. Ms. Corbin maintains her office for the practice of law in Laurel Hollow, New York and is Vice-President of Joel R. Brandes Consulting Services, Inc.

Recent Decisions of Interest

Court of Appeals Rules on Construction of Agreement

In *Kamens v Utica Mut. Ins. Co*, 2005 WL 729152, --- N.E.2d --- (2005) the issue before the Court of Appeals was the effect of a provision in the parties stipulation of settlement, as part of their divorce settlement, which provided that "[Susan] will execute any and all forms or instruments necessary to remove herself as primary contingent beneficiary on annuity owned by Utica Mutual Life Insurance Company implementing a structured settlement that the parties received as a result of injuries suffered by [Charles]." Plaintiffs argued that Susan was agreeing to a "renunciation" of her interest in the Utica Mutual agreement, and point out that under Estates, Powers and Trust Law 2-1.11(d) the effect of a renunciation is "as though the renouncing person had died at the time of filing" the renunciation. While Susan did not file a formal renunciation, plaintiffs' argument was that she in substance agreed to do so. If Susan renounced her interest prior to Charles's death, she must be deemed to have predeceased Charles, and by the terms of the Utica Mutual agreement the payments after Charles's death should go to plaintiffs, their children. Defendants argued that the purpose of Susan's agreement "to remove herself as primary contingent beneficiary" was to convey her rights under the Utica Mutual agreement to Charles. Defendants argued that a conveyance is what Susan in substance agreed to. If Susan's rights were conveyed to Charles, Charles was entitled to name anyone else he liked, to receive the payments that Susan would have been entitled to under the agreement.

The Court stated that the real issue is whether they meant that Susan step aside in favor of her daughters, or in favor of Charles. The Court found that the parties intended Charles, not plaintiffs, to benefit from Susan's agreement to "remove herself." It noted that a primary purpose in any divorce settlement is to divide assets between the husband and the wife, and where, as here, the wife agrees not to claim a particular asset, the natural reading of the agreement is that the asset becomes the husband's. It is true, of course, that parties may and often do agree to give assets to their children, but where that occurs one would normally expect the children to be mentioned. Susan's agreement to "remove herself" made no mention of plaintiffs, suggesting that there was no intention to benefit them. Other language in the divorce settlement supported this inference. The sentence immediately following the one in dispute expressly gave a benefit to "the children." That sentence provided: "In addition, [Susan] will execute any and all forms or instruments necessary to change her as primary beneficiary under the husband's life insurance policy and [Charles] will agree that he will appoint the children irrevocable beneficiaries of such policy." When the parties sought to confer rights on plaintiffs, they left no doubt of their intention. Finally, a colloquy that occurred in open court during the divorce settlement confirmed that the clause in dispute was meant to benefit. The Court held that the Appellate Division correctly concluded that the effect of the disputed provision in the 1985 divorce settlement was to give Charles the right to name anyone he chose as the primary contingent beneficiary of the Utica Mutual agreement.

Appeal without transcript Dismissed

In *Rudick v Rudick*, ___AD3d___, 2005 WL 600678 (N.Y.A.D. 2 Dept.), the mother appealed from an order which, after a hearing, granted the father's application for a downward modification of his maintenance obligation. The Appellate Division dismissed her appeal holding that her failure to include transcripts of the support hearing required dismissal of her appeal. It stated that it is the obligation of the appellant to assemble a proper record on appeal. The failure to provide necessary transcripts inhibits the court's ability to render an informed decision on the merits of the appeal. The papers provided were patently insufficient for the purpose of reviewing the issues she raised.

Must Register to Enforce Foreign Support Order

In *Matter of Linksman v Linksman*, ___AD3d___, 2005 WL 646367 (N.Y.A.D. 2 Dept.) pursuant to the parties 1997 Virginia divorce decree and their previously entered into settlement agreement, the father's child support obligation was \$400 per month. In 2001 the Family Court modified the father's obligation by reducing it to \$0. In 2003 the mother commenced a proceeding in the Family Court to enforce the Virginia decree and for arrears. A Support Magistrate awarded the mother arrears in the sum of \$15,835. The Appellate Division denied the petition and dismissed the proceeding holding that because the mother failed to demonstrate that the Virginia decree was registered in New York, New York lacked subject matter jurisdiction to enforce the decree (citing 28 USC § 1738B[1]; Family Ct Act §§ 580-603, 580-611[a]).

Counsel Fees Pendente Lite

In *Stella v Stella*, 791 N.Y.S.2d 20, (1st Dept.2005) the Appellate Division affirmed a Judgment which awarded plaintiff pendente lite counsel and expert fees, plus interest, in the total amount of \$227,726.33. It held that inasmuch as the record disclosed that defendant husband had significantly greater financial resources at his disposal than plaintiff wife, and that defendant's actions had caused protracted litigation, the court properly exercised its discretion in making the interim awards.

Modification of Maintenance

In *Glass v Glass*, 791 N.Y.S.2d 15 (1st Dept.2005) the Appellate Division held that where a judgment of divorce incorporates by reference, but does not merge with, a stipulation of settlement between the parties the parties to such agreement may contractually provide for a support modification on a lesser standard than legally required.

2005 Equitable Distribution Decisions Update (Continued)

Schiffer v Schiffer, 2005 WL 71204 (NYAD 2 Dept)

Child Support: \$8031.75 per month. Maintenance: \$2500.00 per month for 8 years. Counsel Fee: \$145,000. While Supreme Court properly deducted the amount of defendant's parental income used in calculating child support it failed to account for the increase in his income and the concomitant increase in the child support payments upon the termination of maintenance.

Sina v Sina, 2005 WL 774515 (NYAD 1 Dept)

Years Married: 8. Payments for basic living expenses, the court appointed accountant and divorce lawyers did not constitute dissipation, nor did the decline in the stock market, which was out of defendant's control.

Sysgrove v Sysgrove, 15 AD3d 292, 791 NYS2d 93 (1st Dept.,2005)

Years married: 19. 50% of equity in marital residence awarded to husband, valued in amount of bona fide offer of \$950,000. In July 1998 (a year after action commenced) made prior to time wife transferred the property to her mother to eliminate her mortgage and tax obligations. Husband's expert's testimony, valuing it at \$2.1 million in July 2001 prior to trial was properly rejected.

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