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Party May Testify As an Expert

In *Thoma v Thoma* --- N.Y.S.2d ----, 2005 WL 2381622 (N.Y.A.D. 2 Dept.) the Appellate Division reversed the judgment and the matter was remitted to the Supreme Court for a hearing and new determination as to the issues of maintenance, child support, arrears, the proportion of unreimbursed medical, dental, optical, and pharmaceutical expenses to be paid by the plaintiff, and counsel fees, if any, to be paid by the plaintiff. The defendant was a licensed school teacher with two teaching certificates and a degree in architecture and interior design. She testified that her "best guess" was that if she secured full-time employment as a school teacher, she could earn a starting salary of \$39,000 per year. The defendant testified that for five years since 1999, she was unable to obtain full-time employment. However, she acknowledged that in 2000 she was able to secure full-time employment at a private school but she quit that job. She further noted that she was unable to secure other full-time employment despite the fact that she "sent out 40 resumes last month." She failed to submit copies of applications or any rejection letters. Her claim that she could not secure full-time employment was based upon conclusory assertions. It was clear from the record that the defendant is relatively young and capable of working. Therefore the award of lifetime maintenance was improper. Maintenance should continue only as long as required to render the recipient spouse self-supporting. In view of the conclusory testimony with respect to the defendant's inability to obtain full-time employment, The Appellate Division deemed it appropriate to remit for a new hearing to determine the results of her 40 job applications and whatever other efforts she made to secure full-time employment. It specifically stated that: "This case may warrant imputation of income to the defendant based upon her earnings potential." At the trial, the Supreme Court precluded the plaintiff, an architect, from testifying as an expert as to the defendant's earning capacity in architecture and interior design on the ground that he was an "adversary." This was error. A party may testify as an expert witness. However, since the plaintiff never made an offer of proof as to his qualifications to testify, it was impossible to determine whether this error had an effect on the outcome. At the new hearing, the plaintiff should be permitted to attempt to qualify himself as an expert or to submit other expert testimony. In determining child support, the Supreme Court must deduct from the plaintiff's gross income the amount that he pays in maintenance and taxes paid pursuant to the Federal Insurance Contributions Act before determining the combined parental income and provide for an adjustment in child support upon the termination of maintenance, if any. One of the two children for whom child support was awarded will reach the age of 21 years on December 22, 2005. In view of the close proximity of this date, upon remittitur, the Supreme Court should determine the child support to be awarded before and after December 22, 2005. The judgment directed the plaintiff to pay the unreimbursed medical, dental, optical, and pharmaceutical expenses of the two children under the age of 21 years. However, the Supreme Court was required to determine the plaintiff's share of such expenses by prorating his income to the combined parental income. With respect to counsel fees, the plaintiff did not consent to a determination without a hearing and specifically objected to the amount of counsel fees incurred by the wife as excessive. Therefore, a hearing is warranted on the amount of counsel fees to be awarded, if any.

Claim of Bias By Referee Waived By Failure to Timely Objection

In *Shen v Shen* --- N.Y.S.2d ----, 2005 WL 2384687 (N.Y.A.D. 2 Dept.) the defendant contended on appeal that the referee who was appointed to hear and report exhibited bias against her, and that the Supreme Court should have directed a new hearing on the issues. The Appellate Division held that the defendant waived any claim of bias by her conduct in raising the issue

of bias for the first time after the hearing, after the referee prepared her report, and after the plaintiff moved to confirm the report. The Court held that where a referee's findings are supported by the record, the court should confirm the referee's report and adopt the recommendation made therein. The majority of the referee's findings, including those regarding the custody of the parties' children, were amply supported by the evidence and were properly upheld by the Supreme Court. However, the determination that a particular IRA and bank account owned by the defendant constituted marital property subject to equitable distribution was not supported by the record. Those accounts were opened by the defendant prior to the parties' marriage, she deposited no funds in them during the marriage, and any increase in their value was not attributable to the plaintiff. Thus, the court should not have distributed those accounts. In view of the respective assets and earning capacities of the parties and the other relevant factors in this case the court improvidently exercised its discretion in directing the defendant to pay \$41,934, or approximately 75%, of the plaintiff's counsel fees. Under the circumstances of this case, an award of \$22,000 or approximately 40% of the plaintiff's total counsel fees was appropriate.

Judgment Modified to Correct Oversight

In *Ignaszak v Ignaszak*--- N.Y.S.2d ----, 2005 WL 2404643 (N.Y.A.D. 4 Dept.) the JHO determined that "[e]ach party shall be solely responsible for [his or her] attorney's fees," but that determination was not incorporated into the judgment of divorce. The Appellate Division stated that in its view the court's failure to incorporate the JHO's determination was an oversight, and it modified the judgment on the law by providing that each party shall be solely responsible for his or her attorney's fees.

Maintenance Not Dischargeable in Bankruptcy

In *re Duffy*, --- B.R. ----, 2005 WL 2483328 (Bankr.S.D.N.Y.) the wife waived maintenance but the parties stipulation of settlement which was made during the equitable distribution trial contained the following provision: Adjudged and Decreed that the Defendant [Duffy] shall pay monthly spousal maintenance to the Plaintiff [Taback] commencing July 1, 1997 in the sum of \$2,000 per month payable in monthly installments which shall be made on the first day of each month for the term of ten (10) consecutive years, which payments shall be non-dischargeable in bankruptcy and paid unconditionally to the Wife irrespective of her cohabitation or remarriage. The bankruptcy court held that this debt was dischargeable pursuant to 11 USC 523(a)(5), of the Bankruptcy Code which excepts from discharge any debt (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, ..., or property settlement agreement, but not to the extent that-- ...(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support....The Court held that the payments did not constitute alimony/maintenance within the meaning of Section 523(a)(5) of the Bankruptcy Code. The question whether obligations under a divorce decree constitute alimony/maintenance within the meaning of Section 523(a)(5), or equitable distribution of marital property not within subsection (5), is a question of bankruptcy law to be decided by the bankruptcy court on the basis of all the facts and circumstances, and the bankruptcy court must reject the characterization applied to the obligation by the divorce court or the parties if warranted by a consideration of all of the facts. The court found that payments were designated as "spousal maintenance" and treated as such by the parties at the suggestion of the trial court, not for the purpose of providing alimony but in order to facilitate the settlement of the wife's equitable distribution claim by reducing the net cost to the husband. Unlike alimony/maintenance, the payments were to continue for ten years regardless of the wife's cohabitation, which long predated the divorce, or remarriage, which was contemplated to occur and did shortly after the divorce judgment.

Must Give Credit For Room and Board at College When Directing Payment of College Expenses

In *Navin v Navin*, --- N.Y.S.2d ----, 2005 WL 2438521 (N.Y.A.D. 2 Dept.)the Supreme Court, inter alia, awarded the plaintiff maintenance in the sum of \$540 per week and child support in the sum of \$408.80 per week for the parties' unemancipated child. The Appellate Division modified, on the law, by deleting the decretal paragraph awarding the plaintiff child support of \$408.80 per week for the parties' unemancipated child. In calculating the defendant's child support obligation, the Supreme Court failed to reduce the defendant's income by the amount of maintenance paid to the plaintiff before determining his child support obligation, and failed to direct a concomitant increase in the child support obligation upon the termination of the maintenance obligation. Further, while the Supreme Court properly directed the defendant to pay a proportionate share of the children's educational expenses, it was error to do so without including a provision that the amount that the defendant contributes to the room and board expenses of the unemancipated child's school while the child is away from home and at school shall be deducted from the defendant's child support obligation.

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