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### *Third Department Joins Other Departments Holding Prospective Child Support Payments May Be Waived*

In *Williams v Chapman*, 2005 WL 2782578 (N.Y.A.D. 3 Dept.) the Third Department joined the other Departments in holding that prospective child support payments may be waived. Pursuant to an open court stipulation Family Court ordered respondent to pay petitioner \$150 per week in child support for the parties' two unemancipated children. In February 1999, one child relocated to the father's residence and the parties agreed, in a handwritten document, that child support payments to the mother would be suspended while each party had physical custody of one of the children. In 2003, the mother commenced a proceeding, seeking approximately \$37,000 in child support arrears asserting that the father failed to pay support for both children after one child left the mother's residence. Family Court found that the mother expressly waived prospective child support payments in the parties' agreement and denied her petition. The Third Department affirmed. It noted that in *Matter of Dox v. Tynon*, 90 N.Y.2d 166, 168 [1997] the Court of Appeals has held that pursuant to the New York State Support Enforcement Acts of 1986 and 1987 a recipient may not impliedly "waive the right to unpaid child support simply by failing to demand payment or seek enforcement of support obligations", but declined to reach the question of whether express waivers of future child support payments were similarly impermissible. The mother argued that express waivers of child support must also be deemed to violate the legislative intent of the amendments at issue in *Matter of Dox*. The Appellate Division rejected her argument which was at odds with positions taken by the other Departments (See *Matter of Parker v. Parker*, 305 A.D.2d 1077 [4th Dept 2003]; *Matter of O'Connor v. Curcio*, 281 A.D.2d 100 [2d Dept 2001]; *Matter of Grant v. Grant*, 265 A.D.2d 19, [1st Dept 2000], lv denied 95 N.Y.2d 758 [2000] *Mitchell v. Mitchell*, 170 A.D.2d 585, 585 [2d Dept 1991]). The purpose of the amendments under consideration in *Matter of Dox* was to preclude forgiveness of child support arrears to ensure that respondents are not financially rewarded for failing either to pay the order or to seek its modification. In determining that implied waivers are not permissible, the Court of Appeals emphasized that such waivers are "based on petitioner's behavior after respondent declined to make the requisite payments". Here the waiver was based upon the mother's conduct prior to any default, that is her agreement to forego future support payments, rather than support arrears. The court held that contrary to the mother's argument regarding legislative intent, when future child support payments are waived, no arrears accrue, and the statutory amendments precluding the cancellation of arrears are inapplicable. The court rejected the mother's argument that the express waiver given was invalid as a matter of law due to the parties' failure to comply with Family Ct Act 413(1)(h). While she was correct that in the absence of an express waiver, a party seeking modification of a child support obligation is required to apply to the courts and any order entered in such a proceeding must comply with the CSSA in arguing that the parties' out-of-court agreement must also comply with the statutory requirements, the mother failed to distinguish between a modification agreement and a waiver. A modification agreement 'is binding according to its terms and may only be withdrawn by agreement while a waiver requires no more than the voluntary and intentional abandonment of a known right and, to the extent that it remains executory, may be withdrawn without agreement. Thus, an agreement that does not satisfy the prerequisites of a legally binding modification agreement may nonetheless constitute a valid waiver.

### *Acupuncture License is Martial Property. Husband Warned That Proving Wife's Alleged Fraud in Obtaining License Hurts His Case*

In *Liu v. Chen*, --- N.Y.S.2d ---, 2005 WL 2522800 (N.Y.A.D. 2 Dept.) the plaintiff appealed from a judgment, which, inter alia, awarded the defendant \$127,500, representing 50% of the value of the plaintiff's enhanced earning capacity due to her

acquisition of a license to practice acupuncture, and valued AC500, Inc., the parties' acupuncture and herbology practice, at \$220,000. The Appellate Division held that in determining the value of her enhanced earning capacity resulting from the acupuncture license, Supreme Court improperly relied on the valuation of the expert retained by the defendant. The expert testified that his estimate of the plaintiff's earnings was based on the earnings of AC500, Inc., the company which operated the parties' acupuncture and herbology practice for the year 2000. The expert, erroneously assumed that the company was operated solely by the plaintiff, and had no knowledge of the defendant's role in contributing to the company's earnings. While the plaintiff claimed that the defendant's contributions to the practice that year through his provision of herbology services constituted about 20% of those earnings, the defendant testified that his herbology practice accounted for only 1% of the company's revenue. Nevertheless, the defendant conceded that, in 2000, he worked full-time for the company, six days a week, alongside the plaintiff. The expert's valuation was based on incorrect assumptions, and should not have been relied upon in determining the plaintiff's enhanced earning capacity. Supreme Court also improvidently exercised its discretion in determining the marital portion of the plaintiff's acupuncture license. To meet the admission requirements for the acupuncture licensing exam, the plaintiff was required, inter alia, to establish that she received three years of prior training. The parties were married in China on November 29, 1990, and emigrated to the United States on or about September 27, 1991. The plaintiff qualified for and passed the New York State acupuncture licensing exam in 1992 based, among other things, on documentary evidence that she had received three years of training in China between January 1988 and April 1991. Thereafter, she received a limited permit to practice acupuncture in December 1992, and a full license in April 1995. All times prior to receiving her license, the plaintiff worked outside the home and helped to support the family. In light of the above circumstances, the court's decision to apply a 100% coverture factor in determining the marital portion of the acupuncture license lacked proper support in the record. The defendant claimed that, after the marriage, he paid for three months of acupuncture training for the plaintiff in China, from May 1991 through August 1991, before the couple moved to the United States. He also claimed that he paid the filing fee for the exam, assisted the plaintiff in studying for it, and drove her to the test center. While some portion of the license constituted marital property subject to equitable distribution the evidence did not justify the court's use of a coverture factor of 100%. The court pointed out that defendant's claim that the academic documents submitted by the plaintiff in support of her application for the license were fraudulent did not advance his claim for equitable distribution; to the contrary, such evidence, if true, could only serve to establish that the license was issued under false pretenses and, therefore, had no present value as a future source of earnings. The matter was remitted for a new determination of the valuation issue and to determine the marital portion of the acupuncture license.

#### ***Adultery Committed After Commencement is Still Basis for Divorce***

In ***Golub v Ganz***, ---- N.Y.S.2d ----, 2005 WL 2665335 (N.Y.A.D. 3 Dept.) the Appellate Division rejected the defendant's argument that the trial court should not have granted a divorce on the basis of adultery because his only act of adultery took place after the action was commenced and because plaintiff's own alleged adultery constituted a complete defense to his adultery. Defendant's adultery, committed after the parties were married but before any judgment of divorce, fit within the parameters of Domestic Relations Law 170(4). Since no provision of the Domestic Relations Law precludes a party from obtaining a divorce upon acts of adultery that occur after an action is commenced and because no prejudice had been demonstrated by defendant a divorce could be granted on this ground (citing, inter alia, 1 Foster, Freed and Brandes, Law and the Family New York 6:9, at 392 [2d ed]). Nor was the plaintiff's acknowledgment at trial that she became "romantically involved" with another during the late summer of 2002, sufficient to establish that she committed adultery such that the defense of recrimination was established. Since plaintiff's adultery was not established by independent satisfactory evidence in the first instance, no negative influence arises from her invocation of the Fifth Amendment right against self-incrimination when asked at trial if she engaged in a sexual relationship with another. The defendant failed to establish that the appreciation of plaintiff's premarital stock in the Golub Corporation during the marriage could be attributed to her active efforts during the marriage. The subject stock was nonvoting, preferred stock, plaintiff was but one of hundreds of midlevel managers amongst the corporation's 102 grocery stores and 22,000 employees, had no role in corporate policy-making decisions, had no input into corporate procedures and was the manager of an income-producing department. She was in marketing. Nor had she ever been consulted by any member of corporate management or the board of directors regarding anything other than her specific duties. None of the positions ever held by plaintiff, nor her attendance at corporate meetings or charitable events, had affected the profitability of the corporation.

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