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Bits and Bytes™

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Loss of Employment May Constitute A Change in Financial Circumstances

In *Cox v Cox*, 2005 WL 1678070 (N.Y.A.D. 2 Dept.) the Appellate Division reversed on the law an order of the Family Court, which, after a hearing, dismissed, without prejudice, the father's petition for a downward modification of his child support obligation. It held that a court may modify a child support order derived from a stipulation of settlement that is incorporated but not merged in a judgment of divorce upon a showing that there has been an unreasonable and unanticipated change in circumstances justifying the modification. A parent's loss of employment, if unanticipated, may constitute a change of circumstances warranting a downward modification where he or she has diligently sought reemployment. The Family Court erred in concluding that the father's loss of employment was not an unanticipated change of circumstances. There was no evidence in the record from which the Family Court could reasonably conclude that the father should have anticipated the loss of his most recent employment because he had been terminated from his previous position. Since the Family Court's finding that there was no unanticipated change in circumstances made it unnecessary to reach the issue of the father's diligent search for new employment commensurate with his qualifications and experience, which he must also prove in order to sustain his burden the matter was remitted to the Family Court for further proceedings regarding the father's efforts to obtain new employment.

Railroad Retirement Contributions Treated Like FICA

In *Allison C v Anthony C*, 6/28/2005 NYLJ 19, (col. 3) Supreme Court, Suffolk County (Hudson, J.) the court agreed with the contention of the husband's attorney that Railroad Retirement contributions should not be included in computing income for purposes of fixing child support since "they are the equivalent of FICA." It noted that there was no statutory or case law authority for this interpretation of DRL 240(1-b)(b)(5)(vii)(H). Subdivision (H) merely states, "federal insurance contributions act (FICA) taxes actually paid." Although the Railroad Retirement Act (45 USC Sec. 201 et seq.) may function in the same manner as FICA (26 USC Sec. 3101) there is no ejusdem generis clause found in DRL 240(1-b)(b)(5)(vii) that provides for analogous statutes. Although it appeared that the husband should not receive credit for these deductions because the literal wording of the statute excluded it the Court was aware that the prevailing practice in the jurisdiction was to treat Railroad Retirement Act contributions in the same manner as FICA payments notwithstanding the absence of clear authority.

Actual Loss and Counsel Fees Recoverable for Contempt

In *Jamie v Jamie*, 19 A.D.3d 330, 798 N.Y.S.2d 36 (1st Dept. 2005) the Appellate Division reduced a Judgment in favor of plaintiffs and against defendant in the amount of \$217,626.87, to reduce the award to \$150,000. The Court construed Judiciary Law 773 to mean that where an actual loss has been caused by a contempt, the aggrieved party is entitled to recover not only the amount of such loss, but also the reasonable costs and expenses in proving such amount and the attendant contempt. To hold that reasonable costs and expenses are recoverable only when an actual loss or injury is not shown would be to make recovery of an actual loss or injury anomalously rare, as here, the claimed costs and expenses incurred in prosecuting the contempt are much larger than the claimed actual loss caused by the contempt. The Court overruled its prior holdings that attorneys' fees are not recoverable where actual damages are shown. The Court modified to reduce the award of costs and

expenses because plaintiffs were not entitled to any attorneys' fees for work performed after June 2, 2003, the date of the order referring the matter to a Special Referee, or to any other costs and expenses incurred after that date. The order states that "plaintiffs shall be entitled to the attorney's fees, along with the costs and disbursements, which they have incurred in prosecuting this contempt motion" (emphasis added). The use of the past tense plainly limits recovery to the date of the order. Second, upon review of the record, the court found that the number of hours that plaintiffs' attorneys claimed to spent on the matter was excessive.

Counsel Fee Award Not Forfeited By Right to Assigned Counsel

In *Cook v Jasinski*, 798 N.Y.S.2d 834 (4th Dept. 2005) the Appellate Division held that the Family Court erred in denying the application of respondent for counsel fees based solely upon her possible eligibility for assigned counsel. Family Court Act 262(a) provides that the court shall advise a person entitled to the assistance of counsel pursuant to Family Court Act 262(a)(i) through (viii) that he or she "has the right to be represented by counsel of his [or her] own choosing, of [the] right to have an adjournment to confer with counsel, and of [the] right to have counsel assigned by the court in any case where he [or she] is financially unable to obtain the same...." The right to assigned counsel may be waived and a party who chooses to waive that right is not foreclosed from retaining private counsel and thereafter seeking counsel fees resulting from that representation. In assessing whether respondent was entitled to counsel fees, the court should have conducted a hearing to determine the relative equities and financial circumstances of the parties. In the final fixation of counsel fees, the court should base its determinations upon testimonial and other trial evidence of the financial condition of the parties ... unless the parties have stipulated otherwise.

Divorce By Lockout Denied Where Husband Had Key

In *Soldinger v Soldinger* --- N.Y.S.2d ---, 2005 WL 1962290 (N.Y.A.D. 2 Dept.) the Appellate Division reversed the judgment of divorce, on the law and dismissed the complaint. The plaintiff commenced the action for a divorce pursuant to Domestic Relations Law 170(2) on the ground that the defendant had abandoned him for more than one year by locking him out of the marital residence in 1986 without justification and preventing him from returning ever since. The Appellate Division held that abandonment by lock-out occurs when one spouse changes the lock on the entrance door of the marital abode, or the place where he or she is living, thus effectively excluding the other spouse, unless the act is justified. The plaintiff's testimony failed to establish a prima facie case of abandonment by lock-out since, among other things, he admitted that he was not excluded from the marital residence, he retained the keys to the marital residence, and the defendant never changed the locks. Thus, the Supreme Court should have granted the defendant's motion made at the close of the plaintiff's case to dismiss the action.

Relocation Permitted in Child's Best Interest

In *Matter of Vega v Pollack*, --- N.Y.S.2d ---, 2005 WL 1962982 (N.Y.A.D. 2 Dept.) the mother appealed from an order of the family court which continued the award of custody to the mother but denied her petition to relocate from New York to Virginia with the parties' minor child, and denied the father's request for custody. The Appellate Division reversed the order, on the law, and granted the mother's petition to relocate. The matter was remitted to the Family Court for a determination as to suitable visitation arrangements with the father. The Appellate Division held that the Family Court's determination as to custody, which is accorded great deference on appeal, had a sound and substantial basis in the record and would not be disturbed. It also held that, although a close question, the mother should have been granted permission to relocate from New York to Virginia with the parties' minor child. It pointed out that when reviewing a custodial parent's request to relocate, the court's primary focus must be on the best interests of the child (citing *Tropea v. Tropea*, 87 N.Y.2d 727). Factors to be considered include: "each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements." While noting that the child had a loving relationship with the father and extended family in New York, and that visitation with the father would suffer from the long commute to Virginia, it also found that relocation was in the child's best interest because the mother had remarried and her new husband lived in Virginia with his son and daughter; the mother's new husband had developed a strong and loving bond with the child, and stated that he would actively support the father's efforts to maintain his relationship with the child; the new husband was able to provide a comfortable home and standard of living for the child; and the child expressed great affection for her stepfather and her stepsiblings, whom she referred to as her brother and sister, and indicated that she preferred her home and school in Virginia to her apartment and school in New York.

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