

Counsel Fee Awards in Enforcement Proceedings
By Joel R. Brandes

Domestic Relations Law § 238 provides, in part, that in any action or proceeding to enforce or modify any provision of a judgment or order entered in an action for divorce or in any proceeding pursuant to Domestic Relations Law §§243, 244, 245 or 246 the court may in its discretion require either party to pay counsel fees and fees and expenses of experts directly to the attorney of the other party to enable the other party to carry on or defend the action or proceeding as, in the court's discretion, justice requires having regard to the circumstances of the case and of the respective parties. (Domestic Relations Law § 238 as amended by Laws of 2010, Ch. 329, § 2, effective October 12, 2010.)

Applications for fees and expenses may be maintained by the attorneys for the respective parties in the counsel's own name and in counsel's own behalf. Applications may be made at any time or times prior to final judgment. The payment of any retainer fees to the attorney for the petitioning party does not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under Domestic Relations Law § 238.

Where the parties' settlement agreement contains provisions that govern the award of counsel fees on a future application to enforce the agreement, the agreement's provisions, rather than statutory provisions in Domestic Relations Law § 238 control. However, where the agreement is incorporated in and survives the judgment of divorce a party may seek fees under both the statute and the agreement unless the agreement contains an express waiver of the right to apply under the statute. (*Momberger v. Momberger*, 103 A.D.3d 971, 960 N.Y.S.2d 244 (3d Dept.,2013); *Jeffrey P. v Alyssa P.*, 202 A.D.3d 1409, 164 N.Y.S.3d 265 (3 Dept., 2022)).

Before 2010, Domestic Relations Law §238 did not authorize an award of counsel fees or expenses in proceedings to enforce property distributions or other non-monetary provisions of a judgment or order, and the definition of expenses which is in Domestic Relations Law §237(d) did not apply to enforcement proceedings. These shortcomings were corrected by the amendments made effective on October 12, 2010. (See Laws of 2010, Ch. 329).

The 2010 amendments also added three sentences to Domestic Relations Law §238 which also appear in Domestic Relations Law §237(a) and (b): "There shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, pendente lite, so as to enable adequate representation from the commencement of the proceeding....Both parties to the action or proceeding and their respective attorneys, shall file an affidavit with the court detailing the financial agreement between the party and the attorney. Such affidavit

shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses.” (See Laws of 2010, Ch. 329).

In addition to the enforcement provisions of Domestic Relations Law §238, Domestic Relations Law §237(c) provides that in any action or proceeding for failure to obey any lawful order compelling payment of support or maintenance, or distributive award the court shall, upon a finding that such failure was willful, order respondent to pay counsel fees to the attorney representing the petitioner. In *Davenport v. Davenport*, (151 A.D.2d 541, 542 N.Y.S.2d 314 (2d Dep't 1989)), the Appellate Division held, inter alia, that the award of counsel fees and interest was proper based on the finding that defendant's default was willful under DRL §237(c). (See also *Paniccia v. Paniccia*, (13 A.D.3d 863, 786 N.Y.S.2d 252 (3d Dep't 2004)).

Domestic Relations Law §238 appears to conflict with 22 NYCRR §202.16 (k)(3) of the Uniform Rules for the Supreme and County Court, which was originally adopted in 1986. It provides, in part, “[n]o motion for counsel fees and expenses shall be heard unless the moving papers include the affidavit of the movant's attorney stating the moneys, if any, received on account of such attorney's fee from the movant or any other person on behalf of the movant, the hourly amount charged by the attorney, the amounts paid, or to be paid, to counsel and any experts, and any additional costs, disbursements or expenses, and the moneys such attorney has been promised by, or the agreement made with, the movant or other persons on behalf of the movant, concerning or in payment of the fee.” (22 NYCRR §202.16(k) (3)) However, 22 NYCRR §202.16 (k)(3) specifically exempts from its application motions made pursuant to Domestic Relations Law §237(c) and 238 for counsel fees for services rendered by an attorney to secure the enforcement of a previously granted order or decree. Thus, a spouse is not required to submit a statement of net worth for her request for counsel fees to be heard, nor are the attorneys for the parties required to submit the affidavit required by 22 NYCRR 202.16 (k)(3). (see 22 NYCRR 202.16 (k)); *Jeffrey P. v Alyssa P*, supra.)

In contrast, Domestic Relations Law §238 provides that no motion for counsel fees and expenses shall be heard unless the moving papers include the affidavit of the movant's attorney which shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses. This apparent conflict should be remedied by the removal of this provision from Domestic Relations Law §238 which, as we shall see, is inconsistent with the legislative intent behind the 2010 amendments.

Presumption in favor of less monied spouse

Since the 2010 amendments were enacted Domestic Relations Law § 238 contains a rebuttable presumption that “counsel fees shall be awarded to the less

monied spouse.” Domestic Relations Law §238 does not require that the less monied spouse be a prevailing party on the issues before the court to justify an award of attorney fees. (See dicta in *Lomaglio v. Lomaglio*, 42 Misc. 3d 827, 978 N.Y.S.2d 783 (Sup. Ct., 2013)). Counsel fees may be awarded to a losing party and even to a party who has defaulted in complying with his or her court ordered financial obligations.

Where the party in default of his obligations under a judgment or order is or claims to be the non-monied spouse the rebuttable presumption in Domestic Relations Law § 238 requires the party seeking to enforce the judgment or order to rebut the presumption that the party in default is entitled to counsel fees. This result was not the intent of this legislation and requires remedial legislation modifying this provision to clarify that it does not apply in modification proceedings, nor to counsel fee awards to the spouse in default. According to the letters from its sponsors contained in the Assembly Bill Jacket “[T]he intent of this legislation is not to alter the existing standards established by case law to determine reasonable counsel and expert fees but rather to shift the timing of granting interim counsel fee applications.” (See New York Bill Jacket, 2010 A.B. 7569, Ch. 329.) “We intend that existing case law on counsel and expert fees in matrimonial actions would continue to apply to these cases.”

Discretion as to award and amount

Domestic Relations Law §238 provides that the granting of counsel fees, in a case where authorized, lies within the discretion of the court. The statutory guide for the court's discretion is that the court may in its discretion require either party to pay the expenses of the other in bringing, carrying on, or defending such or proceeding. (Domestic Relations Law § 238). An award under Domestic Relations Law §238 is committed to the sound discretion of the trial court, which is “in a superior position to judge those factors integral to the fixing of counsel fees” such as the financial circumstances of the parties, the circumstances of the case as a whole, including the relative merit of the parties' positions, and the time, effort and skill required of counsel. (*Silberman v. Silberman*, 216 A.D.2d 41, 627 N.Y.S.2d 392 (1st Dep't 1995)).

In contrast, Domestic Relations Law § 237(c) mandates a counsel fee award upon a determination that a party's failure to obey an order compelling payment of support or maintenance, or a distributive award was willful. (*Seale v Seale*, 154 A.D.3d 1190, 63 N.Y.S.3d 550 (3 Dept., 2017)).

Factors affecting the award

There is no formula that determines the number of counsel fees and there is no “judicial rule of thumb” which ties the award of counsel fees in an enforcement proceeding to the amount of arrears sought to be collected.

Before the 2010 amendments Domestic Relations Law § 238 did not expressly require a court to consider the circumstances of the case or the parties in fashioning an

award of counsel fees. (*Matwijczuk v. Matwijczuk* (290 A.D.2d 854, 736 N.Y.S.2d 520 (3 Dept. 2002))). Since 2010 Domestic Relations Law §238 expressly requires a court to consider the circumstances of the case or the parties in fashioning an award of counsel fees.

The court, in exercising its discretion in the fixation of counsel fees takes into account the needs of the respective parties and their financial ability to pay their counsel fees. The Court will consider the financial circumstances of the parties, the disparity in the parties' financial condition, the circumstances of the case as a whole, including the relative merit of the parties' positions, and the documented time, effort, and skill required of counsel. (*Mollah v. Mollah* 136 A.D.3d 992, 26 N.Y.S.3d 298 (2 Dept. 2016); *Wilson v. Wilson*, 128 A.D.3d 1326, 7 N.Y.S.3d 751 (4th Dep't 2015)). The Court may consider all the other circumstances of the case, which may include the tactics of a party in unnecessarily prolonging the litigation. (*Franco v Franco*, 97 A.D.3d 785, 949 N.Y.S.2d 146 (2 Dept., 2012)).

Where the enforcement claim is meritless, it is an abuse of discretion to award counsel fees for legal services rendered relating to the meritless claim. (*Roiphe v. Roiphe*, 98 A.D.2d 676, 469 N.Y.S.2d 410 (1st Dep't 1983)).

Similarly, where the opposition to the enforcement claim is meritless, it is not an abuse of discretion to award counsel fees. In *Pinto v. Pinto* (151 A.D.3d 715, 54 N.Y.S.3d 673 (2 Dept., 2017)) where the plaintiff was compelled to bring a motion to enforce the terms of the stipulation against the defendant and prevailed in doing so, the Supreme Court providently exercised its discretion in awarding her a reasonable attorney's fee particularly given the validity of defendant's enforcement motion and plaintiff's failure to offer, in most instances, any valid defenses to defendant's multiple claims of nonpayment.

Necessity for hearing and waiver

An application for counsel fees in an enforcement proceeding, where challenged, may not be determined by the court upon the moving and opposing papers, without a hearing. An award of counsel fees based on an affirmation alone is improper. They must be proved in an adversarial atmosphere, upon presentation of testimony, where the opposing party may assert the right to cross-examine. (*Price v. Price*, 115 A.D.2d 530, 496 N.Y.S.2d 464 (2d Dep't 1985); *Ferris v Ferris*, 121 A.D.3d 1544, 993 N.Y.S.2d 834 (4 Dept., 2014)).

The right to a hearing on an application for counsel fees in an enforcement proceeding may be expressly waived by stipulation. (*Price v. Price*, *supra*; *Consentino v. Sweeney*, 143 A.D.2d 971, 533 N.Y.S.2d 593 (2d Dep't 1988)). It may also be waived where a defendant in an enforcement proceeding does not object to the procedure and does not submit an opposing affidavit. (*Guinta v. Guinta*, 124 A.D.2d 708, 508 N.Y.S.2d 219 (2d Dep't 1986)).

Conclusion

The purpose of the 2010 amendments to Domestic Relations Law §238 was to require the court, in a proceeding to enforce a judgment, to order the monied party to pay interim counsel fees for the non-monied party at the outset of the case. (New York Bill Jacket, 2010 A.B. 7569, Ch. 329). It appears that the 2010 amendments to Domestic Relations Law §238 do not serve that purpose since in our experience counsel fee awards are still made at the conclusion of an enforcement proceeding, rather than at its outset. Moreover, Domestic Relations Law §238 should be modified to conform to 22 NYCRR 202.16 (k) in accordance with the legislative intent of the 2010 amendments.

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