
LAW AND THE FAMILY

"INSURANCE COVERAGE AND MEDICAL SUPPORT ENFORCEMENT"

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'SPECIAL RELIEF' is one catchphrase that is not likely to lose its resonance any time soon. And if you thought the "special relief" angle of a divorce case meant you were winding down, think again. In these frenzied times even the simplest of issues takes on mammoth proportions and may be the key challenge to settling a divorce case. Nowadays though, things are looking a lot better, so far as statutory guidance.

Domestic Relations Law s236, Part B, Subdivision 8 provides for "special relief in matrimonial actions." The notion alone is intimidating to those embracing its meaning; mystifying for sure to the bulk of lawyers. "Special relief" is a fancy term of art that merely refers to life, health and dental insurance coverage.

The statute provides:

8. Special relief in matrimonial actions.

a. In any matrimonial action the court may order a party to purchase, maintain or assign a policy of insurance providing benefits for health and hospital care and related services for either spouse or children of the marriage not to exceed such period of time as such party shall be obligated to provide maintenance, child support or make payments of a distributive award. The court may also order a party to purchase, maintain or assign a policy of insurance on the life of either spouse, and to designate either spouse or children of the marriage as irrevocable beneficiaries during a period of time fixed by the court. The interest of the beneficiary shall cease upon the termination of such party's obligation to provide maintenance, child support or a distributive award, or when the beneficiary remarries or predeceases the insured.

The mission of the statute is to correct the hardship situation, created by inadequate insurance coverage, that existed under former law. Before 1980 the decisions held that in the absence of statutory authority, a divorce court lacked the power to order life

insurance protection for the family where there was a divorce. [FN1] Unless an agreement provided otherwise, alimony and child support terminated upon the payor's death. If there were no insurance coverage for the family, its only source of income might be, and often was, terminated.

Court-Ordered Protection

DRL s236, Part B, Subdivision 8(a) was enacted to compensate for the earlier inadequacies of the law. It permits the court, in the absence of an agreement, to order insurance protection for the family. The husband or father, for example, may be ordered by the court to "purchase, maintain, or assign" insurance coverage on his life, naming the wife and children as irrevocable beneficiaries. Likewise, the statute authorizes the court to require a spouse to maintain or obtain medical, health and hospital insurance for the protection of the family. Once the husband's obligation to pay maintenance and/or child support is ended, however, he is free to cancel the policies, or to name other beneficiaries.

The need for health, hospital and similar insurance coverage is doubtless. In the case of both maintenance and child support, in the absence of an agreement to the contrary, since the support obligation ceases upon the death of the obligor, it is not a charge against the estate. [FN2] This means that under former New York law a wife dependent upon alimony lost that source of support when the former husband died. Also, under former law the wife might have received no marital property upon divorce and therefore might become destitute when her alimony payments ceased. The Legislature resolved the problem by enacting subdivision 8, and in circumstances where the worker-spouse dies suddenly, this may be one of the most salutary provisions of the equitable distribution law. This particular provision was drafted originally by Judge Bernard Meyer.

The life insurance provisions of subdivision 8(a), make certain, among other things, that the payment of maintenance, distributive awards and child support are made as ordered. If under subdivision 8(a) children are required to be designated as the beneficiaries of life insurance, such designation ceases when they reach majority and another beneficiary may be named in their place. If under that section the wife is required to be designated as the beneficiary of the husband's policy, the designation may be revoked if she remarries or predeceases the insured.

It has been held that where a spouse is denied an award of maintenance, an award of special relief, such as life insurance, would be inappropriate because there is no reason for the insurance coverage. [FN3]

Life Insurance

DRL s236, Part B, subdivision 8, authorizes the court to make an order directing a party to purchase, maintain or assign life insurance on his or her life and to provide health insurance on both pendente lite applications and in the final judgment in a matrimonial action. The increasing importance of provisions for insurance is defied by the absence

of case law on the subject. Only Justice David D. Saxe of the Supreme Court, New York County, has ventured into discussion of the need for life insurance coverage.

In *Merrick v. Merrick*, [FN4] Justice Saxe made a pendente lite order in which he directed the husband to post security of \$220,000 or about one year's temporary support, to be held by the wife as receiver, and directed that if security were not posted, the wife was entitled to submit a further order to the court providing for sequestration of the husband's assets.

Justice Saxe also directed the husband to obtain life insurance coverage of \$1 million, naming the wife as irrevocable beneficiary. He noted that DRL s 236(B)(8)(a) authorizes the court to direct a party to obtain life insurance and to designate the other spouse as irrevocable beneficiary and that the statute was enacted to remedy the prior law under which courts were not authorized to order insurance coverage. [FN5] "The purpose of subdivision 8(a), therefore, is to make certain that the payment of maintenance, distributive awards and child support are made as ordered." He noted that the statute had been applied to pendente lite support awards as well as final determinations.

In *Sullivan v. Sullivan*, [FN6] the parties were married in 1958 and separated in 1982. In 1983, the husband commenced a divorce action in Westchester County. In 1987, after trial, the Supreme Court dismissed the action, since the husband failed to establish grounds for divorce, while awarding the wife \$8,000 per month maintenance. In 1987, the husband again sued for divorce this time in Illinois. He was granted a divorce in 1989 on grounds of irreconcilable differences. The husband then brought an action in New York for equitable distribution and for a downward modification of the Supreme Court's prior maintenance award.

Justice Saxe directed the husband to name the wife as beneficiary of an insurance policy on his life in the amount of \$1 million. In this case, the court had previously made an order requiring the husband to pay \$8,000 per month lifetime maintenance to the 58-year-old wife. Justice Saxe concluded that the insurance was appropriate because the wife would still have a right to equitable distribution if the husband died during the pendency of the proceedings and that her monthly maintenance payments would stop immediately upon the husband's death, without her having any clearcut immediate entitlement to funds with which to continue to support herself, as it was not clear that any ultimate entitlement to equitable distribution would be sufficient to support her.

Little Comment

Appellate and trial court decisions to date offer virtually little or no comment on the issue of life and health insurance coverage. In *Zerilli v. Zerilli*, [FN7] the Appellate Division simply stated that in view of the wife's lack of income and assets, the trial court should have granted the parts of her omnibus motion seeking from her husband life insurance coverage pendente lite.

In *Kalnins v. Kalnins*, [FN8] the parties married in 1972 and the husband abandoned his wife in 1981. Before that the wife suffered permanent brain damage in an auto accident. The action was commenced in April 1986. The husband, who earned \$83,000 a year in 1986, was directed to pay \$3,500 per month permanent maintenance to his 43-year-old wife. He was awarded all of the marital assets (valued at \$411,753). In light of the high permanent maintenance obligation he was directed to buy a single premium annuity and bridge life insurance [to assure payments of \$3,500 a month for the wife when he retires at age 65 (cost \$150,000)] or a \$750,000 life insurance policy for plaintiff, and medical insurance for plaintiff until she was entitled to Medicaid.

In *Price v. Price*, [FN9] the Appellate Division stated that the husband should have been directed to obtain and keep in effect a life insurance policy for the benefit of the children, given the husband's age and the age of his children.

In *Delaney v. Delaney*, [FN10] the Appellate Division held that the divorced wife, rather than the infant children of the parties, should be properly designated as beneficiaries of the divorced husband's life insurance policies, because the wife would be otherwise unprotected if her husband predeceased her. Additionally, the children would not be disadvantaged by such a ruling since it appeared that they had been and would continue to be well provided for.

In *Bofford v. Bofford*, [FN11] the Appellate Division held that the daughter and wife, who received a distributive award from the husband in the matrimonial action, were entitled to have the husband maintain a life insurance policy on his life for their benefit that was to be in the amount of the unpaid balance of the distributive award.

Health Insurance

In addition to "special relief," another practically ignored provision of DRL s240, which was enacted in 1986 [FN12] and amended in 1993, provided that where either parent has health insurance available through an employer or organization that may be extended to cover the child and the court determines that the employer or organization will pay for a substantial portion of the premium or any such extension of coverage, the child support order "shall" require that such parent exercise the option of additional coverage in favor of such child and execute and deliver any forms, notices, documents or instruments necessary to insure timely payment of any health insurance claims for such child. When both parents have health insurance available to them and the court determines that the policies are complementary, the court may order both parents to exercise the option of additional coverage. The Family Court Act had an almost identical provision referring to "legally responsible relative" rather than parent. [FN13]

Notably, only two appellate decisions since 1980 discuss the health insurance questions, and not one reported case mentions employer-provided health insurance coverage.

Shafer v. Shafer, [FN14] held that there was no reason to require the defendant-husband to go to the expense of buying a new health policy, since the plaintiff-wife already had insurance coverage for their child through her employment.

In Jerkovich v. Jerkovich, [FN15] the husband appealed from portions of a judgment of Special Term that directed him to name his children as dependents on his health insurance policy without specifying when the coverage may be terminated. The Appellate Division modified the judgment, holding that while Supreme Court was expressly authorized to direct the husband to maintain both his health insurance policy and his life insurance policy for the benefit of his minor children, it had erred in failing to fix the duration of such policies.

Amendments in 1993

The health insurance provisions of the DRL and Family Court Act were amended in 1993 to strengthen them and again make them mandatory. DRL s240 subdivision 1 and Family Court Act s416 continue to provide that where employer or organization subsidized health insurance coverage is available through an employer or organization that may be extended to cover the child and the employer or organization will pay for a substantial portion of the premium on such coverage, the court must order the parent to exercise the option of additional coverage in favor of the child. However, they have been amended to require that in such case the court must direct the "legally responsible relative" to enroll the eligible dependents who are to be named in the order in the plan no later than the third business day of the first enrollment period allowable under the plans terms of enrollment.

The order must also direct the "legally responsible relative" to maintain the coverage as long as it remains available to such relative and a substantial portion of the premium is paid for by the employer or organization. Upon a finding that a responsible relative wilfully failed to obtain such health insurance in violation of a Court order, the relative is presumptively liable for all medical expenses incurred on behalf of such dependents from the first date such dependent was eligible to be enrolled in the medical insurance coverage after the issuance of the order of support directing the acquisition of such coverage. In making an order for employer or organization provided health insurance pursuant to this provision, the court must consider the availability of such insurance to all parties to the order and direct that either or both parties obtain such insurance and allocate the costs consistent with obtaining comprehensive medical insurance for the child at reasonable cost to the parties. [FN16]

Family Court Act s416, as amended in 1993, also provides that the "legally responsible relative" must assign all of the insurance reimbursement payments to the provider of services or party who actually incurred and satisfied such expenses. Although this provision is not in the DRL, the Supreme Court is authorized to make an identical direction by virtue of its concurrent authority with the Family Court. [FN17]

To provide a mechanism to enforce these provisions, the DRL and Family Court Act were amended to authorize the issuance of "an execution for medical support enforcement" pursuant to CPLR s5241 in accordance with the provisions of the order of support, [FN18] and CPLR s5241, authorizing income executions for support enforcement, was substantially revised. CPLR s5241(b) was amended to add a new Subdivision 2, authorizing an "execution for medical support enforcement," which may be issued by the support collection unit, the sheriff, the clerk of the court or the attorney for a creditor. [FN19] In conjunction therewith, Subdivision (a) of CPLR s5241 was amended to add a new paragraph 11, which defines "health insurance benefits as "any medical, dental, optical and prescription drugs and health care services or other health care benefits which may be provided for dependents, through an employer or organization, including such employers or organizations which are self insured." [FN20]

CPLR s5241 (b)(2) provides that where the order of support orders the debtor to provide health insurance benefits to specific dependents, an execution for medical support enforcement may be issued by the support collection unit or by the sheriff, or the clerk of the court or the attorney for the creditor as an officer of the court subject to certain exceptions. The execution may require the debtor's employer or organization to purchase on behalf of the debtor and the debtor's dependents such available health insurance benefits as are ordered by the order of support. The execution must, consistent with the order of support, direct the employer or organization to provide to the issuer of the execution any identification cards and benefit claim forms and to withhold from the debtor's income the employer's share of the cost of such health insurance benefits.

An execution for medical support enforcement must not require a debtor's employer or organization to purchase or otherwise acquire health insurance or health insurance benefits that would not otherwise be available to the debtor by reason of his employment or membership. Nothing in the statute is deemed to obligate or otherwise hold any employer or organization responsible for an option exercised by the debtor in selecting medical insurance coverage by an employee or member. Note that the "debtor" is defined in CPLR s5241 (a)(2) as any person who is directed to make payments by the order of support.

An execution for medical support enforcement may not be issued where child support orders have been issued pursuant to s413(1)(d) of the Family Court Act or s240(1-b)(d) of the DRL. These sections deal with child support orders that are fixed based on the poverty income guidelines amount and the self-support reserve.

To enforce the foregoing provisions, CPLR s5241(2) was added. It contains seven notices that must be in an execution for medical support enforcement. The execution for medical support enforcement must include:

(i) a notice that the debtor has been ordered by the court to enroll the dependents in any available health insurance benefits and to maintain such coverage for such dependents as long as such benefits remain available;

(ii) a notice inquiring of the employer or organization as to whether such health insurance benefits are presently in effect for the eligible dependents named in the execution, the date such benefits were or become available, and directing that the response to such inquiry immediately be forwarded to the issuer of such execution;

(iii) a statement directing the employer or organization to purchase on behalf of the debtor any available health insurance benefits to be made available to the debtor's dependents as directed by the execution, including the enrollment of such eligible dependents in such benefit plans and the provision to the issuer of the execution of any identification cards and benefit claim forms;

(iv) a statement directing the employer or organization to deduct from the debtor's income such amount which is the debtor's share of the premium, if any, for such health insurance benefits no later than the first enrollment period allowable under the applicable provider's terms of enrollment subsequent to the service of the execution;

(v) a notice that the debtor's employer must notify the issuer promptly at any time the debtor terminates or changes such health insurance benefits;

(vi) a statement that the debtor's employer or organization shall not be required to purchase or otherwise acquire health insurance or health insurance benefits that would not otherwise be available to the debtor by reason of his employment or membership; and

(vii) a statement that failure to enroll the eligible dependents in such health insurance plan or benefits or failure to deduct from the debtor's income the debtor's share of the premiums for such plan or benefits shall make such organization jointly and severally liable for all medical expenses incurred on behalf of the debtor's dependents named in the execution while such dependents are not so enrolled to the extent of the insurance benefits that should have been provided under the execution. [FN21]

Further Provisions

CPLR s5241(g) dealing with income executions was amended [FN22] in 1993 to number it (g)(1) and to provide that it is not applicable to an "execution for medical support enforcement." Thus, the "mistake of fact" provisions of CPLR s5241 (a)(8) do not apply to an execution for medical support enforcement. A new subdivision (2) was added to CPLR s5241(g) to establish the obligations of an employer, income payor or organization who is served with an income execution for medical support enforcement.

If the employer, income payor or organization is served with such an execution, it (a) must purchase on behalf of the debtor any available health insurance benefits which are required to be made available to the debtor's dependents as ordered by the execution, including enrolling the eligible dependents in such benefit plans; (b) must provide to the issuer of the execution any identification cards and benefit claim forms; (c) must begin deductions of the debtor's share of the premium from income due or thereafter due to

the debtor for such health insurance benefits no later than the first enrollment period allowable under the provider's terms of enrollment subsequent to the service of the execution, and (d): must provide a confirmation of the enrollment to the issuer of the execution. If the employer or organization fails to enroll the eligible dependents or to deduct from the debtor's income the debtor's share of the premium, the employer or organization becomes jointly and severally liable for all medical expenses incurred on the behalf of the debtor's dependents named in the execution while the dependents are not so enrolled, to the extent of the insurance benefits that should have been provided under the execution. Except as otherwise provided by law, nothing in the statute is deemed to obligate an employer or organization to maintain or continue an employee's or member's health insurance benefits.

FN1. Flatto v. Flatto (1977, 1st Dept.) 59 AppDiv2d 695, 398 NYS2d 687; Enos v. Enos (1973, 2d Dept.) 41 AppDiv2d 642, 340 NYS2d 783.

FN2. N.Y. Dom. Rel. L.240; See, e.g., Byrne v Byrne, 201 Misc. 913, 112 NYS2d 569; Lund v. Lund, 196 Misc. 136, 91 NYS2d 698; Re Van Ardsdale's Will, 190 Misc. 968, 75 NYS2d 487.

FN3. Rothbaum v Rothbaum (1989, 2d Dept.) 155 AppDiv2d 650, 548 NYS2d 242..

FN4. ___ Misc2d ___, 585 NYS2d 989 (Sup.Ct., NY Co., 1992).

FN5. Citing Foster, Freed & Brandes, Law and the Family, 2d Ed. 12:1, P.490..

FN6. ___ Misc2d ___, 588 NYS2d 232 (Sup. Ct., NY Co., 1992).

FN7. 2d Dept., 110 AD2d 634, 487 NYS2d 373.

FN8. New York Law Journal, Nov. 16, 1989, p.23, col.3, Sup.Ct., NY Co., (Baer, J.).

FN9. 2d Dept. 113 AD2d 299, 496 NYS2d 455, later proceeding (2d Dept.) 496 NYS2d 464, later proceeding (2d Dept.) 496 NYS2d 689.

FN10. 1st Dept., 114 AD2d 312, 494 NYS2d 4.

FN11. 2d Dept., 117 AD2d 643, 498 NYS2d 385.

FN12. Laws of 1986, Ch 849, Effective Aug. 2, 1986.

FN13. Family Court Act 416, as amended by Laws of 1986, Ch 849, s2, eff. Aug. 2, 1986.

FN14. 1st Dept., 96 AD2d 790, 466 NYS2d 17.

FN15. 2d Dept., 100 AD2d 575, 473 NYS2d 507.

FN16. DRL s240 (1) as amended by Laws of 1993, Ch 59, s1; Family Court Act, s 416 as amended by Laws of 1993, Ch 59, s1. (Sections 1-33 became effective July 1, 1993).

FN17. Seitz v. Drogheo, 21 NY2d 181, 287 NYS2d 29 (1967).

FN18. DRL s240(2)(b) as amended by Laws of 1993, Ch 59, s4; Family Court Act s 440(1)(b) as amended by Laws of 1993, Ch 59, s2.

FN19. Laws of 1993, Ch 59, s6, adding CPLR s5241(b)(2).

FN20. Laws of 1993, Ch 59, s5, adding CPLR s5241(a)(11).

FN21. Laws of 1993, Ch 59, s8.

FN22. Laws of 1993, Ch. 59, s8.

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