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## LAW AND THE FAMILY

### More Equitable Counsel Fee Awards

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**COUNSEL FEE AWARDS** are in the court's discretion. Their primary purpose is not to reward or punish a spouse, but to enable a needy person to carry on or defend an action or proceeding so that the parties are as close as possible to being economic equals in the action and ensure that one spouse not have greater leverage during the litigation process.<sup>1</sup>

The Equitable Distribution Law acknowledged the great need for economic equality between spouses with regard to counsel fees in order to ensure a fair and equitable decision. As one court stated: "should one spouse have substantially greater economic leverage during the litigation (and negotiation) process than the other, the fact may have a profound effect on the ultimate resolution both because of its psychological impact on the parties and because of its effect on their ability to finance the litigation." <sup>2</sup>

#### Authority for Awards

The authority to award counsel fees in a matrimonial action is derived from statute, not from the common law.<sup>3</sup> Thus, the court may award counsel fees only in certain actions where specifically authorized by statute, and then the statute is to be strictly construed. Counsel fee awards are not authorized by any provision of the Domestic Relations Law (DRL) in actions or proceedings to obtain maintenance or a distribution of marital property following a foreign judgment of divorce.

DRL §237(a) provides that

in any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, (2) for a separation, (3) for a divorce, (4) to declare the validity or nullity of a judgment of divorce

rendered against a spouse who was the defendant in any action outside the State of New York and who did not appear therein where such spouse assert the nullity of such foreign judgment, or (5) to enjoin the prosecution in any other jurisdiction of an action for a divorce, the court may direct either spouse ... to pay such sum or sums of money directly to the attorney of the other spouse to enable that spouse to carry on and defend the action or proceeding as, in the court's discretion, justice requires, in light of the circumstances of the case and of the respective parties.

Where an action for annulment is maintained after the death of a spouse, [DRL] §237 (a) authorizes the court to direct the person or persons maintaining the action to pay such sum or sums of money directly to the attorney of the other spouse to enable that spouse to defend the action.

"Expenses" is defined in DRL §237(d) and includes, but is not limited to, accountant fees, appraisal fees, actuarial fees, investigative fees and other fees and expenses as the court may determine to be necessary to enable a spouse to carry on or defend one of the actions or proceedings designated in §237(a).

DRL §237(b) provides that,

upon any application to annul or modify an order or judgment for alimony or for custody, visitation or maintenance of a child, made [as prescribed in §§236 or 240] or upon any application by writ of habeas corpus or by petition and order to show cause concerning custody, visitation or maintenance of a child, the court may direct a spouse or parent to pay such sum or sums of money for the prosecution or the defense of the application or proceeding for the other spouse or parent as, in the court's discretion, justice requires, in light of the circumstances of the case and of the respective parties.

DRL §238 states:

In any action or proceeding to compel the payment of any sum of money required to be paid by a judgment or order entered in an action for divorce, separation, annulment or declaration of nullity of a void marriage, or in any proceeding pursuant to [§§243, 244, 245 or 246], the court may, in its discretion, require either party to pay the

expenses of the other in bringing, carrying on or defending such action or proceeding.

This applies to any action or proceeding to compel payment by way of an application for security or sequestration,<sup>4</sup> money judgment<sup>5</sup> or contempt.<sup>6</sup> This section does not authorize counsel fees or expenses to be awarded in proceedings to enforce property distributions or other non-monetary provisions of a judgment or order, nor does the definition of "expenses" in §237(d) apply to enforcement proceedings under this section.

The DRL also provides that, in a proceeding to obtain an order of protection or to enforce such an order, the Court may require any party to pay the reasonable counsel fees and disbursements involved in obtaining or enforcing that order. Such fees may be awarded only in favor of the person obtaining the order or seeking to enforce it.<sup>7</sup>

Counsel fees and expenses may also be obtained by a person seeking to enforce a custody decree of another state under several sections of the Uniform Child Custody Jurisdiction Act<sup>8</sup> and in proceedings to hold a person in contempt of court for failure to obey a non-monetary order, under certain circumstances.<sup>9</sup>

DRL §237(c) provides for a mandatory award of counsel fees in certain enforcement proceedings. The statute provides that in any action or proceeding for failure to obey any lawful order compelling payment of support, maintenance, or distributive award, the court shall, upon a finding that such failure was willful, order respondent to pay counsel fees to the petitioner's attorney.

### Flexibility for Courts

The Court of Appeals in *DeCabrera v. DeCabrera-Rosete* noted that DRL §237 replaced §1169 of the Civil Practice Act and significantly omitted the word "necessary," which had preceded the phrase 'to enable the wife to carry on or defend the action.' This omission gave the courts some flexibility when considering an application for counsel fees. Indigence is not a prerequisite to an award of counsel fees. Rather, in exercising its discretionary power to award counsel fees, a court must review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions.<sup>10</sup>

In *Schussler v. Schussler*,<sup>11</sup> the defendant husband appealed from an order of the Supreme Court, which, after a hearing, awarded the wife counsel fees of \$9,345. The Appellate Division, Second Department, modified the order to reduce that award to \$1,500. It stated that the wife was entitled to an award of counsel fees for amounts expended in defense of the husband's application for a change of custody, but she was not entitled to an award of counsel fees for amounts expended in an attempt to obtain that counsel fee award, since such an award is not authorized by DRL §237(b).

Several years ago we disagreed with this conclusion and commented that the decision rested solely on the unsupported conclusion of the Appellate Division, Second Department, that such awards were not authorized by statute.<sup>12</sup>

In *Wyser-Pratte v. Wyser-Pratte*,<sup>13</sup> the First Department disagreed with the Second Department's conclusion as to the Supreme Court's authority to award such counsel fees and held that a wife was entitled to attorney's fees for time spent by her counsel in preparing an application for counsel fees. It found that such an award was specifically authorized by DRL §237 in an action for divorce. In reaching this conclusion of law, the court stated that the purpose of §237 is to enable the less affluent spouse to obtain appropriate legal and other services necessary for the presentation of his or her case by allowing the court to make the more affluent spouse financially responsible for those services.

### Time Spent

The *Wyser-Pratte* court determined that an award of fees for the time spent by counsel in making the counsel fee application, and in related proceedings, comports with the purpose of the statute and should therefore be encompassed within its scope. It stated that if the time spent in applying for fees was not included in the award, the purpose of the statute could be frustrated by the more economically advantaged spouse engaging in protracted proceedings on the fee application and thereby increasing the cost of obtaining counsel fees for the less affluent spouse.

At that time we wrote, "We believe that the *Wyser-Pratte* court's construction of the counsel fee provisions of the DRL, to authorize such awards, is the preferable and correct interpretation of the statute because it comports with the public policy behind the enactment of counsel fee statutes and recognizes the realities of modern day matrimonial litigation. We also believe that such awards are clearly and expressly authorized by the DRL and that, if and

when the Court of Appeals determines the issue, it will and should adopt the approach of the First Department."<sup>14</sup>

In *O'Shea v. O'Shea*,<sup>15</sup> decided in April, the Court of Appeals finally determined this issue. The trial court, in making its award for counsel fees in a divorce action, included amounts for legal services that were rendered before the action was commenced, and for those rendered in connection with a counsel fee hearing. The appeal turned on the interpretation of DRL §237(a). The husband argued that the statute left no room for the counsel fee awards at issue. The wife contended that it did.

The Court of Appeals agreed with the wife, indicating in a footnote that the same holds true for related professional-type expenses. It discussed the history of counsel fee legislation and concluded that, when the Legislature enacted DRL §237, it eliminated the words "during the pendency," which had appeared in the previous counsel fee statute, on which the husband's argument rested. It concluded that courts have the discretion, in appropriate cases, to grant such awards, based upon criteria that include the circumstances of the parties and the reasonableness of their positions.

Given the statutory background and the unswerving direction of the decisional law over the last century and a half, the Court of Appeals also held that courts have the discretion to grant counsel fees to the wife for legal services rendered in connection with the hearing to determine the fee award. This is not to say that awards for legal services for fee hearings should be routinely expected or freely granted, any more than those for pre-action services. It is a matter of discretion; it is to be exercised in appropriate cases, to further the objectives of litigational parity and to prevent the more affluent spouse from wearing down or financially punishing the opposition by recalcitrance, or by prolonging the litigation. Because a party is entitled to resist the opponent's fee application and has the right to a hearing, the mere request for a hearing should not carry with it a label of intransigence. It is for the court to make such distinctions.

#### NOTES:

(1) *Hinden v. Hinden*, (1983) 122 Misc2d 552.

(2) *Hinden v. Hinden*, *supra*.

(3) *Romaine v. Chauncey* (1892) 129 NY 566, 29 NE 826; *Kagan v. Kagan* (1986) 21 NY2d 532; *Caldwell v. Caldwell* (1948) 298 NY 146;

**Erikenbrach v. Erikenbrach (1884) 96 NY 456; Griffin v. Griffin (1872) 47 NY 134.**

**(4) DRL, §243.**

**(5) DRL, §244.**

**(6) DRL, §245-246.**

**(7) DRL, §240(e).**

**(8) DRL, §75, subds h(7), i(3), and p(2).**

**(9) Judiciary Law, §756 et seq.**

**(10) DeCabrera v. DeCabrera-Rosete (1987) 70 NY2d 879.**

**(11) 109 AD2d 875.**

**(12) See Freed and Brandes, "Equitable Counsel Fee Awards," New York Law Journal, 6-26-90, P. 3, col. 1.**

**(13) 160 AD2d 290.**

**(14) Freed and Brandes, "Equitable Counsel Fee Awards," supra.**

**(15) 93 NY2d 187 (1999).**

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