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Unwrapping the 2010 'No Fault' Package

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The headlines were all about "No Fault Divorce," but the package of changes to the Domestic Relations Law (DRL) made by the legislature in 2010 did much more than establish a new "No Fault" ground for divorce.

Pursuant to a legislative bargain to assuage the concerns of legislators and interest groups concerned that "No Fault" would work to the disadvantage of women, those changes included the adoption of a formula-based approach to determining the amount of pendente lite maintenance to be paid by the higher-income spouse; the establishment of a "rebuttable presumption" in favor of awards of counsel fees to the less monied spouse; and provisions that will make modifications of child support easier to obtain, while increasing the volume of post-judgment child-support litigation.

"No Fault" Divorce

The legislature amended DRL §170, by adding a new ground for divorce in actions commenced on or after Oct. 12, 2010: "The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath." DRL §170(7). As part of the aforementioned legislative bargain, however, DRL §170(7) prohibits the granting of a judgment of divorce until the issues of equitable distribution, spousal support, child support, counsel and expert fees of the less monied spouse, and custody and visitation with respect to any minor children have been resolved.

Since the new law took effect, the courts have had to address the issue of whether "No Fault" means "no defense," and thus "no trial." The courts that have addressed that issue so far have gone both ways, with a majority of the reported decisions taking the view that one party's assertion that the marriage has been "irretrievably broken" for six months establishes that ground for divorce conclusively, leaving no room for factual dispute.

The first reported decision to address the issue was *Strack v. Strack*.[1] While denying the defendant husband's motion to dismiss, the court held that his denial of the wife's sworn allegation of an irretrievable breakdown of the marriage for more than six months—pointing, inter alia, to the wife's previous commencement of, and subsequent voluntary discontinuance of, two earlier divorce actions—was sufficient to establish a disputed issue of fact as to the existence of grounds, and ordered an immediate trial on the issue. The court reasoned that:

> Domestic Relations Law §170(7) is not a panacea for those hoping to avoid a trial. Rather, it is simply a new cause of action subject to the same rules of practice governing the subdivisions which have preceded it. Specifically, Domestic Relations Law §173 provides that "[i]n an action for divorce there is a right to trial by jury of the issues of the grounds for granting the divorce" and, here, the Legislature failed to include anything in Domestic Relations Law §170(7) to suggest that the grounds contained therein are exempt from this right to trial. Had it intended to abolish the right to trial for the grounds contained within Domestic Relations Law §170(7), it would have explicitly done so.… [T]he determination of whether a breakdown of a marriage is irretrievable is a question of fact to be determined by the finder of fact.[2]

The court thus implicitly held that the phrase "provided that one party has so stated under oath" in DRL §170(7) made a sworn statement by the plaintiff attesting to an irretrievable breakdown of more than six months only a necessary condition of a "No Fault" divorce, not a sufficient condition if the allegation is controverted by the defendant.

Soon after, the court in *A.C. v. D.R.*,[3] took the opposite view, holding that a "plaintiff's self-serving declaration about his or her state of mind is all that is required for the dissolution of a marriage on grounds that it is irretrievably broken"[4] and adding that "in this court's view, the Legislature did not intend nor is there a defense to DRL §170(7)."[5] The only reported decision since then to reach the same conclusion as *Strack* was *Schiffer v. Schiffer*,[6] which reasoned that:

> [T]he no-fault ground and certain other "fault" grounds…are similar in that they each contain elements which require proof of a minimum time duration.… In all of these similarly constructed sections, each element must be proved to establish the ground for divorce.… An assertion by a party that the marriage has been irretrievably broken for six months is subject to the same scrutiny and burden of proof as assertions made under other sections of the statute [DRL §170].[7]

The court cited *Strack* and cases from several other states.[8]

The three reported cases since then to address the issue have all explicitly followed *A.C. v. D.R.*, adopting its formulation that "a plaintiff's self-serving declaration about his or her state of mind" is sufficient to establish irretrievable breakdown.[9] But can it possibly be true that, as one of those decisions put it, "once a party has stated under oath that the marriage has been irretrievably broken for a period of at least six months, the cause of action for divorce has been established as a matter of law"? Can such a sworn statement be conclusive where, for example, it is made only three months after the parties were married?

We have found no appellate decisions addressing the question of whether "irretrievable breakdown," if disputed, is a triable issue of fact.

Temporary Maintenance

The new provisions governing temporary maintenance, set forth in the newly created DRL §236(B)(5-a), have probably been the most criticized element of the 2010 amendments, for reasons discussed below. More specifically, the existence of various provisions that appear

more appropriate to a determination of post-judgment maintenance in a final judgment of divorce than to a determination of temporary maintenance have led many observers to suspect that, amid the chaos that is traditional in the closing days of a legislative session, when bills are often considered, amended and passed at dizzying speed, legislative language intended for a provision governing post-judgment maintenance was converted into a statute governing temporary maintenance only, without adequate attention to the differences between the two.

Under the new statute, effective as of Oct. 12, 2010, the primary determinant of the amount of temporary maintenance to be received by the less monied spouse is a mathematical formula. A court may deviate from the result yielded by application of the formula, but may do so only based on specified factors, and must explain any such deviation with specificity.

The "formula" is actually two formulas. The court is required to perform two different calculations based on each party's annual income (as defined in the Child Support Standards Act [CSSA][10, 11]), with the *lower* of the two results becoming the "presumptive amount" of temporary maintenance (except to the extent that such amount would leave the payor's income below the self-support reserve for a single person, as defined in the CSSA). A court may deviate from the presumptive amount (or the "guideline amount," discussed below) only based on specified factors, and must explain with specificity how the application of those factors justified any such deviation.

The two initial calculations to be performed are as follows:

(1) Subtract 20 percent of the income of the payee (the lower-income spouse) from 30 percent of the income (up to $524,000[12]) of the payor (the higher-income spouse).

(2) Subtract the payee's income from 40 percent of the sum of the payor's income (up to $524,000) and the payee's income. Thus, for example, if the payor's annual income is $90,000 and the payee's annual income is $50,000, the first calculation would be: $27,000 (30 percent of $90,000) minus $10,000 (20 percent of $50,000) equals $17,000; the second calculation would be $56,000 (40 percent of $140,000 [$90,000 plus $50,000]) minus $50,000 equals $6,000. Accordingly, the presumptive amount of temporary maintenance would be $6,000 per year ($500 per month), the lower of the results of the two calculations.

The combined effect of the second calculation and the rule that the lower result prevails is to limit the presumptive amount of temporary maintenance to the amount needed to bring the payee's income (including temporary maintenance received) up to 40 percent of the parties' total income, or two-thirds as much as the income (after temporary maintenance payments) of the payor. Frequently, of course, the payor will also by paying interim child support to the payee.

If the payor's income exceeds $524,000, the court, after making the calculations described above, may determine an additional amount of temporary maintenance, if any, to be paid from the payor's income above $524,000, based on consideration of 19 factors, the last of which is an elastic clause—"any other factor which the court shall expressly find to be just and proper." The sum of the presumptive amount and any additional amount to be paid from the payor's income in excess of $524,000 constitutes the "guideline amount" of temporary maintenance. The court may deviate—upward or downward—from the guideline amount, where it finds that amount to be "unjust or inappropriate" based on consideration of 17 factors, again including an elastic clause. The court must explain its reasons for any deviations, with reference to the specified factors, in a written order.

Where the parties have provided insufficient information for the court to determine their gross income, the court is to determine temporary maintenance "based upon the needs of the payee

or the [marital] standard of living…whichever is greater." An upward modification may be granted *without* a showing of a change in circumstances, upon a showing of newly discovered or obtained evidence. These provisions seem designed to encourage prospective payors to be forthcoming concerning their income.

To ward off a deluge of applications for modifications of existing maintenance awards, the statute specifies that, in any such application, "the temporary maintenance guidelines set forth in this subdivision shall not constitute a change of circumstances warranting modification of such support order."

The statute's provision with respect to the duration of temporary maintenance— DRL §236(B)(5-a)(d)—is perplexing. It reads, in its entirety, as follows:

The court shall determine the guideline duration of temporary maintenance by considering the length of the marriage. Temporary maintenance shall terminate upon the issuance of the final award of maintenance or the death of either party, whichever occurs first. The second sentence appears to mean that payment of temporary maintenance is to continue as long as the matrimonial action does. But the first sentence indicates that the duration of temporary maintenance is to be determined by the court, "considering" the length of the marriage. It is hard to believe that the drafters of this statute, who provided the courts with substantial discretion (17 factors here, 19 factors there) in determining the annual *amount* of temporary maintenance, intended to require them to make a determination regarding the *duration* thereof based on only one factor. Our research has revealed no reported case in which the court, in ordering temporary maintenance pursuant to the new statute, has specified a termination date.

A practitioner preparing to enter into a stipulation or agreement "to be presented to the court for incorporation into an order" in a matrimonial action commenced after Oct. 12, 2010, should parse carefully DRL §236(B)(5-a)(f), which is confusingly drafted but could affect the validity of the stipulation or agreement. On its face, it requires, in *any* such stipulation or agreement, the inclusion of language stating that the parties have been advised of the provisions of DRL §236(B)(5-a) and that "the presumptive award provided for therein results in the correct amount of temporary maintenance." Such a requirement is logical if the parties are stipulating with respect to pendente lite support issues, but puzzling as applied to any of a wide range of stipulations that the parties to a matrimonial action might enter into during the pendency of the action and want to have "So Ordered," or to a settlement agreement resolving the action, for inclusion in a judgment of divorce whose entry would mark the *end* of temporary maintenance. It seems likely that there was a drafting error here.

In *Khaira v. Khaira*,[13] the only appellate case we have located on the temporary-maintenance statute, the court below had ordered the husband to pay unallocated support consisting of cash payments to the wife in the presumptive amount of temporary maintenance and direct payment of certain fixed expenses of the family, notably housing costs, without articulating the reasons for awarding more than the presumptive amount of temporary maintenance by reference to the statutory factors. In vacating the support order and remanding for reconsideration "in light of the directives of Domestic Relations Law §236(B)(5-a),"[14] the Appellate Division, First Department, used the case as a vehicle to (1) articulate, in dicta, its view that the presumptive amount (or, where the court orders the payment of additional temporary maintenance from the payor's income above the income cap, the guideline amount) of temporary maintenance was intended to cover all of the payee's living expenses, including housing costs;[15] and (2) emphasize the statutory requirement that the state Supreme Court explicitly explain awards of temporary maintenance above or below the presumptive amount or the guideline amount by reference to

the statutory factors.[16]

Counsel Fees

Until they were amended in 2010, DRL §§237(a) and 237(b) provided that a court "may" award counsel fees, including interim counsel fees, to the less monied party in a matrimonial action or custody proceeding to enable him or her to litigate the action or proceeding. In recent years, the appellate courts have exhorted the trial-level courts to make such awards whenever there is a significant disparity in the financial strength of the parties, and to make *timely* interim awards, to level the playing field. See, e.g., *Frankel v. Frankel*;[17] *O'Shea v. O'Shea*,[18] *Prichep v. Prichep*,[19] and *Charpie v. Charpie*.[20] In *Prichep*, decided in 2008, the Second Department effectively established a *presumption* in favor of awarding interim counsel fees to the less monied spouse:

> In light of the important public policy underlying Domestic Relations Law 237(a), as acknowledged in *Frankel*, an award of interim counsel fees to the non-monied spouse will generally be warranted where there is a significant disparity in the financial circumstances of the parties[.][21]

In the 2010 amendments, the legislature essentially codified *Prichep*, although in terms equally applicable to awards made at the end of a case, amending DRL §§237(a) and 237(b) to establish, in cases commenced on or after Oct. 12, 2010, "a rebuttable presumption that counsel fees shall be awarded to the less monied spouse" and providing 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." As amended, the statutes now specify that the payment of a retainer fee to the attorney for the less monied spouse "shall not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under this section."

In *S.B.S. v. S.S.*,[22] a custody proceeding, the new statute appears to have prompted an award of counsel fees even in a case to which it was not legally applicable, because the case had been commenced over three months before the effective date of the statute.

On a motion to reargue the court's previous denial of the respondent's motion for interim counsel fees, the court—without identifying any "matters of fact or law…overlooked or misapprehended by the court in determining the prior motion"[23]—reversed itself and granted the respondent interim counsel fees of $85,000, more than twice as much as she had incurred up to that point, after pointedly taking note of the new statute and the presumption established by it. The court did not discuss the incomes of the parties, but a large disparity—and very high income on the part of the petitioner—can be inferred from the fact that, as noted in the decision, the respondent was receiving from the petitioner child support of more than $240,000 per year, for one child. In another high-income case, *G.S. v. A.S.*,[24] the court, citing the presumption established by the new statute, ordered the husband to pay interim counsel fees of $120,000 on the wife's behalf early in the case, although the wife had liquid assets of approximately $1.2 million in her own name. The wife was not employed, while the husband had reported earned income of over $7 million on the parties' most recent tax returns. In *Khaira*, supra, another high-income case, the court affirmed an award of interim counsel fees of $42,000 early in the case.[25]

In several cases involving couples with more modest incomes, however, courts have found that the presumption in favor of an award of counsel fees to the lower-income spouse was rebutted by the reallocation of resources resulting from the court's awards of maintenance and child support to the lower-income spouse, and/or that the higher-income spouse could no longer be

considered the "monied spouse" in light of those awards. See *J.H. v. W.H.*,[26] *Margaret A. v. Shawn B.*,[27] and *Scott M.*, supra.[28] In *J.H.*, the court denied the motion for interim counsel fees. In the latter two cases, however, the courts, having found the presumption rebutted, nonetheless made modest interim awards of $5,000.

Child Support Modification

The 2010 amendments also revise DRL §236(B)(9)(b)(2) in a manner that will make modifications of child support far easier to obtain, and therefore will vastly increase the number of modification applications that the courts will have to adjudicate and provide many additional occasions for former spouses and romantic partners to square off in court.

Prior to the 2010 amendments, a party seeking modification of a child-support award actually determined by a court (a "court-determined award", i.e., *not* a judgment in which the court has simply incorporated the terms of an agreement between the parties concerning child support that survives as an independent contract) was required to show a "substantial change in circumstance,"[29] while a party seeking modification of a child-support award made pursuant to an agreement between the parties that has been incorporated into a judgment but survives as an independent contract (a "stipulated award") was required to show an "unanticipated and unreasonable change in circumstances,"[30] unless he or she could show that modification was necessary to uphold the "child's right to receive adequate support."[31]

As amended, effective Oct. 12, 2010, DRL §236(B)(9)(2) significantly loosens the legal standard for modifications of child support, first by making a showing of a "substantial change in circumstances" (as opposed to an "unanticipated and unreasonable change in circumstance") sufficient to warrant modification of a stipulated award, as well as of a court-determined award. In addition, it also provides that:

> Unless the parties have specifically opted out of the following provisions in a validly executed agreement or stipulation…the court may modify an order of child support where:
>
> (A) three years have passed since the order was entered, last modified or adjusted; or
>
> (B) there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified or adjusted.

Subparagraph (B), codifying decades of case law, continues with the proviso that: “A reduction in income shall not be considered as a ground for modification unless it was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability and experience.”

To avoid repeated modification motions, it will almost always be advisable for settlement agreements (or prenuptial agreements) to include a provision "opting out" of the modification provisions described above, to the extent possible, perhaps providing for self-executing adjustments under various eventualities. The wording of the provisions discussed above suggests that it is not possible to opt out of the provision providing for modifications based on a "substantial change of circumstances"—a view that downstate practitioners, at least, have found prevalent in the courts.

The new statute also specifies that "[i]ncarceration shall not be a bar to finding a substantial change in circumstances," language apparently intended to overrule longstanding case law

holding that lack of income due to incarceration is not a "substantial change of circumstances" warranting a downward modification of child support, because the incarceration was the payor's own fault, and therefore not involuntary.[32]

Our research has not revealed any reported cases applying or discussing the revised DRL §236(B)(9)(b)(2).

Time Will Tell

It is impossible to say, as of this writing, whether "No Fault" means "no trial"; whether the legislature will correct its significant drafting errors and clean up DRL §236(B)(5-a), or leave that task to the courts; or whether the increase in fairness that will result from making modifications of child support awards easier to obtain will outweigh the additional financial and emotional costs of the increase in child-support litigation that will also result. Only time will tell. But it seems almost certain that non-monied spouses and parents will enjoy a more level playing field when litigating those and other issues.

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Endnotes:

1. 916 N.Y.S.2d 759 (Sup. Ct. Essex Co. 2011).

2. Id. at 764.

3. 927 N.Y.S.2d 496 (Sup. Ct. Nassau Co. 2011).

4. Id. at 505.

5. Id. at 506.

6. 930 N.Y.S.2d 827 (Sup. Ct. Dutchess Co. 2011).

7. Id. at 830-31.

8. Id. at 831.

9. *Townes v. Cooker*, 943 N.Y.S.2d 823, 826-27 (Sup. Ct. Nassau Co. 2012); *Vahey v. Vahey*, 940 N.Y.S.2d 824, 827-828 (Sup. Ct. Nassau Co. 2012); *Palermo v. Palermo*, 2011 WL7711557, at *3-*8 (Sup. Ct. Monroe Co. 2011). The reader will note that three of the four cases discussed in which the court held that the sworn attestation of the plaintiff to the existence of an irretrievable breakdown is conclusive proof of grounds for divorce are from one county: Nassau.

10. DRL §240(1-b)

11. The temporary-maintenance statute actually defines "income" as the CSSA income *plus* "income from income-producing property to be distributed" under equitable distribution. But the latter is one of the provisions that appears to have been intended for a statute governing *post-judgment* maintenance.

12. The "income cap," referred to at several places in the statute, was set at $500,000 per year when the statute was enacted, but the statute provides for a cost-of-living adjustment of that amount as of Jan. 31 of every even-number year, pursuant to which the income cap increased to $524,000 as of Jan. 31, 2012.

13. 938 N.Y.S.2d 513 (1st Dept. 2012).

14. Id. at 518.

15. Id. at 517.

16. Id. at 518.

17. 781 N.Y.S.2d 59, 60 (2004).

18. 689 N.Y.S.2d 8, 10 (1999).

19. 858 N.Y.S.2d 667, 670-71 (2d Dept. 2008).

20. 710 N.Y.S.2d 363, 365 (1st Dept. 2000).

21. 885 N.Y.S. 2d at 670.

22. 2011 WL 1486642 (Fam. Ct. Nassau Co. 2011).

23. CPLR R. 2221(d)(2).

24. 2011 WL 2139091.

25. 938 N.Y.S.2d at 518.

26. 2011 WL 1158653, at *6-7 (Sup. Ct. Kings Co. 2011).

27. 921 N.Y.S.2d 476, 484-85 (Sup. Ct. Westchester Co. 2011).

28. 915 N.Y.S.2d at 844-47.

29. DRL §236(B)(9)(b)(2), as it read prior to Oct. 12, 2010.

30. *Boden v. Boden*, 397 N.Y.S.2d 701, 703 (1977).

31. *Brescia v. Fitts*, 451 N.Y.S.2d 68, 71 (1982).

32. See, e.g., *Knights v. Knights*, 527 N.Y.S.2d 748, 748-49 (1988); *Commissioner of Social Services v. Darryl B.*, 759 N.Y.S.2d 676, 677 (1st Dept. 2003); *Frasca v. Frasca*, 624 N.Y.S.2d 259 (2d Dept. 1995).
