 KeyCite Yellow Flag - Negative Treatment  
Distinguished by [Harlan v. Harlan](#), N.Y.Sup., October 6, 2014  
31 Misc.3d 353  
Supreme Court, Kings County, New York.

SCOTT M., Plaintiff,  
v.  
ILONA M., Defendant.

Jan. 27, 2011.

**Synopsis**

**Background:** Husband commenced action for divorce from wife. Husband moved for pendente lite custody of infant son, and wife cross-moved for pendente lite custody, child support, maintenance, and attorney fees.

**Holdings:** The Supreme Court, Kings County, [Jeffrey S. Sunshine](#), J., held that:

[1] deviation from pendente lite maintenance guidelines was warranted, and

[2] presumption of payor spouse being monied spouse for pendente lite attorney fees was rebutted.

Defendant's motion granted.

West Headnotes (8)


[1] **Child Support**

 Decision, findings, or verdict as to guidelines

Trial court must articulate the reasons for an amount of pendente lite child support directly attributed to child support in excess of the \$130,000 statutory cap. McKinney's DRL § 2401-B(c)(2).

[Cases that cite this headnote](#)

[2] **Child Support**

 **Amount of award pending divorce or dissolution proceedings**

Husband's obligation for pendente lite child support, in divorce action, together with other add-on expenses and pendente lite maintenance obligation, did not warrant exceeding statutory cap of \$130,000 on pendente support, even upon deviation from pendente lite maintenance guidelines, since lifestyle of husband and wife would be met by combined maintenance and support award. McKinney's DRL §§ 236, 2401-B(c)(2).

[Cases that cite this headnote](#)

[3] **Divorce**

 Amount

Husband's presumptive obligation of pendente lite **maintenance** in divorce action was **unjust** and inappropriate, as required for deviation from mandatory pendente lite **maintenance** guidelines, warranting award representing one-third reduction from mandatory calculation; under statutory factors requiring consideration of existence and duration of pre-divorce joint household and child care expense obligations, husband's available annual resources without deviation would be \$39,398.77, which would not allow him to maintain his pre-separation household, but wife's available resources would be \$78,309.55. McKinney's DRL § 236.

[4 Cases that cite this headnote](#)

[4] **Divorce**

 Amount

In determining whether a deviation from the mandatory pendente lite **maintenance** guidelines is warranted based on **unjust** or inappropriate presumptive award, the factor delineated as "any other factor which the trial court shall expressly find to be just and proper" cannot be used in isolation from the rest of the statute to support a finding of an **unjust** or inappropriate presumptive amount merely because the formula may

shift resources from one party to the other.  
[McKinney's DRL § 236.](#)

[7 Cases that cite this headnote](#)

**[5] Divorce**

 [Temporary and pendente lite awards](#)

**Divorce**

 [Evidence in general](#)

Although husband earned \$155,590.00 per year and wife only earned \$33,705.36, husband could not be considered as “monied spouse,” within meaning of pendente lite attorney fees guidelines, providing rebuttable presumption that attorney fees would be awarded to less monied spouse in divorce action, since husband could no longer be considered monied spouse after pendente lite maintenance and child support award that substantially shifted parties' actual financial resources, even after deviating from maintenance award due to injustice and inappropriateness of guidelines presumptive award. [McKinney's DRL §§ 236, 237.](#)

[8 Cases that cite this headnote](#)

**[6] Divorce**

 [Temporary and pendente lite awards](#)

Award of interim attorney fees in a divorce action is a matter within the sound discretion of the trial court, and the issue is controlled by the equities and circumstances of each particular case. [McKinney's DRL § 237\(a\).](#)

[Cases that cite this headnote](#)

**[7] Divorce**

 [Temporary and pendente lite awards](#)

In determining whether to award interim attorney fees in a divorce action, the trial court should 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. [McKinney's DRL § 237.](#)

[1 Cases that cite this headnote](#)

**[8] Divorce**

 [Temporary and pendente lite awards](#)

An appropriate award of interim attorney fees in a divorce action should take into account the parties' ability to pay, the nature and extent of the services rendered, the complexity of the issues involved, and the reasonableness of the fees under all of the circumstances. [McKinney's DRL § 237.](#)

[Cases that cite this headnote](#)

**Attorneys and Law Firms**

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[JEFFREY S. SUNSHINE, J.](#)

**\*354 Introduction**

This Court is called upon *inter alia* to determine if the new mandatory *pendente lite* maintenance guidelines and *pendente lite* counsel fee statutes enacted by the legislature should be deviated from where the calculations will result in the payee spouse having more monies available than the payor spouse as a result of the calculation. The Court must also determine if the shift in financial resources that results from the guideline calculation rebuts the presumption of the payor spouse being the “monied” spouse.

The plaintiff husband, Scott M., moves by order to show cause dated October 18, 2010, for an order seeking: (1) *pendente lite* custody of the infant son, [name omitted]; (2) immediate supervised drug testing; (3) to turn over to plaintiff the sum of nine-thousand (\$9,000.00) dollars which was wrongfully taken from the parties' joint account so that plaintiff may discharge a present and pressing matrimonial obligation; and (4) for such other and further relief as the court may deem just and proper. The

defendant wife, \*355 Ilona M., moves by cross-motion dated October 26, 2010, for an order granting *pendente lite* custody, child support, maintenance, attorney's fees, and for such other and further relief as the Court may deem just and proper. The matter was orally argued on December 16, 2010.

### **Background**

The parties were married in a civil ceremony in Arlington, Virginia in June of 2000. There is one child of the marriage who is three (3) years of age. The husband commenced this action on October 15, 2010. The husband is 44 years of age, and is currently employed as a vice president of a major financial institution. The wife is 34 years of age and currently employed as a production assistant.

The parties previously resided in Virginia before moving to New York. The parties met through an online dating service. The husband traveled to Saint Petersburg, Russia to meet the wife. The wife emigrated to the United States on April, 2000 on a "K-1" visa (for a fiancée) and became a United States Citizen in 2006. The wife's mother also emigrated to the United States and appears to be the source of much of the husband's concerns relating to her care of the parties' child and his reports of an obsessive compulsion with cleanliness and hand washing. The husband expresses grave concerns about the wife's use of the drug "ecstasy" for which she tested positive for in a court ordered drug test. The husband alleges her use of the drug escalated in the spring of 2010 and continues to increase at an alarming rate. The husband admits to having known of the defendant's use of ecstasy.

The wife contends that the husband uses the drug cocaine which he vehemently denies. The husband tested negative in a court ordered drug test. There is an active investigation with the New York City Administration for Children's Services \*\*837 which conducted an investigation and issued a report on December 1, 2010. The child resides with the mother and the father has extensive parenting time. The father resides in the former marital apartment. An attorney has been appointed for the child<sup>1</sup>. The husband and wife each seek custody of the child. The husband avers that his employment will allow him to spend substantial time at home with the child. There is a day care provider which is paid over \$1,700.00 each month at a substantial \*356 cost to the husband.

The husband alleges that he is contractually obligated to pay for the child care and the wife has not contributed to the costs.

### **Legislative History**

As a result of dissatisfaction with *pendente lite* maintenance and counsel fee awards, the legislature effective October 12, 2010, requires that courts conduct a formula approach to the calculation of temporary maintenance awards. The statutory requirement does not apply to final awards and is subject to review after a report by the Law Revision Commission no later than December 31, 2011.<sup>2</sup> In support of the legislation the sponsor noted:

\*357 Purpose of Bill: To take steps toward reforming the state's spousal maintenance awards by providing consistency and predictability in calculating temporary spousal maintenance awards, revising the state's laws on final maintenance awards by incorporating factors that reflect the experiences of divorcing couples, and directing a review of our maintenance laws and the economic consequences of divorce to enable the legislature to improve the effectiveness of these laws ...

The legislation established (19) factors for a court to consider as a deviation. The Court has performed a number of calculations outlined below in order to explain the options and consequences of the calculation (*see* DRL 236 B [5-a]).

### **\*\*838 Calculation I**

#### **Gross Income Calculation for Support Purposes**

For purposes of both child support and maintenance calculations, annual income is defined as Gross Income Less FICA and New York City taxes, thus the following calculations result in the parties' annual income calculation as follows:<sup>3</sup>

#### *Husband Wife*

Gross Income:\$155,590.00 Gross Income:\$33,705.36

FICA and Medicare<sup>4</sup>:\$6,466.58 FICA and Medicare:-\$2,089.74

New York City Tax:\$5,445.65  
New York City Tax:-  
\$1,179.69

**Total Income** <sup>5</sup> :\$143,677.77-\$30,435.93

**\*358 Calculation II**

**Mandatory Pendente Lite Maintenance Calculation Pursuant to the Statute:**

Calculation A:30% of payor's income minus 20% of payee's income

(a) payor's income\$143,677.77

x .3

30% of payor's income \$43,103.33

(b) payee's income\$ 30,435.93

x .2

20% of payee's income \$6,087.19

(c) 30% of payor's income\$43,103.33-

20% of payee's income\$6,087.19

**Calculation A total\$37,016.14**

Calculation B:40% of combined income minus payee's income

(a) husband's income\$143,677.77

+

wife's income\$ 30,435.93

Combined income \$174,113.70

(b) combined income\$174,113.70

x .4

40% of combined income \$ 69,645.48

(c) combined income\$ 69,645.48

-

payee's income\$30,435.93

**Calculation B total\$39,209.55**

The guideline amount is the lesser of Calculation A and Calculation B or zero if calculation B is less than or equal to zero:

Calculation A:\$37,016.14

Calculation B:\$39,209.55

Guideline amount:\$ 37,016.14

**\*359 Low Income Calculation**

If the guideline amount reduces the payor's income below the selfsupport reserve (in 2010 it is \$14,620) than the award is the payor's income minus the self-support reserve. If the low income award equals zero, there is no adjustment for low income.

payor's income\$143,677.77

guideline amount:-\$ 37,016.14

\$106,661.63

The guideline amount does not reduce the payor's income below the selfsupport **\*\*839** reserve, accordingly, there is no low income adjustment herein.

The payee spouse is entitled to the lower of the above two resulting figures, absent any finding that the presumptive amount would be **unjust** or inappropriate based on the factors delineated in **DRL Section 236, Part B(5)(E)(1)**. The factors include the age and health of the parties, their earning capacity, a party's care of children or other family members that inhibits his or her earning capacity, the need of a party to pay for exceptional additional expenses for the parties' children, the contributions of the party seeking temporary **maintenance** to the marriage, the existence and duration of a pre-marital joint household or a pre-divorce separate household, and any other factor that the court finds to be just and proper.

**Calculation III**

**Pendente Lite Child Support Maintenance Deviation on Total Combined Income (No Child Support Cap)**

If the Court were to utilize the new maintenance guidelines and not deviate, the calculation would be as follows: The husband's income is \$155,590.00 less FICA \$6,466.58, New York City local tax \$5,445.65 and maintenance \$37,016.14. The husband's income for child support

purposes is \$106,661.63. The wife's annual income is \$33,705.36 less FICA \$2,089.74 and New York City tax \$1,179.69. The wife's income for child support purposes is \$30,435.93<sup>6</sup>. The combined parental income is (\$106,661.63 + \$30,435.93 = \$137,097.56). In accordance with \*360 CSSA 17% of the total combined parental income is \$23,306.58. Accordingly, the husband's *pro rata* share, (77.80%), for child support would be \$18,132.51 annually; which is \$1,511.04 each month. Statutory add on expenses, such as day care and unreimbursed medical expenses for the child would also be paid on a *pro rata* basis; the husband's *pro rata* obligation under this scenario would be 77.80% and the wife's *pro rata* obligation is 22.20%.

#### Calculation IV

##### *Pendente Lite Child Support Utilizing Child Support Cap of \$130,000.00*

[1] [2] Effective January 31, 2010, (see DRL 2401–b (c)(2)), the legislature raised the cap on mandatory child support from \$80,000.00 to \$130,000.00 of combined parental income. Thus, if the child support is calculated on the combined parental of \$130,000.00 at 17% for one child, the combined child support would be a total of \$22,100.00. At a *pro rata* ratio of 77.80% for the husband and 22.20% for the wife, the husband's child support obligation would be \$17,193.80 per year and the wife's child support obligation would be \$4,906.20. Pursuant to *Cassano v. Cassano* 85 N.Y.2d 649, 628 N.Y.S.2d 10, 651 N.E.2d 878 (1995) the Court must articulate \*\*840 the reasons for an amount of support directly attributed to child support in excess of the now \$130,000 cap. In the case at bar, the lifestyle of the parties is being met by the combined maintenance and child support award. Here, even if the court deviated from the mandatory maintenance guidelines, the amount of support attributed to the father of \$17,193.80 together with the other add ons expenses and the maintenance, would not warrant the court to exceed the child support \$130,000.00 cap *pendente lite*.

##### *Add on Expenses*

The court is aware that there are substantial add on expenses including the payment of \$1,700.00 per month in child care. The wife at oral argument claimed that the husband has no obligation to continue the child in such an expensive child care arrangement \*361 and that

she would be willing to contribute toward that expense of child care. The husband claims he is contractually obligated to make these payments. These are mandatory add on expenses because the parties are employed and child care is thus a mandatory expenditure. See DRL 2401–b (c) *Wallin v. Wallin* 53 A.D. AD 663(2nd Dept., 2008).

#### Calculation V

##### *Analysis of the Effect of Mandatory Pendente Lite Maintenance and Basis for a Deviation*

The new statute poses significant challenges for courts. It dramatically changes the philosophy and purposes of *pendente lite* support. No longer is the standard to tide over the “more” needy spouse *see Yecies v. Yecies* 108 A.D.2d 813, 485 N.Y.S.2d 128 [2d Dept.1985], *Valente v. Valente*, 269 A.D.2d 389, 703 N.Y.S.2d 206 (2d Dept.2009), *Iannone v. Iannone* 31 A.D.3d 713, 820 N.Y.S.2d 86 (2d Dept., 2006) (the purpose of a *pendente lite* award is to “tide over the more needy party, not to determine the correct ultimate distribution”). The standard is a shift in resources pre-trial by automatic calculation. The basis for the majority of deviations enunciated in the statute are difficult to determine pre-trial and pre-discovery. At the earliest stage of the litigation (*pendente lite*) the court is required to consider factors some of which can only be established after a full trial and or extensive discovery. In accordance with DRL 236 B 5–a [e] (1) “[t]he court shall order the presumptive award of temporary **maintenance** in accordance with paragraphs c and d of this subdivision, unless the court finds that the presumptive award is **unjust** or inappropriate and adjusts the presumptive award of temporary **maintenance** accordingly based upon consideration of the following factors:”

- (a) the standard of living of the parties established during the marriage;
- (b) the age and health of the parties;
- (c) the earning capacity of the parties;
- (d) the need of one party to incur education or training expenses;
- (e) the wasteful dissipation of marital property;



(f) the transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

**\*362** (g) the existence and duration of a pre-marital joint household or a pre-divorce separate household;

(h) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;

(i) the availability and cost of medical insurance for the parties;

**\*\*841** (j) the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity or ability to obtain meaningful employment;

(k) the inability of one party to obtain meaningful employment due to age or absence from the workforce;

(l) the need to pay for exceptional additional expenses for the child or children, including, but not limited to, schooling, day care and medical treatment;

(m) the tax consequences to each party;

(n) marital property subject to distribution pursuant to subdivision five of this part;

(o) the reduced or lost earning capacity of the party seeking temporary **maintenance** as a result of having foregone or delayed education, training, employment or career opportunities during the marriage;

(p) the contributions and services of the party seeking temporary **maintenance** as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and

(q) any other factor which the court shall expressly find to be just and proper.

[3] [4] After considering the statutory factors, the Court finds in the case at bar that the presumptive amount of temporary **maintenance** of \$37,016.14 (which is \$3,097.00 per month) would be **unjust** and inappropriate because (1) the Court must consider the existence and duration

of the pre-divorce joint household of both parties and (2) the child care expense obligation of the parties. This determination cannot be made in a vacuum. In the case at bar and under the formula enunciated by the recent legislation, the shift in resources from the payor spouse to the **\*363** payee spouse results in the payor spouse having a substantial reduction in resources and thus cannot maintain his pre-separation household. Here, the legislation specifically provides that the existence of a pre-divorce household be considered. The statute does not articulate only the payee spouse's household. The Court does not believe the factor (q), "any other factor which the court shall expressly find to be just and proper", allows a blanket rejection of the calculation because it is simply too much money. The financial resource shift, in and of itself, is not a basis for the Court to re-write the intent of the statute. The legislature did not articulate a factor that would permit the court, as an act of equity, to simply re-adjust the calculation. The language **unjust** or inappropriate does not stand alone. The factor delineated as (q) (any other factor which the court shall expressly find to be just and proper) cannot be used in isolation from the rest of the statute to support a finding of an **unjust** or inappropriate presumptive amount merely because the formula may shift resources from one party to the other. While the category may appear on its face to invite a deviation based upon a resource shift, the legislative intent of the statute is consistency in **maintenance** awards. Granting a deviation just because there is a resource shift would be inconsistent with the statutory intent. The economic intent of the statute clearly is to shift resources. Of course, how dramatic of a shift depends on the incomes and resulting financial resources of the parties. In order to maintain the pre-divorce or separation household for both parties herein, there must be excess resources available that were not utilized previously. The cost to the plaintiff of the pre-divorce household rent alone is \$25,200.00 a year. There is no reason he should be forced to move *pendente lite* especially where the issue of custody is unresolved. See **\*\*842 Dornbusch v. Dornbusch**, 110 A.D.2d 808, 488 N.Y.S.2d 229 [2d Dep't 1985] (in an initial custody battle, there is no presumption in favor of either parent). Simple mathematics and common sense dictate that it costs more to maintain two households than one. Here, there is no indication that the parties had resources that were not utilized. In fact, notwithstanding substantial income, the parties were having difficulty meeting their expenses, nor can it be said at this juncture that the husband or wife has purposefully diminished their income.

The role of the court in this case is to devise an award that will consider the existence of a pre-divorce household (factor (G)). The court must also consider the substantial child care obligations (factor (L)).

**\*364** If the Court did not deviate from the maintenance guidelines, the economic analysis would be the husband's resources, for *pendente lite* purposes, of \$143,677.77 (income), less the *pendente lite* maintenance award of \$37,016.14, less his annual child support obligation (up to \$130,000.00 in combined income) of \$17,193.80, thus leaving the husband's resources reduced to \$89,467.83. When you take this into account with his Federal tax obligation of \$24,553.80 and his State tax obligation of \$9,644.06 (his New York City and FICA were already deducted pursuant to the formula) his available resources with these payments would be \$55,269.97<sup>7</sup>. If you were to deduct his (77.80%) pro rata share of the \$1,700.00 child care per month or \$20,400.00 per year under this scenario, his available resources would be further reduced an additional \$15,871.20 to \$39,398.77 per year to meet all of his expenses.

The wife's resources, for *pendente lite* purposes, of \$30,435.93 (income) plus the *pendente lite* maintenance award in accordance with the formula would be \$37,016.14 plus the child support award of \$17,193.80 less the wife's federal tax obligation of \$730.08 and her state tax obligation of \$1,077.44 leave her with an annual resources of \$82,83.35<sup>8</sup>. If you deduct her pro rata share of child care, it would be further reduced to 22.20% of \$20,400.00 which equals \$4,528.80 which would leave her and the child with available resources of \$78,309.55.

**Expenses**

Pursuant to the husband's affidavit of net worth dated October 6, 2010, his monthly expenses are: (1) rent \$2,100.00; (2) utilities \$620.00; (3) food \$400.00; (4) clothing \$200.00; (5) laundry \$80.00; (6) dry cleaning \$200.00 (7) medical \$50.00; (8) therapy \$800.00; (9) household maintenance \$55.00; (10) household help \$800.00; (11) daycare \$1,700.00; (12) recreation \$830.00; (13) miscellaneous \$350.00. The husband's total expenses are \$8,185.00.<sup>9</sup>

**\*\*843 \*365** Pursuant to the wife's affidavit of net worth dated November 1, 2010, her monthly expenses are: (1) rent \$1,150.00; (2) utilities \$230.00; (3) food \$900.00; (4) clothing \$400.00; (5) laundry \$100.00; (6) household maintenance \$100.00; (7) daycare \$1,700.00<sup>10</sup>; (8) recreation \$261.28; (9) miscellaneous \$390.00; (10) lawyer \$400.00; (11) child's diapers and wipes \$200.00; and (12) child's toys \$200.00. The wife's total expenses are \$6,031.28.

As such, the Court recognizing that the purpose of a *pendente lite* award is no longer to "tide over the more needy party", does deviate and determines that temporary maintenance in the amount of \$24,667.42 per annum *pendente lite* implements the intent and language of the new law as presently written. The court deviates in order for the plaintiff to meet his pre-divorce household expenses and taking into account the parties expenses, child care costs and net available resources. This calculation reduces the mandatory calculation of \$37,016.14 by one third to \$24,677.42. The Court further finds that the child support calculation in the amount in excess of \$130,000 cap in combined pro rata income for purposes of child support is not warranted herein, given the total combined child support and maintenance awarded *pendente lite*.

**Calculation of Support**

Thus, the court determines the following calculation:

*Husband Wife*

Gross Income:	\$155,590.00	Gross Income:	\$33,705.36
Less FICA + Medicare:	-\$6,466.58	Less FICA + Medicare:	-\$2,089.74
Less New York City tax:	-\$5,445.65	Less New York City Tax:	-\$1,179.69
Less Maintenance:	-\$24,677.42		
<b>Total Gross:</b>	<b>\$119,000.35</b>	<b>Total Gross:</b>	<b>\$30,435.93</b>

**(For Child Support)**

**\*366** The husband's total gross for child support calculation is \$119,000.35 and the wife's total gross for child support calculation is \$30,435.93. The parties' combined parental income (with no cap) would be

\$149,436.28 multiplied (one child) by 17%, equals \$25,404.16. The husband's pro rata share of 79.60% would be \$20,221.71. The wife's pro rata share of 20.40% would be \$5,182.44. The court finds child support (given the amount of maintenance, the pre-standard of living and amount of resources each party is left with) utilizing combined parental income cap of \$130,000 multiplied by 17%, equals \$22,100.00 is more appropriate. The husband's pro rata share (79.60%) equals \$17,591.00. The wife pro rata share (20.40%) equals \$4,508.40.

The child care of \$1,700.00 monthly (\$20,400 annually) shall also be paid on a pro rata share basis by the parties. 79.60% by the husband (\$16,238.40) and 20.40% by the wife (\$4,161.60). Similarly, the parties shall share the cost of any unreimbursed medical, dental or optical costs on the same pro rata basis *pendente lite*. The husband shall continue to cover the wife and child on his existing health insurance. All life insurance policies shall remain in full force and effect. Thus, the child support of \$17,591.00 per year equals \$338.28 per week and the maintenance of \$24,677.42 per year equals \$474.56 per week for a combined support order of \$42,268.00.

The husband will then have net available resources of \$50,973.00 and the wife and **\*\*844** the 3-year-old child will have net available resources of \$66,735.23. These resource sums are calculated as follows:

*Husband*

Gross Income \$155,590.00  
 Less FICA and Medicare-\$6,466.58  
 Less New York City Taxes-\$5,445.65  
 Less Federal Taxes-\$24,553.80  
 Less State Taxes-\$9,644.06  
 Less Payment of Maintenance-\$24,677.42  
 Plus payment of Maintenance 0  
 Less Child Support-\$17,591.00  
 Less Pro Rata share of Child Care-\$16,238.40  
 Balance of Resources Available **\$50,973.09**

**\*367** *Wife and 3-year-old child*

Gross Income \$33,705.36  
 Less FICA and Medicare-\$2,089.74  
 Less New York City Taxes-\$1,179.69  
 Less Federal Taxes-\$730.08  
 Less State Taxes-\$1,077.44  
 Plus payment of Maintenance+\$24,677.42  
 Plus Child Support+\$17,591.00  
 Less Pro Rata share of Child Care-\$4,161.60  
 Balance of Resources Available **\$66,735.23**

***Interim Counsel Fee Award***

The wife requests an award of interim counsel fees in the amount of \$10,000.00. The legislation also changes the methodology for the ordering of counsel fees *pendente lite*. **DRL 237** has been amended to provide that: “[t]here shall be 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. Applications for the award of fees and expenses may be made at any time or times prior to final judgment. 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. Any applications for fees and expenses may be maintained by the attorney for either spouse in his own name in the same proceeding. Payment of any retainer fees to the attorney for the petitioning party shall not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under this section.”

The sponsor of the bill in the Senate noted:



**\*368 Justification:** This bill would amend [sections 237 and 238 of the Domestic Relations Law](#) to require the court in a matrimonial case, or a proceeding to enforce a judgment therein, involving parties with greatly unequal financial resources, to order the monied party to pay counsel fees for the non-monied party during the course of the case so as to enable her or him to carry on or defend it.

Current law places an onus upon the party in a matrimonial action seeking counsel fees *pendente lite*, to show why the interests of justice require it. In addition, Judges appear reluctant to order *pendente lite* counsel fee awards in matrimonial actions under the current statute. A judicial order for *pendente lite* counsel awards in a **\*\*845** matrimonial proceeding is a vital step in preventing an imbalance in the parties' resources from affecting the proceeding's outcome. Given the importance of *pendente lite* counsel fees, and the frequency of financial imbalance between parties to matrimonial proceedings, it is inappropriate to place the burden upon a non-monied spouse to justify it. Therefore, it is important for the Legislature to revise the statute, as proposed, to create a rebuttable presumption that such relief is necessary.

This bill proposal presumes that in a matrimonial case an order for *pendente lite* counsel fees is required, and it is left to the affected parties to show why, in the interests of justice, the order should not be made. This will better address today's economic and social realities, and will help ensure that no party to a matrimonial case is strategically at a disadvantage for want of resources to pursue or defend the case.

[5] In this case, the husband earns \$155,590.00 and the wife earns \$33,705.36. The husband is the monied spouse. In accordance with the new statutory scheme there is a rebuttable presumption that counsel fees shall be awarded to the less monied spouse, the wife. However, based upon the temporary maintenance and child support award, even with the deviation, you can no longer consider the husband as a "monied spouse". As stated herein, even with the deviation, there is a substantial shift in actual financial resources. This court is cognizant that the award of temporary maintenance very well may have future **\*369** tax implications for each of the parties but this court can only consider that which is before it at this time. These tax benefits will not be realized, if at all, until at the very earliest of 2012.

The husband's affidavit states that his attorney's retainer amount was \$3,500.00. The husband's counsel's hourly rate is \$300.00.

The wife's retainer was in the amount of \$4,800.00. Through November 5, 2010, the wife's counsel billed \$7,955.00. There remains a balance due and owing in the amount of \$1,987.50. The wife's counsel's hourly rate was initially \$395.00 however, counsel (after the rate for legal assistants and paralegals were questioned by the wife's attorneys) stated that he entered into a new retainer agreement with the wife wherein he reduced the hourly rate to \$245.00 retroactively to the commencement of the action. Accordingly, the wife is awarded interim counsel fees in the amount of \$5,000.00.

The re-allocation of financial resources articulated herein shift the burden from the husband from being considered the monied spouse and as such rebuts the presumption. There is no doubt that the plaintiff earns more than the defendant does, and there is a disparity in gross income, but under the financial shift as a result of the mandatory Child Support Standards Act and Maintenance guidelines, even with the maintenance deviation of one-third the defendant will have more available resources for her and the child than plaintiff will. Of course, the support requirement of two individuals as compared to the support of one cannot go unnoticed, nor will the court consider child support as income. Yet, the Court cannot decide that just because one party "earns more" than the other that they automatically become the "monied spouse". Here, it is clear that the husband has not paid his attorneys themselves a sufficient sum of money for the amount of litigation involved. They may or may not have their reasons, that though should not bind the defendant wife to find attorneys equally as benevolent as the plaintiff's attorneys.

[6] [7] [8] Even before the recent legislation, it was well established under **\*\*846 Domestic Relations Law § 237(a)** attorney's fee is a matter within the sound discretion of the trial court, and the issue is controlled by the equities and circumstances of each particular case (*Grant v. Grant*, 71 A.D.3d 634, 895 N.Y.S.2d 827, quoting *Gruppuso v. Caridi*, 66 A.D.3d 838, 839, 886 N.Y.S.2d 613 [2d Dep't 2009], quoting *Morrissey v. Morrissey*, 259 A.D.2d 472, 473, 686 N.Y.S.2d 71 [2d Dep't 1999] ). "In determining whether to **\*370** award such a fee, the court should 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" ' (*Gruppuso*, 66 A.D.3d at 839, 886 N.Y.S.2d 613, quoting *DeCabrera v. Cabrera-Rosete*, 70 N.Y.2d 879, 881, 524 N.Y.S.2d 176, 518 N.E.2d 1168 [1987] ). Further, "[a]n appropriate award of attorney's fees should take into account the parties' ability to pay, the nature and extent of the services rendered, the complexity of the issues involved, and the reasonableness of the fees under all of the circumstances" ' (*DiBlasi v. DiBlasi*, 48 A.D.3d 403, 405, 852 N.Y.S.2d 195 [2d Dep't 2008], *lv. denied* 10 N.Y.3d 716, 862 N.Y.S.2d 468, 892 N.E.2d 862 [2008], quoting *Grumet v. Grumet*, 37 A.D.3d 534, 536, 829 N.Y.S.2d 682 [2d Dep't 2007] [citations omitted] ).

It is also well settled that "[a]n award of interim counsel fees is designed to create parity in divorce litigation by preventing a monied spouse from wearing down a nonmonied spouse on the basis of sheer financial strength" (*Rosenbaum v. Rosenbaum*, 55 A.D.3d 713, 714, 866 N.Y.S.2d 234 [2d Dep't 2008], citing *O'Shea v. O'Shea*, 93 N.Y.2d 187, 193, 689 N.Y.S.2d 8, 711 N.E.2d 193 [1999]; *Wald v. Wald*, 44 A.D.3d 848, 844 N.Y.S.2d 86 [2d Dep't 2007] ). Stated differently, "[s]uch awards are designed to redress the economic disparity between the monied spouse and the non-monied spouse and ensure that the matrimonial scales of justice are not unbalanced by the weight of the wealthier litigant's wallet" (*Kaplan v. Kaplan*, 28 A.D.3d 523, 523, 812 N.Y.S.2d 360 [2d Dep't 2006], quoting *Frankel v. Frankel*, 2 N.Y.3d 601, 607, 814 N.E.2d 37, 781 N.Y.S.2d 59, 814 N.E.2d 37 [2004], quoting *O'Shea*, 93 N.Y.2d at 190, 689 N.Y.S.2d 8, 711 N.E.2d 193). Further:

"Such an award is appropriate to prevent the more affluent spouse from wearing down or financially punishing the opposition by recalcitrance, or by prolonging the litigation" (*Gober v. Gober*, 282 A.D.2d 392, 393, 724 N.Y.S.2d 48, quoting *O'Shea v. O'Shea*, 93 N.Y.2d at 193 [689 N.Y.S.2d 8, 711 N.E.2d 193]; see *Charpie v. Charpie*, 271 A.D.2d 169, 710 N.Y.S.2d 363). If the playing field were not leveled by an award of interim counsel fees, a wealthy husband could obtain the services of highly paid (and presumably seasoned and superior) matrimonial counsel, while the indigent wife, essentially, would be relegated to counsel willing to take her case on a poverty basis' (*Sassower v. Barone*, 85 A.D.2d 81, 89, 447 N.Y.S.2d 966).

"In *Frankel v. Frankel* (2 N.Y.3d 601, 781 N.Y.S.2d 59 [814 N.E.2d 37] ), the Court of Appeals recognized that the realities of contentious matrimonial litigation require a regular infusion of funds,' and that more frequent interim counsel fee awards would prevent accumulation of \*371 bills' (*id.* at 605 n. 1, 607 [781 N.Y.S.2d 59, 814 N.E.2d 37] )."

(*Prichep v. Prichep*, 52 A.D.3d 61, 65, 858 N.Y.S.2d 667 [2d Dep't 2008] ).

The Appellate Division, Second Department, therefore held that:

"[A]n award of interim counsel fees to the non-monied spouse will generally be warranted where there is a significant disparity in the financial circumstances \*\*847 of the parties. Accordingly, courts should not defer requests for interim counsel fees to the trial court, and should normally exercise their discretion to grant such a request made by the non-monied spouse, in the absence of good cause ...."

(*Prichep v. Prichep*, 52 A.D.3d at 65, 858 N.Y.S.2d 667 [emphasis added] ). While the purpose of counsel fees is to make sure that the monied spouse does not control by the power of the pocketbook or wallet, the court must realistically assess the available resources to each party as a result of the litigation. The Court must leave the payor spouse with funds sufficient to meet their daily living expenses. As such, counsel fees are awarded to the defendant's counsel in the amount of \$5,000.00 to be paid within 30 days from the date of this decision and order. If plaintiff fails to make payment, the defendant may enter judgment with the clerk of the court without the need for further judicial intervention for said sum together with costs and interest upon 10 days written notice to plaintiff by certified mail.

### Conclusion

For the reason stated herein, the husband is ordered to pay *pendente lite* child support in the amount of \$17,591.00 per year on a monthly basis of \$1,465.91 per month. He

is further directed to pay *pendente lite* maintenance in the amount of \$24,667.42 per year or \$2,055.61 per month; the court having determined that an award of \$37,016.14 per year would be unjust and inappropriate based upon factors (g) and (l) of the statute. The parties shall share the cost of child care at a ratio of 79.60% by the husband or \$16,238.40 per year, (\$1,353.20) per month and 20.40% by the wife or \$4,161.60 per year, (\$346.80) per month. First payments are to be made on February 1, 2011, and subsequent payments to be made on the first day of each month thereafter. All unreimbursed medical expenses for the wife and child are to be paid pro rata in accordance with the calculations herein. *Pendente lite* counsel fees in the amount of \$5,000.00 to be paid to the wife by the husband within 30 days. All payments shall be retroactive to the date of the first application (see *Dooley v. Dooley*, 128 A.D.2d 669, 513 N.Y.S.2d 167 [2d Dept., 1987]).

\*372 The plaintiff-husband shall receive a credit retroactive to the date of the application for any voluntary payment made or payments made pursuant to the interim orders of the court. The application for return of the \$9,000.00 allegedly mis-appropriated by the wife is referred to the trial court inasmuch as an evidentiary hearing on the issue will be necessary to determine the claim.

This shall constitute the decision and order of the court.

#### All Citations

31 Misc.3d 353, 915 N.Y.S.2d 834, 2011 N.Y. Slip Op. 21026

#### Footnotes

- 1 The court also ordered an emergency investigation regarding the safety of the child pursuant to FCA 1034 on November 10, 2010.
- 2 The statute states: 6–a. Law revision commission study. a. The legislature hereby finds and declares it to be the policy of the state that it is necessary to achieve equitable outcomes when families divorce and it is important to ensure that the economic consequences of a divorce are fairly shared by divorcing couples. Serious concerns have been raised that the implementation of New York state's maintenance laws have not resulted in equitable results. Maintenance is often not granted and where it is granted, the results are inconsistent and unpredictable. This raises serious concerns about the ability of our current maintenance laws to achieve equitable and fair outcomes. The legislature further finds a comprehensive review of the provisions of our state's maintenance laws should be undertaken. It has been thirty years since the legislature significantly reformed our state's divorce laws by enacting equitable distribution of marital property and introduced the concept of maintenance to replace alimony. Concerns that the implementation of our maintenance laws have not resulted in equitable results compel the need for a review of these laws. b. The law revision commission is hereby directed to: (1) review and assess the economic consequences of divorce on the parties; (2) review the maintenance laws of the state, including the way in which they are administered to determine the impact of these laws on post marital economic disparities, and the effectiveness of such laws and their administration in achieving the state's policy goals and objectives of ensuring that the economic consequences of a divorce are fairly and equitably shared by the divorcing couple; and (3) make recommendations to the legislature, including such proposed revisions of such laws as it determines necessary to achieve these goals and objectives. b. The law revision commission shall make a preliminary report to the legislature and the governor of its findings, conclusions, and any recommendations not later than nine months from the effective date of this subdivision, and a final report of its findings, conclusions and recommendations not later than December thirty-first, two thousand eleven.
- 3 The wife submitted a temporary maintenance guidelines worksheet and the parties stipulated to its submission at the time of oral argument.
- 4 The FICA paid by the parties was derived from the temporary maintenance guidelines worksheet submitted and agreed to on the record.
- 5 As defined by both the maintenance guidelines and the CSSA. The total income was derived from the basic mathematical calculation however, this court notes that it differs from the parties temporary maintenance guidelines worksheet. The parties calculated \$140,497.77, not \$143,677.77, for the husband and \$30,436.13 for the wife, not \$30,435.93. It is unclear to this court how the parties arrived at these numbers. The court simply subtracted the FICA and local tax to arrive at the income for purposes of the *pendente lite* maintenance formula.
- 6 The *pendente lite* maintenance award is not income to the wife for the child and maintenance calculation. Since no prior order existed and, therefore, the monies were not reportable in the most recent tax year it is not counted as income

(see *Lee v. Lee*, 18 A.D.3d 508, 795 N.Y.S.2d 283 [2d Dept.,2005] “The court also erred in considering the maintenance to be received by the wife as her income for purposes of performing the CSSA calculations [citations omitted].”; see also *Krukenkamp v. Krukenkamp*, 54 A.D.3d 345, 862 N.Y.S.2d 571 [2d Dept., 2008] “The Child Support Standards Act requires the court to establish the parties' basic child support obligation as a function of the “gross (total) income” that is, or should have been, reflected on the party's most recently filed income tax return [citation omitted]. Since, ..., the total income reported on the mother's most recently filed tax return included the maintenance payments she had received from the father that year, ... was improperly excluded from her income for the purpose of calculating her child support obligation [citations omitted]”).

- 7 The husband's Federal and State tax payments were derived from his 2009 W–2 which is annexed to his “reply affidavit in support of defendant's cross motion”.
- 8 The wife did not submit a W–2 statement for herself. The tax payments of the wife were derived from her affidavit of net worth dated November 1, 2010, which is annexed to the notice of cross motion. The wife reported she has bi-weekly deductions for federal tax in the amount of \$28.08 and state tax in the amount of \$41.44.
- 9 This court omitted an expense of “back rent” in the amount of \$1,050.00 which was placed next to the household maintenance section on the husband's affidavit of net worth. The husband elaborates in his “Reply Affidavit” which annexes the landlord's three day notice that \$9,700.00 is due. However, the notice is not dated and it is unclear to this court the outstanding balance due. The explanation given by the husband for the need to pay back rent is that the wife used the parties' rent money to purchase recreational drugs, particularly, ecstasy. This court also omitted the husband's tax obligation itemized in his expense section, as these number have been considered above.
- 10 This court notes both parties deducted the total monthly day care expenses of \$1,700.00 in calculating their monthly expenses.