Frankel v. Frankel: The Sequel to *O'Shea v. O'Shea*[1]

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In *Frankel v. Frankel*[2] the Court of Appeals addressed the question whether, under DRL §237(a), counsel who represented the non-monied spouse (universally understood to refer to wives[3]) may seek attorneys fees from the monied spouse after counsel has been discharged without cause.

The salient facts in *Frankel* are that the wife had paid her lawyer an initial retainer of $5,000. The billings soon escalated well beyond that amount and the Supreme Court awarded her an additional $2,500 in interim counsel fees. Nearly two years later, following a 32-day custody trial, the court granted another interim fee award of $25,000. Eighteen days thereafter, she discharged her lawyer without cause. Counsel moved to collect the unpaid balance by proceeding directly against the husband under DRL §237(a).[4] The trial court held that counsel was statutorily entitled to proceed against the husband in the same action. A divided appellate bench galvanized the matrimonial bar when it reversed, holding that counsel lost standing to so proceed upon discharge.

The Appellate Division's reasoning was grounded exclusively in the most restrictive and narrowest reading of the principles of statutory construction. It held that, when statutory language is clear and unambiguous, a court is precluded from exploring legislative intent beyond the statutory language and the plain meaning of the words must be given effect.[5] An application of this ruling to §237(a) means that only the current attorney of record may benefit from the statute because had the Legislature intended to confer this benefit on discharged counsel, too, it could have so stated. The Court of Appeals reversed and reinstated the lower court ruling.

The briefs to the Court of Appeals were front loaded with arguments emphasizing the principles of statutory construction,[6] as codified by statute and interpreted by decisional authority,

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[1] N.Y.L.J., October 1, 2004.

[2] 2004 WL 1440067, 2004 N.Y. Slip Op. 05558 (2004).

[3] O'Shea v. O'Shea, 689 N.Y.S.2d 8, 93 N.Y.2d 187, 711 N.E.2d 193 (1999); DeCabrera v. Cabrera-Rosete, 524 N.Y.S.2d 176, 70 N.Y.2d 879, 518 N.E.2d 1168 (1987).

[4] DRL §237(a) provides, in pertinent part: . . . 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 or defend the action or proceeding as, in the court's discretion, justice requires . . .*Any applications for counsel fees and expenses may be maintained by the attorney for either spouse in his own name in the same proceeding*.

[5] Frankel v. Frankel, 309 A.D.2d 65, 764 N.Y.S.2d 135 (2nd Dept., 2003).

[6] See, New York Statutes.

that direct a court to do whatever is necessary to seek out and implement the legislative intent.[7] Two unifying principles behind the scheme of statutory construction state: (a) where a literal application produces injustice or hardship another and more reasonable interpretation should be sought and *must necessarily* be adopted...courts are to disregard the letter of the law and follow its spirit,[8] and (b) the legislature is presumed not to intend to enact laws which leave a party without a remedy.[9] Three statutes are instructive as to how courts are to extrapolate legislative intent and breathe life into a statute.[10] NY Statutes §96 emphasizes that:

> Statutes always have some purpose or object to accomplish, whose *sympathetic and imaginative discovery* is the surest guide to their meaning, and a basic and necessary consideration in the interpretation of a statute is the general spirit and purpose underlying its enactment.

NY Statutes §191 admonishes against blindly wielding the sword of literalism at the expense of legislative purpose especially where the objective is to correct a wrong:

> While [legislative intent] is first to be sought from a literal reading of the act itself, and the words and language used, giving such language its natural and obvious meaning, *it is generally the rule that the literal meaning of the words used must yield when necessary to give effect to the intention of the Legislature*. In the interpretation of statutes, the spirit and purpose of the act and the objects to be accomplished must be considered and given effect, and the literal meanings of words are not to be adhered to or suffered to defeat the general purpose and manifest policy intended to be promoted. The letter of a statute is not to be slavishly followed when it leads away from the true intent and purpose of the Legislature or leads to conclusions inconsistent with the general purpose of the statute or to consequences irreconcilable with its spirit and reason; and statutes are not to be read with literalness that destroys meaning, intention, purpose or beneficial end for which the statute has been designed.[11]

NY Statutes §94 confers broad powers upon the judiciary to prevent literalism from impeding legislative intent:

> A strict literal construction is not always to be adhered to, and the literal wording of

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[7] Albano v. Kirby, 36 N.Y.2d 526, 330 N.E.2d 615, 369 N.Y.S.2d 655 (1975); Hogan v. Culkin, 18 N.Y.2d 330, 221 N.E.2d 546, 274 N.Y.S.2d 881 (1966).

[8] NY Statutes §146.

[9] NY Statutes §§144 and 230.

[10] Spatial limitations prohibit even a glance at every applicable decision and statute that runs contrary to the exegesis applied by the Appellate Division.

[11] NY Statutes §76 warns that the lack of ambiguity is not the dispositive factor in statutory construction because "it is clear intent, not clear language, which precludes further investigation as to the interpretation of a statute."

> a statute may be required to give way to the expressed object of the lawgivers. So it has been held that language of a statute may be freely dealt with, since the words of the statute ought to be made subservient to the intent and not contrary to it. In keeping with the mandate to carry out the legislative intent, courts may interpolate or transpose words; enlarge or restrain their meaning; required; or disregard them entirely where their presence or absence is obviously a mistake...Even grammatical construction and punctuation as it appears in the statute must yield to give effect to the intent of the Legislature.[12]

Although the aforementioned principles are supported by decisional counterparts,[13] *New York State Bankers Ass'n v. Albright* is somewhat philosophy in its expression:[14]

> While statutes may appear literally unambiguous on their face, the absence of ambiguity facially is never conclusive. Sound principles of statutory interpretation generally require examination of a statute's legislative history and context to determine its meaning and scope.
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> The words men use are never absolutely certain in meaning; the limitations of finite man and the even greater limitations of his language see to that. Inquiry into the meaning of statutes is never foreclosed at the threshold; what happens is that often the inquiry into intention results in the conclusion that either there is no ambiguity in the statute or that for policy or other reasons the prior history will be rejected in favor of the purportedly explicit statement of the statute...Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words.

The majority opinion also failed to consider the statutory principle requiring a review of the social climate during the time of a law's enactment and its historical evolution.[15] Such a diachronic analysis requires that scrutiny be given to the role of statutory amendments that remedy prevailing ills.[16] To that end there is no better chronicler than the Court of Appeals in its review of more than

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[12] See, NY Statutes §98.

[13] Sutka v. Conners, 73 N.Y.2d 395, 538 N.E.2d 1012, 541 N.Y.S.2d 191 (1989); Rankin on Behalf of Bd. of Ed. of City of New York v. Shanker, 23 N.Y.2d 111, 242 N.E.2d 802, 295 N.Y.S.2d 625 (1968); Peterson v. Daystrom Corp. 17 N.Y.2d 32, 215 N.E.2d 329, 268 N.Y.S.2d 1 (1966).

[14] 38 N.Y.2d 430, 343 N.E.2d 735, 381 N.Y.S.2d 17 (1975).

[15] NY Statutes §§124 and 72.

[16] See, NY Statutes §95; NY Statutes §234; and, §§193(a) and (b) and §222 of NY Statutes.

a century of law on the evolution of counsel fees in the seminal decision *O'Shea v. O'Shea*.[17]

Frankel also analogized[18] Judiciary Law §475 to §237(a) to refute the Appellate Division's interpretation that "the attorney for either spouse" in §237(a) can only refer to current counsel.[19]

Much to the chagrin of counsel who worked feverishly to analyze the principles of statutory construction, the Court of Appeals ruled without referencing a single principle. The absence of catechism notwithstanding, the decision is plainly anchored in public policy thus evincing the court's implicit compliance with the principles of statutory construction to implement the legislative intent.

Significantly, §237(a) tacitly and implicitly incentivizes representation of the non-monied spouse: (a) the first inducement facilitates future fee claims by preserving them within the context of the matrimonial action rather than in arduous litigation via a plenary proceeding, and (b) the second grants counsel the right to seek payment directly from the other spouse. The second incentive is of critical value to because counsel fees pursuant to §237(a) are secured against dischargeability in bankruptcy[20] because they are deemed to be in the nature of support.

The Court of Appeals was not unmindful of fee collections as the lifeline of law office economics that foregoes immediate payment:

> ...if applications for legal fees are denied or deferred, "the attorney for the nonmonied spouse is left not only without payment for services rendered, but without reasonable expectation as to how or whether payment will be made. Considering the protracted nature of divorce actions, both client and attorney are left in limbo for an indefinite period of time, a circumstance which can drive a wedge between attorney and client."[21]

The court further observed that:

> If lawyers terminated without cause lose their right to petition the court for a fee award from an adversary spouse, the less affluent spouse would suffer the consequences. The spouse with ready and ample funds would have a wide choice of counsel, and the financial wherewithal to maintain the litigation, while the non-monied spouse would struggle to find a lawyer who might have to go unpaid. A matrimonial lawyer may be willing to carry a client on its accounts receivable books, but not as to accounts that will prove unreceivable.

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[17] 93 N.Y.2d 187, 711 N.E.2d 193, 689 N.Y.S.2d 8 (1999).

[18] See, NY Statutes §221, Statutes in *Pari Materia*.

[19] Klein v. Eubank, 87 N.Y.2d 459, 663 N.E.2d 599, 640 N.Y.S.2d 443 (1996).

[20] In re Spong, 661 F.2d 6 (2nd Cir., 1981).

[21] Frankel v. Frankel, 2004 WL 1440067, 2004 N.Y. Slip Op. 05558 (2004), FN1.

In another key pronouncement, the court took aim at the commonplace practice that defers counsel fee applications to the trial court, which is in contravention of the statutory mandate directing periodic awards of interim fees.[22] The court graciously credited and incorporated into its ruling an argument advanced in the *Amicus Curiae* brief, submitted on behalf of the American Academy of Matrimonial, as a means of ameliorating this problem:[23] "the realities of contentious matrimonial litigation require a regular infusion of funds." This phrase is most powerful because, sitting as a sentinel to minimize situations like *Frankel*,[24] it revitalizes the moribund segment of the statute regarding periodic interim fee awards thereby reversing the momentum behind rulings that defer fee applications. This branch of *Frankel* will, hopefully, usher in a new era where motion courts blow the dust off this branch of the statute.

In sum, *Frankel* made two critical pronouncements which, if implemented, will assure economically disadvantaged spouses access to experienced counsel.

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[22] DRL §237(a): "...Such direction *must* be made in the final judgment in such action or proceeding, *or by one or more orders from time to time before final judgment, or by both such order or orders and the final judgment*; provided, however, such direction shall be made prior to final judgment where it is shown that such order is required to enable the petitioning party to properly proceed..."

[23] The author was privileged to have written the brief on behalf of the Academy.

[24] Frankel v. Frankel, 2004 WL 1440067, 2004 N.Y. Slip Op. 05558 (2004), FN1. Furthermore, *Frankel* does not restrict courts from denying fees where warranted by equity, such as in cases of obfuscation, dilatory tactics, or any other wrongdoing.