Support Following the Dismissal of a DRL § 236B[2][a] Action[1]

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Although New York has finally ushered in an era of enlightment by enacting the no-fault divorce law (Domestic Relations Law § 170(7), effective Oct. 12, 2010), a key issue persists when spousal support is sought in actions enumerated in Domestic Relations Law (DRL) § 236B(2)(a):

> Except as provided in subdivision five of this part, *the provisions of this part shall be applicable to* actions for an annulment or dissolution of a marriage, for a divorce, for a separation, for a declaration of the nullity of a void marriage, for a declaration of the validity or nullity of a foreign judgment of divorce, for a declaration of the validity or nullity of a marriage, and to proceedings to obtain maintenance or a distribution of marital property following a foreign judgment of divorce, commenced on and after the effective date of this part.

In its definition of "maintenance", DRL §236B(1)(a) states that maintenance "awarded by the court" may be for "for a definite or indefinite period of time." The mandatory language ["shall"] in §§ 236B(1)(a) and 236B(2)(a) is unambiguous: the statutory option of "definite *or* indefinite support" lodges in all the enumerated actions. Furthermore, DRL § 236B(6)(c) makes permanent spousal support discretionary: a "court *may* award permanent maintenance" – thus emphasizing that permanency is not the default setting. Significantly, the statute does not state or even hint that the procedural termination of a § 236B(2)(a) action is a determinant in the fixing of definite or indefinite spousal support.

That said, an anticlimactic issue gnaws through § 236B(1)(a): whether the Supreme Court is constrained to grant indefinite, or nondurational, spousal support under Family Court Act (FCA) § 442 when a § 236B(2)(a)-action is dismissed, or may it also consider finite spousal support under its own statutory scheme (DRL § 236B(1)(a)). While logic dictates that this at-first-blush-seemingly-silly question should not even exist as a question, much less rise to the level of an issue worthy of a column, because the Supreme Court must unquestionably be vested with the authority to apply the Domestic Relations Law to a Domestic-Relations-Law-enumerated-action within its own statutory scheme, the answer is unanticipatedly complex as the case law is inconsistent even in the same Department.

Although none of the § 236B(2)(a) actions may be commenced in the Family Court, as it is without subject matter jurisdiction to entertain them, case law, as seen below, has inexplicably made FCA § 442 the default statute for spousal support where a § 236B(2)(a) action has been dismissed.

Family Court Act § 442, "order of support by a spouse", provides in pertinent part:

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[1] N.Y.L.J., June 17, 2011.

> If the court finds after a hearing that a husband or wife is chargeable under section four hundred twelve with the support of his or her spouse and is possessed of sufficient means or able to earn such means, the court shall make an order requiring the husband or wife to pay weekly or at other fixed periods a fair and reasonable sum for or towards the support of the other spouse.

The Legislature's failure to include an alternative in § 442 has been held to mean that Family Court spousal support awards are indefinite only.

Legislative Intent

McKinney's Statutes § 92, a canon of statutory construction, states that legislative intent is primary and controlling, and may not be thwarted by the courts.[2] Generally, it is not necessary to look further than the unambiguous language of the statute to discern its meaning.[3] Courts cannot, through construction, enact an intent the Legislature totally failed to express.[4] DRL §§ 236B(1)(a) and 236B(2)(a) are silent as to whether the discretion to fix the finiteness of spousal support in the Supreme Court is to be driven by the procedural means which terminated the action. In sum, the legislative intent was to vest the Supreme Court with discretion to grant either durational or nondurational spousal support in § 236B[2][a]-actions without consideration of their procedural posture. The unambiguous legislative directive makes it clear that Supreme Court may not resort to extraneous statutory schemes, especially one which binds the Supreme Court to apply the indefinite standard.

Inconsistencies in the Departments

The foregoing notwithstanding, the Second and Third Departments have marked Family Court Act § 442 as the default setting for the determination of the duration of spousal support when a matrimonial action specified in DRL § 236B(2)(a) is dismissed: the spousal support automatically becomes indefinite. The Supreme Court has been divested of its statutory discretionary authority.

Beginning with the most recent decision, in *Levy v. Levy* 65 A.D.3d 1295 (2nd Dept.,2009), an action for divorce, the Second Department, citing the Third Department, *Kenyon v. Kenyon* 155 A.D.2d 825 (3rd Dept.,1989), an action for separation, reversed a durational spousal maintenance award following the dismissal of the husband's cause of action for divorce. Neither *Levy* nor *Kenyon* could have been heard in the Family Court.

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[2] Niesig v. Team I, 76 N.Y.2d 363 (1990); Ferres v. City of New Rochelle, 68 N.Y.2d 446 (1986).

[3] Morgenthau v. Avion Resources Ltd. 11 N.Y.3d 383 [2008]; Jones v. Bill, 10 N.Y.3d 550 [2008].

[4] Statutes § 92.

Emphasizing the distinction between FCA § 442 and DRL § 236B regarding the discretionary temporality to support orders, the court held, without any foundation for the thesis, that once "there was no longer a matrimonial action pending, the [] application for support was properly viewed as one for spousal support under Family Court Act, rather than under Domestic Relations Law § 236B":

> There is no durational provision in the Family Court Act on spousal support (Family Ct. Act §§ 412, 442), as there is in the case of maintenance in the context of a matrimonial action (Domestic Relations Law § 236[B][1] [a]; § 236[B][6]; Matter of Shreffler v. Shreffler, 302 A.D.2d 822, 823, 754 N.Y.S.2d 601; Kenyon v. Kenyon, 155 A.D.2d at 826, 548 N.Y.S.2d 97).

In *Kenyon v. Kenyon* 155 A.D.2d 825 (3rd Dept.,1989), defendant appealed from a judgment which awarded permanent monthly maintenance after plaintiff had withdrawn her action for a separation, leaving only the action seeking to set aside an antenuptial agreement, which included an application for maintenance:

> Since there was no longer a matrimonial action pending, the provisions of Domestic Relations Law § 236(B) were inapplicable (DRL § 236 [B][2]). Thus, plaintiff's application for support must be viewed as one for spousal support under Family Court Act article 4 (Family Ct. Act § 412).
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> As to defendant's objection to the unlimited duration of the award, we note that in contrast to the definition of maintenance in the context of a matrimonial action (DRL § 236[B][1][a]; see also, DRL § 236[B][6]), there is no provision for a definite period or duration of spousal support (FCA §§ 412, 442).

Shreffler v. Shreffler 302 A.D.2d 822 (3rd Dept. 2003), the order granting nondurational support originated in the Family Court. The Appellate Division, citing *Kenyon*, held that unlike § 236B(2)(a), the FCA standard (§ 442) of nondurational support was correct. But such reference was unnecessary because the action had been commenced in the Family Court which left the Family Court with no discretion:

> [I]n contrast to the definition of maintenance in the context of a matrimonial action (Domestic Relations Law § 236[B][1][a]; see also, Domestic Relations Law § 236[B][6]), there is no provision for a definite period or duration of spousal support (see, Family Ct Act §§ 412, 442).

The path followed by the Second Department on this issue has neither been smooth nor steady. The correct reading of *King v. King* 230 A.D.2d 775 (2nd Dept.,1996), is that discretion rests with the Supreme Court even after the dismissal of a matrimonial action:

> In a matrimonial action, the court has the authority to award maintenance, even permanent maintenance, notwithstanding that the marital relationship remained unaltered and that circumstances exist precluding the entry of judgment dissolving the marriage (DRL § 236 [B][8][b]; Forbush v. Forbush, 115 A.D.2d 335, [et al] Scheinkman, 1996 Supp Practice Commentaries, McKinney's Cons Laws of NY,

Book 14, Domestic Relations Law C236B:35, 1996 Supp Pamph, at 147).
[T]he court acted within its authority in granting ... an award of permanent maintenance notwithstanding the fact that it dismissed the plaintiff's divorce action.

However, in *Blisko v. Blisko* 149 A.D.2d 127 (2nd Dept.,1989), decided seven years before *King*, the Second Department assumed a contrary position holding that "the newly-conferred power to fix a durational limit on maintenance awards is confined to instances where the marital relationship is judicially altered":

By its enactment of DRL § 236(B), the Legislature preserved the Supreme Court's authority to award maintenance, notwithstanding that the marital relationship remained unaltered (cf., Domestic Relations Law § 236 [B][8][b]...Scheinkman, 1987 Supplemental Practice Commentaries, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law, C236B:44, at 64 [1989 Cum.Annual Pocket Part]). It also explicitly expanded the Supreme Court's power so as to include the authority, under appropriate circumstances, to limit the duration of maintenance payments to a definite period of time (Domestic Relations Law § 236[B][1][a]; [6]). We conclude however that the Legislature did not intend to abrogate the obligation of one spouse to support another (Family Ct.Act § 412) and therefore determine that the exercise of the newly-conferred power to fix a durational limit on maintenance awards is confined to instances where the marital relationship is judicially altered. To hold otherwise would be contrary to established public policy as otherwise expressed (Family Ct.Act § 412; see, McKinney's Cons Laws of NY, Book 1, Statutes §§ 126, 153, 221, 222; cf., Matter of Steinberg v. Steinberg, 18 N.Y.2d 492, 277 N.Y.S.2d 129) and would require the Supreme Court to regard a marriage as financially ended when legally it is not (cf., McKinney's Cons Laws of NY, Book 1, Statutes § 141). As noted by Professor Scheinkman in his Practice Commentaries to Domestic Relations Law § 236(B):

"[A] durational limitation on maintenance is appropriate in the context of planning for all aspects of the parties' separate, post-marriage economic existence. The durational limitation is but part of an economic package which includes property distribution. Where the marital tie is not severed, mutual support obligations persist, marital property is not equitably distributed, and the same level of permanency does not attach to the result" (Scheinkman, 1988 Supplemental Practice Commentaries, Domestic Relations Law, C236B:10, at 29 [1989 Cum.Annual Pocket Part]).

In *Foy v. Foy* 121 A.D.2d 501 (2nd Dept.,1986), an action for separation, the Appellate Division emphasized the wife's impaired health in upholding a permanent support award. The court's focus on the wife's condition as the predicate for the nondurational award rather than on FCA § 442.

Occasional summonses or complaints in the § 236B(2)(a)-enumerated actions include a demand for spousal support under § 442 so as to allow the court the option to review the matter in an indefinite light only. While the Supreme Court is a court of general original jurisdiction,[5] I have seen no explanation as to how or why procedure or the inclusion of a demand to consider support under another statutory scheme divests the Supreme Court of its legislatively imbued discretion (§ 236B(1)(a)) in favor of a mandatory standard foreign to matrimonial actions commenced under the Domestic Relations Law, which actions could, ab initio, only have been commenced in the Supreme Court where the same relief is available. From the perspective of judicial economy, the application of § 442 relieves overburdened courts from writing lengthy decisions as to why support was permanent rather than finite.

Discontinuance v. Dismissal

The companion issue to the above problem is the oft misunderstood distinction between the relief available following the dismissal or discontinuance of an action. When an action is discontinued, the further proceedings in the action are arrested.[6] It is as if it had never been; everything done in the action is annulled and all prior orders in the case are nullified.[7] A court may thus not direct future orders of support. However, when the underlying action has been dismissed economic and other relief remain available.[8] The Legislature underscored this point in DRL § 236B(8)(b), which authorizes payments to various third party service providers[9] "where the court has ordered temporary maintenance, maintenance, distributive award or child support." Such direction may be made notwithstanding that the parties continue to reside in the same abode

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[5] N.Y.Const., art. VI; Thrasher v. U. S. Liability Ins. Co., 19 N.Y.2d 159 (1967).

[6] Brown v. Cleveland Trust Co. 233 N.Y. 399 (1922).

[7] Newman v. Newman 245 A.D.2d 353 (2nd Dept.,1997); Weldotron Corp. v. Arbee Scales, Inc. 161 A.D.2d 708 (2nd Dept.,1990).

[8] Adinolfi v. Adinolfi 168 A.D.2d 401 (2nd Dept.,1990) (The matrimonial action was not terminated because the plaintiff's cause of action for a divorce was dismissed for failure to state a cause of action and failure of proof. "The judgment left standing all of the defendant's counterclaims for ancillary relief. Therefore, the court did not err in directing the continuance of the prior pendente lite orders pending a final determination of the defendant's claims for ancillary relief."); Naughton v. Naughton 92 A.D.2d 914 (2nd Dept.,1983); Maulella v. Maulella 90 A.D.2d 535 (2nd Dept.,1982).

[9] DRL § 236B[8][b]: real and personal property and services furnished to the other spouse, or for the rental or mortgage amortization or interest payments, insurances, taxes, repairs or other carrying charges on premises occupied by the other spouse.

and notwithstanding that the court refuses to grant the relief requested by the other[10] spouse.

Bellizzi v. Bellizzi, 2011 N.Y. Slip Op. 02507 (3rd Dept.,2011), reversed a dismissal of the spousal maintenance claim "because the dismissal of a divorce action (due to) lack of proof does not divest the court of jurisdiction to hear an application for maintenance when a temporary award of maintenance has already been sought or obtained."

The general rules common to dismissal and discontinuance are:

- the right to enforce payment of maintenance pendente lite by contempt proceedings ends when the action in which it was awarded is terminated by settlement, abandonment, discontinuance, or dismissal of the complaint, or after the entry of a final judgment in the action;[11] and

- although the payor's current obligations pursuant to the pendente lite order have terminated, the payor was required to obey the pendente lite order during the pendency of the action. Accordingly, the plaintiff remains entitled to any arrears which accrued under that order prior to dismissal and may enforce that obligation by seeking leave to enter a money judgment.[12]

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[10] Justice Allan Scheinkman, McKinney's Statutes, DRL 236B, C236B:44: Form of the Award and Denial of Matrimonial Relief, states that the words the "other spouse" are "clearly in error; the reference should be to a denial of relief to 'either' spouse."

[11] Polizotti v. Polizotti 305 N.Y. 176 (1953); Walis v. Walis 192 A.D.2d 598 (2nd Dept.,1993).

[12] Fotiadis v. Fotiadis 18 A.D.3d 699 (2nd Dept.,2005); King v. King 230 A.D.2d 775 (2nd Dept.,1996) (The pendente lite order did not lapse upon dismissal of the divorce action and the defendant was still entitled to obtain a money judgment for arrears due under the pendente lite order.); Patricia Lynn N. v. Vincent Michael N. 152 A.D.2d 547 (2nd Dept.,1989); Walis v. Walis 192 A.D.2d 598 (2nd Dept.,1993).