



Saturday, July 3, 2010

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A07569 Summary:

BILL NO A07569A
 SAME AS Same as S 4532-A
 SPONSOR Weinstein
 COSPNSR O'Donnell, John, Jaffee
 MLTSPNSR
 Amd SS237 & 238, Dom Rel L

Provides for the payment of all counsel and expert fees in matrimonial actions by the more monied party to such action; adds actions to obtain maintenance or distribution of property after a foreign judgment of divorce to the actions for which such fees shall be awarded; directs the court to assure that each party is adequately represented; such actions shall also include actions to enforce a court order.

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A07569 Memo:

BILL NUMBER:A7569A REVISED 6/9/10

TITLE OF BILL: An act to amend the domestic relations law, in relation to the payment of counsel and expert fees in matrimonial actions

PURPOSE OF BILL: This bill provides for a rebuttable presumption of interim attorney's fees to the non-monied spouse in a matrimonial case or in proceedings to enforce a judgment therein. It also authorizes the court to order expert fees to be paid by one party to the other to enable the party to carry on or defend the action.

SUMMARY OF PROVISIONS OF BILL: Sections 237 and 238 of the Domestic Relations Law are amended to provide for a presumption of counsel fees to a non-monied spouse. In addition the court is authorized to order expert fees to be paid by one party to the other to enable the party to carry on or defend the action. The parties are also required to provide financial information to the court to enable the court to make its

determination regarding counsel and expert fees.

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 interim counsel fees for the non-monied party 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 fee awards in a 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 should be granted to the non-monied spouse. This measure requires that in a matrimonial action an order for pendente lite counsel fees and expenses should be granted at the outset of the case to ensure adequate representation of the less monied spouse from the commencement of the proceeding, 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 disadvantage for want of resources to pursue or defend the case. Nothing precludes an award of counsel fees to a non-profit legal service organization where such organization provides legal services without charge to a party who is eligible for counsel fees under this measure. In addition, this measure is not intended to preclude a court's current discretionary power to award counsel fees for service: and expenses incurred before the action begins.

LEGISLATIVE HISTORY:

2009: A.7569-A/S.4532-A - Passed Assembly/S.Judi

2005-06; Similar A.8108 - Passed Assembly

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS: None.

EFFECTIVE DATE: This act shall take effect on the one hundred-twentieth day after it shall have become a law and shall apply to any action or proceeding commenced on or after such effective date.

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A07569 Text:

S T A T E O F N E W Y O R K

2009-2010 Regular Sessions

I N A S S E M B L Y

April 15, 2009

Introduced by M. of A. WEINSTEIN, O'DONNELL, JOHN -- read once and referred to the Committee on Judiciary -- reported from committee, advanced to a third reading, amended and ordered reprinted, retaining its place on the order of third reading

AN ACT to amend the domestic relations law, in relation to the payment of counsel and expert fees in matrimonial actions

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Subdivisions (a) and (b) of section 237 of the domestic
2 relations law, subdivision (a) as amended by chapter 482 of the laws of
3 1987 and subdivision (b) as amended by chapter 892 of the laws of 1986,
4 are amended to read as follows:

5 (a) In any action or proceeding brought (1) to annul a marriage or to
6 declare the nullity of a void marriage, or (2) for a separation, or (3)
7 for a divorce, or (4) to declare the validity or nullity of a judgment
8 of divorce rendered against a spouse who was the defendant in any action
9 outside the State of New York and did not appear therein where such
10 spouse asserts the nullity of such foreign judgment, [or] (5) TO OBTAIN
11 MAINTENANCE OR DISTRIBUTION OF PROPERTY FOLLOWING A FOREIGN JUDGMENT OF
12 DIVORCE, OR (6) to enjoin the prosecution in any other jurisdiction of
13 an action for a divorce, the court may direct either spouse or, where
14 an action for annulment is maintained after the death of a spouse, may
15 direct the person or persons maintaining the action, to pay [such sum or
16 sums of money] COUNSEL FEES AND FEES AND EXPENSES OF EXPERTS directly to
17 the attorney of the other spouse to enable [that spouse] THE OTHER
18 PARTY to carry on or defend the action or proceeding as, in the court's
19 discretion, justice requires, having regard to the circumstances of the
20 case and of the respective parties. [Such direction must be made in the
21 final judgment in such action or proceeding, or by one or more orders
22 from time to time before final judgment, or by both such order or orders
23 and the final judgment; provided, however, such direction shall be made

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets
[] is old law to be omitted.

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1 prior to final judgment where it is shown that such order is required to
2 enable the petitioning party to properly proceed] THERE SHALL BE REBUTT-
3 ABLE PRESUMPTION THAT COUNSEL FEES SHALL BE AWARDED TO THE LESS MONIED
4 SPOUSE. IN EXERCISING THE COURT'S DISCRETION, THE COURT SHALL SEEK TO
5 ASSURE THAT EACH PARTY SHALL BE ADEQUATELY REPRESENTED AND THAT WHERE
6 FEES AND EXPENSES ARE TO BE AWARDED, THEY SHALL BE AWARDED ON A TIMELY
7 BASIS, PENDENTE LITE, SO AS TO ENABLE ADEQUATE REPRESENTATION FROM THE

8 COMMENCEMENT OF THE PROCEEDING. APPLICATIONS FOR THE AWARD OF FEES AND
 9 EXPENSES MAY BE MADE AT ANY TIME OR TIMES PRIOR TO FINAL JUDGMENT. BOTH
 10 PARTIES TO THE ACTION OR PROCEEDING AND THEIR RESPECTIVE ATTORNEYS,
 11 SHALL FILE AN AFFIDAVIT WITH THE COURT DETAILING THE FINANCIAL AGREEMENT
 12 BETWEEN THE PARTY AND THE ATTORNEY. SUCH AFFIDAVIT SHALL INCLUDE THE
 13 AMOUNT OF ANY RETAINER, THE AMOUNTS PAID AND STILL OWING THEREUNDER, THE
 14 HOURLY AMOUNT CHARGED BY THE ATTORNEY, THE AMOUNTS PAID, OR TO BE PAID,
 15 ANY EXPERTS, AND ANY ADDITIONAL COSTS, DISBURSEMENTS OR EXPENSES. Any
 16 applications for [counsel] fees and expenses may be maintained by the
 17 attorney for either spouse in his own name in the same proceeding.
 18 PAYMENT OF ANY RETAINER FEES TO THE ATTORNEY FOR THE PETITIONING PARTY
 19 SHALL NOT PRECLUDE ANY AWARDS OF FEES AND EXPENSES TO AN APPLICANT WHICH
 20 WOULD OTHERWISE BE ALLOWED UNDER THIS SECTION.

21 (b) Upon any application to ENFORCE, annul or modify an order or judg-
 22 ment for alimony, MAINTENANCE, DISTRIBUTIVE AWARD, DISTRIBUTION OF MARI-
 23 TAL PROPERTY or for custody, visitation, or maintenance of a child, made
 24 as in section two hundred thirty-six or section two hundred forty OF
 25 THIS ARTICLE provided, or upon any application by writ of habeas corpus
 26 or by petition and order to show cause concerning custody, visitation or
 27 maintenance of a child, the court may direct a spouse or parent to pay
 28 [such sum or sums of money for the prosecution or the defense of] COUN-
 29 SEL FEES AND FEES AND EXPENSES OF EXPERTS DIRECTLY TO THE ATTORNEY OF
 30 THE OTHER SPOUSE OR PARENT TO ENABLE THE OTHER PARTY TO CARRY ON OR
 31 DEFEND the application or proceeding by the other spouse or parent as,
 32 in the court's discretion, justice requires, having regard to the
 33 circumstances of the case and of the respective parties. [With respect
 34 to any such application or proceeding, such direction may be made in the
 35 order or judgment by which the particular application or proceeding is
 36 finally determined, or by one or more orders from time to time before
 37 the final order or judgment, or by both such order or orders and the
 38 final order or judgment] THERE SHALL BE A REBUTTABLE PRESUMPTION THAT
 39 COUNSEL FEES SHALL BE AWARDED TO THE LESS MONIED SPOUSE. IN EXERCISING
 40 THE COURT'S DISCRETION, THE COURT SHALL SEEK TO ASSURE THAT EACH PARTY
 41 SHALL BE ADEQUATELY REPRESENTED AND THAT WHERE FEES AND EXPENSES ARE TO
 42 BE AWARDED, THEY SHALL BE AWARDED ON A TIMELY BASIS, PENDENTE LITE, SO
 43 AS TO ENABLE ADEQUATE REPRESENTATION FROM THE COMMENCEMENT OF THE
 44 PROCEEDING. APPLICATIONS FOR THE AWARD OF FEES AND EXPENSES MAY BE MADE
 45 AT ANY TIME OR TIMES PRIOR TO FINAL JUDGMENT. BOTH PARTIES TO THE ACTION
 46 OR PROCEEDING AND THEIR RESPECTIVE ATTORNEYS, SHALL FILE AN AFFIDAVIT
 47 WITH THE COURT DETAILING THE FINANCIAL AGREEMENT, BETWEEN THE PARTY AND
 48 THE ATTORNEY. SUCH AFFIDAVIT SHALL INCLUDE THE AMOUNT OF ANY RETAINER,
 49 THE AMOUNTS PAID AND STILL OWING THEREUNDER, THE HOURLY AMOUNT CHARGED
 50 BY THE ATTORNEY, THE AMOUNTS PAID, OR TO BE PAID, ANY EXPERTS, AND ANY
 51 ADDITIONAL COSTS, DISBURSEMENTS OR EXPENSES. Any applications for
 52 [counsel] fees and expenses may be maintained by the attorney for either
 53 spouse in counsel's own name in the same proceeding. [Representation by
 54 an attorney pursuant to paragraph (b) of subdivision nine of section one
 55 hundred eleven-b of the social services law shall not preclude an award
 56 of counsel fees to an applicant which would otherwise be allowed under
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1 this section.] PAYMENT OF ANY RETAINER FEES TO THE ATTORNEY FOR THE
 2 PETITIONING PARTY SHALL NOT PRECLUDE ANY AWARDS OF FEES AND EXPENSES TO
 3 AN APPLICANT WHICH WOULD OTHERWISE BE ALLOWED UNDER THIS SECTION.

4 S 2. Section 238 of the domestic relations law, as amended by chapter
 5 529 of the laws of 1978, is amended to read as follows:

6 S 238. Expenses in enforcement AND MODIFICATION proceedings. In any

7 action or proceeding to [compel the payment of any sum of money required
8 to be paid by] ENFORCE OR MODIFY ANY PROVISION OF a judgment or order
9 entered in an action for divorce, separation, annulment [or], declara-
10 tion of nullity of a void marriage, DECLARATION OF VALIDITY OR NULLITY
11 OF A JUDGEMENT OF DIVORCE RENDERED AGAINST A SPOUSE WHO WAS THE DEFEND-
12 ANT IN ANY ACTION OUTSIDE THE STATE OF NEW YORK AND DID NOT APPEAR THER-
13 EIN WHERE SUCH SPOUSE ASSERTS THE NULLITY OF SUCH FOREIGN JUDGMENT, OR
14 AN INJUNCTION RESTRAINING THE PROSECUTION IN ANY OTHER JURISDICTION OF
15 AN ACTION FOR A DIVORCE, or in any proceeding pursuant to section two
16 hundred forty-three, two hundred forty-four, two hundred forty-five, or
17 two hundred forty-six OF THIS ARTICLE, the court may in its discretion
18 require either party to pay [the expenses of the other in bringing,
19 carrying on, or defending such action or proceeding] COUNSEL FEES AND
20 FEES AND EXPENSES OF EXPERTS DIRECTLY TO THE ATTORNEY OF THE OTHER PARTY
21 TO ENABLE THE OTHER PARTY TO CARRY ON OR DEFEND THE ACTION OR PROCEEDING
22 AS, IN THE COURT'S DISCRETION, JUSTICE REQUIRES HAVING REGARD TO THE
23 CIRCUMSTANCES OF THE CASE AND OF THE RESPECTIVE PARTIES. THERE SHALL BE
24 A REBUTTABLE PRESUMPTION THAT COUNSEL FEES SHALL BE AWARDED TO THE LESS
25 MONIED SPOUSE. In any such action or proceeding, applications for [coun-
26 sel] fees and expenses may be maintained by the attorney for the respec-
27 tive parties in counsel's own name and in counsel's own behalf. IN
28 EXERCISING THE COURT'S DISCRETION, THE COURT SHALL SEEK TO ASSURE THAT
29 EACH PARTY SHALL BE ADEQUATELY REPRESENTED AND THAT WHERE FEES AND
30 EXPENSES ARE TO BE AWARDED, THEY SHALL BE AWARDED ON A TIMELY BASIS,
31 PENDENTE LITE, SO AS TO ENABLE ADEQUATE REPRESENTATION FROM THE
32 COMMENCEMENT OF THE PROCEEDING. APPLICATIONS FOR THE AWARD OF FEES AND
33 EXPENSES MAY BE MADE AT ANY TIME OR TIMES PRIOR TO FINAL JUDGMENT. BOTH
34 PARTIES TO THE ACTION OR PROCEEDING AND THEIR REPRESENTATIVE ATTORNEYS,
35 SHALL FILE AN AFFIDAVIT WITH THE COURT DETAILING THE FINANCIAL AGREEMENT
36 BETWEEN THE PARTY AND THE ATTORNEY. SUCH AFFIDAVIT SHALL INCLUDE THE
37 AMOUNT OF ANY RETAINER, THE AMOUNTS PAID AND STILL OWING THEREUNDER, THE
38 HOURLY AMOUNT CHARGED BY THE ATTORNEY, THE AMOUNTS PAID, OR TO BE PAID,
39 ANY EXPERTS, AND ANY ADDITIONAL COSTS, DISBURSEMENTS OR EXPENSES.
40 PAYMENT OF ANY RETAINER FEES TO THE ATTORNEY FOR THE PETITIONING PARTY
41 SHALL NOT PRECLUDE ANY AWARDS OF FEES AND EXPENSES TO AN APPLICANT WHICH
42 WOULD OTHERWISE BE ALLOWED UNDER THIS SECTION.
43 S 3. This act shall take effect on the one hundred twentieth day after
44 it shall have become a law and shall apply to actions and proceedings
45 commenced on or after such effective date.

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