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Family Law Section

Memorandum in Support

FLS #1-A

May 28, 2015

A. 7637 - OCA 2015-37

By: M. of A. Seawright
Assembly Committee: Judiciary
Effective Date: 90 days becoming a law

AN ACT to amend the Family Court Act ("FCA") and the Domestic Relations Law ("DRL") in relation to spousal maintenance and child support in Supreme and Family Court.

RULE & SECTION OF LAW REFERRED TO: DRL §§ 240, FCA § 413

THE FAMILY LAW SECTION SUPPORTS THIS BILL

Analysis

This bill, introduced at the request of the Family Court Advisory and Rules Committee to the Chief Administrative Judge (the "Bill"), seeks to amend DRL Section § 240(1-b) and FCA § 413 (the "Child Support Standards Act," or "CSSA")) to require courts, when determining the respective incomes of the parties for child support purposes, to include as income to a party any alimony or maintenance paid or to be paid to him or her pursuant to an existing court order, or contained in the order to be entered by the court, or pursuant to a validly executed written agreement. In such event, the order or agreement must provide for a specific adjustment in the amount of child support payable upon termination of the alimony or maintenance payments to such party, which adjustment will be made in accordance with the CSSA.

The Bill would correct the current inconsistency in the law, which generally includes alimony/maintenance paid to a recipient as income for the child support calculation only if the recipient were required to report such maintenance as income in the most recent income tax return. In other words, prospective alimony/maintenance to be awarded by the court in a current proceeding or divorce action is not counted as income to the future maintenance recipient for child support purposes, but past alimony/maintenance previously awarded by a court and required to be reported by the recipient as income in his or her most recent income tax return is counted as income to the recipient for the child support calculation.

There is no logical distinction between the two situations described above, and New York courts have justified this anomalous result by relying on the plain language of the CSSA, which defines income for child support purposes, among other things, as "gross (total) income as should have been or should be reported in the most recent income tax return." See Domestic Relations Law § 240(1-b)(b)(5)(i). or as should be reported on the most recent income tax return. See e.g. Wallach v. Wallach, 37 A.D.3d 707, 831 N.Y.S.2d 210 (2nd Dept. 2007); See also Baldino v. Baldino, 232 A.D.2d 480, 648 N.Y.S.2d 643 (2nd Dept. 1996); Diamond v. Diamond, 254 A.D.2d 288, 678 N.Y.S.2d 127 (2nd Dept. 1998); Ansour v. Ansour, 61 A.D.3d 536, 878 N.Y.S.2d 17 (1st Dept. 2009). Since the proposed bill removes this anomaly, the Family Law Section endorses such an amendment to the CSSA.

The Section had opposed the draft version of the Bill (prior to its introduction) because its prior language did not make it clear that the specific adjustment in the amount of child support payable upon the termination of alimony/maintenance is without prejudice to either party's right to seek a modification of such specific adjustment in accordance with applicable law (i.e., a substantial change in circumstances, a change of 15% or more in a party's income, or the passage of three years). See DRL § 236B(9)(b)(2); FCA § 451(3)(a)-(b).

Now that the Bill, as introduced, includes our requested language clarifying the above right to seek modification, the Family Law Section supports passage of the Bill.

Based on the foregoing, the Family Law Section **SUPPORTS** this legislation.

Memorandum prepared by: The Family Law Section Committee on Legislation

Chair of the Section: Alton L. Abramowitz, Esq.