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Family Law Section

Memorandum in Opposition

FLS #1 May 8, 2015

LBDC 09654-01-5
OCA 2015-37

Proposed by the Family Court Advisory and Rules Committee to the Chief Administrative Judge

Effective Date: 90 days after becoming 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

PREPARED BY FAMILY LAW SECTION COMMITTEE ON LEGISLATION

THE FAMILY LAW SECTION OPPOSES THIS BILL

Analysis

The Family Court Advisory and Rules Committee to the Chief Administrative Judge has proposed a bill (the "proposed bill") amending DRL Section § 240(1-b) and FCA § 413 (the "Child Support Standards Act," or "CSSA")) which would 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 proposed 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; however, the Section cannot endorse the proposed bill unless the change in language recommended below is adopted.

The proposed bill further provides that when the court includes the alimony/maintenance paid to a recipient as income in the child support calculation, the court must provide for a specific adjustment in the amount of child support payable upon the termination of alimony/maintenance. The CSSA currently provides that maintenance/alimony paid is deducted from the payor's income in determining the payor's income for child support purposes, so long as there is a specific adjustment in the child support obligation in accordance with the CSSA upon the termination of maintenance/ alimony. See DRL § 240(1-b)(b)(5)(vii)(C)); FCA § 413(1)(b)(5)(vii)(C)). This provision protects the child support recipient by relieving him or her of the burden of having to commence an upward modification proceeding to obtain a new child support amount upon the termination of maintenance. The proposed bill similarly seeks to ensure a specific adjustment of the child support obligation upon the termination of maintenance/alimony, without the necessity of further court intervention, to account for the fact that the maintenance/alimony recipient is no longer receiving the income from such maintenance payments.

However, the Family Law Section is concerned that the language in the proposed bill does 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). As such, the Family Law Section recommends that the proposed bill include language to that effect, and similar language regarding the specific adjustment in child support required where maintenance/alimony payments are deducted from the payor's income in determining his or her income for child support purposes. See DRL § 240(1-b)(b)(5)(vii)(C)) and FCA § 413(1)(b)(5)(vii)(C)).

Should the above modification to the proposed bill be made, the Family Law Section is prepared to endorse the proposed bill, but it cannot recommend its passage in its current form.

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

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