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

4532

2009-2010 Regular Sessions

I N S E N A T E

April 24, 2009

Introduced by Sen. SAMPSON -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

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:

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

(a) In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to declare the validity or nullity of a judgment of divorce rendered against a spouse who was the defendant in any action outside the State of New York and did not appear therein where such spouse asserts the nullity of such foreign judgment, [or] (5) TO OBTAIN MAINTENANCE OR DISTRIBUTION OF PROPERTY FOLLOWING A FOREIGN JUDGMENT OF DIVORCE, OR (6) to enjoin the prosecution in any other jurisdiction of an action for a divorce, the court may direct either spouse or, where an action for annulment is maintained after the death of a spouse, may direct the person or persons maintaining the action, to pay [such sum or sums of money] COUNSEL FEES AND FEES AND EXPENSES OF EXPERTS directly to the attorney of the other spouse to enable [that spouse] THE OTHER PARTY to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. [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] THERE SHALL BE REBUTT-

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

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ABLE PRESUMPTION THAT COUNSEL FEES SHALL BE AWARDED TO THE LESS MONIED SPOUSE. IN EXERCISING THE COURT'S DISCRETION, THE COURT SHALL SEEK TO ASSURE THAT EACH PARTY SHALL BE ADEQUATELY REPRESENTED AND THAT WHERE FEES AND EXPENSES ARE TO BE AWARDED, THEY SHALL BE AWARDED ON A TIMELY BASIS, PENDENTE LITE, SO AS TO ENABLE ADEQUATE REPRESENTATION FROM THE COMMENCEMENT OF THE PROCEEDING. APPLICATIONS FOR THE AWARD OF FEES AND EXPENSES MAY BE MADE AT ANY TIME OR TIMES PRIOR TO FINAL JUDGMENT. BOTH PARTIES TO THE ACTION OR PROCEEDING AND THEIR RESPECTIVE ATTORNEYS, SHALL FILE AN AFFIDAVIT WITH THE COURT DETAILING THE FINANCIAL AGREEMENT BETWEEN THE PARTY AND THE ATTORNEY. SUCH AFFIDAVIT SHALL INCLUDE THE AMOUNT OF ANY RETAINER, THE AMOUNTS PAID AND STILL OWING THEREUNDER, THE HOURLY AMOUNT CHARGED BY THE ATTORNEY, THE AMOUNTS PAID, OR TO BE PAID, ANY EXPERTS, AND ANY ADDITIONAL COSTS, DISBURSEMENTS OR EXPENSES. IN FIXING FEES AND EXPENSES WHICH THE COURT DETERMINES SHALL BE PAID BY EITHER PARTY TO ENABLE THE OTHER PARTY TO CARRY ON OR DEFEND THE ACTION OR PROCEEDING, THE COURT SHALL FIX THE AMOUNT TO BE PAID FOR SUCH PROSECUTION OR DEFENSE OF THE ACTION OR PROCEEDING AT AN AMOUNT EQUAL TO THE HOURLY RATE ORDINARILY AND CUSTOMARILY CHARGED BY THE ATTORNEY FOR THE PARTY REQUIRED TO PAY SUCH COUNSEL FEES; PROVIDED, HOWEVER, IF THE HOURLY RATE ORDINARILY AND CUSTOMARILY CHARGED BY THE ATTORNEY FOR THE PARTY PETITIONING FOR SUCH AWARD IS LOWER, SUCH FEES SHALL BE FIXED AT THE HOURLY RATE ORDINARILY AND CUSTOMARILY CHARGED BY SUCH ATTORNEY FOR SUCH LEGAL SERVICES. THE FOREGOING PROVISION SHALL NOT BAR AN AWARD FOR COUNSEL FEES AT A RATE HIGHER THAN THE FEES CHARGED BY THE ATTORNEY FOR THE PARTY REQUIRED TO PAY SUCH COUNSEL FEES IN APPROPRIATE CIRCUMSTANCES. Any applications for [counsel] fees and expenses may be maintained by the attorney for either spouse in his own name in the same proceeding. PAYMENT OF ANY RETAINER FEES TO THE ATTORNEY FOR THE PETITIONING PARTY SHALL NOT PRECLUDE ANY AWARDS OF FEES AND EXPENSES TO AN APPLICANT WHICH WOULD OTHERWISE BE ALLOWED UNDER THIS SECTION.

(b) Upon any application to ENFORCE, annul or modify an order or judgment for alimony, MAINTENANCE, DISTRIBUTIVE AWARD, DISTRIBUTION OF MARITAL PROPERTY or for custody, visitation, or maintenance of a child, made as in section two hundred thirty-six or section two hundred forty OF THIS ARTICLE provided, or upon any application by writ of habeas corpus or by petition and order to show cause concerning custody, visitation or maintenance of a child, the court may direct a spouse or parent to pay [such sum or sums of money for the prosecution or the defense of] COUNSEL FEES AND FEES AND EXPENSES OF EXPERTS DIRECTLY TO THE ATTORNEY OF THE OTHER SPOUSE OR PARENT TO ENABLE THE OTHER PARTY TO CARRY ON OR DEFEND the application or proceeding by the other spouse or parent as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. [With respect to any such application or proceeding, such direction may be made in the order or judgment by which the particular application or proceeding is finally determined, or by one or more orders from time to time before the final order or judgment, or by both such order or orders and the final order or judgment] THERE SHALL BE A REBUTTABLE PRESUMPTION THAT COUNSEL FEES SHALL BE AWARDED TO THE LESS MONIED SPOUSE. IN EXERCISING THE COURT'S DISCRETION, THE COURT SHALL SEEK TO ASSURE THAT EACH PARTY SHALL BE ADEQUATELY REPRESENTED AND THAT WHERE FEES AND EXPENSES ARE TO BE AWARDED, THEY SHALL BE AWARDED ON A TIMELY BASIS, PENDENTE LITE, SO AS TO ENABLE ADEQUATE REPRESENTATION FROM THE COMMENCEMENT OF THE PROCEEDING. APPLICATIONS FOR THE AWARD OF FEES AND EXPENSES MAY BE MADE AT ANY TIME OR TIMES PRIOR TO FINAL JUDGMENT. BOTH PARTIES TO THE ACTION OR PROCEEDING AND THEIR RESPECTIVE ATTORNEYS, SHALL FILE AN AFFIDAVIT

WITH THE COURT DETAILING THE FINANCIAL AGREEMENT, BETWEEN THE PARTY AND THE ATTORNEY. SUCH AFFIDAVIT SHALL INCLUDE THE AMOUNT OF ANY RETAINER, THE AMOUNTS PAID AND STILL OWING THEREUNDER, THE HOURLY AMOUNT CHARGED BY THE ATTORNEY, THE AMOUNTS PAID, OR TO BE PAID, ANY EXPERTS, AND ANY ADDITIONAL COSTS, DISBURSEMENTS OR EXPENSES. IN FIXING FEES AND EXPENSES WHICH THE COURT DETERMINES SHALL BE PAID BY EITHER PARTY TO ENABLE THE OTHER PARTY TO CARRY ON OR DEFEND THE ACTION OR PROCEEDING, THE COURT SHALL FIX THE AMOUNT TO BE PAID FOR SUCH PROSECUTION OR DEFENSE OF THE ACTION OR PROCEEDING AT AN AMOUNT EQUAL TO THE HOURLY RATE ORDINARILY AND CUSTOMARILY CHARGED BY THE ATTORNEY FOR THE PARTY REQUIRED TO PAY SUCH COUNSEL FEES; PROVIDED, HOWEVER, IF THE HOURLY RATE ORDINARILY AND CUSTOMARILY CHARGED BY THE ATTORNEY FOR THE PARTY PETITIONING FOR SUCH AWARD IS LOWER, SUCH FEES SHALL BE FIXED AT THE HOURLY RATE ORDINARILY AND CUSTOMARILY CHARGED BY SUCH ATTORNEY FOR SUCH LEGAL SERVICES. THE FOREGOING PROVISION SHALL NOT BAR AN AWARD FOR COUNSEL FEES AT A RATE HIGHER THAN THE FEES CHARGED BY THE ATTORNEY FOR THE PARTY REQUIRED TO PAY SUCH COUNSEL FEES IN APPROPRIATE CIRCUMSTANCES. Any applications for [counsel] fees and expenses may be maintained by the attorney for either spouse in counsel's own name in the same proceeding. [Representation by an attorney pursuant to paragraph (b) of subdivision nine of section one hundred eleven-b of the social services law shall not preclude an award of counsel fees to an applicant which would otherwise be allowed under this section.] PAYMENT OF ANY RETAINER FEES TO THE ATTORNEY FOR THE PETITIONING PARTY SHALL NOT PRECLUDE ANY AWARDS OF FEES AND EXPENSES TO AN APPLICANT WHICH WOULD OTHERWISE BE ALLOWED UNDER THIS SECTION.

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

S 238. Expenses in enforcement AND MODIFICATION proceedings. In any action or proceeding to [compel the payment of any sum of money required to be paid by] ENFORCE OR MODIFY ANY PROVISION OF a judgment or order entered in an action for divorce, separation, annulment [or], declaration of nullity of a void marriage, DECLARATION OF VALIDITY OR NULLITY OF A JUDGEMENT OF DIVORCE RENDERED AGAINST A SPOUSE WHO WAS THE DEFENDANT IN ANY ACTION OUTSIDE THE STATE OF NEW YORK AND DID NOT APPEAR THEREIN WHERE SUCH SPOUSE ASSERTS THE NULLITY OF SUCH FOREIGN JUDGMENT, OR AN INJUNCTION RESTRAINING THE PROSECUTION IN ANY OTHER JURISDICTION OF AN ACTION FOR A DIVORCE, or in any proceeding pursuant to section two hundred forty-three, two hundred forty-four, two hundred forty-five, or two hundred forty-six OF THIS ARTICLE, the court may in its discretion require either party to pay [the expenses of the other in bringing, carrying on, or defending such action or proceeding] COUNSEL FEES AND FEES AND EXPENSES OF EXPERTS DIRECTLY TO THE ATTORNEY OF THE OTHER PARTY TO ENABLE THE OTHER PARTY TO CARRY ON OR DEFEND THE ACTION OR PROCEEDING AS, IN THE COURT'S DISCRETION, JUSTICE REQUIRES HAVING REGARD TO THE CIRCUMSTANCES OF THE CASE AND OF THE RESPECTIVE PARTIES. THERE SHALL BE A REBUTTABLE PRESUMPTION THAT COUNSEL FEES SHALL BE AWARDED TO THE LESS MONIED SPOUSE. In any such action or proceeding, applications for [counsel] fees and expenses may be maintained by the attorney for the respective parties in counsel's own name and in counsel's own behalf. IN EXERCISING THE COURT'S DISCRETION, THE COURT SHALL SEEK TO ASSURE THAT EACH PARTY SHALL BE ADEQUATELY REPRESENTED AND THAT WHERE FEES AND EXPENSES ARE TO BE AWARDED, THEY SHALL BE AWARDED ON A TIMELY BASIS, PENDENTE LITE, SO AS TO ENABLE ADEQUATE REPRESENTATION FROM THE COMMENCEMENT OF THE PROCEEDING. APPLICATIONS FOR THE AWARD OF FEES AND EXPENSES MAY BE MADE AT ANY TIME OR TIMES PRIOR TO FINAL JUDGMENT. BOTH PARTIES TO THE ACTION OR PROCEEDING AND THEIR REPRESENTATIVE ATTORNEYS,

SHALL FILE AN AFFIDAVIT WITH THE COURT DETAILING THE FINANCIAL AGREEMENT BETWEEN THE PARTY AND THE ATTORNEY. SUCH AFFIDAVIT SHALL INCLUDE THE AMOUNT OF ANY RETAINER, THE AMOUNTS PAID AND STILL OWING THEREUNDER, THE HOURLY AMOUNT CHARGED BY THE ATTORNEY, THE AMOUNTS PAID, OR TO BE PAID, ANY EXPERTS, AND ANY ADDITIONAL COSTS, DISBURSEMENTS OR EXPENSES. IN FIXING FEES AND EXPENSES WHICH THE COURT DETERMINES SHALL BE PAID BY EITHER PARTY TO ENABLE THE OTHER PARTY TO CARRY ON OR DEFEND THE ACTION OR PROCEEDING, THE COURT SHALL FIX AN AMOUNT TO BE PAID FOR SUCH PROSECUTION OR DEFENSE OF THE ACTION OR PROCEEDING AT AN AMOUNT EQUAL TO THE HOURLY RATE ORDINARILY AND CUSTOMARILY CHARGED BY THE ATTORNEY FOR THE PARTY REQUIRED TO PAY SUCH COUNSEL FEES; PROVIDED, HOWEVER, IF THE HOURLY RATE ORDINARILY AND CUSTOMARILY CHARGED BY THE ATTORNEY FOR THE PARTY PETITIONING FOR SUCH AWARD IS LOWER, SUCH FEES SHALL BE FIXED AT THE HOURLY RATE ORDINARILY AND CUSTOMARILY CHARGED BY SUCH ATTORNEY FOR SUCH LEGAL SERVICES. THE FOREGOING PROVISION SHALL NOT BAR AN AWARD FOR COUNSEL FEES AT A RATE HIGHER THAN THE FEES CHARGED BY THE ATTORNEY FOR THE PARTY REQUIRED TO PAY SUCH COUNSEL FEES IN APPROPRIATE CIRCUMSTANCES. PAYMENT OF ANY RETAINER FEES TO THE ATTORNEY FOR THE PETITIONING PARTY SHALL NOT PRECLUDE ANY AWARDS OF FEES AND EXPENSES TO AN APPLICANT WHICH WOULD OTHERWISE BE ALLOWED UNDER THIS SECTION.

S 3. This act shall take effect on the one hundred twentieth day after it shall have become a law and shall apply to actions and proceedings commenced on or after such effective date.