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

5667--B

2009-2010 Regular Sessions

I N S E N A T E

May 27, 2009

Introduced by Sen. OPPENHEIMER -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary -- recommitted to the Committee on Judiciary in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the domestic relations law and the family court act, in relation to enacting the "Divorce Reform Act of 2010"

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

Section 1. Short title. This act shall be known and may be cited as the "Divorce Reform Act of 2010".

S 2. Paragraph a of subdivision 1 of part B of section 236 of the domestic relations law, as amended by chapter 884 of the laws of 1986, is amended to read as follows:

a. The term "maintenance" shall mean payments provided for in a valid agreement between the parties or awarded by the court in accordance with the provisions of subdivision six of this part, to be paid at fixed intervals [for a definite or indefinite] EITHER PERMANENTLY OR FOR A FIXED period of time, but an award of maintenance shall terminate upon the death of either party or upon the recipient's valid or invalid marriage, or upon modification pursuant to paragraph [(b)] B of subdivision nine of [section two hundred thirty-six of] this part or section two hundred forty-eight of this [chapter] ARTICLE. FAILURE TO STATE IN AN AGREEMENT BETWEEN THE PARTIES, OR IN A COURT ORDER, THAT THE RECIPIENT'S RE-MARRIAGE SHALL TERMINATE AN AWARD OF MAINTENANCE, SHALL NOT PREVENT THE TERMINATION OF SUCH MAINTENANCE.

S 3. Subparagraph 2 of paragraph d of subdivision 5 of part B of section 236 of the domestic relations law, as added by chapter 281 of the laws of 1980, is amended to read as follows:

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

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(2) the duration of the marriage and the age and health of both parties AND THE POST-DIVORCE STANDARDS OF LIVING OF THE PARTIES;

S 4. The opening paragraph of paragraph a and paragraph c of subdivision 6 of part B of section 236 of the domestic relations law, as amended by chapter 884 of the laws of 1986, are amended to read as follows:

Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action the court may order temporary maintenance or maintenance in such amount as justice requires, having regard for the standard of living of the parties established during the marriage, whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs and whether the other party has sufficient property or income to provide for the reasonable needs of the other and the circumstances of the case [and of the respective parties. Such order]. IN THOSE SITUATIONS WHERE THE PARTY SEEKING MAINTENANCE IS UNABLE TO MAINTAIN THE STANDARD OF LIVING OF THE PARTIES ESTABLISHED DURING THE MARRIAGE DUE TO THE DURATION OF THE MARRIAGE, AGE, HEALTH, OR REDUCED OR LOST LIFETIME EARNING CAPACITY, OR LOSS OF HEALTH INSURANCE BENEFITS, OR THE NEEDS OF MINOR OR DEPENDENT CHILDREN, THE COURT SHALL ORDER PERMANENT MAINTENANCE, SUBJECT TO MODIFICATION, PURSUANT TO PARAGRAPH B OF SUBDIVISION NINE OF THIS PART, IN AN AMOUNT SUFFICIENT TO ELIMINATE THE DISPARITY IN THE POST-DIVORCE STANDARD OF LIVING OF THE PARTIES. ORDERS OF MAINTENANCE shall be effective as of the date of the application therefor, and any retroactive amount of maintenance due shall be paid in one sum or periodic sums, as the court shall direct, taking into account any amount of temporary maintenance which has been paid. In determining the amount and duration of maintenance the court shall consider:

c. [The court may award permanent maintenance, but an award of] WHERE THE COURT ORDERS PERMANENT MAINTENANCE OR MAINTENANCE FOR A FIXED PERIOD, maintenance shall terminate upon the death of either party or upon the recipient's valid or invalid marriage, or upon modification pursuant to paragraph [(b)] B of subdivision nine of [section two hundred thirty-six of] this part or section two hundred forty-eight of this [chapter] ARTICLE. FAILURE TO STATE IN AN AGREEMENT BETWEEN THE PARTIES, OR IN A COURT ORDER, THAT THE RECIPIENT'S RE-MARRIAGE SHALL TERMINATE AN AWARD OF MAINTENANCE, SHALL NOT PREVENT THE TERMINATION OF SUCH MAINTENANCE.

S 5. Section 170 of the domestic relations law is amended by adding a new subdivision 7 to read as follows:

(7) IRRECONCILABLE DIFFERENCES HAVE ARISEN BETWEEN THE PARTIES SUCH THAT THERE IS NO REASONABLE PROSPECT OF RECONCILIATION. THERE SHALL BE A PRESUMPTION THAT, AFTER TWELVE CONSECUTIVE MONTHS OF SEPARATE HABITATION, NO REASONABLE PROSPECT OF RECONCILIATION EXISTS. NOTHING IN THIS SUBDIVISION SHALL RELIEVE A PARTY FROM HIS OR HER OBLIGATION TO COMPLY SUBSTANTIALLY WITH ALL THE TERMS AND CONDITIONS OF ANY DECREE OR JUDGMENT OF SEPARATION PURSUANT TO SUBDIVISION FIVE OF THIS SECTION OR OF ANY WRITTEN AGREEMENT OF SEPARATION PURSUANT TO SUBDIVISION SIX OF THIS SECTION. THE COURT SHALL NOT AWARD SUMMARY JUDGMENT ON ANY CAUSE OF ACTION BROUGHT PURSUANT TO THIS SUBDIVISION. IN THE ABSENCE OF A VALID WRITTEN AND FULLY EXECUTED AGREEMENT OF SEPARATION, JUDGMENT IN AN ACTION BROUGHT PURSUANT TO THIS SUBDIVISION SHALL NOT BE GRANTED UNTIL THE ECONOMIC ISSUES BETWEEN THE PARTIES, INCLUDING BUT NOT LIMITED TO, THE DISTRIBUTION OF MARITAL PROPERTY, SPOUSAL SUPPORT AND CHILD SUPPORT,

AND CUSTODY AND VISITATION HAVE BEEN DECIDED BY THE COURT AND INCORPORATED IN THE FINAL JUDGMENT OF DIVORCE.

S 6. 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 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. 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. 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 7. 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 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 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 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. 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 8. Section 438 of the family court act, as amended by chapter 892 of the laws of 1986, is amended to read as follows:

S 438. Counsel fees. (a) In any proceeding under this article, including proceedings for support of a spouse OR FORMER SPOUSE and children OF THE PARTIES, [or] for support of children only, [or at any hearing] IN ANY PROCEEDING to modify or enforce an order entered in [that] A proceeding UNDER THIS ARTICLE, or a proceeding to modify a decree of divorce, separation, or annulment, including an appeal under article eleven OF THIS ACT, the court may allow counsel fees [at any stage of the proceeding], AND FEES AND EXPENSES OF EXPERTS DIRECTLY, to the attorney representing [the spouse, former spouse or person on behalf of children] ANY PARTY TO ENABLE SUCH PARTY TO CARRY ON OR DEFEND THE PROCEEDING AS, IN THE COURT'S DISCRETION, 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 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. ANY APPLICATIONS FOR FEES AND EXPENSES MAY BE MAINTAINED BY THE ATTORNEY FOR EITHER SPOUSE IN COUNSEL'S 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) In any proceeding for failure to obey any lawful order compelling payment of support of a spouse or former spouse and children, or of children only, the court shall, upon a finding that such failure was willful, order respondent to pay counsel fees AND FEES AND EXPENSES OF EXPERTS DIRECTLY to the attorney representing the petitioner or person on behalf of the children. [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.] 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. ANY APPLICATION FOR 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.

S 9. This act shall take effect on the sixtieth day after it shall have become a law and shall apply to any action or proceeding commenced on or after such effective date.