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Counsel Fees: Consequential and as Consequences

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In the realm of litigated divorces,awards of counsel fees are "consequential" and have "consequences." Throughout its existence from 1962 through the present, New York Domestic Relations Law (DRL) §237 has been "consequential" because of its importance as a tool that enables the justice presiding over a matrimonial action to ensure that the non-moneyed spouse has the financial wherewithal to hire counsel of their own choosing to prosecute their case and/or defend them against a spouse possessed of greater financial resources.

Similarly, as was touched upon in our previous Divorce Law column which addressed *The 'Bad Actor Syndrome' in Matrimonial and Family Law: The Misbehaving Spouse or Parent*, NYLJ 9/20/2024, awards of counsel fees can serve as a "consequence" (*i.e.*, punishment) which a court can impose against a spouse whose conduct during the litigation unfairly and/or improperly disadvantaged their marital partner.

What follows is a review of some of those 2025 decisions which,to our minds,are consequential and/or have had significant consequences for the parties and/or attorneys involved in those cases.

The basic underpinnings for awards of counsel fees and expenses in matrimonial actions are found in DRL §237. That statute provides in pertinent part that in any matrimonial action the court may direct one party "to pay counsel fees and fees and expenses of experts directly to the attorney for the other spouse 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." Importantly, the statute then goes on to provide:

Courtesy photos

Alton L. Abramowitz, left, and Leigh Baseheart Kahn, right, of Schwartz Sladkus Reich Greenberg Atlas.

"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." (The language of DRL §238

pertaining toawards of counsel fees in matrimonial enforcement and modification proceedings mirrors that of DRL §237).

In *Cohen Goldstein, LLP v. Marbury,* 2024 WL 5284730 (Sup. Ct. NY County 12/30/2024), Justice Louis L. Nock granted summary judgment to the plaintiff-attorneys against their former client (the wife of basketball player Stephon Marbury) on the basis of an account stated in the sum of $279,305.05 plus interest. The application for fees had previously been denied, on the basis of:(i)a finding that the client was not obligated to pay her lawyers until her husband was either ordered to pay her attorneys in the underlying divorce action or was "absolved from any obligation to do so"; and, (ii) a finding that an account stated claim may not be pleaded because it duplicated a breach of contract claim.

In granting renewal, Nock noted that the subsequent settlement of the divorce action had included a waiver by both parties of any claims against the other for counsel fees, and that "the Appellate Division, First Department, clarified that an account stated is not duplicative of a breach of contract claim" in *Aronson Mayefsky & Sloan, LLP, v. Praeger,* 228 AD3d 182, 183 (First Dept 2024).

The issue of the spouses' litigation conduct came into play in *Matassov v. Matassov,*236 AD3d 644 (Second Dept 2025). The Second Department modified the lower court's award of $50,000 to the plaintiff-wife by denying her application altogether, finding that not only had the wife failed to prove that she was the less monied spouse, but also"that both parties had engaged in conduct not conducive to a speedy resolution of the action"where each spouse had accused the other of engaging in conduct that lengthened the litigation and increased the costs thereof.

The First Department precluded a spouse from having a "second bite of the apple" in *Caluori v. Caluori,* 236 AD3d 461 (First Dept 2025), which involved an appeal addressing, among other things, the lower court's award of $100,000 in temporary counsel fees to the wife. The Appellate Division modified the$100,000counsel fee award by reducing it to $23,683.82 because, in seeking attorneys' fees for a second time, the wife "impermissibly sought a second opportunity to recover legal fees incurred between September 2023 and February 2024 after [the lower] court had already rejected her claim to recover the full amount [that her attorneys had] billed for that period."

Justice Susan M. Capeci in *P.A. v. G.L.,* NYLJ 3/25/2025(Sup. Ct. Westchester County) addresssed a post-settlement application made in a divorce action by the wife's former attorney for a money judgment against her in the sum of $127,543.60.While conceding that she owed her former counsel $76,000, the wife "specifically contested many of the fees charged, asserting that they were excessive and for unwarranted actions on the part of her [former] counsel..."

In addition, her testimony indicated that she had not received all of the invoices for which payment was sought and that there were gaps of many months between the billings that she did receive. Capeci denied the application because the former attorney for the wife had failed to comply with the requirement of 22 NYCRR §1400.2 that the attorney provide the client with "a written, itemized bill on a regular basis, at least every 60 days," noting that in this case there had been an initial lapse of five months, followed by two separate lapses of four months apiece during which bills had not been sent.

The court contrasted the former attorney's failures to the "substantial compliance" with the court rules in other reported cases where fees were awarded to the petitioning attorneys –such as, for example, *Bracey v. Bracey,* 222 AD3d 613, 614 (Second Dept 2023); *Hovenac v. Hovenac,* 79 AD3d 816, 817 (Second Dept 2010); *Gahagen v. Gahagen,* 51 AD3d 863, 864 (Second Dept 2008); *Spataro v. Spataro,* 211 AD3d 1069, 1070 (Second Dept 2022).

RA v. DA, 85 Misc3d 1283(A), 231 NYS3d 919 (Sup Ct Richmond County 2025) involved a wife's motion for additional temporary counsel fess where the court had previously awarded her total of $237,487.62in interim fees (in two separate tranches), while the husband had paid his lawyers over $500,000. The parties had been married for 13 years at the time of commencement and they had two children. The marital estate was $23million,of which $10million were liquid assets.

The husband, whose annual income exceeded $1.2 million, had control over the marital assets. The wife had serious health and medical issues and had not worked during the marriage as a result. Justice Ronald Castorina, Jr., observed that the wife was "medically and functionally incapable of employment and [was] wholly dependent on the court's *pendente lite* orders for basic support and legal fees."

He stated that DRL §237 (a) "is rooted in the principle that meaningful access to legal representation must not be a function of economic advantage and that both parties to a matrimonial action are entitled to a fair opportunity to assert and defend their claims."In rendering his decision, Justice Castorina cited to the husband's full control over significant marital assets and the fact that he had "sustained litigation through high-cost legal counsel and continued to finance [his case] without impediment,"while the wife could not pay for her attorneys "without judicial intervention."

In an effort to avoid the proverbial "*handwriting on the wall, "*the husband maintained that any further award to the wife should be characterized as an "advance against equitable distribution," citing *Sykes v, Sykes,* 41 Misc 3d 1061 (Sup Ct NY County 2013). Castorina rejected the husband's reliance on the *Sykes* decision, pointing out that *Sykes* was a trial level decision out of the First Department and was not binding on a Second Department trial court, and that it was not "persuasive precedent on the [facts and circumstances] present in this case."He further noted that the Court had the authority to adjust or reapportion its award at the conclusion of the trial. The court therefore awarded $375,000 to be divided between the wife's two sets of lawyers on the basis of their respective invoices.

Counsel fees were also the subject of the bankruptcy courts in 2025.*In re Wilson,*670 B.R. 822, 2025 WL 1878750 (U.S. Bankruptcy Ct, SDNY 2025), was an adversarial proceeding instituted by the attorney for the debtor-husband's wife, who had been awarded $20,000 in legal fees in the underlying divorce action. The debtor had obtained a discharge in bankruptcy order which essentially stated,in part,that "some debts were not discharged, such as debts that are'domestic support obligations'",as well as "debts that the bankruptcy court has decided or will decide are not discharged in this bankruptcy case[.]" The debtor-hubsand argued that the counsel fee award had been discharged when the bankruptcy court granted his Discharge Order.

The court found in favor of the attorney for the wife, ruling that the counsel fee award was not dischargeable because it was in the nature of a "domestic support obligation" as described in 11 U.S.C. §523(a)(5), and that the fact that to find otherwise because the court order awarded the fees directly to the wife's matrimonial lawyer instead of to the wife "would be exalting form over substance,"citing *Falk & Siemer, LLP v. Maddigan (In re Maddigan),* 312 F.3d 589,593 (Second Circuit 2002) (Sotomayor, J), as well as *Campagna Johnson Mady, P.C. v. Kalsi (In re Kalsi),* 631 B.R. 369, 372 (Bankruptcy Ct., SDNY 2021), *In re Rogowski,* 462 B.R. 435, 445 (Bankruptcy Ct. EDNY 2011), and *Pauley v. Spong (In re Spong),* 661 F.2d 6, 9 (Second Circuit 1981).

In a Third Department decision, *Marshak v. Marshak,* 240 AD3d 1094 (2025), the appellate court directly addressed the consequences of refusing to reasonably engage in settlement efforts in an attempt to avoid financial discovery. The husband in *Marshak* challenged the Trial Court's award to the wife after trial of $549,962.37 in counsel fees and $122,951 in experts' fees.

Agreeing with the husband's argument that the distributive award made to the wife was a relevant factor for the Trial Court to consider in looking at "[t]he relative financial positions of the parties," the Appellate Division nevertheless affirmed the Trial Court's finding that the husband remained in "a better financial position" than the wife because he retained control of the marital business and the "use of its corporate assets." The Third Department then went on to say: "Supreme Court further credited the proof that the husband unnecessarily complicated this case by, among other things, refusing the wife's offer to engage in mediation to resolve their financial disputes because he wanted to avoid disclosing information about the finances of [the marital business].

By doing so, the husband forced the wife to engage in prolonged discovery to obtain

information about [that business] and prepare to litigate the disposition of other assets, retain an expert to analyze the corporate ledgers to determine how corporate monies had been used by the husband and how much of that money should have been paid to the wife, and then go through an extended trial."

The Appellate Division concluded by saying: "in view of 'the financial circumstances of the parties, the relative merits of their positions, and the tactics of the husband in unnecessarily prolonging and complicating this litigation,' Supreme Court properly exercised its discretion in directing the husband to pay counsel and expert fees to the wife."

In *J.P. v. S.M.,*86 Misc.3d 1256(A) (Sup Ct Kings County 2025) Statewide Coordinating Judge for Matrimonial Matters, Hon. Jeffrey S. Sunshine, addressed the issue of counsel fees in the 17th motion filed in the case before him and, in doing so, addressed the extent to which family wealth—utilized by one party to subsidize his own counsel fees and lifestyle—can be considered as available to a spouse to satisfy an award of counsel fees to the other spouse.

At the outset of his decision. Sunshine notes that he was called upon to decide whether "a monied-spouse's consistent and admitted use and reliance on family wealth and resources to fund a divorce litigation can be considered in awarding *pendente lite* counsel fees to the non-monied spouse pursuant to DRL 237. "The plaintiff-father asserted that he was not the monied spouse because his earned income was $45,000 per year from his clothing store business, while at the same time he spent $57,000 per month for living expenses and had paid more than $1.5million for his own counsel fees.

The plaintiff's primary contention was that his family's wealth could be used to support his lifestyle and to cover his attorneys 'fees, but that it had no obligation to contribute financially to the counsel fees of the defendant-mother. Sunshine noted that in the court's prior *pendente lite* support award it had "found the father's representation as to his income not credible and determined that he is the monied spouse."*J.P. v. S.M.,* 85 Misc. 3d 1284(A) (Sup Ct Kings County 2025).

Sunshine noted that the plaintiff's attorney "[had] made it very clear on the record that this case will continue to be extensively litigated." Sunshine exhibited a great deal of incredulity with respect to the plaintiff's arguments, finding that "[t]o accept the plaintiff's proposition that the court cannot consider financial circumstances such as accepting consistent and ongoing infusions of family wealth used to fund one [party's] litigation costs in awarding *pendente lite* counsel fee awards to a non-monied spouse would entirely undermine the statutory scheme and effectively nullify DRL 237.

Instead of leveling the playing field in matrimonial cases this scenario would empower a party with access to family wealth to financially overwhelm the non-monied spouse." The court went on to award the defendant's attorney $200,000 *pendente lite* without prejudice to future applications as necessary at the time of trial or sooner.

A significant 2025 decision in the field of New York divorce law was that of Justice Kathleen Waterman-Marshall in *C.S. v. R.H.,* 87 Misc. 3d 1201(A) (Sup Ct NY County 2025), where the parties' wealth "rocketed" early on in the marriage due to the purchase of the financial firm of which the husband was an equity partner by Goldman Sachs. This transaction resulted in their wealth going "from comfortable to extravagant"to the extent of roughly $120 million at the time of commencement and increasing over seven years of litigation to over $181million by the time of trial. Over the course of the marriage, the vast majority of the parties' assets were placed into trusts, LLC's, etc. Subsequent to the commencement of the divorce action, the husband was found to have violated the Automatic Orders as well as specific orders of the court.

The husband also failed tofully respond to the wife's trial subpoena for documents. More specifically, Waterman-Marshall held that "[p]ost-commencement, Husband unequivocally, unreservedly and unilaterally cut Wife out of the Trusts, removed her as Managing Director of the LLC's, terminated her access to trust accounts, kicked her out of her homes with all of the attendant luxury accommodations, and cut her off from the family lifestyle."

First, based on the facts surrounding the marriage pre-commencement, the court ruled that the wife was entitled to a distributive award of 50% of the value of the entire marital estate, inclusive of the value of the trust assets Second, the court ruled that the husband's post-commencement violation of orders and "bad-faith conduct" amounted to "egregious fault" and that it was "just and proper" to distribute to the wife 50% of the marital estate under the catchall factor in the Equitable Distribution Law (DRL §236B[5][d][16]).

Per the court's decision, it was proved that prior to trial the wife had incurred $2,235,459.08 in attorneys' fees and $162,306.50 in experts' fees. Waterman-Marshall found that it was "appropriate to award the wife as the non-monied spouse" 75% of the attorneys' fees that she had sought "considering the lack of merit to [the] husband's position on equitable distribution of trust assets, as well as his cavalier and controlling conduct over marital assets, including violations of the Automatic Orders," while noting that the wife was not seeking an award of attorneys' fees for the trial and post-trial work. Thus, the final award was $1,676,594.25 for counsel fees and $162,306.50 for experts' fees—and this, despite the fact that the wife had been awarded a significant equitable distribution.

Finally, counsel fees also appeared, in 2025, in a decision involving a suspended attorney. *Hogan v. Van Buren,* 2025 WL 3467342, NYLJ 12/11/2025 (Sup Ct Erie County 2025) was a lawsuit by a lawyer whose law license had been suspended for ethical violations and former clients(with respect to the same matters) from whom he was attempting to collect.

Acting Supreme Court Justice Peter Allen Weinmann held, among other things, that in the Fourth Department a suspended attorney may not represent themselves *pro se* because the order of suspension specifically stated that the plaintiff had been "commanded during the term of [their] suspension to cease and desist from the practice of law in any form either as principal or agent, clerk or employee of another, and he is *hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice,board, commission or other public authority, or to give another an opinion as to the law or its application,* or any advice in relation thereto... (emphasis added)."

Weinmann then went on to hold "that the overwhelming body of accumulated case law prohibits [the plaintiff] as a suspended attorney from collecting fees, advances and disbursements from his former clients for the representation which was the very ground for his suspension from the practice of law." However, the court also denied the defendants' application for sanctions finding that"while [the plaintiff's] plea in seeking payment for decidedly unethical conduct which caused his suspension from the practice of law is not frivolous it is unarguably a stunning and breath-taking example of *chutzpah*."

The common thread that pervades the cases discussed in this article is that there are "consequences" for the inappropriate way in which a spouse conducts themselves during their marriage and/or during the litigation of their divorce—or, in the case of the final decision discussed, for the inappropriate way in which a lawyer conducts himself during an action—which results in the award of "consequential" legal fee amounts to the spouse who has been unfairly disadvantaged by that "bad conduct" (or the denial of such an award to the spouse or the lawyer who has acted in such a manner).

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