Enforcing Counsel Fee, Support and Distributive Awards by Execution of Judgment

By Joel R. Brandes

Occasionally, we come across a decision awarding counsel fees to a spouse, which directs that if the counsel fee awarded is not paid, a money judgment can be entered for that amount upon the submission of an affirmation of nonpayment. In Darby v. Darby, [1] the Court directed that '"If the counsel fees are not paid within the specified time, the Office of the County Clerk may enter a money judgment in favor of the wife's counsel in the sum of $7,500.00, plus costs and statutory interest, upon Affirmation of non-compliance and on ten (10) days written notice to the husband and to the husband's counsel by certified mail." In S.B., v. G.B.,[2] the Court ordered that "…If the counsel fees are not paid by the dates set forth above, the Clerk is directed to enter a money judgment in favor of counsel upon counsel's written affirmation. No further notice to the Husband shall be required."

These provisions in an order are an incentive to the obligor spouse to make prompt payment -- but are they authorized by law?

CPLR 2222 provides that at the request of any party the clerk shall docket as a judgment an order directing the payment of money, including motion costs. Once docketed, interest starts to run at 9% and the enforcement remedies in CPLR Article 52 become available. As we shall see, CPLR 2222 may not be utilized to docket a judgment for arrears of maintenance, child support, counsel fees and equitable distribution in a matrimonial action.

Arrears of maintenance or child support

Historically, although a final judgment in an action for a divorce ended the marriage, the husband's duty to support his wife was continued in the award of alimony.[3] Under former Civil Practice Act § 1170, the predecessor of Domestic Relations Law § 236, the court was authorized to award alimony, and to annul, vary, or modify an alimony award at any time after final judgment, or, if there was no award, to make one by amendment. A judgment directing the payment of alimony was subject to retroactive modification. [4]

In 1948 the Civil Practice Act, was amended [5] to provide that the authority to

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[1] 35 Misc.3d 1235(A), 2012 WL 2044632 (Sup. Ct, 2012)

[2] 33 Misc.3d 1212(A), 2011 WL 5027159, (Sup. Ct, 2011)

[3] Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826 (1892)

[4] Kirkbride v. Van Note, 275 N.Y. 244, 9 N.E.2d 852 (1937)

[5] Laws of 1948, ch. 212.

modify judgments awarding alimony applied to unpaid sums or installments accrued prior to the application for modification. Civil Practice Act § 1171–b, the predecessor of Domestic Relations Law §244, made it clear that alimony awards were not regarded as final until a judgment for the amount unpaid, or the part of the amount unpaid, as justice requires, was entered in the discretion of the court, after application on such notice as the court may direct. The alimony award was considered final only to the extent provided in the judgment. Arrears of alimony awarded by a matrimonial judgment could not be enforced by execution until the arrears were reduced to final judgment. The right to award alimony and the means for its enforcement rested exclusively upon the statutory provisions.[6]

Former Civil Practice Act § 1171–b also provided for enforcement of a matrimonial judgment by contempt and sequestration proceedings, in addition to the docketing of a final judgment. Consequently, proceeding under section 1171–b was the only method by which a judgment could be entered for a sum certain, which would be final, and not subject to further modification. Once such a judgment was entered section 1171–b specified that it could be enforced by execution, or in any other manner provided by law for the collection of money judgments.[7] It was held that this language referred to relief by sequestration or contempt proceedings, which were the only other remedies to which the wife was entitled to when the section was enacted. [8]

This is still the law today. In Tannenberg v. Beldock the Appellate Division held that the exclusive remedy by which to seek judgment for arrears in alimony or child support due under a domestic judgment is section 244 of the Domestic Relations Law.[9] A judgment for arrears of maintenance or child support under a domestic matrimonial judgment or order, which can be enforced by execution, or in any other manner provided by law for the collection of money judgments, cannot be recovered in an independent action. An application must be made in the matrimonial action pursuant to Domestic Relations Law §244. [10] The other statutory enforcement remedies are security and sequestration under Domestic Relations Law §243, contempt under

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[6] Walker v. Walker, 155 N.Y. 77, 49 N.E. 663 (1898); Caldwell v. Caldwell, 298 N.Y. 146, 152, 81 N.E.2d 60, 63(1948).

[7] Former Civ.Prac.Act, § 1171-b. Karlin v. Karlin, 280 N.Y. 32, 19 N.E.2d 669(1939); Snow v Snow, 8 A.D.2d 516, 190 N.Y.S.2d 902 (1st Dept., 1959)

[8] Karlin v. Karlin, supra. Snow v Snow, supra.

[9] 68 A.D.2d 307, 416 N.Y.S.2d 808(1st Dept. 1979).

[10] Snow v Snow, supra; Kahn v. Sampson, 23 A.D.2d 539, 255 N.Y.S.2d 963 (1st Dept. 1965).

Domestic Relations Law §245, an execution for support enforcement under CPLR 5241 (b)(1) and the Court may grant an income deduction order for support enforcement under CPLR 5242 (b) upon motion, for good cause shown.

Counsel Fees

Since 1845[11] the courts have been authorized to award counsel fees in a matrimonial action. Like awards of alimony, courts had discretion "in or before final judgment [to] annul or modify any such direction" to pay counsel fees.

In St. Germain v. St. Germain,[12] the plaintiff's attorney entered a judgment ex parte against the former husband, pursuant to CPLR 2222, for counsel fees which he had been awarded for an appeal. The Appellate Division vacated the judgment, holding that CPLR 2222 did not authorize the plaintiff's attorney to enter an ex parte judgment against defendant for arrears in payment of the counsel fee award. It held that Section 244 of the Domestic Relations Law is the exclusive remedy for the entry of a judgment; and it requires an application to the court for permission to enter judgment, which the court in its sound discretion may grant or deny in an adversary proceeding on appropriate notice. It held that the general language of CPLR 2222 was circumscribed by the provisions of Domestic Relations Law §244 which require the sanction of the court for such relief in a matrimonial action.

Domestic Relations Law § 237 was amended in 1983 to delete the provision that gave the court discretion "in or before final judgment [to] annul or modify any such direction" to pay counsel fees. [13] It initially appeared that the effect of the 1983 amendment to Domestic Relations Law § 237 was that a counsel fee award became vested and non-modifiable and was now entitled to be docketed as a money judgment pursuant to CPLR 2222, [14] This is not the case, as Domestic Relations Law § 244 was not amended at that time. It still continues to provide for the discretionary modification of arrears: the court "... shall make an order directing the entry of judgment for the amount of arrears of any other payments so directed, together with costs and disbursements, unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears."

In Lieberman v Pobiner, London, Bashian & Buonamici [15] a law firm obtained a

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[11] North v North, 1 Barb.Ch. 241, 1845 WL 4311 (N.Y.Ch., 1845)

[12] 25 A.D.2d 568, 568-69, 267 N.Y.S.2d 789 (2d Dept. 1966).

[13] NY Legis Ann, 1983, p 129. See also O'Shea v O'Shea, 93 NY 187, n.4 (1999)

[14] See Frink v Frink (1984) 126 Misc 2d 60, 480 NYS2d 1005 holding that a money judgment could be docketed for arrears of counsel fees pursuant to CPLR 2222.

[15] 190 App Div 2d 716, 593 NYS2d 321(2d Dept., 1993,)

judgment for arrears of counsel fees, by the submission of a judgment and affirmation in support, attesting to the default. Several days later the law firm was notified by the County Clerk that the judgment would be vacated *sua sponte* because the order awarding counsel fees did not say "enter judgment." The Appellate Division held, inter alia, that the manner in which the law firm attempted to enforce the award of counsel fees contained in the *pendente lite* order was technically improper. Counsel fees awarded in a matrimonial action do not become a judgment debt enforceable by execution until the award is first reduced to a judgment.[16]

However, in Donaghy v Donaghy,[17] the Third Department held that it was not necessary to serve defendant with a notice of entry of money judgments entered in a matrimonial case prior to execution on those judgments. In *dictum* the court noted that the same result would have occurred if the order for the payment of money had simply been docketed as a judgment under CPLR 2222.

Subsequently, in Sherman v Sherman, [18] the Second Department held in a brief memorandum decision that the plaintiff's failure to make a formal motion for the money judgments did not warrant vacatur of the money judgments where the plaintiff served the defendant with the judgment of divorce and served him with notice of settlement of the proposed money judgments.

Significantly, neither Donaghy nor Sherman mention Domestic Relations Law § 244, which requires that a judgment debtor have notice and an opportunity to be heard before a money judgment may be granted.

Distributive award

A “distributive award” is a payment awarded by the court where authorized in a matrimonial action, in lieu of or to supplement, facilitate or effectuate the division or distribution of property. It may be payable either in a lump sum or over a period of time in fixed amounts.[19] A distributive award is not modifiable. [20]

A party may be precluded from collecting all or part of a distributive award if the six-year statute of limitations for distributive awards runs before a payment is reduced to

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[16] Citing Domestic Relations Law § 244; Gaines v Gaines, 109 AD2d 866, 867 (2d Dept.,1985).

[17] 203 App Div 2d 803, 611 NYS2d 55 (3d Dept., 1994)

[18] 304 A.D.2d 745, 745, 757 N.Y.S.2d 761 (2d Dept., 2003)

[19] Domestic Relations Law §236[B][1][b]

[20] O'Brien v. O'Brien, 66 N.Y.2d 576, 591, 498 N.Y.S.2d 743 (1985)

judgment.[21] Even though a distributive award is not modifiable [22] it appears that because of the due process mandates of Domestic Relations Law § 244, Tannenberg v Beldock and St. Germain are applicable to enforcement of a distributive award, and that a distributive award may not be docketed as a money judgment under CPLR 2222, absent a motion upon notice.

Conclusion

A counsel fee, maintenance, child support, and distributive award cannot be enforced by the docketing of a money judgment pursuant to CPLR 2222, nor may a court direct that judgment for arrears be entered upon submission of an affirmation. When a party is in arrears of one of these obligations, an application must be made, on notice as the court may direct, for a money judgment under Domestic Relations Law § 244. The cases that seem to hold otherwise appear to be an anomaly.

[21] In Woronoff v. Woronoff, 70 A.D.3d 933, 894 N.Y.S.2d 529 (2d Dept. 2010) the Appellate Division held that the distributive award to the wife in the divorce judgment was not a "money judgment" subject to a 20–year statute of limitations, but was governed by the six-year statute of limitations set forth in CPLR 213(1) and (2).

[22] McAuliffe v. McAuliffe, 70 A.D.3d 1129, 895 N.Y.S.2d 228 (3d Dept., 2010); Greenwald v. Greenwald, 164 A.D.2d 706, 565 N.Y.S.2d 494 (1st Dept.,1991); Siegel v. Siegel, 132 A.D.2d 247, 254, 523 N.Y.S.2d 517 (2d Dept.,1987).