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Maureen F. Thompson

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## DOMESTIC RELATIONS LAW

*DRL § 237: Post- Orr evaluation upholds constitutionality of statute by construing it to authorize award of attorney's fees to either spouse in a matrimonial action*

DRL § 237<sup>187</sup> authorizes the award of counsel fees in matrimonial actions, but only permits the court to "direct the husband" to pay for the services of his wife's attorney.<sup>188</sup> Since § 237 on its face discriminates between similarly situated males and females, it appeared to represent the likely object of an equal protection challenge.<sup>189</sup> Indeed, the constitutional validity of § 237 was seriously undermined when the Supreme Court, in *Orr v. Orr*,<sup>190</sup> declared that state laws imposing alimony obligations on husbands, but not wives, violated the fourteenth amendment's equal protection clause.<sup>191</sup> Recently, however, in *Childs v. Childs*,<sup>192</sup> the Appellate

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<sup>187</sup> DRL § 237 (1977 & Supp. 1979-1980).

<sup>188</sup> *Id.* DRL § 237 provides in pertinent part:

(b) Upon any application to annul or modify an order or judgment for alimony or for custody, visitation, or maintenance of a child, made as in section two hundred thirty-six or section two hundred forty 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 the husband or father to pay such sum or sums of money for the prosecution or the defense of the application or proceeding by the wife or mother as, in the court's discretion, justice requires, having regard to the circumstances of case and of the respective parties.

*Id.*

<sup>189</sup> Although several commentators and lower courts predicted the future viability of § 237, they conceded that the section was unconstitutional as written. See *Levy v. Levy*, N.Y.L.J., Apr. 19, 1979, at 13, col. 5 (Sup. Ct. Queens County), *aff'd mem.*, 72 App. Div. 2d 972, 421 N.Y.S.2d 750 (1st Dep't 1979); *Laka v. Laka*, N.Y.L.J., Mar. 20, 1979, at 12, col. 3 (Sup. Ct. N.Y. County); *Atkins & Schlissel, An Analysis of 'Orr' Effect in New York*, N.Y.L.J., Apr. 5, 1979, at 28, col. 2; *New York's Gender-Based Alimony Statutes Undone by Supreme Court, Calling for Quick Corrective Measures*, N.Y.S., LAW DIG. No. 231 (March 1979). One lower court, however, declared section 237 to be unsusceptible to "semantic surgery" and therefore invalid. *Schneider v. Schneider*, N.Y.L.J., July 5, 1979, at 14, col. 3 (Sup. Ct. Nassau County).

<sup>190</sup> 440 U.S. 268 (1979).

<sup>191</sup> *Id.* at 283. U.S. CONST. amend. XIV, § 1 provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

In *Orr*, the wife initiated a contempt proceeding against her former husband for failure to make alimony payments required by a final divorce decree. *Id.* at 270-71. The husband contended that Alabama's alimony statutes were unconstitutional because they did not permit an award of alimony to husbands. *Id.* at 271. The Court reasoned that in order to withstand an equal protection challenge, gender-based distinctions "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 279 (quoting *Califano v. Webster*, 430 U.S. 313, 316-17 (1977)). The Court analyzed three purposes that could be promoted by Alabama's statutory scheme: to enforce the

Division, Second Department, preserved the constitutionality of § 237 by construing it to permit the award of counsel fees to either spouse, but only on the basis of need.<sup>193</sup>

Mr. Childs commenced a postdivorce proceeding in which the trial court granted his former wife's application for attorney's fees.<sup>194</sup> Instead of cross-moving for counsel fees, Mr. Childs appealed the award, arguing that DRL § 237 denied him equal protection under the law as guaranteed by the fourteenth amendment.<sup>195</sup> The Appellate Division, Second Department, ruled that the husband lacked standing to initiate his constitutional attack against the statute,<sup>196</sup> since he had never requested counsel fees.<sup>197</sup> The Court of Appeals dismissed his appeal finding that "no substantial constitutional question [was] directly involved."<sup>198</sup> The Supreme Court of the United States granted the husband's petition for certiorari, vacated the judgment, and remanded the case to the appellate division for further consideration in light of *Orr v. Orr*.<sup>199</sup>

On remand, a unanimous appellate division<sup>200</sup> held that the husband had standing to challenge the constitutionality of DRL § 237,<sup>201</sup> but upheld the statute.<sup>202</sup> Justice O'Connor, writing for the

State's preference for relegating the wife to a dependent role in the home; to help needy spouses, employing sex as "the proxy for need"; or to compensate for past discrimination. 440 U.S. at 280. The Court, relying upon *Stanton v. Stanton*, 421 U.S. 7 (1975), declared that any statutory allocation of family responsibilities would be invalid. *Id.* at 279. Since Alabama's statute provided for a hearing to determine the parties' respective financial circumstances, the Court determined that a consideration of gender would be superfluous. *Id.* at 281. Moreover, the Court maintained that a distinction designed to compensate a wife for past discrimination would tend to reinforce the old stereotypes of dependency. *Id.* at 282-83. Concluding that there was no legitimate governmental objective being served by this statutory scheme, the Court held it unconstitutional. *Id.* at 283.

<sup>192</sup> 69 App. Div. 2d 406, 419 N.Y.S.2d 533 (2d Dep't. 1979).

<sup>193</sup> *Id.* at 409, 419 N.Y.S.2d at 535.

<sup>194</sup> *Id.* at 409-10, 419 N.Y.S.2d at 535-36.

<sup>195</sup> *Id.* at 410, 419 N.Y.S.2d at 536.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 410-11, 419 N.Y.S.2d at 536.

<sup>198</sup> 43 N.Y.2d 946, 947, 374 N.E.2d 1247, 403 N.Y.S.2d 896 (1978).

<sup>199</sup> 440 U.S. 952 (1979).

<sup>200</sup> The panel consisted of Justices O'Connor, Lazer, Gulotta, and Mangano.

<sup>201</sup> 69 App. Div. 2d at 415, 419 N.Y.S.2d at 538-39. In holding that the husband had standing, the *Childs* court relied upon *Orr v. Orr*, 440 U.S. 268, 269-70 (1979). 69 App. Div. 2d at 414-15, 419 N.Y.S.2d at 538. The argument was advanced in *Orr* that the husband was unable to challenge the statute since he had not sought alimony. 440 U.S. at 269. The Supreme Court rejected this contention, noting that whenever a statute is questioned on equal protection grounds, the state may satisfy constitutional requirements either by applying the statute to the previously ignored class or by completely nullifying the statute and denying its protections to anyone. *Id.* at 272. Although the husband might gain nothing if the state

court, stated that although the statute's gender-based distinction is patently invalid,<sup>203</sup> it need not be stricken as unconstitutional.<sup>204</sup> In reaching this conclusion, Justice O'Connor noted that the judiciary must pursue every reasonable possibility of conforming a controverted statute to the mandates of the Constitution.<sup>205</sup> Therefore, rather than declaring DRL § 237 unconstitutional, the *Childs* court expansively construed its language as authorizing the award of counsel fees to either spouse.<sup>206</sup> Emphasizing that the authority to order the payment of counsel fees derives solely from statute,

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opted for the former approach, the Court observed that he would benefit if the state were to abrogate the statute as to all. *Id.* Therefore, his constitutional attack, while holding only a promise of relief from the underinclusive statute, nevertheless established a personal stake in the outcome of the controversy. *Id.* In any case, the Court maintained that the burden borne by the defendant on account of his sex was sufficient to confer standing. *Id.*

As an additional justification for hearing the husband's claim, the *Childs* court mentioned that appellate courts have authority to consider issues that implicate sufficiently grave public policy concerns, notwithstanding a litigant's failure to raise the question in the lower court. 69 App. Div. 2d at 415, 419 N.Y.S.2d at 538 (citing *In re Niagara Wheatfield Adm'r's Ass'n*, 44 N.Y.2d 68, 72, 375 N.E.2d 37, 39, 404 N.Y.S.2d 82, 83 (1978)).

<sup>202</sup> 69 App. Div. 2d at 419, 419 N.Y.S.2d at 541.

<sup>203</sup> *Id.* at 416, 419 N.Y.S.2d at 539. The court emphasized the close similarity between the statutes involved in *Orr* and in *Childs*, and concluded that there existed no doubt that DRL § 237, as written, was violative of the fourteenth amendment. *Id.* See note 189 *supra*.

<sup>204</sup> 69 App. Div. 2d at 418, 419 N.Y.S.2d at 540-41.

<sup>205</sup> *Id.*; see N.Y. STAT. § 150(c) (McKinney 1977). Section 150(c) provides in pertinent part: "Where the constitutionality of an act may be rendered doubtful, the court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

<sup>206</sup> 69 App. Div. 2d at 419, 419 N.Y.S.2d at 541. Justice O'Connor also observed that, in addition to reading a statute expansively, a court may construe the law "in tandem" with other legislation to overcome constitutional difficulties. *Id.* at 419, 419 N.Y.S.2d at 541 (citing *Carter v. Carter*, 58 App. Div.2d 438, 446, 397 N.Y.S.2d 88, 93 (2d Dep't. 1977)). Since DRL § 238 permits either spouse to recover the expenses of a marital enforcement proceeding, DRL § 238 (1977 & Supp. 1979-1980), the *Childs* court found that it provided supplementary support for interpreting DRL § 237 as authorizing the award of counsel fees to the husband as well as to the wife. 69 App. Div. 2d at 419-20, 419 N.Y.S.2d at 541-42. See generally, *Matthews v. Matthews*, 240 N.Y. 28, 147 N.E. 237 (1925); E. CRAWFORD, *THE CONSTRUCTION OF STATUTES* §§ 230-33 at 429-34 (1940); 2A J. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 51.03 at 298-313 (4th ed. C. Sands 1973).

It should be noted that DRL § 238 was amended prior to the *Orr* decision to allow the award of costs of either spouse. Ch. 529 § 1, [1978] N.Y. Laws 1 (McKinney). The avowed purpose of the amendment was not to eliminate an invidious gender-based distinction, but "to permit an attorney to maintain an application for counsel fees and expenses in the same enforcement proceeding in which he rendered service." Memorandum of State Executive Department, reprinted in [1978] N.Y. Laws 1728 (McKinney).

In addition, DRL § 244 was examined by the *Childs* court, and while the court concluded that its gender predicates also were unconstitutional, this section similarly was interpreted as conferring its benefits upon both husbands and wives. 69 App. Div. 2d at 416, 419 N.Y.S.2d at 539.

the court expressed concern that the nullification of DRL § 237 could have a devastating impact on indigent spouses.<sup>207</sup> Finally, the *Childs* court determined that its decision should be applied prospectively only, since to do otherwise would cause both "chaotic and inequitable" consequences.<sup>208</sup>

It is apparent that the *Childs* court's concern over the ramifications of invalidating DRL § 237<sup>209</sup> compelled it to excise judicially the discriminatory language contained within the statute. Notwithstanding the resulting inconsistency between the present wording of DRL § 237 and the meaning ascribed it by the *Childs* court,<sup>210</sup> the propriety of this technique is well supported. In equal protection challenges, courts often have rectified the statute in question by extending its protections or benefits to the class of persons previously excluded.<sup>211</sup> It is suggested that a similar approach could be used to buttress New York's alimony statute,<sup>212</sup> which contains identical terminology.<sup>213</sup>

<sup>207</sup> 69 App. Div. 2d at 419, 419 N.Y.S.2d at 541. See note 209 *infra*.

<sup>208</sup> 69 App. Div. 2d at 420, 419 N.Y.S.2d at 542.

<sup>209</sup> Courts have no common-law authority to award attorney's fees, see *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); *Steinberg v. Steinberg*, 46 App. Div. 2d 684, 684, 360 N.Y.S.2d 75, 76 (2d Dep't 1974); *Lambert v. Lambert*, 45 App. Div. 2d 715, 356 N.Y.S.2d 94 (2d Dep't. 1974); text accompanying note 207 *supra*; thus, had the *Childs* court invalidated DRL § 237, the practical effect would have been to leave needy spouses unable to obtain judicial resolution of their marital disputes, absent remedial legislation. See *Schneider v. Schneider*, N.Y.L.J., July 5, 1979, at 14, col. 3 (Sup. Ct. Nassau County); *Levy v. Levy*, N.Y.L.J., Apr. 19, 1979, at 13, col. 5 (Sup. Ct. Queens County), *aff'd mem.*, 72 App. Div. 2d 972, 421 N.Y.S.2d 750 (1st Dep't 1979); *Laka v. Laka*, N.Y.L.J., Mar. 20, 1979, at 12, col. 3 (Sup. Ct. N.Y. County).

<sup>210</sup> It should be noted that the *Childs* court resolved the statute's constitutional difficulties by substituting the word "spouse" for "wife." 69 App. Div. 2d at 420, 419 N.Y.S.2d at 542. It is submitted, however, that such an interpretation does not adequately reconcile DRL § 237 with the mandates of *Orr*, see note 191 and accompanying text *supra*, because it leaves the statute authorizing the court to order the husband, but not the wife, to pay his "spouse's" attorney's fees. See generally DRL § 237 (1977 & Supp. 1979-1980). Since this essentially would continue the section's impermissible discrimination between husbands and wives, it would appear that the *Childs* court intended the term "spouse" to replace both the words "husband" and "wife" in DRL § 237.

<sup>211</sup> For the past sixty years, courts have been expanding underinclusive statutes to preserve their constitutionality. See, e.g., *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164, 168 (1972); *Levy v. Louisiana*, 391 U.S. 68, 70-71 (1968); *Yale & Towne Mfg. Co. v. Travis*, 262 F. 576 (1919), *aff'd*, 252 U.S. 60 (1920); *In re Patricia A.*, 31 N.Y.2d 83, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972); *Passante v. Walden Printing Co.*, 53 App. Div. 2d 8, 385 N.Y.S.2d 178 (3d Dep't 1976). Thus, it seems clear that the *Childs* court was entitled to choose the course of interpretation it did. See generally Note, *Extension versus Invalidation of Underinclusive Statutes: A Remedial Alternative*, 12 COLUM. J.L. & SOC. PROB. 115 (1975).

<sup>212</sup> DRL § 236 (1977 & Supp. 1979-1980).

<sup>213</sup> DRL § 236 provides in pertinent part:

The *Childs* decision represents a legitimate exercise of judicial discretion, especially in light of the dilatory conduct of the legislature.<sup>214</sup> It is hoped, however, that remedial legislation will be forth-

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In any action or proceeding brought (1) during the lifetime of both parties to the marriage to annul a marriage or declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, the court may direct the husband to provide suitably for the support of the wife as, in the court's discretion, justice requires

.....  
*Id.*

Some lower courts and commentators have suggested that the validity of DRL § 236 could be preserved by judicial construction. *See, e.g., Levy v. Levy*, N.Y.L.J., Apr. 19, 1979, at 13, col. 5 (Sup. Ct. Queens County), *aff'd mem.*, — App. Div. 2d —, 421 N.Y.S.2d 750 (1st Dep't 1979); *Atkins & Schlissel, An Analysis of 'Orr' Effect in New York*, N.Y.L.J., Apr. 5, 1979, at 28, col. 1; *New York's Gender-Based Alimony Statutes Undone by Supreme Court, Calling for Quick Corrective Measures*, N.Y.S. LAW DIG. No. 231 (March 1979).

Since sections 236 & 237 of the DRL are worded similarly and usually are invoked together, the courts, for the most part, treat them as one. *See Steinberg v. Steinberg*, 46 App. Div. 2d 684, 360 N.Y.S.2d 75 (2d Dep't 1974); *Schneider v. Schneider*, N.Y.L.J., July 5, 1979, at 14, col. 3 (Sup. Ct. Nassau County); *Thaler v. Thaler*, 89 Misc. 2d 315, 391 N.Y.S.2d 331 (Sup. Ct. Nassau County), *rev'd on other grounds*, 58 App. Div. 2d 890, 396 N.Y.S.2d 815 (2d Dep't 1977). Therefore, it is submitted that if challenged, DRL § 236 perhaps might receive similar judicial interpretation.

<sup>214</sup> By the time the *Childs* case reached the appellate division, at least six bills had been introduced in the legislature proposing to eliminate the discriminatory language found in DRL §§ 236 & 237. *See* N.Y.S. 6304, N.Y.A. 7367, 202d Sess. (1979) (proposed amendment to DRL §§ 236 & 237 to provide alimony and counsel fees for husbands as well as wives); N.Y.S. 5381, N.Y.A. 7769, 202d Sess. (1979) (proposed amendment to DRL §§ 237 & 238 to give benefits of counsel fees to "spouses" generally); N.Y.S. 5374, N.Y.A. 7760, 202d Sess. (1979) (proposed amendment to DRL § 237 to change "husband" to "spouse"); N.Y.A. 188, 202d Sess. (1979) (proposed amendment to DRL § 237 to authorize court to direct financially responsible spouse to pay for other party's attorney's fees); N.Y.A. 4947, 201st Sess. (1978) (proposed amendment to DRL § 236 to require supporting spouse to pay alimony); N.Y.A. 1431, 201st Sess. (1978) (proposed amendment to DRL § 237 to permit either party to pay counsel fees).

Moreover, the legislature's lack of initiative is particularly exemplified by its inaction following two appellate court rulings on other underinclusive statutes. In *Passante v. Walden Printing Co.*, 53 App. Div. 2d 8, 385 N.Y.S.2d 178 (3d Dep't 1976), the court declared that "the Workmen's Compensation Board shall be required to award death benefits to surviving husbands on the same basis as they are presently awarded to widows." *Id.* at 13, 385 N.Y.S.2d at 181. It was not until 3 years after the *Passante* decision, however, that the legislature reformed the Worker's Compensation Law. This amendment removed the terms "wife" and "dependent husband," and placed the word "spouse" in their stead. Ch. 168, § 1, [1979] N.Y. Laws 408 (McKinney). In *In re Patricia A.*, 31 N.Y.2d 83, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972), the Court concluded that a provision of the Family Court Act, which permitted girls to be adjudged a Person in Need of Supervision (PINS) until the age of 18, but allowed boys to be designated as PINS only until the age of 16, unconstitutionally discriminated on the basis of sex. The Court, therefore, struck as unconstitutional "so much of section 712(b) of the Family Court Act as encompasses females between the ages of 16 and 18 . . ." *Id.* at 89, 286 N.E.2d at 435, 335 N.Y.S.2d at 38. Although more than 8 years have passed since *In re Patricia A.* was decided, the legislature has not yet amended § 712(b) of the Family Court Act.

coming to reconcile the language of the DRL with its proper interpretation.

*Maureen F. Thompson*

### INSURANCE LAW

*Ins. Law § 675: Attorney's fees awarded to compensate for services necessary to substantiate a prior claim for counsel fees*

Section 675 of the Insurance Law<sup>215</sup> entitles a claimant to recover from the carrier reasonable attorney's fees incurred in enforcing a valid claim for first-party benefits that are overdue and unpaid before an attorney has been retained.<sup>216</sup> Although recovery is measured by the value of the services actually performed by the claimant's attorney,<sup>217</sup> section 675 fails to prescribe the specific

<sup>215</sup> N.Y. INS. LAW § 675(1)(McKinney Supp. 1979-1980).

<sup>216</sup> *Id.* Section 675(1) provides in pertinent part:

Payments of first party benefits shall be made as the loss is incurred. . . . If a valid claim or portion thereof was overdue and such claim was not paid before an attorney was retained with respect to the overdue claim, the claimant shall also be entitled to recover his attorney's reasonable fee, which shall be subject to limitations promulgated by the superintendent in regulations.

In *In re Country-Wide Ins. Co.* (Barrios), 43 N.Y.2d 685, 371 N.E.2d 789, 401 N.Y.S.2d 26 (1977), the Court upheld an award for fees which greatly exceeded the claim. The Court declared that under section 675, "[i]t is the arbitrator who is empowered to evaluate legal services." *Id.* at 686, 371 N.E.2d at 789, 401 N.Y.S.2d at 27. In response to this broad discretion conferred on the arbitrator, the legislature amended section 675 to authorize the Superintendent of Insurance to issue regulations limiting the attorney's fees that may be recovered. See Ch. 892, § 13, [1977] N.Y. Laws 1835 (McKinney); notes 233 and 247 *infra*.

The New York no-fault law, which became effective February 1, 1974, was enacted to remedy three defects in the common-law system of automobile accident tort litigation: the system was excessively expensive and inefficient, distribution of compensation to accident victims was inequitable, and the system placed an onerous burden on the State's judicial system. *Montgomery v. Daniels*, 38 N.Y.2d 41, 50-51, 34 N.E.2d 444, 448-50, 378 N.Y.S.2d 1, 8-9 (1975). Enactment was preceded by exhaustive legislative consideration. *Id.* at 53, 340 N.E.2d at 451, 378 N.Y.S.2d at 11. See note 244 *infra*.

A claim is overdue if the carrier does not make payment within 30 days after the claimant has shown proof of loss. N.Y. INS. LAW § 675(1) (McKinney Supp. 1979-1980). Once a claim is overdue, in addition to attorney's fees, a carrier is liable for interest "at the rate of two percent per month." *Id.*

Section 675(2) mandates that the carrier afford the claimant the option of submitting any dispute arising under subdivision one to arbitration. N.Y. INS. LAW § 675(2)(McKinney Supp. 1979-1980). As originally enacted, section 675(2) prescribed binding arbitration; the statute was amended, however, in 1977 to authorize review of the arbitration award by a master arbitrator. Ch. 892, § 13, [1977] N.Y. Laws 1835 (McKinney).

<sup>217</sup> *In re Country-Wide Insurance Co.* (Barrios), 43 N.Y.2d 685, 686, 371 N.E.2d 789,