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DRL § 81: Mother Liable in Part for Counsel Fees Arising from Habeas Corpus Proceeding Brought To Determine Child's Custody

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the plaintiff did not follow the procedural requirements for *enforcement* by the German courts;[224] he therefore contended that the New York courts could not confirm the award since it was inconclusive in New York within the meaning of the treaty.

Judge Stecher reasoned that a treaty has the same effect on the common law as a federal statute; therefore, there is no presumption that it preempts the laws of the state unless its language expressly or impliedly mandates that result. In the court's view, the treaty in question merely set forth the *minimum* standards for confirmation of foreign awards. In other words, awards meeting the treaty terms must be confirmed. However, as indicated, the common law remains intact, and under New York law, foreign awards, like foreign judgments, are recognized and deemed conclusive unless the foreign tribunal lacked jurisdiction of the person or the subject matter, or a fraud was perpetrated on the court.[225] In the absence of proof of any of these three defects the *Engelbrechten* court ordered enforcement of the award.[226]

Domestic Relations Law

DRL § 81: Mother liable in part for counsel fees arising from habeas corpus proceeding brought to determine child's custody.

DRL section 81 decrees that "[a] married woman is a joint guardian of her children with her husband, with equal powers, rights and duties in regard to them."[227] However, this statutory prescription fails to specify what "powers, rights and duties" it is intended to encompass. For instance, can a mother ever have a "duty" to pay counsel fees incurred in her child's behalf in light of the fact that an expense of that nature is a necessary?[228] The DRL seemingly suggests that this question should be answered in the negative. For, sections 237 and 240 of the DRL, dealing with counsel fees and expenses, and custody and maintenance of children, respectively, expressly provide for payment of

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224 It was contended that the plaintiff could not obtain execution in Germany until: (1) a court had certified the award, and (2) the defendant had an opportunity to file objections.

225 *See* 8 WK&M ¶ 7510.15 (1968).

226 The court granted a sixty-day stay to enable the defendant to protest the award before the German courts. *Cf. In re* Overseas Distrib., 5 App. Div. 2d 498, 499, 173 N.Y.S.2d 110, 112 (1st Dep't 1958), where the court stated: "We recognize that an award may be deemed to be final if all that remains to be done are ministerial acts or arithmetical calculations."

227 Dom. Rel. Law § 81 (McKinney 1964).

228 Friou v. Gentes, 11 App. Div. 2d 124, 126, 204 N.Y.S.2d 836, 838 (2d Dep't 1960): "Legal services rendered for a wife or child are necessaries."; Gutterman v. Langerman, 2 App. Div. 2d 63, 153 N.Y.S.2d 113 (1st Dep't 1956).

these costs "by a husband or father" or "to the wife"; but no mention is made of payment by a wife as mother or to a husband.

In 1961, however, the Joint Legislative Committee on Matrimonial and Family Laws stated that, at least with respect to DRL section 237, a court with discretion could "order a wife who has failed to prove her case to repay a counsel fee."[229] This statement has now received judicial approval from the County Court of Westchester County in *Erico v. Manville*,[230] wherein an attorney sought to recover from an infant's mother a judgment for legal services rendered in the child's behalf.

In 1959 the child's parents had entered into a separation agreement, pursuant to which custody of the infant was awarded to the father and the mother agreed to pay him $150 per month as support, plus a proportionate share of the child's necessary educational expenses. Shortly after the separation agreement was entered into, the mother married the allegedly wealthy Thomas F. Manville. This latter revelation accounts for the somewhat unusual aspects of the aforementioned financial arrangement between the parents.

Some eight years later, and after the death of Mr. Manville, the mother instituted a habeas corpus proceeding to obtain custody of her daughter. In that action the father employed an attorney to oppose the mother, and in addition, requested the court to increase the support to $500 per month and to order the mother to pay the counsel fees incurred as a result of the proceeding. The court denied both the mother's application for custody and the cross-relief sought by the father. As to the latter, the court noted that it was powerless to grant the relief requested because neither section 237 nor section 240 of the DRL provided for payments other than those by a husband or father.[231]

As indicated previously, the attorney opposing the mother in the habeas corpus proceeding initiated the instant action to recover his fees. The mother impleaded the father, theorizing that if she were found liable to the plaintiff the father would in turn be liable to her for the full amount of the judgment.

Disposing of the res judicata issue raised by the mother,[232] the

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229 REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON MATRIMONIAL AND FAMILY LAWS, 1961 N.Y. LEG. DOC. NO. 19 at 81.

230 59 Misc. 2d 549, 299 N.Y.S.2d 914 (Westchester County Ct. 1969).

231 A portion of the opinion in the habeas corpus proceeding appears in 59 Misc. 2d at 551, 299 N.Y.S.2d at 918.

232 The court held that the habeas corpus determination regarding counsel fees was not res judicata on the question whether the attorney could recover his fee in a separate action against the mother. 59 Misc. 2d at 551-52, 299 N.Y.S.2d at 918.

court immediately recognized that the legal services rendered were necessaries performed on the infant's behalf since a habeas corpus proceeding of this nature is a determination solely for the child's best interests and welfare. Furthermore, the court held that DRL sections 237 and 240 did not provide the exclusive remedy for recovery of the costs of necessaries. DRL section 81 provides support for the proposition that a mother may be liable for a child's necessaries in the same manner a father is. Other factors peculiar to this case also necessitated this result: the father earned little more than $5,000 per year as a barber; the mother, however, received investment income in excess of $12,000 per year and stood to receive more if Mr. Manville's will was admitted to probate; the separation agreement evidenced a recognition on the mother's part that she, rather than her ex-husband, was liable for most of the child's support, and the plaintiff had relied upon this when he consented to represent the child in the habeas corpus proceeding.

Although the plaintiff would normally have been entitled to recover from both parents, his judgment was limited to the mother since she was the only one he had served in the action. Nevertheless, the mother was entitled to contribution of five-seventeenths of the judgment from her ex-husband, an amount determined by the ratio of his annual income to the annual income of both parents.

With this decision the court has arrived at an equitable solution to a unique set of circumstances for which the legislature purposefully chose not to provide.[233]

DRL § 211: Conflict over applications for temporary alimony continues.

The "cooling-off" statute of the DRL, section 211, has permitted plaintiffs to serve a petition to the court for temporary alimony and counsel fees in conjunction with a summons since 1968. This seemingly innocuous provision has generated some sharp conflict among the lower courts in the state. Since DRL section 215-e permits a party to a conciliation proceeding to apply directly to the conciliation commissioner for temporary alimony, the courts have divided on the question of which section should normally be controlling. In short, if a court

233 1961 N.Y. LEG. DOC. No. 19 at 83-84:

> While the bill treats primarily of wives and their rights against husbands for the awards described, it is also of moment what should be done with reference to the husband who is without funds or support or who appears better qualified to care for children, particularly in those cases where there is a wide disparity in personal wealth in favor of the wife. For the time, however, if we consider that wives still are considered the natural custodian of minor children, particularly girls, there is virtue in the presently proposed bill.