

DRL § 236: Impact on Support Proceedings in Family Court

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This is precisely the situation CPLR 1007 was meant to prevent. However, the court in this case appears to have had no alternative since the defendant had contracted away his right to judicial resolution of disputes. This decision stands as a warning against careless drafting of arbitration agreements. This unfortunate situation could have been avoided by a clause exempting from arbitration disputes originating in suits against the general contractor. Under such a clause, the parties could still arbitrate the many disputes that would be solely *inter se*. This suggested provision must be clear and express since, as this case indicates, the courts will not find an implied one.

DOMESTIC RELATIONS LAW

DRL § 236: Impact on support proceedings in Family Court.

While the Family Court is powerless to entertain matrimonial actions, it does have the power under Section 412 of the Family Court Act to order support of the wife. The award may be on a minimum "public charge" basis, *i.e.*, based on preventing the wife from becoming a public charge, or, in the court's discretion, it may be based on the husband's ability to pay.¹⁴² Although the Family Court has independent discretion, it has usually followed certain criteria used by the supreme court in matrimonial actions.¹⁴³

Prior to section 236, the rule in the supreme court had been that where the wife lost her separation action due to her voluntarily living apart, she was not entitled to support.¹⁴⁴ Following the supreme court's direction, the Family Court denied support on a "means" basis where the wife was voluntarily living apart.¹⁴⁵

Since the adoption of Section 236 of the Domestic Relations Law,¹⁴⁶ the supreme court has been more liberal in awarding

¹⁴² Section 412 of the Family Court Act provides that: "[a] husband is chargeable with the support of his wife and, if possessed of sufficient means . . . , may be required to pay for her support a fair and reasonable sum, as the court may determine, having due regard to the circumstances of the respective parties" (emphasis added).

¹⁴³ Zunder v. Zunder, 187 Misc. 557, 62 N.Y.S.2d 776 (Dom. Rel. Ct. Bronx County 1946); Kenneson v. Kenneson, 178 Misc. 832, 36 N.Y.S.2d 676 (Dom. Rel. Ct. Bronx County 1942).

¹⁴⁴ Batchelor v. Batchelor, 295 N.Y. 544, 68 N.E.2d 681 (1946); Solomon v. Solomon, 290 N.Y. 337, 49 N.E.2d 470 (1943); Roosevelt v. Roosevelt, 13 App. Div. 2d 334, 216 N.Y.S.2d 604 (1st Dep't 1961).

¹⁴⁵ Zunder v. Zunder, 187 Misc. 557, 62 N.Y.S.2d 776 (Dom. Rel. Ct. Bronx County 1946).

¹⁴⁶ Section 236 provides that ". . . the court may direct the husband to provide suitably for the support of the wife as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. . . . Such direction may be made . . . notwithstanding that the court refuses to grant the relief requested by the wife . . ." (emphasis added).

alimony. Section 236 was applied in *Brownstein v. Brownstein*¹⁴⁷ to allow alimony even though separation was denied because the husband and wife were living apart by mutual consent. Accordingly, section 236 has had a liberalizing influence on the Family Court. In *Steinberg v. Steinberg*,¹⁴⁸ the Court of Appeals stated that the change in public policy as enunciated in section 236 was projected also into the Family Court. It was held that Section 236 of the Domestic Relations Law similarly authorized the Family Court to award support on a "means" basis under Section 412 of the Family Court Act even though the parties were voluntarily living apart.

Steinberg, it is submitted, is the precursor of changing law in the Family Court that will be indirectly effected by the liberal provisions of the Domestic Relations Law.

DRL § 240: Failure to obey child support order not punishable by contempt.

Under Section 240 of the Domestic Relations Law a court may, in a habeas corpus proceeding brought to obtain custody or visitation rights, order a parent to provide for the support of his child.¹⁴⁹ However, in *Feit v. Feit*,¹⁵⁰ the supreme court dismissed a wife's petition to punish her husband for contempt for failing to make child support payments ordered in such a proceeding.

Section 245 of the Domestic Relations Law makes child support orders issued in matrimonial actions enforceable by contempt. Although it felt that it was merely a legislative oversight that a similar provision was not made for such orders issued in habeas corpus proceedings, the court was reluctant to hold the husband in contempt.¹⁵¹

Until section 245 could be amended, it was suggested that CPLR 7006 be used to enforce orders arising out of habeas corpus proceedings.¹⁵² However, it appears that CPLR 7006 can be used only to compel production of the "corpus" and not compliance

¹⁴⁷ 25 App. Div. 2d 205, 268 N.Y.S.2d 115 (1st Dep't 1966).

¹⁴⁸ 18 N.Y.2d 492, 223 N.E.2d 558, 277 N.Y.S.2d 129 (1966).

¹⁴⁹ It should be noted that before the enactment of Domestic Relations Law §§ 237(b), 240, no award of support was available for a child in a habeas corpus proceeding. See 7B MCKINNEY'S CPLR 203, commentary 361-64 (1964).

¹⁵⁰ 52 Misc. 2d 829, 276 N.Y.S.2d 668 (Sup. Ct. Bronx County 1967).

¹⁵¹ *Id.* at 829-30, 276 N.Y.S.2d at 669.

¹⁵² *Ibid.*