

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D31285
C/ct

_____AD3d_____

Submitted - February 17, 2011

JOSEPH COVELLO, J.P.
ARIEL E. BELEN
L. PRISCILLA HALL
JEFFREY A. COHEN, JJ.

2010-09387

DECISION & ORDER

In the Matter of Kevin J. Talty, respondent, v Ethel
A. Talty, appellant.

(Docket No. F-03162/00/08G)

Mark D. Imber, Garden City, N.Y., for appellant.

DiMascio & Associates, LLP, Garden City, N.Y. (John P. DiMascio and Joshua B.
Hecht of counsel), for respondent.

In a support proceeding pursuant to Family Court Act article 4, the mother appeals, as limited by her brief, from so much of an order of the Family Court, Nassau County (Zimmerman, J.), dated August 19, 2010, as, upon granting the father's objection to so much of an order of the same court (Watson, S.M.), dated February 1, 2010, as granted that branch of the mother's motion which was for an award of an attorney's fee in the sum of \$11,893.04, vacated the award of the attorney's fee.

ORDERED that the order dated August 19, 2010, is reversed insofar as appealed from, on the law, with costs, the father's objection to so much of the order dated February 1, 2010, as granted that branch of the mother's motion which was for an award of an attorney's fee in the sum of \$11,893.04 is denied, and that portion of the order dated February 1, 2010, which granted that branch of the mother's motion which was for an award of an attorney's fee in the sum of \$11,893.04 is reinstated.

Family Court Act § 438(a) provides: "[i]n any proceeding under this article, including

August 23, 2011

Page 1.

MATTER OF TALTY v TALTY

proceedings for support of a spouse and children, or for support of children only, or at any hearing to modify or enforce an order entered in that proceeding or a proceeding to modify a decree of divorce, separation, or annulment, including an appeal under article eleven, the court may allow counsel fees at any stage of the proceeding, to the attorney representing the spouse, former spouse or person on behalf of children.”

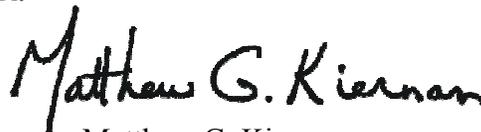
As we read the plain text of Family Court Act § 438(a), the language “[i]n any proceeding under this article” includes “an appeal under article eleven” (Family Ct Act § 438[a]). Thus, the plain meaning of the statute supports the interpretation that a request for an attorney’s fee can be made “at any stage of the proceeding,” which includes “an appeal under article eleven” (Family Ct Act § 438[a]). In this context, therefore, the “proceeding” does not conclude until the appellate process has concluded. Stated differently, the proceeding is terminated when an appeal has concluded and no more appellate relief is available, or when the time to file an appeal has expired.

Applying this interpretation of the statute to the facts of this case, the mother’s motion for an award of an additional attorney’s fee was timely, as the appellate process had not yet concluded at the time the motion was made (*see generally Label v Label*, 78 AD3d 1127; *Matter of Salvati v Salvati*, 242 AD2d 538). To the extent that any of our decisions suggest otherwise (*see Matter of McGrath v Parker*, 41 AD3d 852; *Matter of Cassieri v Cassieri*, 31 AD2d 927), they are no longer to be followed.

The father’s remaining contention is not properly before this Court.

COVELLO, J.P., BELEN, HALL and COHEN, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan
Clerk of the Court