The Imputation of Income and Maintenance's Last Gasp

By Vesselin Mitev

A veteran practitioner once told me the primary reason he started practicing matrimonial law was that there was not a lot of paper involved. Now, he shook his head, the simplest case has three boxes of nonsense. Much like the ever-expanding universe, and the Internal Revenue Code (did you know the original 1040 form that came out in 1913 was three pages? Plus one for instructions, of course), the volume of paper that consumes the matrimonial practice seems to swell rather than streamline.

Consider the order directing a preliminary conference that directs both parties to produce (most) of the relevant documents to the typical divorce prior to the preliminary conference; then, the actual preliminary conference order that further fleshes out demands for additional documents; then, the standard discovery practices, tools and mechanisms available under Article 31 of the CPLR (that one could argue conflict with the two existing court orders regarding disclosure) that no doubt further fan the embers of litigation, rather than extinguish redundancy. After all, what could be more pleasurable than answering the same question at a deposition that you were first asked in writing in an interrogatory and before that in a Notice to Admit?

The natural human reaction to this is to cleave through the thicket and sever the Gordian knot of typically tightly wound people (lawyers) carefully constructing tightly wound legal traps by serving and re-serving ponderous monoliths of papers back and forth upon each other until mercifully released from this M.C. Escher staircase by settlement or trial. But ironically it appears that one way of accomplishing this is to short-cut, or rule-of-thumb, the amount of maintenance a spouse may be entitled to receive.

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The legislature took the first steps toward cementing these guideposts (that eventually, like all guideposts serve to preclude further exploration of anything except the trail one is currently on) in 2015; now that maintenance is no longer tax deductible in the overwhelming majority of cases and thus more nearly approximating child support payments in form if not substance, two legs of the three legged stools have been effectively knocked out.

The third is wobbling, I submit, as the courts continue to deliver blows upon it, by the prevalent phenomenon of presumptively imputing income upon the non-monied spouse in an effort, one supposes, to lessen the blow (in view of the new tax treatment) upon the payor spouse.

But the case law (as always) reminds us that there are real dangers in skipping steps in the name of cutting to the chase see for example, *Haagen–Islami v. Islami,* 96 A.D.3d 1004, 946 N.Y.S.2d 889 (2nd Dept.2012); *Cusumano v. Cusumano,* 96 A.D.3d 988, 989, 947 N.Y.S.2d 175 (2nd Dept.2012); *Matter of Gebaide v. McGoldrick,* 74 A.D.3d 966, 901 N.Y.S.2d 857 (2nd Dept.2010).

Preliminarily, although the court is not bound to accept a party's representation of its finances, goes the argument for imputing income, it is equally true that the burden is on the party encouraging imputation to prove that income should be imputed.

Practically speaking, an on-the-books salaried store manager making $65,000.00 a year who has worked for the same mom and pop store for the last eight years would have a much easier time finding employment at similar or higher pay scales than a stay-at-home mom with a masters' degree who spent the last eight years raising the children. Yet when the court's initial view is that even the homemaker wife can earn $45,000.00 a year (despite being out of the workforce for nigh a decade), it can be extraordinarily hard to overcome that improper burden shift: in other words, convince the court that it is the other side that *first has to prove* the wife's ability to earn, rather than merely say so.

Part and parcel of such proof would be one's employment history, general life experience, educational background, volunteer experience, and, oddly enough the circle of friends and relatives one surrounds themselves with. This is where holding yourself out online that you are the founding partner of a defunct non-profit, or calling yourself "Dr." because you obtained an online degree in leadership in your LinkedIn profile, for example, can have dire evidentiary consequences. Posting pictures on Instagram with oversized magnums of champagne? Again, evidence that your finances are rose-ier (forgive the pun) than they appear.

The standard of proof is not high — preponderance of the evidence, but it is a standard. A showing, therefore, must and should be made that the party upon whom additional income is sought to be imputed (especially where that party is the non-monied spouse otherwise eligible for maintenance) is indeed capable of earning more by the party urging such an imputation. *Ipse dixit* proofs of this should not be countenanced until, at least, the Legislature once more amends the statute to do away with maintenance entirely.

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