Modifying Maintenance and the Minotaur's Lair

By Vesselin Mitev

Your client, a voluble gentleman who says his "t's" like "d's" and talks more with his hands rather than his mouth, impresses upon you two pertinent facts: He swears that he will do jail time rather than watch his ex-wife live in the house he built with "dese doo hands" with her new boyfriend, and although she has been the stay-at-home mom for the entirety of the couple's 15-year marriage, he knows that she has been named the executor of her miser father's multi-million dollar estate, and said father is not doing too well lately, God help him.

Also, while you're at it, he wants the divorce wrapped up yesterday, because he has a new girlfriend who is advising him that her best friend's sister's cousin, who lives in another state, was in his exact same spot and ended up paying no maintenance, and his divorce took only three months, and he got the kids too.

Since anecdotes are the opposite of data, and you are a seasoned, knowledgeable lawyer who goes to the Tippins update *and* does CLEs, you let this wave of nonsense wash over you, grit your teeth, and steadfastly go about your business, as Hercules handled his Seventh Labor.

Doing your best to balance your client's irreconcilable postures, you manage to settle the case, convincing him to pay maintenance at a certain amount (with the requisite girlfriend premium added on, of course) and with the parties agreeing that the house will be sold upon the last child's high school graduation or turning 18, whichever is earlier; you tell your client that he will have to deal with the boyfriend living in said house, quietly pointing out that he has moved in with his (much younger) girlfriend, whose online hemp-based pet clothes boutique is sure to be the next big thing, if she can only find the necessary investors.

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Five months after the divorce judgment is issued, you get a call from your client telling you that his ex-wife's father kicked the bucket, and he knows that she is about to become a multi-millionaire. He wants, in no uncertain terms, to cut his maintenance payments off in full, and while you're at it, you should ask the judge for maintenance for him as well, since online hemp-based pet clothes boutiques are not the game changer we all thought they were.

Chin in hand, you briefly consider changing careers, before remembering that like child support, no matter what you agreed to, maintenance can also be reviewed and modified by a court.

Of course, like in (some) child support matters, the standard of review differs, based on the circumstances of how that maintenance award came to be. DRL 236 B(9)(b)(1) provides, in relevant part, that:

Upon application by either party, the court may annul or modify any prior order or judgment made after trial as to maintenance, upon a showing of the payee's inability to be self-supporting or upon a showing of a substantial change in circumstance, including financial hardship or upon actual full or partial retirement of the payor if the retirement results in a substantial change in financial circumstances. Where, after the effective date of this part, an agreement remains in force, no modification of an order or judgment incorporating the terms of said agreement shall be made as to maintenance without a showing of extreme hardship on either party, in which event the judgment or order as modified shall supersede the terms of the prior agreement and judgment for such period of time and under such circumstances as the court determines.

Self-evidently, then two different standards apply; if the case was settled by agreement, the nigh-impossible "extreme hardship" standard is invoked, under the rubric that a party chooses its litigation course but must remain bound by it, and is deemed to have anticipated the benefits and obligations of its bargain.

If the maintenance award was made after a trial, the much lower standard of "substantial change" in financial circumstances governs. Parenthetically, the standard of post-judgment review of a maintenance award may be one of the factors that is least discussed with clients when deciding whether or not to go to trial, and as it turns out, should probably get much higher billing. *Ceteris paribus*, if you represent the monied client and the settlement talks are stalled over maintenance, the right call is probably to try the case, on the basis of this lower standard alone, especially if your client is approaching retirement age, or if the guideline maintenance factor length will place him or her in retirement during its pendency.

Last month, in *Schwartz v. Schwartz*, 201874/05, the Appellate Division, Second Department, applied the foregoing in a case where the wife had inherited between $15 and $20 million from her late father's estate. The reversal of the lower court is worth reading, but the most notable part of the decision is what it does not say: had the parties resolved their differences by settlement, rather than trial, the ex-wife's inheritance of a whopping $15 million would not have made an iota of difference in the ex-husband's application to terminate his maintenance, since her inheriting a fortune would have no impact on whether or not the husband's maintenance payments were an "extreme hardship;" or, in layman's terms, the rich (would have) gotten richer.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 percent devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.