

## Propping Up a Proper Pendente Lite Application

By Vesselin Mitev

With *pendente lite* (not a level of cooked pasta, oddly enough) support applications now almost entirely mathematical and formulaic, little is left in the way of imagination or creativity to attempt to either gin up a request for more support or to definitively oppose one that would propel the motion into the Venn diagram of the art of practicing the science of law.

Yet this “plug-and-chug” approach, prosaic as it may be, can certainly ensure that your client receives the most bang for their buck under the law; likewise, in defending an application for support, merely ticking off the

factors unaddressed by your adversary is a sound tactic for whittling down the final number.

The factors are set forth herein; you can cut this out and paste it next to your computer, if you finally decide to join the small yet growing legion of practitioners who are apparently just winging it and get up the courage to pull the plug on that Westlaw subscription (I know two, personally, DM me for details):

“h. (1) The court shall order the guideline amount of temporary maintenance up to the income cap in accordance with paragraph c of this subdivision, unless the court finds



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that the guideline amount of temporary maintenance is unjust or inappropriate, which finding shall be based upon consideration of any one or more of the following factors, and adjusts the guideline amount of temporary maintenance accordingly based upon such consideration:

- (a) the age and health of the parties;
- (b) the present or future earning capacity of the parties, including a history of limited participation in the workforce;
- (c) the need of one party to incur education or training expenses;

(d) the termination of a child support award during the pendency of the temporary maintenance award when the calculation of temporary maintenance was based upon child support being awarded and which resulted in a maintenance award lower than it would have been had child support not been awarded;

(e) the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration;

(f) the existence and duration of a pre-marital joint household or a pre-divorce separate household;

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(g) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;

(h) the availability and cost of medical insurance for the parties;

(i) the care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity;

(j) the tax consequences to each party;

(k) the standard of living of the parties established during the marriage;

(l) the reduced or lost earning capacity of the payee as a result of having forgone or delayed education, training, employment or career opportunities during the marriage; and

(m) any other factor which the court shall expressly find to be just and proper." See Domestic Relations Law § 236(b)(5-a) *et seq.*

The most often unaddressed factors (anecdotal) are (i), (j) – this is a killer, in my opinion, since as of Jan. 1, 2019, spou-

sal maintenance is no longer a tax break to the paying spouse or taxable to the receiving spouse and not addressing this factor in a pendente lite application would be harmful if not fatal; (k) because of its apparent overlap with (f) and (c), with respect to training expenses.

Self-evidently, these factors are guideposts for the court to check off in rendering a comprehensive *pendente lite* decision; but for those that don't apply, a well-done application should simply state: "n/a;" or "none."

Strained attempts to fit a square peg into a round hole by trying to wedge in a factor if the facts do not support it do little more than annoy the court's confidential law secretary who is trying to work their way through the tomes of similar requests for relief obscuring their view into the outside world.

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