FAMILY

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.


Vesselin Mitev

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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REAL ESTATE

Real Estate Attorneys Don't Work for Brokers

By Andrew Lieb

In yet another reminder that a transactional real estate attorney works for the buyer or seller, not the real estate brokers who referred the deal, the New York State Bar Association Committee on Professional Ethics has issued Ethics Opinion 1161. Now, attorneys are ethically prohibited from providing a copy of the contract of sale to the referring broker as a matter of course. Instead, attorneys may only provide the broker with a copy of the contract of sale after obtaining their client's informed consent.

In reaching the opinion, the committee looked to Rule 1.6(a) and found that a contract of sale constitutes "confidential information." However, the opinion plainly admits that this finding is only based upon an assumption ("we assume that the sale contract is confidential information"). Further, nowhere, throughout the four-corners of the opinion, is there any actual analysis of why this assumption is made beyond a restatement of the three-prong definition of confidential information found in the ethics Rule, to wit: "(a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested to be kept confidential." In analyzing whether a contract of sale meets the definition, prong (a) is plainly inapplicable as the contract was shared with a third-party, the opposing counsel, and therefore privilege was waived. *See* CPLR §4503. Additionally, prong (c) requires an affirmative act by the client, a request that does not always occur, and as such, this cannot form the general basis for an axiomatic rule. As such, we are left with prong (b), which appears to be the basis for the rule that a contract of sale constitutes "confidential information." Prong (b) forms a logical basis and is alluded to in the opinion where it expressly declines "to speculate here whether a dispute over the broker's fee is latent in the broker's request for the real estate contract" and observes "that this potential may be part of a lawyer's duty to meet the adequacy test of disclosure under Rule 1.0(j)." To explore these points, case law provides that sharing the contract is detrimental to a client who disputes a brokerage commission because the standard indemnification provision contained in such a contract of sale,


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which identifies the brokers, has been held in the Second Department to be dispositive, as a matter of law, to establish that such brokers are entitled to receive commission. *See Halstead Brooklyn, LLC v. 96-98 Baltic, LLC*, 49 A.D.3d 602 (2d Dept. 2008). Therefore, the opinion that a contract of sale constitutes "confidential information" is supported by law, albeit law that is not clearly set forth in the Opinion.

As a contract of sale legitimately constitutes "confidential information," we are reminded by the opinion that an attorney "shall not knowingly reveal" such contract without their client's "informed consent." In fact, the Ethics Opinion provides that "[t]he adequacy of informed consent depends on the facts and circumstances of each case" and reminds counsel that "'[t]he extent of the information needed and the risks to be addressed will vary both with the nature of the information being disclosed and the sophistication' of the client." As such, a boilerplate client authorization in a retainer agreement or the like, will not suffice to satisfy an attorneys' ethical obligations unless it is designed for the most unsophisticated of clients with the largest relationship possible between attorney and broker disclosed. As such, a broad disclosure is suggested to counsel. Such a disclosure may be written as follows:

> By executing this informed consent letter, you affirmatively authorize this law firm to provide the real estate brokers who worked on the deal with a copy of [choose appropriate item: the lease / contract of sale] concerning the property subject to our representation. You acknowledge that you have been informed of the consequences associated with providing such consent, including but not limited to, waiving your rights to such confidential information, which means, accordingly to Rule 1.6 of the Rules of Professional Conduct (i.e., attorneys' ethics rules), that such information is protected by the attorney-client privilege, that such information is likely to be embarrassing or detrimental to you if disclosed, or that such information was otherwise requested by you to be kept confidential by your attorney. Please understand that no positive legal benefit flows to you from sharing this

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New SEQRA Amendments (Continued from page 12)

an additional hurdle for developers and property owners alike.

Revisions to scoping

The amendments have also added new scoping requirements. While scoping was previously optional, the amendments now make it *mandatory* for all EIS.[18] The regulations previously required the lead agency to list the prominent issues raised during scoping that were determined to not be relevant or environmentally significant. Under the amendments, the final scope must *also* provide a brief description of the prominent issues *considered* and provide reasons why those issues *were not* included in the final scope.[19]

Revisions to publication requirements

In an effort to make the SEQRA process more transparent, the DEC has added a requirement that all draft and final scopes and EIS's be published and remain on a publicly available website for at least one year after all necessary permits have been issued.[20]

Take away

The DEC has made efforts to modernize the SEQRA process and make it more transparent. Most notably, the amendments have expanded on the list of Type II actions with a goal of encouraging "green" building and reducing waste. Developers will now benefit from the new list of projects that are no longer subject to SEQRA review. However, where actions are considered Type I or Unlisted and have received a Positive Declaration, the process will become more onerous, and now include mandatory scoping.

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[1] *See* State Environmental Quality Review Act Findings Statement for Amendments to 6 NYCRR Part 617 ("Findings Statement") (2018) at 1, *available at* https://www.dec.ny.gov/docs/permits_ej_operations_pdf/617fnlfindings.pdf.
[2] 6 NYCRR § 617.5(c)(18).
[3] 6 NYCRR § 617.5(c)(2).
[4] 6 NYCRR § 617.5(c)(3).
[5] 6 NYCRR § 617.2(r).
[6] *See* Finding Statement, at 10.
[7] 6 NYCRR § 617.5(c)(11).
[8] 6 NYCRR § 617.5(c)(40).
[9] 6 NYCRR § 617.5(c)(16).
[10] 6 NYCRR § 617.5(c)(7).
[11] 6 NYCRR § 617.5(c)(14).
[12] 6 NYCRR § 617.5(c)(15).
[13] 6 NYCRR § 617.4(b)(5)(iii)(iv) & (v).
[14] 6 NYCRR § 617.5(4)(b)(iii) & (iv).
[15] 6 NYCRR § 617.4(b)(9).
[16] Findings Statement, at 7.
[17] *Id.* at 6.
[18] 6 NYCRR § 617.8(a).
[19] 6 NYCRR § 617.8(e)(7).
[20] 6 NYCRR 617.12(c)(5).

Compliment Not a Compliment (Continued from page 3)

poses should be discussed with your client. This new law affects all employers, whether one or one thousand employees which makes for a wide-reaching effect on all clients. If employees are permitted to do an "on line" training, proper certification needs to be made part of the employee's personnel file. Demonstrating compliance as a preventative measure while implementing disciplinary or corrective action taken in response to a sexual harassment claim may afford the Employer an affirmative defense. Counsel would be wise to review the NYS materials and develop a training protocol, compliant with the statute. As our clients may not be aware of the intricacies of compliance, annual training can be another way to promote additional legal services.

Fifth, a review of employer hierarchy, particularly supervisor and manager positions, should be conducted to educate affected personnel on their increased responsibility and mandatory reporting requirements. As the new law raises the standard for anti-harassment for supervisors and managers, job descriptions and titles should be evaluated.

On a more proactive note, does counsel now caution employers that policies on "dress code," "office parties," "outside travel with co-workers" and other run of the mill business concerns need to be addressed. Should companies maintain an anti-dating policy amongst employees ?

While some of us may not remember the famous bottled water delivery commercial where the "handsome" delivery guy comes in to deliver water only to be "eyed up and down" by the office secretaries or the copier commercial where the repair man, who looks like "Fabio," is constantly being summoned to clear a simple paper jam, sexual sensitivity in the workplace has reached new statutory heights.

Do I dear let my secretary know her new hair cut looks great or that she looks nice in that new dress ? After all, one person's compliment can be another's harassment.

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See NYS Labor Law section 201-G for reiteration of specific policy standards

Excessive Fines Clause (Continued from page 21)

have been dismissed, defendants have violated the Eighth Amendment's prohibition upon excessive fines in comparison to the accused actions." In acknowledging the applicability of the Excessive Fines Clause, Judge Bianco noted that this decision was based upon the allegations and not the argument that the fine was unconstitutionally excessive or disproportionate.

Long Islanders regularly feel increasing government fines, from recording a deed to fines associated with routine traffic matters. "The misuse of the forfeiture statutes has become epidemic among local and state police departments. Too often, it leads to baroque corruption, and it also functions as a backdoor way to fund basic services in municipalities that don't have the guts to ask their citizens for tax increases."[10] In *Timbs,* it was argued that the car in rural Indiana was "incidental not instrumental" to the sale of drugs. Where the incorporation of the Second Amendment to the states has recently led to a Federal District Court declaring that the nunchaku ban is void as violative of the Second Amendment,[11] perhaps we will see the regular forfeiture of vehicles in driving while intoxicated cases, the taking of expensive phones, the doubling and tripling of traffic fines or the threat of daily fines offered by municipal entities be addressed in the years to come.

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[1] *Harmelin* v. *Michigan*, 111 S.Ct. 2680, 2693 n. 9 (1991) (J. Scalia)
[2] *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3035, fn. 13 (2010) (citing *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276, n. 22, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989) ("*Browning-Ferris*").
[3] German Lopez, *Why the US Supreme Court's new ruling on excessive fines is a big deal*, VOX (February 20, 2019), https://www.vox.com/policy-and-politics/2019/2/20/18233245/supreme-court-timbs-v-indiana-ruling-excessive-fines-civil-forfeiture.
[4] Jason Snead and Elizabeth Slattery, *Supreme Court's 9-0 Ruling Protects Americans Against Excessive Fines*, The Daily Signal (February 21, 2019), https://www.dailysignal.com/2019/02/21/supreme-courts-9-0-ruling-protects-americans-against-excessive-fines/.
[5] *United States* v. *Bajakajian*, 524 U.S. 321, 355 (1998) (J. Kennedy Dissenting) ("*Bajakajian*") (citations omitted).
[6] *Austin v. United States*, 509 U.S. 602, 609–610 (1993) (emphasis deleted).
[7] *Id.* at 610 (quoting *United States* v. *Halper*, 490 U.S. 435, 447–48 (1989).
[8] *Solem* v. *Helm*, 463 U.S. 277, 290–92, 103 S.Ct. 3001, 3010-11, 77 L.Ed.2d 637 (1983).
[9] *United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (quoting *Austin v. United States*, 509 U.S. 602, 609-10 (1993)).
[10] Charles P. Pierce, *The Supreme Court Just Stopped Local Sheriffs From Carjacking to Pay the Bills*, Esquire (February 20, 2019), https://www.esquire.com/news-politics/politics/a26433271/supreme-court-civil-asset-forfeiture-timbs-v-indiana/.
[11] *Maloney v. Singas*, No. 03-CV-786 (PKC)(AYS) (E.D.N.Y. Dec. 14, 2018).

Real Estate Attorneys (Continued from page 17)

document with the real estate brokers and the brokers may, in fact, leverage the document to your detriment should you dispute their right to a commission on the brokerage of the transaction. You further acknowledge that this law firm has not exerted any undue pressure or influence to cause you to consent and that this law firm has, in fact, offered you the option that we not disclose the document to the real estate brokers, which you have rejected. Lastly, it is disclosed that this law firm has previously collaborated with and/or represented certain real estate brokers who are participating in this transaction and may continue to collaborate and/or represent with such real estate brokers both during and after the conclusion of our representation of you as there is no significant risk that this law firm's professional judgment on behalf of you will be adversely affected by our own financial, business, property or other personal interests. In such, you give your informed consent, confirmed in writing as follows:

While it is believed that this sample disclosure satisfies the Ethics Opinion, a question left open by the opinion is if the same consent would satisfy the attorneys' ethics requirements as to sharing a contract of sale with a real estate broker who either represents the opposing transacting party or has waived conflicts of interest (i.e., dual agency or dual agency with designated sales agent). The reason for this open question is that the opinion is limited to "the client's real estate broker." Perhaps, a second opinion is necessary on this topic with respect to adverse brokers.

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