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DRL Contempt Legislation: A Silver Lining For The Payor-Spouse?

Last year, Governor Cuomo signed into law legislation, which became effective September 30, 2016, amending Domestic Relations Law (DRL) § 245, eliminating the require-



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ment that other enforcement remedies be exhausted before contempt would be found against the individual who fails to pay child support, spousal support, or a combination of both, pursuant to a court order in a supreme court matrimonial action. Significantly, the amended legislation applies to pendente lite support orders. Equally significant, the inability to pay continues to be a defense to a finding of contempt.

While on its face, the amended legislation appears to favor only the payee-spouse who brought the pendente lite motion to obtain court-ordered support, the new legislation is potentially a silver lining for the payor-spouse. Consider, for example, a pendente lite order that treats the pay-

or-spouse harshly based upon allegations of imputed income, directing the payor to pay beyond his or her actual ability to pay the sums required. As a result, the payor does not comply with the pendente lite order. Consequently, the payee's counsel considers options for enforcement, an application for contempt among them, while payor's counsel considers options for modification of the pendente lite order.

It is well and long-established that any perceived inequities in a pendente lite order are best remedied by a speedy trial, at which the parties' financial circumstances can be thoroughly explored.¹ As a result, modifications of pendente lite support awards are rarely made, and then only under exigent circumstances.² Accordingly, a payor-spouse ordered to pay pendente lite support based upon imputed income, for instance, is very often caught between the proverbial rock and a hard place; namely, being financially unable to pay the ordered support but legally unable to obtain a modification of the pendente lite order pending the divorce action.

This conundrum is exacerbated by the fact that any support arrears which may accrue as a result of the payor-spouse's inability to pay the ordered pendente lite support obligation may not be forgiven by the court. The New York State Support Amendment Act amended the DRL and the Family Court Act to prohibit courts from reducing or cancelling any child support arrears which have accrued.³ The purpose of these revisions was to ensure that the parent obligated to pay child support pur-

suant to an order or judgment is "not financially rewarded for failing either to pay the order or to seek its modification."⁴

Where, in the amended DRL legislation which provides advantage to the payee by removing the requirement that other enforcement remedies be exhausted before contempt be sought, is the silver lining for the payor? It lies in the payor's defense. In order to form the basis for a contempt commitment, an applicant must establish, by clear and convincing evidence, that there was a willful violation of a prior court order.⁵ Indeed, a commitment for contempt has been held to be unwarranted in light of a clear demonstration of present financial inability to make ordered support payments.⁶

Significantly, the Appellate Division has held that even where there is evidence that a payor had the money to pay ordered support but refused to do so, the issue of the payor's ability to pay is a crucial issue that must be explored in depth.⁷ The appellate courts have thus held that adjudging a party in contempt without a hearing on the issue of willfulness is improper.⁸

The amended legislation does not obviate the need, as has been established by case law, to conduct a hearing on the issue of willfulness before adjudging the payor-spouse in contempt. This hearing on the issue of willfulness, that is, the ability of the payor-spouse to pay the ordered support, is the very hearing that is not otherwise available to the payor spouse to challenge and modify an onerous pendente lite support order. This hearing, oth-

erwise unavailable, now opens the door for the payor-spouse to seek modification of the pendente lite order.

While the new legislation had every intention of providing an easier path to enforcement for the payee-spouse, in practice, it may have done more to help the payor-spouse. How else would the payor obtain a review and modification of an unfair and onerous pendente lite support order?

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1. *Conyca v. Conyca*, 81 A.D.3d 869 (2d Dept. 2011).

2. *Malik v. Malik*, 66 A.D.3d 968 (2d Dept. 2009).

3. *Dox v. Tynon*, 90 N.Y.2d 166 (1997).

4. 90 N.Y.2d at 173, quoting Memorandum from Governor Mario Cuomo approving NYS Support Enforcement Act of 1986, reprinted in NY Legis. Ann., at 361 (1986).

5. *Matter of Schmerer v. McElroy*, 105 A.D.2d 840 (2d Dept. 1984); *Farmer v. Farmer*, 123 Misc.2d 298 (Fam. Ct., N.Y. Co. 1984).

6. *Alvarado v. Dungee*, 128 A.D.2d 519 (2d Dept. 1987).

7. *Abbondola v. Abbondola*, 40 A.D.2d 976 (2d Dept. 1972), citing *Whitener v. Whitener*, 37 A.D.2d 979 (2d Dept. 1971).

8. See *Boritzer v. Boritzer*, 137 A.D.2d 477 (2d Dept. 1988); *Rogers v. Rogers*, 94 A.D.2d 764 (2d Dept. 1983), *lv denied sub nom. Elizabeth R. v. John R.*, 63 N.Y.2d 604 (1984); *Pirrota v. Pirrota*, 42 A.D.2d 715 (2d Dept. 1973).