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**TIME TO EFFECTIVELY PENALIZE FAILURE TO
DISCLOSE ASSETS**

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On July 31, 2001, the front page of the New York Law Journal heralded: "Doctor Forfeits Pension Account in Divorce Case," reporting on the ruling in *Ayuyao v. Ayuyao* [FN1], and the outwardly tough penalty imposed by Justice Jacqueline Silbermann upon a discovery-recalcitrant ex-husband.

The disclosure-disobedient Dr. Ayuyao was ordered to surrender his entire known pension account, valued at some \$400,000. One-half of that amount was to go directly to Mrs. Ayuyao for equitable distribution, and the other half was to be held in escrow for various other expenses, including the cost of obtaining whatever additional financial documentation Mrs. Ayuyao needed that Dr. Ayuyao had failed to provide.

Upon closer look, however, this was but a Pyrrhic victory for Mrs. Ayuyao. In forfeiting a mere \$400,000, Dr. Ayuyao, a wealthy surgeon who admittedly earned in excess of \$250,000 annually (and in all likelihood earned in excess of \$500,000 annually) succeeded in keeping his financial information out of view, hiding perhaps more than Mrs. Ayuyao could ever have proven, and providing a "how to" for others looking to avoid the production of the records and information necessary to produce the most accurate valuation of the assets in issue.

Realistically, what more or else could the court have done given the available statutory and judicial penalties afforded and prescribed in CPLR 3126?

Matrimonial lawyers are constantly confronted with this question, in the face of the subtle and not so subtle failures of parties to disclose the financial information of a marriage that is the core of the equitable distribution process. For the non-titled dependent spouses, acquiring the financial information needed to uphold their burden of proof and establish both their interest in the property and its value remains an uphill battle. Punishment for the noncompliant spouse is seldom swift or satisfactory.

A survey of recent decisions indicates a greater inclination of the courts to mete out

sterner remedial measures than in the past, but reveals that such remedial measures are applied without consistency and without producing the intended results.

It is time to give the courts the ammunition necessary to more effectively encourage marital litigants to comply with their financial disclosure obligations by more effectively penalizing those who fail to fully and timely disclose the extent of their assets.

A model for such a system can be found in Chapter 68 of the Internal Revenue Code, which sets forth a system of fixed and formulaic penalties for abusers who fail to comply with their obligations under the tax law through late filings, failure to file, failure to pay, inaccurate reporting and other fraudulent behavior. A system of penalties similar to those set forth in Chapter 68 could be adapted to enable the courts to more effectively encourage litigants to comply with their disclosure obligations under Domestic Relations Law 236B.

Where Noncompliance Is Rewarded

With the enactment of DRL 236B and the numerous cases interpreting the legislation, beginning with Roussos v. Roussos, 106 Misc. 2d 583, 434 N.Y.S.2d 600 (Sup. Ct. Queens Co., 1980), the perception and treatment of marriage as an "economic partnership" was supposedly thrust into modernity. In the "undiscover'd country" [FN2] of equitable distribution, compulsory financial disclosure on an expansive and liberal basis was the order - deemed critical both to aid in proper trial preparation and to assist the court in making the detailed findings required by the statute. [FN3]

A "searching exploration" for assets was the new order of the day, enabling litigants to crawl into all the financial nooks and crannies of their marriages, places where they in all likelihood never deigned to go before. The goal was to uncover and quantify the extent of "marital property" and "separate property," and to expose hidden assets, potential waste and any other information that could bear on the financial issues to be determined by the court. [FN4]

In actuality, however, the path to discovery nirvana rarely proved to be a smooth one. Pitfalls and roadblocks lurked around every corner as the discovery process wended its way toward trial. Net worth statements, the preliminary step in that process, frequently were intentionally or negligently crafted bastions of incompleteness - possibly correct for a fleeting moment in time, a moment that could be recreated only with great effort and at considerable expense. [FN5] Interrogatories languished unanswered; document production requests were ignored in whole or in part; and depositions were adjourned ad nauseum.

Under the promise of the new regime as mandated by DRL 236B(4), the punishment for discovery transgressions was to be found in any or all of the punishments prescribed in CPLR 3126. [FN6]

The Legislature, in offering up the double-barreled interplay of DRL 236(B)(4) and CPLR 3126, afforded courts a triumvirate of non-exclusive, prescribed punishments for nondisclosure. The variety of penalties was intended to enable the courts to impose the punishment most commensurate with the particular disobedience; allowing the sanctioning of

any party who "willfully fails to disclose information which the court finds ought to have been disclosed." CPLR 3126.

The enumerated penalties can best be summed up as: (i) issue resolution (CPLR 3126(1)); (ii) evidentiary preclusion (CPLR 3126(2)); and (iii) stay, dismissal or default of the action (CPLR 3126(3)). [FN7] Additional penalties tacitly provided in the statute encouraged courts to "make such orders with regard to the failure or refusal as are just ... " and include contempt, [FN8] criminal prosecution [FN9] and the imposition of legal fees, costs and sanctions. [FN10]

Do Sanctions Really Hurt?

Issue resolution is often the first step (and perhaps the least serious sanction) in redressing discovery violations. Invoking this remedy permits a court to resolve the factual disputes against the spouse who refuses to provide requested discovery, based on the theory that the motive for failure to provide the required information is that it favors the other spouse's position. [FN11]

Next, the court may choose to look to evidentiary preclusion; an order of evidentiary preclusion prohibits the right to present evidence on the financial issues to be litigated. The effects of this sanction can be seen in the cases of *Miller v. Miller*, 2002 N.Y. App. Div. 5838 (2002), *Perell v. Krause*, 277 A.D.2d 213, 715 N.Y.S.2d 653 (2d Dept. 2000), *Pearl v. Pearl*, 266 A.D.2d 366, 698 N.Y.S.2d 160 (2d Dept. 1999); *Robustelli v. Robustelli*, 262 A.D.2d 390, 691 N.Y.S.2d 159 (2d Dept. 1999); *Maillard v. Maillard*, 243 A.D.2d 448, 663 N.Y.S.2d 67 (2d Dept. 1997); and *Cohen v. Cohen*, 228 A.D.2d 961, 644 N.Y.S.2d 831 (3d Dept. 1996), all of which precluded the disobedient party from producing evidence or witnesses supporting their financial issues at trial.

The most severe enunciated sanction for discovery violations empowers the court to strike the guilty spouse's pleading and enter a default judgment. This sanction is deemed appropriate in cases of persistent disclosure defiance over an extended period of time. [FN12]

Clearly, the goal is to prevent the non-compliant spouse from exploiting or benefiting from the unavailability of the proof in question. [FN13]

The goal intended to be fostered by the imposition of these penalties is not being met. Litigants are still managing to hide assets, thereby avoiding equitable distribution.

Generally, the party seeking to obtain an interest in the property held by the other spouse has the burden of establishing his or her entitlement to an interest in that property, as well as its value. [FN14] More often than not, this means that the party with the least resources and the least information about the assets of the marriage bears the most difficult burden of locating, corroborating and substantiating an asset and its value [FN15] - as in the case of Mrs. Ayuyao.

Under the current law, even if a party is precluded from presenting evidence regarding his or her interest in property in issue, he or she is still permitted to cross-examine the other

spouse's witnesses. E.g., Grande v. Grande, 129 A.D.2d 612, 514 N.Y.S.2d 250 (2d Dept. 1987). Consequently, the recalcitrant spouse may actually be rewarded for impeding the discovery process - enabling that spouse to suppress information, secrete the very property in issue and dissipate marital assets with impunity - leaving the court to divide property without full financial information. Miceli v. Miceli, 233 A.D.2d 372, 650 N.Y.S.2d 241 (2d Dept. 1996).

Currently, monetary sanctions on the noncooperating party are limited to the actual and reasonable expenses incurred by the pursuing spouse. Courts seem hamstrung by the general belief that the punishment need address only the particular disobedience, without considering the likelihood that a leopard is unlikely to change his or her spots. As such, prophylactic sanctions based on past conduct should be considered part of any punishment scheme.

Fortunately, CPLR 3126 is but a beginning. It is neither restrictive nor immutable and, in and of itself, encourages the court to shape a punishment appropriate to the misbehavior.

Adapting IRC Approach

Constructing a penalty suitable to the disclosure disobedience it seeks to forestall requires the balancing of three elements: (1) timeliness in response; (2) good faith effort in execution [FN16] ; and (3) cumulative financial penalties for repeated violations, in either a fixed amount or according to a pre-determined formula. The approaches adopted in Chapter 68 of the Internal Revenue Code are easily adaptable to the DRL, as follows.

Failure-to-file penalty. The failure to file a return when due (including extensions), subjects the party to a penalty of 5 percent of the tax not paid by the due date for each month or part of a late month. This penalty cannot be more than 25 percent of the tax due.

Suggested DRL Adaptation: The failure to respond in a timely fashion to any discovery demand when due (including extensions), subjects the party to a penalty resulting in the forfeiture of an additional sum equal to 5 - 25 percent of the finally determined total amount of marital assets.

Penalty for frivolous return. A penalty of \$500 is imposed for the filing of a return that does not include enough information to figure the correct tax or shows an incorrect tax amount due to: a frivolous position taken or a desire to delay or interfere with the administration of the federal income tax laws.

Suggested DRL Adaptation: The forfeiture of an additional fixed percentage of the finally determined total amount of marital assets shall be imposed for the filing, or production, of documents the purpose of which is to delay or interfere with discovery.

Accuracy-related penalty. An accuracy-related penalty of 20 percent applies to any underpayment of tax due to negligence or disregard of rules or regulations or the substantial understatement of income tax.

Suggested DRL Adaptation: A party shall be subject to a penalty equaling 20 percent

beyond the under disclosure for negligence or intentional disregard of the rules. The term "negligence" includes any failure to make a reasonable attempt to comply with an appropriate discovery demand, and the term "disregard" includes any careless, reckless, or intentional disregard.

Fraud-related penalty. If the taxpayer's actions involved destruction of records, concealment, or lies, he or she will be liable for 75 percent of the portion of the underpayment that is attributable to civil fraud.

Suggested DRL Adaptation: The wrongdoing spouse will be subject to a penalty equaling the forfeiture of an additional 75 percent of the value of the finally determined total amount of marital assets.

Maximum limits should of course apply to all penalties, combined penalties should be encouraged, and the courts specifically empowered to order a penalty equal to 100 percent added to the value of the asset in question - full forfeiture times two - for "evasion of" or "failure to" disclose that which the court finds should have been disclosed. [FN17]

Conclusion

It is time for an overhaul of disclosure penalties as they relate to matrimonial matters. Rules and penalties must be clear, consistent and uniformly applied, and they must be meaningful and in context. This means specific, unapologetic, financial penalties for the failure to timely disclose complete and accurate information.

FN1. 2001 NY Slip Op 40352U; 2001 N.Y. Misc. LEXIS 1013 (Decided July 25, 2001).

FN2. Hamlet III,i,56.

FN3. DRL 236(B)(4); Rubin v. Rubin, 87 A.D.2d 587, 447 N.Y.S.2d 762 (2d Dept. 1982); Ahern v. Ahern, 94 A.D.2d 53, 463 N.Y.S.2d 238 (2d Dept. 1983).

FN4. Roussos v. Roussos, 106 Misc. 2d 583, 434 N.Y.S.2d 600 (Sup. Ct. Queens Co., 1980).

FN5. The enactment of 22 NYCRR 130-1.1a purportedly has attempted to remedy this problem - though that is a discussion for another day.

FN6. Roussos, supra; and Cohen v. Cohen, 228 A.D. 2d 961, 644 N.Y.S. 2d 831 (3rd Dept. 1996).

FN7. CPLR 3126: 1. an order that issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

FN8. Braverman v. Braverman, 151 A.D.2d 713, 542 N.Y.S.2d 784 (2d Dept.1989); Kim v. Kim, 170 Misc. 2d 968, 652 N.Y.S.2d 694 (Sup. Ct. Suffolk Co. 1996).

FN9. People v. Russo, 124 Misc. 2d 438, 476 N.Y.S.2d 469 (Sup. Ct. Suffolk Co. 1984).

FN10. Demis v. Demis, 168 A.D.2d 840, 564 N.Y.S.2d 515, app dsmd without op. 78 N.Y.2d 1007, 575 N.Y.S.2d 458, 580 N.E.2d 1061 (\$3,500 sanction); See also, in contrast Kim v. Kim, supra (contempt plus a \$10,000 fine) and Cohen v. Cohen, 228 A.D.2d 961, 644 N.Y.S.2d 831 (3d Dept.. 1996), wherein the court imposed a 20 percent "penalty" which it added to the value of the disclosure-recalcitrant husband's business value - but was reversed on appeal.

FN11. See, e.g., Holmes v. Holmes, 151 A.D.2d 911, 542 N.Y.S.2d 884 (3d Dept. 1989); Richter v. Richter, 131 A.D.2d 453, 515 N.Y.S.2d 876 (2d Dept. 1987); Hubbard v. Hubbard, 113 Misc.2d 763, 449 N.Y.S.2d 899 (Sup. Ct., Suffolk Co. 1982).

FN12. Ryan v. Ryan, 177 A.D.2d 895, 576 N.Y.S.2d 655 (3d Dept. 1991); Fucci v. Fucci, 166 A.D.2d 551, 560 N.Y.S.2d 833 (2d Dept. 1990).

FN13. DiDomenico v. C & S. Aeromatik Supplies, Inc., 252 A.D. 2d 41, 682 N.Y.S.2d 452 (2d Dept. 1998).

FN14. Rodgers v. Rodgers, 98 A.D.2d 386, 470 N.Y.S.2d 401 (2d Dept. 1983), app dsmd 62 N.Y.2d 646, 476 N.Y.S.2d 1028 (1984); Ayuyao v. Ayuyao, 2001 NY Slip Op 40352U; 2001 N.Y. Misc. LEXIS 1013 (decided July 25, 2001).

FN15. Strecker v. Strecker, 124 Misc.2d 813, 477 N.Y.S.2d 531 (Sup. Ct. Dutchess Co. 1984).

FN16. Kihl v. Pfeffer, 94 N.Y.2d 118, 700 N.Y.S.2d 87 (1999).

FN17. As a result, the wrongdoer could be subject to penalties equal to several multiples of the total marital assets. The penalty assessed would be entered as a money judgment and subject to the payment and enforcement provisions of Articles 51 and 52 of CPLR.

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