

Accumulating Arrears and Pendente Lite Orders

By Vesselin Mitev

You've been retained to represent the monied husband (who just got done crying in your office that he has no money, and is going to be homeless if this keeps going on much longer) who drove to said office in a late model Audi).

You note he has had four prior lawyers, which should give you pause, but the lights don't keep themselves on, so you take a substantial retainer (which he claimed he borrowed from his poor mother) and get to work on the immediate problem — a contempt motion has been filed, seeking your new client's incarceration, for failure to pay \$65,000.00 in arrears, in a still-pending matrimonial, with an appearance two days hence. Your client advises that his income is being garnished and he therefore cannot understand why he would be in contempt, or so far in arrears.

Since you don't have the box from the last lawyer, and your client's understanding of what has transpired is murky at best, you decide to call your adversary to get the lay of the land. You are told, in a somewhat contemptuous tone (as if you didn't pay the arrears) by an adversary who was just admitted last year and still thinks in kind distribution was a 90's boy band, that your client is a deadbeat who is headed to jail, because the judge has had enough of his b.s. You agree that you will ask the judge for time to oppose the motion at the next court appearance since surprise, surprise, the prior lawyer did not put in answering papers.

At said court appearance, prepared for a lambasting, you sit quietly while your adversary rails about your client's contemptuous nose-thumbing at the



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court's *pendente lite* order, and his \$65,000.00 arrearage, ending with the zinger that your client must have the money since he hired you, yet chose not to feed his children but retain a fifth lawyer. The court then turns to you, all Cheshire cat in black robes, and invites your learned defense, whilst your client wilts beside you.

Thankfully, you've searched the court file prior to the appearance and have discovered that, for whatever reason, there has never been an actual *pendente lite* order, since the original *pendente lite* motion, which was commenced by order to show cause, has never been decided. Thus, all that exists is the initial order to show cause, which granted TRO relief, ex parte, in the form of a \$6,000.00 monthly support obligation (which is how your adversary has cal-

culated the "arrears" upon which he has filed his new contempt motion).

You begin by stating the obvious: If the *pendente lite* motion has never been decided, then the court has yet to rule upon the initial application, which is to decide whether or not any interim support is due; and if so, how much, especially since the TRO was issued by the Special Term Justice and not the justice the case is now assigned to.

You point out that the order to show cause, drafted by your luminary adversary itself states that your client was obligated to pay certain sums "pending the hearing and determination of this motion" — 'but the motion itself has never been heard, nor determined.

You point out further that the court is required to set forth the reasons *why* it issued a certain support order (and that has never been done because the motion it-

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self has never been decided, merely a TRO has been issued), and that, to use the absurd to illustrate the obvious, if the court determines upon the full submission of the *pendente lite* papers that your client's interim obligation is "0" then he would owe no arrears, and in fact be is entitled to a credit for the overpayments he has been making all along, a credit he would have to "offset" against any final support award that may be rendered.

Thus, as to the pending contempt mo-

tion, you argue, it is premature, since there has never been a decision on the underlying *pendente lite* application, which would set the benchmark for any *pendente lite* arrears. The TRO, which was granted ex parte, cannot be the arrearage aggregator, since it is subject, at all times, to a final *pendente lite* order that would set the parties' obligations and liabilities during the action. And, since the best remedy for any *pendente lite* inequity is a speedy trial, you point

out, the failure to decide the motion is unlawfully foreclosing your client's right to appeal.

The Cheshire cat grin has widened, as the court now looks at your adversary for a rebuttal of these salient legal points. Panicked, he starts rehashing his initial points, only to be politely cut off by the court, who reminds him that repetition does not strengthen an argument but weakens it. His client is now shooting daggers at him, and stalks out of the

court room. Your client appears on the verge of crocodile tears again, thanking you for keeping him out of jail.

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 % devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.