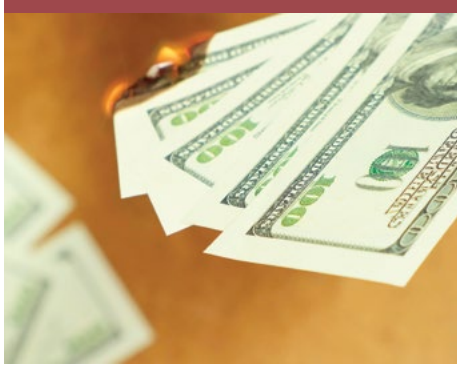
FOCUS:
MATRIMONIAL LAW

Stop Wasting Marital Savings on Interim Counsel Fee Applications



Peter J. Galasso

All too frequently, divorce actions veer off the tracks that would otherwise lead to an expeditious resolution. The reason is the conflict that often occurs over how the needy spouse's attorney will be paid during the pendency of the action.

The tension created by that single "process" issue is ordinarily grounded in the monied spouse's belief that it is counterintuitive to voluntarily supply ammunition to one's mortal enemy. This article seeks to point the matrimonial bar and the judiciary in the most pragmatically beneficial direction to solve this problem and thereby enable divorcing couples to reduce the cost of litigating while they focus on addressing their substantive issues.

Judicial Discretion Under DRL § 237

To combat the monied spouse's disinterest in getting the counsel fees of the non-monied spouse paid, Domestic Relations Law § 237(a) was amended in 2010 to purportedly ensure a level playing field in divorce litigation. Now the "less monied" is presumptively entitled to an award of interim counsel fees, though courts may address the situation as justice dictates:

> In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, pendente lite, so as to enable adequate representation from the commencement of the proceeding.

Despite the needy-spouse presumption, the myriad issues complicating the resolution of interim Section 237(a) applications were recently and ably summarized by the former Presiding Justice of the Second Department, Alan Scheinkman, in *Kaufman v. Kaufman*:

> A less-monied spouse should not be expected to exhaust or spend down a prospective or actual distributive award in order to pay counsel fees as the result of unreasonable or excessive litigation conduct by the adverse party. On the other hand, the more affluent spouse should not be treated as an open-ended checkbook expected to pay for exorbitant legal fees incurred by the less affluent spouse through excessive litigation or the assertion of unreasonable positions.[1]

Justice Scheinkman went on to explain that an "assessment of litigiousness" may even require a hearing, which would necessarily elongate the action and errantly grow the parties' counsel fees.

Although some commentators have suggested that the standard of proof required to entitle a needy spouse to an award of interim counsel fees should be limited to establishing the movant's inability to pay her own counsel fees and should not contemplate or permit an inquiry into the merits of the needy spouse's position,[2] decisions like *Kaufman* continue to support the converse notion.

Advantages of Interim Awards

While that debate rages on, other commentators have pointed to decisions of noted jurists like Monroe County's Justice Richard A. Dollinger's in *Kinney v. Kinney*.[3] Justice Dollinger reserved the right to reallocate fees after trial to ensure equitable distribution:

> This award still leaves the husband with a 'horse in the race'—his exposure to additional fees during the trial and *the potential for reallocation of fees against his interest after trial*—that should nose him—and his soon-to-be ex-wife (who faces the same choices)—closer to the finish line.[4]

Spending limited marital savings on interim attorney fee applications is commonly driven by the parties' displaced aggression. Clients see it as a fight where compromise constitutes capitulation. That is why judges who successfully discourage or avoid pendente lite motion practice under Section 237 deserve ample praise.

Augmenting the financial waste, interim counsel fee applications also tend to elevate the parties' temperature, as their attorneys meticulously craft derogatory passages about the other spouse in their supporting papers to justify an award. That move inevitably invites an even more vituperative response. This dance always represents a turn for the worse. In disbelief over an adverse decision, an irate and dissatisfied spouse may then choose to appeal or perhaps move to renew and reargue, all over the payment of the interim counsel fees. Indeed, the litigation cacophony stirred up over the payment of interim counsel fees can be literally deafening and must, therefore, be pragmatically and permanently silenced.

Rather than engage in motion practice to test a jurist's bent on the interim counsel fee issue, the best solution is for the court to take more proactive steps to avoid deciding interim counsel fee applications altogether. Judges could follow the lead taken by Special Referee John Montagnino in *Freihofner v. Freihofner*, where he awarded the wife an advance against her prospective equitable distribution pending resolution of who was ultimately responsible for litigation costs:

> It would be inappropriate at this time for the Court to make any comment with regard to who should ultimately be required to shoulder this burden. And so, as an accommodation, *the Court has made the instant directive that defendant advance certain monies in equitable distribution* in order to allow plaintiff to continue to be represented in this proceeding.[5]

The only problem with the Freihofner decision is that the Special Referee's non-decision was rendered in response to motion practice, rather than in lieu of motion practice. That problem can be easily remedied by a collaboration between counsel and the court to add language to the parties' preliminary conference order establishing a fund to pay the parties' counsel fees and forbidding interim counsel fee applications.

Planning Ahead in the Preliminary Conference Order

In most contested divorces, the Preliminary Conference is a critical but too often a neglected opportunity to prudently chart the trajectory of a case. At the Preliminary Conference, in addition to ensuring that the parties collaborate in maintaining the pre-commencement status quo, the parties must be instructed by the Court to identify the marital accounts to be used to pay the parties' counsel fees.

Pursuant to the Court's inherent power to advance the parties a portion of their equitable distribution to pay their own counsel fees,[6] the Court must then order that those funds remain segregated and be used to pay the counsel fees of both parties, subject to reallocation after trial. In that way, no nasty attorney fee motions will need to be made and no interlocutory appeals will need to be taken. At the end of the case, and after all the facts are in, the Court can decide whether one party should bear a portion of the other party's counsel fees, if the parties cannot otherwise agree.

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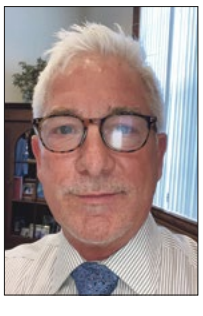

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Paving…

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virtual Town Hall meetings, wellness programs, and Continuing Legal Education and outreach programs on coping and survival skills. LAP has also increased the frequency of recovery meetings from monthly to weekly. These weekly virtual recovery meetings have been consistently well attended and have provided a safe and supportive place for attorneys in all stages of recovery. LAP has also increased its supportive services to law schools.

One of the tragic outcomes as a result of the pandemic is that many attorneys have found themselves unemployed or underemployed. In response, LAP has restarted its Un/Underemployed Support Group. This group is currently being held virtually at 6:00 P.M. on the second Tuesday of each month. This group provides support and guidance to attorneys struggling to find or maintain work as a lawyer. The Un/Underemployed Group provides an opportunity for attorneys to discuss their difficulties and support one another. LAP intends to gain feedback from group members to determine what additional assistance can be provided, e.g., LAP may invite attorneys to present to the group on topics like networking, resume writing, job searches, and transitions.

LAP is also happy to announce that Melissa Del Giudice, founder of Yoga for Health Long Island, will be facilitating LAP's Mindfulness Mondays series to begin April 12, 2021 at 6:00 P.M., and will run the second Monday of each month thereafter. Melissa participated in LAP's six-week Wellness Series last year and participants wanted more! Melissa will share her extensive knowledge of yoga, meditation, and mindfulness to teach participants how to increase feelings of well-being and resilience in their day-to-day lives.

Additionally, in honor of National Mental Health Month, LAP will hold a four-week Wellness Wednesday program. This program will be held each Wednesday at 6:00 P.M. during the month of May and will focus on wellness, mental health, stress reduction, increasing motivation and resilience, wellness, nutrition, and women's health.

The Lawyer Assistance Program has several programs available to lawyers, judges, law students, and their immediate family members. LAP Director Elizabeth Eckhardt provides individual, professional supportive counseling to help attorneys through difficult times. Dr. Eckhardt provides needs assessments to assist in determining what services are needed and can provide referrals to outside treatment for mental health and substance use services. In some cases, Dr. Eckhardt provides supportive counseling for just one session whereas others may see Dr. Eckhardt for up to 6 supportive counseling sessions. Lawyers often find it very difficult to reach out for help. Many attorneys see themselves as problem solvers and find it difficult to be the one with a problem. Sometimes speaking to another attorney who understands the unique challenges that attorneys face can be the very assistance they are looking for. The Lawyer Assistance Committee is the backbone of LAP, and committee members are dedicated to providing peer support to attorneys who struggle with substance use or mental health issues.

LAP is available to members and non-members of the NCBA. Many people do not know that LAP also provides assistance to family members of attorneys who may be struggling with a wellness issue, substance use disorder, or a mental health issue.

To date, LAP has helped thousands of attorneys. "The Lawyer Assistance Program has supported me throughout law school and my legal career. I took medical leave from law school to seek treatment for my alcoholism and drug addiction. When I got home and was faced with what came next, LAP was there for me. Through LAP, I met lawyers in recovery who helped guide me every step of the way—applying to restart law school, dealing with the stresses of law school and a legal career through my recovery, choosing when and how to disclose my story, submitting my character and fitness materials as part of my application for admission to the bar, and helping other law students and lawyers in recovery who I met both inside and outside of LAP. I've regularly attended LAP meetings since getting sober almost five years ago, and I would not be where I am today—clerking for a judge in the Southern District of New York, a job that previously was well beyond my wildest dreams—without the help of the LAP and its members."

Sometimes speaking to another attorney who understands the unique challenges that attorneys face, can be the very assistance they are looking for. The Lawyer Assistance Committee is the backbone of LAP, and committee members are dedicated to providing peer support to attorneys who struggle with substance use or mental health issues.

The rates of substance use, mental health issues, and even suicide are higher among attorneys than most other professions. LAP is committed to reaching out and educating members of the legal profession about why lawyers often struggle more than other professionals, and what services are available. LAP conducts presentations and workshops in large and small law firms, to solo practitioners, law schools, and legal departments. Programs can be tailored to Managing Partners and Human Resource departments to discuss topics such as how to address impairment, information about LAP's Attorney Monitoring Program, what to look for in an attorney struggling with substance use or mental health issues, and when and how to intervene. Other programs are directed to partners, associates, and staff and include information about mental health and substance use among lawyers, coping skills, resiliency, well-being, and information about LAP services.

To register for any of the previously mentioned LAP programs/services or for additional information, please contact Elizabeth Eckhardt at eeckhardt@nassaubar.org or (526) 512-2618.

Marital Savings…

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This pragmatic approach avoids depleting a good portion of the parties' savings on counterproductive motion practice, helps level the playing field for the needy spouse, and ensures that the totality of the parties' financial circumstances and the parties' conduct during the litigation can be assessed when the attorney fee issue is ultimately addressed. For all concerned, this is a win-win-win solution. The Court avoids wasting its valuable judicial resources deciding pendente lite motion practice over funding the parties' divorce, counsel for both parties get paid, and the parties' dramatically reduce their overall counsel fees.

The highly impractical and inherently unpredictable alternative to this approach has festered far too long in the matrimonial halls of justice. Consider the case of *Straub v. Straub*,[7] where now-retired Suffolk County Supreme Court Justice Carol Mackenzie, in response to motion practice, awarded the wife's attorney a whopping $5,000 in interim counsel fees. On appeal, that award was increased by over 1000% to $60,000. Unfortunately, the lower court's abuse of discretion probably cost the parties about $50,000 in additional counsel fees fighting over the lower court's shockingly stingy interim counsel fee award.

To avoid such chaos, the mantra of the court at every Preliminary Conference where the issue of interim counsel fees exists should be, "Show me the money." If it's there, it should be used to pay counsel fees.

As *Straub* illustrates, the variance in attitudes among the members of the bench over funding the needy spouse's representation can also act to prevent a truly level playing field from ever being achieved. By forcing divorcing couples to allocate marital savings to enable the parties to pay their attorneys, litigation costs will necessarily contract. Moreover, deferring the decision under DRL §237 until the end of the case also tends to the concerns raised by Manhattan Supreme Court Justice Matthew Cooper's now famous "skin in the game"[8] objection to the non-monied spouse's presumptive entitlement to an interim award of counsel fees. In the parties' best interests, the Court needs to take affirmative steps to defer all counsel fee applications to the conclusion of the case.[9]

Conclusion

Some may argue that this approach is all fair and good when the parties have savings to invade. But that observation simply begs the question. If no marital savings exist to allocate to counsel fees, then any motion practice seeking an award of counsel fees would be ill-conceived, an effort in futility, and even borderline frivolous. In essence, an attorney "make-work" project, an ugly tendency that also needs to be soundly rebuked. An ostensibly unpayable award under such circumstances only leads to a motion to hold the alleged monied spouse in contempt, a hearing, and a possible appeal, all over a miscalculated interim counsel fee award.

To avoid such chaos, the mantra of the court at every Preliminary Conference where the issue of interim counsel fees exists should be, "Show me the money." If it's there, it should be used to pay counsel fees; if not, then counsel may have to wait until the end of the case to get paid, like a personal injury attorney. As a referendum going forward, divorcing litigants must stop wasting their marital savings on interim counsel fee applications. Working together, the Judiciary and the Bar can help them achieve that goal.

1. 189 A.D.3d 31 (2d Dept. 2020)(citation omitted).
2. *DRL§ 237 Amendments, 10 Years Later: Interim Counsel Fee Awards*, NYLJ (Dec. 14, 2020). The author seems to press for a judicial declaration that the 2010 amendment to Section 237 was intended to limit interim counsel fee applications to funding the needy spouse's legal representation as opposed to determining whether that legal representation is being wisely employed.
3. 58 Misc.3d 1209(A) (Sup.Ct., Monroe Co. 2018).
4. *Id*. at *3..
5. 39 A.D.3d 465 (2d Dept. 2007)(emphasis added).
6. *See Havell v. Islam*, 288 A.D. 160 (1st Dept. 2001).
7. 155 A.D.3d 919 (2d Dept. 2017).
8. *Sykes v. Sykes*, 43 Misc.3d 1220(A) (Sup.Ct., New York Co. 2014).
9. The one exception to this rule against interim counsel applications is where one spouse has a substantial separate property estate but where no marital savings exist. Under such circumstances, it would behoove the "monied" spouse to agree to contribute toward the non-monied spouse's interim counsel fees paid to the monied spouse's attorney.