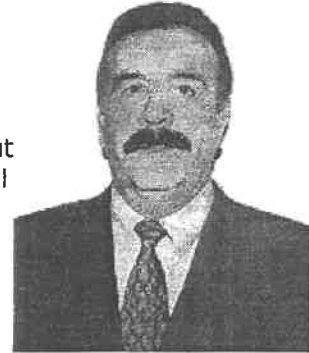


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## **INTERIM COUNSEL FEES IN MATRIMONIAL ACTIONS THE CASE OF THE NON-MONIED LAWYER BY ROBERT C. MANGI**

In the Donna Reed world of 1960, the nuclear family consisted of 2.4 children, a stay-at-home mother, and a breadwinner-father. Divorce, if not rare, was infrequent. Today, Donna Reed and her nuclear family has gone the way of black and white television. Matrimonial attorneys are plentiful, and in many families, both spouses are gainfully, but not necessarily equally, employed. When one spouse earns all or most of the family income, he or she is referred to in the matrimonial vernacular as the "monied spouse." The lesser employed (or unemployed) spouse is the "non-monied spouse." In prosecuting or defending a divorce action, the non-monied spouse may have to borrow the funds necessary just to retain counsel. That retainer often expires before the action does.



Experts must be hired, assets must be appraised, and yes, additional counsel fees will rapidly accrue. The expectation of a sale of a house or property at the end of the action provides no solace, and, more importantly, no immediate funds to carry on or defend the action. The good news is that there is both statutory and case law authority for the award of interim counsel fees and other expenses incurred in preparing a case.

The bad news is that existing law is not applied often enough, and when it is applied, the amount awarded is frequently insufficient.

DRL §237 authorizes a court to award counsel fees and other expenses pendente lite or at the conclusion of the matter, in any action or proceeding for a divorce or separation, or to annul a void marriage, or to uphold or challenge the validity of a divorce brought outside the State of New York. The amount of such awards is in the sole discretion of the trial court based upon the following four considerations: 1

1. The nature of the marital property involved;
2. The difficulties involved, if any, in identifying and evaluating the marital property;
3. The services rendered and an estimate of the time involved; and
4. The applicant's financial status.

The statute also permits the court to award counsel fees pendente lite in actions for custody, visitation or child support. In an action to enforce an order of support, maintenance or distributive award, DRL §237(c) directs the court to award counsel fees upon a finding that payor's failure to pay was willful. Family Court practitioners seeking to enforce support orders in that venue, will cite Family Court Act §454 (3) which likewise directs the Court to award counsel fees to a petitioner in such action upon a finding by the hearing magistrate that respondent's failure to pay a (lawful) support order is willful.

### **Procedure**

DRL §237 does not set forth the method of procedure by which an application for fees

should be made. In actual practice applications for counsel fees and expenses are made by motion on notice or by order to show cause. A sworn statement of net worth and a copy of applicant's retainer agreement must be attached (along with timesheets) to any motion for counsel fees.<sup>2</sup>

In addition, the affirmation of movant's counsel must include a statement indicating whether or not any part of the fees paid on retainer to counsel were paid or are guaranteed by a person other than the client and any agreement to that effect with such third party.<sup>3</sup> Failure to include client's statement of net worth, retainer and attorney's affirmation is fatal and will result in a rejection or denial of the motion.

The judge has discretion to grant or deny the award of fees and the amount thereof. In exercising its discretion, the court shall consider the following factors: the difficulty of the issues involved, the level of expertise required to handle those issues; the time and effort required; the experience, reputation and ability of the attorney; the ordinary and customary fees charged for such services by the legal community; and the results obtained.<sup>4</sup> The attorney affirmation which attests to the above factors is sometimes referred to as an "Ahern" affidavit, so named for the case which establishes those factors.<sup>5</sup>

In 1999 the Court of Appeals described DRL §237 as a statute designed to redress an economic disparity between a monied and a non-monied spouse in order that "the matrimonial scales of justice are not unbalanced by the weight of the wealthier litigant's wallet."<sup>6</sup> Words of comfort to the non-monied spouse. In practice however, interim awards are often deferred to trial, an inadequate remedy which completely sidesteps the issue, which is the need to defend or pursue the action. Despite the changes to the nuclear family in the post-Donna Reed era, many of the non-monied spouses are stay-at-home mothers who have forgone their education or career goals in support of their spouse. In a contested divorce action against the monied spouse, their only hope for a level playing field is the application of principles set forth by the Court of Appeals and the statutory authority of DRL §237. Although it is not required that a party exhaust his or her own resources in order to be granted interim counsel fees, courts are often unwilling to award such fees pendente lite without showing absolute necessity under the theory that the trial provides a better opportunity to fully assess the circumstances of the case.

Nevertheless under the New York law of Equitable Distribution, the parties must be prepared to present evidence regarding the exact nature and values of the marital property in order to assist the court in reaching its determination.<sup>7</sup> A searching exploration of each other's assets and dealings cannot be accomplished without the expenditure of counsel and expert fees.<sup>8</sup> The entire financial history of the marriage must be open for inspection by both parties.<sup>9</sup> Moreover, the provisions of the Equitable Distribution Laws present the courts with a host of complex issues involving the tracing and evaluation of marital property thereby requiring protracted involvement by counsel, as well as various experts, i.e. accountants, appraisers and, in many instances, actuaries.<sup>10</sup> A pro bono attorney may forego his own fees, but even the most dedicated of those can hardly be expected to advance the cost of expert services. The remedy is with the trial court which has ample authority in statute and by case law to provide interim fees and costs.

**Robert C. Mangi, is past chair of the Nassau Family Court Law and Procedure Committee and is presently co-editor and 2nd vice chair of the Nassau County Matrimonial Committee.**

1. DRL §237 (d)

2. See 22 NYCRR §202.16.
3. See 22 NYCRR §202.16 [subd. K].
4. Steiger v Dweck, 305 Ad2d 475,762 NYS2d 84 (2nd Dept. 2003)
- 5 Ahern v Ahern, 94 AD2d 53, 453 NYS2d 238
6. O'Shea v O'Shea, 93 NY2d 187, 689 NYS2d 8, 711 NE2d 193 (1999)
7. Ahern v Ahern, supra
8. Roussos v Roussos, 106 Misc. 2d 583-585, 434 NYS2d 600
9. Roussos v Roussos, supra
10. Shainswit, "Some Thoughts from the Bench on Equitable Distribution," NYLJ, April 6, 1981, p.1, col. 2)