

PREPARATION OF PENDENTE LITE APPLICATIONS - Part Four

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Case Information Statements

The CIS with all required attachments is typically the most important attachment to a pendente lite motion. As a word of caution, the CIS can be used against the client's interests if care is not taken in completing it. Do not give a blank CIS to the client and then publish for all the world to see the client's raw work product. This could lead to disaster. The fact of the matter is that most raw CIS submissions are filled with potentially damaging errors.

Instead, there are steps that should be pursued before the client fills in the CIS and steps to be taken thereafter, prior to arriving at a smooth draft. One useful practice involves having the client bring the most recent state and federal tax returns, W-2s, 1099s, and three sequential paystubs from all employment with them to an office consultation early in the process. These documents should then be copied against an 8 ½ x 11 background. The lawyer or paralegal should then go over the documents with the client, being careful to circle any entries, such as certain payroll deductions and itemized deductions on the tax returns, which warrant clarification. Many clients are uncertain about what some of their payroll deductions are and, more often than not, the legends explaining them are not attached to the paystubs or are undecipherable. Draw straight lines from each circled entry to the margin of each page, while asking the client to explain each item, and print the explanation for each in the margin at the end of the corresponding line. Clients may well have to consult their tax preparers and payroll departments to accomplish this. If the legends are available, which explain the various payroll deductions, they should be a part of your file.

Another helpful practice involves providing your client with a copy of a Notice to Produce Documents, to assist them in assembling documents they have, and as a guide to discovering the documents they do not have, but need. If some of the requested documents are in the other parties' possession, we not only have a guide as to what to include in a Notice to Produce to be propounded upon the other party, but we also have the beginnings of a Rider to attach to our client's CIS, setting forth all the documents that we did not have access to in preparing our client's CIS.

When the filled-in CIS is received back from the client, it must be carefully reviewed to ensure that the CIS reflects the client's real circumstances, as sought to be presented and as will be demonstrated through proofs.

The client must be advised that, although the CIS may be amended during the course of the case, every time the CIS is completed, it must be accurate to the extent of the client's reasonable perceptions, as of the date of completion. After all, Case Information Statements are completed and signed under oath and under penalty of perjury. Clients must be made well aware that the submission of knowingly erroneous sworn documents can be used for impeachment purposes at trial and to impugn the client's credibility.

Your review of the client's raw Case Information Statement (and the other party's filed one) should include the following:

- a) Comparison of the income information on the CIS with the income information on the tax returns;
- b) Comparison of the tax payments and deductions as set forth in the CIS with that which appears on the filed tax returns;

c) Comparison of the last three paystubs and projections of annual earnings for the current year (based upon year-to-date figures) with year-end earnings — as evidenced by the prior year's filed tax returns, W-2s and 1099s;

d) Comparison of the income earning assets appearing on the CIS assets balance sheet with the actual income set forth on the previously filed tax returns;

e) Comparison of the unreimbursed business deductions appearing on the filed tax returns with the transportation costs appearing on Schedule B of the CIS;

f) Comparison of the itemized monthly tax reserve appearing on Schedule C of the CIS with the annual federal, state and local taxes as evidenced by the filed returns;

g) Analysis of any bonus computation, with possible carry over to the following year for tax purposes;

h) In appropriate cases where you already have the other party's CIS, review of any direct payments claimed to have been made by the payor spouse, which are or will be included or omitted in the payee spouse's CIS, such as roof, automobile, medical and educational expenses;

i) Recognition of expenditures appearing on Schedules A-C of the CIS, where there might not have been similar expenditures in the past — conversely, recognition of any previously existing recurring expenses which may have been omitted on the current CIS (these are of course interview questions for your client, concerning his or her CIS, and about the other party's filed CIS);

j) Comparison of the monthly itemized expense for debt service appearing on Schedule C of the CIS with the existing credit card debt appearing on the CIS liabilities balance sheet, ensuring that "double-dipping" does not occur;

k) Comparison of the monthly itemized expense for car payments appearing on Schedule B of the CIS with any existing car loan appearing on the CIS liabilities balance sheet, ensuring that "double-dipping" does not occur;

l) Comparison of the itemized monthly costs for life issuance appearing on the CIS with the total life insurance cash surrender values, which were accumulated during coverture;

m) Comparison of the monthly savings component appearing on the CIS with the assets actually accumulated during coverture.

Remember, the CIS presents the first impression to the Judge of your client's initial economic needs. It is also the initial repository of information about a party's ability to pay. Your client's (or the other party's) paystubs may not accurately set forth earnings for the current year, which will necessarily reoccur the following year. If separate paystubs are not provided for bonuses, there is clearly the potential for inaccuracy going forward, since the bonus may not be the same next year. The paystub may also reflect both an old salary level and a salary increase during the same year. It is important to use riders to explain exactly what the income means, as well as the actual periodic regularly reoccurring income level.

In fact, as a general rule, if anything in your client's CIS is potentially unclear, always employ the use of schedules and riders to clarify and justify the numbers provided. Define your client's terms so that the CIS cannot be to impeach her client's credibility in the future. Frequently, the provision of information is estimated, particularly toward the beginning of your case. Make sure that you indicate on the CIS the instances in which your figures are estimated, by keying-in the letters "est" next to your entries. Another approach, where estimations may be too attenuated, is to include the letters "TBD" (to be determined) next to any blank entries that might otherwise be filled in.

It is important to consider whether you want to distinguish between the needs of a spouse and the needs of children in the CIS. This may be difficult to accomplish early on in the pendente lite support phase of your case. In cases where the family continues to live at the same residence, making a distinction between spousal and child-related expenses may be unnecessary, since

your client is still living in an intact family setting. In that case, what was done during the pre-complaint household is what should arguably continue. Case Information Statements filed when the family is still living together provide a useful baseline for marital lifestyle analyses. One might even consider drafting an adjunct CIS reflecting what the intact family budget was, even after the parties have separated.

The CIS requires us to accurately identify the number of people whose needs are to be addressed by the support request. After your client reviews the credit card statements, check register entries, etc. in order to get a handle on family expenses, the approximations arrived at are likely reflective of expenses relating to the intact family. If your client is attempting to approximate a budget for the client living separately, with or without children, adjustments need to be made. As the case gets older, it is increasingly important that these adjustments be made. One useful feature in allocating expenses — particularly when you are representing the payor spouse — is that you can clearly illustrate to the judge that your client has expenses too.

The allocation of expenses between parent and children also facilitates post judgment review on applications for modification to both spousal and child support (if ease of future review is what you are going for).

As early as the pendente lite stage, the Court must separate the sums needed for spousal support, versus those sums representing the needs of the children. Consider using the additional budget columns appearing on the Schedule A-C section of the CIS to itemize your client's needs. It is our obligation to present information to the Court — by way of evidence and testimony — supportive of the claim that certain expenses reflect the needs of the spouse versus those of the children. The Court is required to make the determination of alimony before entering an award for child support. Pressler, Current N.J. Court Rules, Appendix IX A to R.5:6A, "Considerations In the Use of Child Support Guidelines; 19, Determining Child Support and Alimony or Spousal Support Simultaneously" (2004). If we fail to present to the Court a basis upon which to make the allocation between alimony and child support, then we have failed to properly present the alimony issue.

There is no easy way to allocate a child's expenses. It is much easier to subtract-out the expenses of the other spouse. The Comments to the Child Support Guidelines discuss their underlying economic basis. However, the Guidelines cannot be mechanically applied to calculate what portion of a family budget represents the child's needs, and what portion represents those of the dependent spouse. While the financial considerations of the Guidelines can certainly be used as a reference point, we should shy away from the use of arbitrary percentages to calculate allocations, without some further persuasive proofs or testimony.

ROOF EXPENSES

Avoid using an arbitrary percentage of the current housing costs. If three people are living under the same roof, do not assume that your client's expense is simply one third of the total. In thinking through this issue, consideration of the Child Support Guidelines may be helpful. They assume, as the number of children increases, that the marginal cost associated with each child does not rise in direct proportion. The needs of the dependent spouse are constant, regardless of the number of children. Do not forget about the many pleasures of home ownership, including the costs of broken plumbing, snow removal, leaky roofs and yard work. There are often cases where one spouse routinely did many of these things. (we have even heard a few husbands actually offer to continue doing lawn care and household maintenance, in lieu of paying alimony). Will the fact of this lost handy spouse result in additional expenses for the remaining spouse? Typically it would.

In most households, continuing expenses associated with equipment and furnishings are quite predictable. Clients often overlook many of them, however. While the new Maytag washer and the wall-length entertainment unit with flat-screen TV purchased last year may quickly come to mind, the smaller items such as bedding, window treatment and knickknacks often miss the cut. They do, however, add up.

TRANSPORTATION

Your client's car payment, leasing costs, registration and license fees (one-month pro rata

portion, as with all non-monthly expenses), insurance, maintenance, fuel, and commuting expenses, if applicable, are all included here. Identify the type of vehicle your client has typically driven over the past three to five years. Consider making adjustments if the car currently in use is typical of the marital lifestyle, or if it's an out-of-repair clunker, necessitated by current conditions. Consider also (for future reference) if it would be replaced during the alimony term. Remember that pendente lite applications do not happen in a vacuum. The ultimate desired outcome of your case must also be reflected and consistent with your pendente lite application, including the supporting CIS.

Do not arbitrarily use a percentage of the automobile insurance cost (which is more than likely covered under a multiple car family policy) to arrive at your client's allocation. The cost to insure your client's car on an individual policy and in light of the driver's past experience will determine the actual cost of the automobile insurance. Both parties stand to have significantly different premiums when separate policies are used post-dissolution.

PERSONAL EXPENSES

I will first mention to always include a savings component, if appropriate. This is often omitted, even on final versions of the CIS. Determine if savings was a regular part of the marital lifestyle or is needed to maintain lifestyle later on. If so, it should definitely be added as a budget item. See *Khalaf v. Khalaf*, 58 N.J. 63 (1971).

Concerning expenses in general — particularly when you are representing the supported spouse, it is important to subtract-out any such expenses that are more closely related to your client. This is easier done with some consumption categories than with others. For example, a reasonable food budget for individual adults may vary widely on a case-by-case basis. Food budgets for children may be approximated by considering the number of children, their known eating habits, all in the context of the family's overall eating tendencies.

As the Zen saying goes, your clients must train themselves to see their consumption habits through new eyes. Otherwise, a lot could get overlooked. Don't undervalue the costs of vacations — even short get-aways — entertainment and gifts. Direct your client to go back several years to arrive at an average representative of the marital lifestyle.

How does one best present proofs of lifestyle? The more hard precise the proofs, the easier it will be for the trial court to make a decision in your favor. Obtain the records that were used by the family, reflective of money spent prior to the separation, e.g., credit card statements, check registers, and the like.

CLIENT MIND-SET

Another consideration in preparing the budget contained in the initial CIS concerns the fact that your client may not feel favorably disposed to making rational decisions with regards to their post divorce life, especially early on in the pendente lite phase. The pendente lite budget, therefore, may not fairly and accurately address the actual post judgment needs of your client. The Court Rules anticipate that the CIS will be amended, and further mandate that parties are under a continuing duty to revise the statements as needed. R.5:5 2(c). The budget utilized in support of a pendente lite motion should therefore be annotated with language to the effect that the budget is subject to change.

It is usually necessary to prepare multiple budgets in any case involving alimony. The pendente lite budget will almost always differ from the budget presented at Trial. Clients should begin focusing on their post judgment plans early on, especially when the parties are still living under one roof. Will the marital home be sold? If not, who will remain? What will future employment to involve? How will childcare be handled?

OTHER CONSIDERATIONS

Remember that the pertinent measuring unit for the marital lifestyle is not the lifestyle enjoyed at the date of the filing of the complaint, but rather the lifestyle enjoyed until the parties separated. *Hughes v. Hughes*, 311 N.J. Super. at 31. Therefore, if your client is the monied spouse and there has been a significant increase in income between separation and the filing of

the complaint, waste no time spelling this out in your *pendente lite* application. Emphasize the pre-separation level, rather than current income picture. If, on the other hand, you represent the supported spouse, you should consider relying on the language contained in *Guglielmo v. Guglielmo*, 287 N.J. Super. 337 (App. Div. 1996), stressing what some have called the marital momentum theory.

In making our *pendente lite* applications, sometimes issues of underemployment may arise. If earning capacity is in issue, then you might need to retain employment and vocational experts to evaluate the party's actual capacity to earn, and this can be requested in the context of your PL application. Concerning claims of voluntary underemployment, see *Dorfman v. Dorfman*, 315 N.J. Super. 511 (App. Div. 1998).

- CJR

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