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# The Matrimonial

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## The Community Income Reporting Rule

By Mark Schwarz

Only nine states recognize the concept of "community property": Washington, Idaho, Wisconsin, California, Nevada, New Mexico, Arizona, Texas and Louisiana. The remaining states defer to the "title" in which property is held or income earned. In community property states, the marital relationship is referred to as the "marital community" and each member of that "community" is treated as an undivided one-half partner in income of the other partner. This fictional "marital community" may result in significantly different tax consequences if the parties do not file jointly. In community property states, each spouse reports only one half of his or her income, but must also report one half of the other spouse's income. This may seem like an easy task; however, for couples that remain married but no longer live together, or worse yet, refuse to speak to one another or cooperate in any way, this can quickly become a tax nightmare. Luckily, Congress has thought of, and provided for, this problem ... sort of.

### RELIEF UNDER IRC SECTION 66(A) OR (B)

Under § 66(a) of the Internal Revenue Code, in certain circumstances a married couple can "qualify" to be taxed as though they live in a non-community property state, and thus avoid being

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## Enforcement Remedies to Combat Default

By Judith L. Poller and Elizabeth Warner

**W**hen divorcing parties enter into a settlement agreement or when a court issues a decision distributing the parties' assets and awarding support, the expectation should be that the case is at an end and the parties will adhere to the results. Unfortunately, in these uncertain economic times, the role of attorney does not end with the entry of a divorce judgment. Attorneys are frequently faced with client requests to enforce their rights to receive the assets and/or support awarded in the judgment. For purposes of illustration in this article, we will assume the client is an "Ex-Wife" and the defaulting party is an "Ex-Husband."

In determining the appropriate enforcement remedy to pursue, the attorney should try to assess why the Ex-Husband is in default and how best to collect for the Ex-Wife. The Ex-Husband's financial circumstances will affect the remedy the lawyer recommends. If money is tight, the best course may be to attempt to settle and minimize legal fees for all involved. However, if the Ex-Husband has assets and/or income and has willfully elected not to pay the Ex-Wife, there are a variety of remedies that can be applied.

This article discusses those remedies. (We focus on remedies available in New York State. However, each state has its own set of statutes and remedies available to assist an Ex-Wife against her Ex-Husband.)

### CONTEMPT SHOULD BE SOUGHT AS A LAST RESORT

Contempt is often the first remedy a lawyer considers to address a default, and often the remedy a frustrated client knows the best. While it is an important option, in most situations it should be the last remedy a lawyer pursues. When the Ex-Wife moves for civil contempt (the most commonly used contempt proceeding in the family law context), she may seek an order of the court to impose both fines and prison sentences on the Ex-Husband, and to have her attorney's fees paid. In order to prevail on a motion for contempt in New York, for example, the Ex-Wife must demonstrate that the Ex-Husband violated a clear and unequivocal mandate of the court, which intentionally and willfully violated the Ex-Wife's rights. The latter has the burden of proving this by clear and convincing evidence.

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## Combating Default

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The lawyer should explain to the Ex-Wife that this is a difficult burden to overcome. In one recent case, *Wolfe v. Wolfe*, 71 A.D.3d 878, 895 N.Y.S.2d 855 (2d Dep't 2010), the court found that because there was no time frame provided in an agreement, which called for reimbursement of transportation costs, the failure to reimburse for two years was not sufficient to find a violation of a "clear and unequivocal mandate." Even if the Ex-Wife does meet the 'clear and unequivocal' standard, the court could still find, as the recent court in *Rubin v. Rubin*, 78 A.D.3d 812, 911 N.Y.S.2d 384 (2d Dep't 2010) did, that "immediate incarceration would serve no purpose." In addition, there are many procedural hurdles that must be overcome: The Ex-Husband must be on actual notice of the contempt motion with an exact recitation of the statutory warning of contempt, and must also be on actual notice of the underlying order. He is entitled to have counsel appointed if he claims to be destitute, and a hearing is required in almost every instance, along with periodic judicial reviews of the sentence.

Before seeking contempt, a practitioner should ask the Ex-Wife what purpose it would serve to seek to incarcerate the Ex-Husband. This remedy may even make the Ex-Wife less likely to recover, as the Ex-Husband may be hampered from earning income while in prison. Also, in New York, Domestic Relations Law (DRL) § 247 and the corresponding statute

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under the Family Court Act § 455(4), suspends an ex-husband's spousal support obligations while incarcerated; thus, spousal arrears that would otherwise continue to accrue for the Ex-Wife's benefit are lost if she wins the contempt motion and the Ex-Husband is sent to jail.

In New York, DRL § 245 not only requires the Ex-Wife to seek alternative remedies before moving for contempt, but also that she state in her contempt motion what attempts were made to seek alternative remedies and/or why such alternative remedies would be ineffective. These alternative remedies can be more immediate and effective tools at forcing compliance. It is only when the Ex-Husband has made himself totally judgment-proof, by transferring all of his assets, not having a job, moving away from the jurisdiction and not carrying any licenses, that contempt should be considered.

### THE EX-HUSBAND WITH EARNINGS Income Execution

Income execution should be among the first remedies a practitioner considers when an Ex-Husband has an employer or receives benefits from the federal government (other than welfare benefits, which are exempt). In New York, once an Ex-Husband is in arrears for three payments or an amount equal to one month's support (if he is making reduced payments), the Ex-Wife's attorney can issue an execution for support enforcement as an officer of the court to the Ex-Husband and his employer. In other words, though the Ex-Wife may go to court to combat the Ex-Husband's arrears, she does not have to. New York Civil Practice Laws and Rules (CPLR) outline specific and lengthy instructions for the service of the execution on both the Ex-Husband and the employer, which must be strictly followed. However, once the proper steps have been taken and the employer and the Ex-Husband are served, support payments are automatically deducted from the Ex-Husband's paycheck in the next pay period. It is then up to the

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Ex-Husband to go to court to bring objections to the amount that his income is being deducted.

While it sounds like a simple solution, the practitioner should be aware that income execution does not always provide complete relief. First, federal law only allows the Ex-Wife to execute against 50%-65% of the Ex-Husband's disposable earnings, depending on how much in arrears he is, and whether he has another family to support. Second, New York limits this remedy to the recovery of child support and spousal support, not for the recovery of equitable distribution awards or counsel fee awards. Third, it does not capture all types of income an Ex-Husband may receive. Though the Ex-Wife can execute against wages or a pension, this remedy would not capture income from family members, for example. Finally, settlement agreements often contain waivers of this remedy. A practitioner advising the Ex-Wife post-judgment should be sure to review thoroughly any agreements executed to determine whether such a waiver is in place. A practitioner advising the Ex-Wife before an agreement is reached should not allow such a waiver to be inserted if there is a history of arrears and a concern about the possibility of non-payment.

### **Garnishment**

If the Ex-Husband is current with support but has failed to turn over assets or pay a distributive award, an income execution order is not available to the Ex-Wife and the Ex-Wife must seek to have a money judgment entered against the Ex-Husband. After she obtains a money judgment, then the Ex-Wife may seek to have the Ex-Husband's wages garnished by service from the sheriff or marshal's office of a Notice to Garnish-ee. DRL § 244 allows the Ex-Wife to file a motion for a money judgment for arrears in the same action where the original support or distributive award was ordered; no separate litigation is necessary. Unlike with an income execution, when the Ex-Wife obtains a money judgment, the

Ex-Wife can have the Ex-Husband's wages garnished for any monetary award granted under the judgment, not just support. However, garnishment can only reach 10% of the Ex-Husband's income, while an income execution order can reach 50%-65% of the Ex-Husband's income.

### **THE EX-HUSBAND WITH ASSETS Sequestration**

If an income execution order or garnishment does not provide the Ex-Wife with complete relief, the Ex-Wife will have to look past the Ex-Husband's income to his assets. Sequestration is a powerful remedy to pursue, particularly if the Ex-Husband owns an income-generating asset such as a rental property. With this remedy, the Ex-Husband's property is sequestered, and the court can order a receiver to control these assets and apply them to pay the Ex-Husband's support obligations. To justify sequestration, the Ex-Wife needs to show that the Ex-Husband has repeatedly defaulted and that a receivership is necessary to protect her interest. If the Ex-Wife can make this showing, the lawyer should apply to have the Ex-Wife herself elected as the receiver of the Ex-Husband's property. This remedy takes the Ex-Husband's assets out of his control and puts it in the hands of the Ex-Wife. She can seek to become the receiver over brokerage accounts of the Ex-Husband (a particular nuisance to those Ex-Husbands who are active traders), or retirement accounts (a particular nuisance for older Ex-Husbands). The Ex-Wife may even be able to take over the Ex-Husband's business accounts when she can demonstrate that the Ex-Husband controls the business accounts and uses them for personal expenses. The upset caused by an Ex-Wife acting as a receiver is a strong incentive for an Ex-Husband to become compliant.

Sequestration is considered a "drastic" remedy, albeit less than contempt, so the Ex-Wife should be sure to be prepared with a history of arrears before pursuing this course. If she cannot establish this history, she may want to pursue a different remedy. To reach the Ex-Husband's

assets, the Ex-Wife may be entitled to seek remedies that are available to any judgment creditor in a civil case, such as filing a lien against, or seizing the Ex-Husband's property. While it is important that the practitioner be aware of such remedies, they are beyond the scope of this article.

### **Posting of Security**

If an Ex-Husband has an asset like a bank account, which can be set aside to pay for future arrears, this would be the ideal security to post. However, even if the Ex-Husband does not have an asset to post, the court can direct that he post a bond to secure his obligations. See DRL § 243. A court will give particular consideration to this remedy where the Ex-Husband does not live in the home jurisdiction or there is a threat that he will leave the jurisdiction.

### **THE EX-HUSBAND WHO DOES NOT HAVE EARNINGS OR ASSETS**

#### **Suspension of Licenses**

The court may direct the suspension of the Ex-Husband's state-issued licenses if he does not have financial resources. These include driver's, business/trade, professional and recreational licenses. The Ex-Wife may bring a motion for suspension to a matrimonial or family court, or if available, seek suspension through an administrative hearing. For example, in New York, the Department of Social Services has the administrative authority to suspend driver's licenses. In New York, the Child Support Enforcement Unit often seeks this remedy because it has statutory authorization under Family Court Act § 458-a to direct a suspension from the DMV without court intervention. However, there is nothing preventing a private action to seek suspension remedies. See *Steinberger v. Steinberger*, 224 N.Y.L.J. p. 32 (col. 5) (Sup. Ct. Kings Co. Sept. 26, 2000) (on a contempt motion from the wife, the court ordered the DMV to suspend the husband's license and further directed the clerk of the court to send its decision to the New York Grievance Committee to suspend the husband's license to practice law).

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A practitioner should consider that seeking to suspend a professional license or driver's license might have the same adverse effect on an Ex-Wife that a contempt motion would have: It may cut off the Ex-Husband's income stream, making him less able to pay support. Also, in New York, this remedy can only be utilized to combat child support arrears or a combination of spousal and child support arrears. It cannot be used if the Ex-Husband only has spousal support arrears. It also cannot be used if there is a current income execution order against the Ex-Husband. And of course, it might not have the same scare-factor that the other remedies have. This remedy should be sought in conjunction with other remedies, if possible.

## Tax Affecting

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tax rates to the earnings flow without application of some premium as calculated by one of the models discussed lessens the amount of the forecasted earnings and should find less marital equity value. Beware of the analyst who uses only a singular income-based method, ignor-

## Probation

If the Ex-Wife is adamant about seeking a punitive remedy like contempt, an alternative that may satisfy her is probation, if the Ex-Husband lives in the jurisdiction. In one recent decision in New York, *Mary M. v. Thomas M.*, 31 Misc.3d 1233(A), 2011 WL 2150758, 2011 N.Y. Slip Op. 50972 (Family Ct. Clinton Co., June 01, 2011), the court ordered probation against a father defaulting on his child support obligations, prohibiting him from purchasing or leasing a laundry list of "non necessary items," including electronic devices and movie tickets, without the express consent of the court-appointed probation officer. The court further required the father to submit proof of any transfers of money in or out of his bank accounts so that the probation officer could confirm his compliance. This is an effective remedy because the pro-

ing market and cost approach perspectives, because these alternative methods offer a "sanity check" of the results from an income method. The advantage to appraising value using multiple methods and "reconciling" the indications is that the opinion is more robust and grounded.

Tax affecting is a perilous game, and many venues will question an automatic application of a tax rate

10 years. Equitable relief can also be requested within three years of the date the returns were filed, or two years from the date the tax was paid.

### REQUESTING RELIEF

Equitable relief under I.R.C. § 66(c) is best claimed by filing a Form

es if the issue of spousal testimonial privilege for same-sex couples appears before the court in a future case.

"I would think people on the right would jump all over this as an example of overreaching by the court," Culhane said. "Regardless of what you think about civil unions, applying this retroactively is something

bation officer will be able to monitor not only the Ex-Husband's expenditures, but also any monies received.

## CONCLUSION

The frustration and fear an Ex-Wife experiences when she is not receiving the income or assets she is entitled to receive can be enormous. However, there are many remedies available to her to collect against the Ex-Husband. While it is tempting to seek the most drastic remedy — contempt — often, this is less effective, both because a court is reticent to order an Ex-Husband to jail, and because it may only delay payment to the Ex-Wife. Less drastic remedies are more likely to be granted by a judge and can be a considerable nuisance to the Ex-Husband. A practitioner should review all possible remedies with the Ex-Wife before taking action.

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when evidence shows that the subject company pays no corporate tax. Jack Bogdanski opined recently that "when valuing S-corporation stock, tweak the discount rate but don't call it tax affecting." (Jack Bogdanski, "Tax Affecting Has Stalled in the Courts ..." *BV Wire*, Dec. 21, 2011, issue #3, page 1.) Beware of the options your expert must consider!

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8857 with the IRS. The form can be found at [www.irs.gov](http://www.irs.gov). It should also be noted that the IRS is still seeking comments on the proposed changes highlighted in Notice 2012-8.

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you would expect them to question."

For now, however, the order remains a victory for same-sex couples. "This helps move us toward a place where there is no question among litigants about whether same-sex communication is privileged," Sommer said.

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## Reporting Rule

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limitations for claiming equitable relief. Relief can now be requested at any time the IRS can pursue collection under I.R.C. § 6502, which is typically

## Spousal Privilege

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a helpful legal precedent that could have application in other contexts.

It is unlikely that the court's order would be appealed because defense counsel did not object to it. However, it could face legal challeng-

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