

MATRIMONIAL/FAMILY LAW

What's the Net Worth to You? Avoiding Pitfalls Before and During Trial

By Vesselin Mitev

The most likely culprit for why matrimonial trials get a bad rap for being tedious is the affidavit of net worth, or net worth statement, a form designed to give the court a “snapshot” of a party’s finances, but which in reality seems to provide more fodder for cross-examination than any other document in the matrimonial trial lawyer’s quiver, if used properly.

Financial disclosure in matrimonial actions is “compulsory”¹ and the Domestic Relations Law specifically requires that a party shall provide a “sworn statement of net worth” either 20 days after a demand for such or file one with the court within 10 days of issue having been joined.

Section 202.16 (k) of the Uniform Rules for the Supreme and County courts provides that motions for alimony, maintenance, interim counsel fees and child support in a pending action must include a copy of the net worth statement (unless waived by the court for good cause shown). Parenthetically, this requirement does not apply to motions seeking counsel fees under DRL § 237 (c) (counsel fees are mandatory in an action or proceeding for failure to obey an order compelling payment of support or maintenance, if the court finds the failure was willful) or DRL § 238 (an action or proceeding to enforce or modify any provision of a judgment or order in a matrimonial action).

The standard net worth form provides two dates that are important and useful for cross-examination. The first is the date to which the party swore, according to the form itself, that its net worth affidavit was true and accurate (usually at the end); the second date is the date purporting to reflect

the assets and liabilities as they existed, i.e., “Plaintiff herein, being duly sworn, deposes and says that the following is an accurate statement as of November 23, 2015, of my net worth...”

It is common for “updated” net worth statements to be filed, with an updated so-sworn date at the end, but the “as of” date is never changed. By its terms, such a document is not “updated” since it gives the court the assets and liabilities as they existed (usually) many months, or even years ago. Thus, it can be cogently argued, a party who failed to file an updated net worth, should be precluded from offering or contesting financial information at trial, especially if it is seeking counsel fees, as the failure to file an updated net worth has been held fatal to a counsel fee application².

Omissions, gross exaggerations and inflated expenses are usually par for the course in any net worth; but going line by line at trial may quickly sap the attention of the triers of fact, who often quietly warn that they will “bust” what is essentially turning into a deposition at trial. Instead, using the net worth to attack the credibility of the witness is best done by hitting a few major points and saving the rhetoric for summation.

Q: You told the court the truth on your direct examination, correct?

A: Yes.

Q: And you’ve told the court the truth throughout this litigation even if you weren’t on the witness stand, am I correct?

A: Yes.

Q: And all the papers and documents that you have signed and put in to the court, no doubt those were all true, am I correct?



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A: Yes.

Q: That’s because you would never sign anything that wasn’t true, am I correct?

A: Of course.

Q: And you carefully reviewed each document before you signed it to make sure you weren’t putting in false claims to the court, am I correct?

A: Yes.

Q: With that thought in mind, take a look at page six of your net worth; you claim you spend \$1,000.00 a month on clothes for your husband; that’s not true, am I correct? You folks haven’t lived together in three years?

A: That’s a mistake...

Q: Mistake or not, can we agree, that the \$1,000.00 per month you claimed to spend on clothes for your husband in this sworn affidavit is simply not true?

A: That’s correct.

Every once in a while (whether out of best-intentioned yet misguided puritanical adherence to the rules of evidence or just to shake things up) an adversary will object to the net worth statement being put in on a party’s direct case, under a strict (framer’s intent?) construction of the hearsay rule: an out of court statement offered for its truth; and secondarily, as unnecessary cumulative bolstering.

While technically true, since a party can simply tell the court its expenses, liabilities and assets, the statute (DRL § 236B(4)) and the Uniform Rules § 202.16 *et seq.* both explicitly require that net worth statements be prepared and filed with the court, as part of the compulsory financial disclosure mandated by the Legislature. Thus, the technical hearsay and bolstering objection is improper and

should be summarily overruled.

In the unlikely, yet not-unheard-of event that it is sustained, an exception should be taken, then permission sought to take the opposing party out of turn on a brief issue. The opposing party, once seated, can be asked:

Q: Sir, do you agree that your wife should be awarded maintenance?

A: What? No, I don’t think so at all.

Q: How about counsel fees? Do you think you should have to pay my counsel fees?

A: Absolutely not.

Q: And do you believe you should be required to pay for the marital debt, which is around \$60,000.00?

A: No. Not one cent.

Q: And therefore it’s your position that your wife’s claims are not true, am I correct?

A: Yes.

Q: Because if they were true, we wouldn’t be here, correct?

A: You got it.

Q: And in fact you filed an answer to the complaint, denying all of her claims, and further seeking a dismissal of this action and all the requested relief, am I correct?

A: Yes.

Now, the other side has put the amounts sought in issue; and, parenthetically, raised a claim of recent fabrication by your client which can be rebutted by the introduction of the affidavit of net worth.

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

¹ DRL § 236 B(4)(a)

² *Bertone v. Bertone*, 15 AD3d 326 (2d Dept. 2005)