Impeaching Credibility in Matrimonial Actions
By Joel R. Brandes

In a recent decision, the trial court stated 10 separate times that "the defendant was generally not credible." The judge emphasized that "[t]he record was plagued by his lack of credibility and feigned forgetfulness."

Is lying a frequent occurrence in divorce and custody actions? A google search of the term "lying in divorce actions" turned up eight law firm websites with pages about spouses lying in divorce actions and custody proceedings. One site tells its readers that "… Often, spouses lie to seek an edge in a contested divorce. Maybe they want more time with the children or more spousal support than they should have. Lying about finances is also fairly common. **…** A lying spouse might fail to disclose assets, discount the value of assets, fail to report self-employed income, or exaggerate expenses. …Spouses sometimes lie about you to gain an edge in a child custody battle. They might claim you have a drug or alcohol addiction or are mentally ill. These are serious accusations meant to persuade the judge to not give you custody. (See "What To Do When Your Spouse Lies During Your Divorce", https://www.bfsteinlaw.com/what-to-do-when-your-spouse-lies-during-your-divorce/. In this article we discuss methods of impeaching the credibility of a lying witness.

The credibility of the witnesses is an inquiry within the province of the trial court. (Viles v. Viles, 14 N.Y.2d 365, 251 N.Y.S.2d 672 (1964). Since the trial court has the opportunity to view the demeanor of the witnesses at the trial, it is in the best position to gauge their credibility, and its resolution of credibility issues is entitled to great deference on appeal (Schwartz v. Schwartz, 186 A.D.3d 1742, 132 N.Y.S.3d 34 (2d Dep't 2020)). In Kerley v Kerley, 131 A.D.3d 1124, 17 N.Y.S.3d 150 (2 Dept., 2015) the Supreme Court found the defendant's testimony to be "devoid of any credibility, unsupportable, and utterly unreliable." The Appellate Division affirmed stating that the assessment of credibility is a matter committed to the trial court's sound discretion and deference is owed to the trial court's credibility determinations.

Where the determination as to equitable distribution has been made after a nonjury trial, the trial court's assessment of the credibility of witnesses is afforded great weight on appeal. (Linenschmidt v Linenschmidt, 163 A.D.3d 949, 82 N.Y.S.3d 474 (2 Dept., 2018)). A trial court's decision regarding the credibility of the witnesses is a determination that will only be disturbed on appeal when clearly unsupported by the record. (Hass & Gottlieb v. Sook Hi Lee, 55 A.D.3d 433, 866 N.Y.S.2d 72 (1st Dep't 2008)).

Where evidence is given by an interested witness, the trier of fact is not required to believe it even if it is the only evidence in the case on an issue. (Piwowarski v. Cornwell, 273 N.Y. 226, 7 N.E.2d 111 (1937); Schultze v. McGuire, 241 N.Y. 460, 150 N.E. 516 (1926)). The fact that numerous witnesses testify to the same fact does not

require that their testimony be believed. (See Wadsworth v. Delaware, L. & W. R. Co., 296 N.Y. 206, 71 N.E.2d 868 (1947)). On the other hand, the fact that testimony comes from an interested or biased witness does not require that the evidence be disregarded. Its credibility is for the trier of fact. (Coutant v. Mason, 221 N.Y. 49, 116 N.E. 866 (1917)).

Oral testimony may be found to be incredible as a matter of law. It is 'incredible as a matter of law' only where no reasonable man could accept it and base an inference upon it. (Blum v. Fresh Grown Preserve Corporation, 292 N.Y. 241, 54 N.E.2d 809 (1944)). A court may find testimony to be utterly incredible as a matter of law when it is "manifestly untrue, physically impossible, or contrary to common experience, and such testimony should be disregarded as being without evidentiary value notwithstanding that it is uncontradicted." (Price v. City of New York, 172 A.D.3d 625, 103 N.Y.S.3d 31 (1st Dep't 2019)).

In Sexstone v. Amato, 8 A.D.3d 1116, 778 N.Y.S.2d 635 (4th Dep't 2004) Plaintiff's proof submitted in support of his motion for summary judgment demonstrated that plaintiff gave an engagement ring to the defendant in contemplation of their marriage and was entitled to its return or its value upon the termination of their engagement (*see* Civil Rights Law § 80-b). The Appellate Division held that the conclusory assertions of the defendant that she accepted the ring for her birthday and never intended to marry plaintiff were "patently insufficient to overcome plaintiff's proof". When pressed to answer a question concerning the location of the ring, the defendant testified that she returned the ring to the plaintiff on the day that he gave it to her. The Appellate Divison held that the testimony, made months after the commencement of the action, was patently false and incredible as a matter of law. While credibility is an issue that should be left to a fact-finder at trial, "there are of course instances where credibility is properly determined as a matter of law." This Court is not "required to shut its eyes to the patent falsity of a defense."

Where a witness has given demonstrably false testimony, with respect to any material fact, the Court may, under the maxim "falsus in uno falsus in omnibus", choose to discredit or disbelieve other testimony given by that witness (Deering v Metcalf, 74 NY 501 (1878); DiPalma v State of New York, 90 AD3d 1659 (2011)). The falsus in uno doctrine is not mandatory, and a court is free to credit any part of a witness's testimony that it deems true and disregard what it deems false. *(*Accardi v City of New York, 121 A.D.2d 489, 503 N.Y.S.2d 818 (2 Dept., 1986)

The main purposes of cross-examination are to elicit favorable facts from the witness or to impeach the credibility of the witness. The trial court controls the method and duration of cross-examination to determine a witness' credibility or accuracy. When the cross-examination of a witness relates either to facts in issue or relevant facts, it may be pursued as a matter of right. When its object is to ascertain the accuracy or credibility of a witness, its method and duration are subject to the discretion of the trial

judge, and unless abused, its exercise is not the subject of review. (See Langley v. Wadsworth, 99 N.Y. 61, 1 N.E. 106 (1885).

A witness may be cross-examined with respect to specific immoral, vicious, or criminal acts which bear upon the witness's credibility. Generally, the nature and scope of the cross-examination are discretionary with the trial court. However, the inquiry must have some tendency to show moral turpitude to be relevant to the credibility issue. (Badr v. Hogan, 75 NY2d 629, 555 NYS2d 249 (1990)).

A witness may be impeached by questioning his reputation for veracity, his perception, recollection, or memory, by showing he is biased (an irrational predisposition in favor) or prejudiced (an irrational pre-disposition against), that he has an interest at stake in the outcome of the litigation, that he is corrupt or has been bribed, that he has a prior conviction, that he committed prior bad acts (immoral, criminal, vicious), and that he has made prior inconsistent statements. A witness may be impeached by showing his bias, hostility, or Interest. (Richardson on Evidence, 11th Edition, 6-415).

Cross-examination relative to specific misconduct must be based upon reasonable grounds and pursued in good faith. (People v. Greer, 42 NY2d 170, 397 N.Y.S.2d 613 (1977)). A witness may not be asked about conduct that was the subject of criminal charges when those charges resulted in an acquittal. (People v. Santiago, 15 NY2d 640 (1964)).

As a general rule, the credibility of any witness can be attacked by showing an inconsistency between his testimony at trial and what he has said on previous occasions (People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637).

Counsel may also show prior inconsistent statements to discredit the adverse party though oral and not made under oath. Such statements are treated as admissions of a party. (Koester v. Rochester Candy Works, 194 N.Y. 92, 87 N.E. 77 (1909)). Any oral or written statement of a witness made out of court, which contradicts a material part of his testimony, may be, if properly proven, introduced in evidence, as tending to discredit him, rather than as proof of the truth of the statement. (Larkin v. Nassau Electric R. Co., 205 N.Y. 267, 98 N.E.465 (1912)).

If evidence of the statement of a witness is intended to prove that he gave an opinion inconsistent with the testimony, it is sufficient if the opinion is so incompatible with the facts he testified to that an honest mind knowing the facts would not be likely to entertain the opinion. It is sufficient if the testimony and the statements are inconsistent and tend to prove differing facts. (Larkin v. Nassau Electric R. Co., supra).

A witness cannot be impeached by inconsistent statements that he made before or after he has testified unless he has been adequately warned by the cross-examiner that those statements will be later offered against him. (Larkin v. Nassau Electric R. Co., supra). There must be a proper foundation laid for the introduction of prior inconsistent statements of a witness. To prevent surprise and give the witness the first opportunity to

explain any apparent inconsistency between his testimony at trial and his previous statements, he must first be questioned as to the time, place, and substance of the prior statement. (People v. Duncan, 46 N.Y.2d 74, 385 N.E.2d 572 (1978)).

The statements may be proved by the admissions of the witness when it is shown to him. If he admits that he made them further proof is unnecessary. His admission that he signed the written statements proves them. (Larkin v. Nassau Electric R. Co., supra)).

The general rule concerning the impeachment of witnesses with respect to collateral matters is that “the cross-examiner is bound by the answers of the witness to questions concerning collateral matters inquired into solely to affect credibility.” (People v. Pavao, 59 N.Y.2d 282, 464 N.Y.S.2d 458 (1983)).

The collateral evidence rule limits the ability of the cross-examiner to contradict the witness by the introduction of extrinsic evidence. It holds that "the party who is cross-examining a witness cannot introduce extrinsic documentary evidence or call other witnesses to contradict a witness' answers concerning collateral matters solely for the purpose of impeaching that witness' credibility.” (People v. Pavao, supra).

Even where a particular subject is proper impeachment upon cross-examination, it is collateral unless it is relevant to some issue in the case other than credibility or is independently admissible to impeach the witness. Such collateral matter, while proper cross-examination because relevant to the witness's credibility, may not be proved to impeach the witness by extrinsic evidence. (Badr v. Hogan, 75 NY2d 629, 555 NYS2d 249 (1990); People v. Schwartzman, 24 NY2d 241, 299 NYS2d 817 (1969)).

Thus, where the questioning bears upon the witness's credibility because it shows that the witness had acted deceitfully on a prior unrelated occasion, it is collateral and, if the witness denies the conduct, the questioner is bound by the witness's answer and may not refute it with independent proof. However, a negative response by the witness does not preclude further questioning of the witness on the point, " on the chance that [she] may change [her] testimony.” (People v. Sorge, 301 NY 198, 93 N.E.2d 637 (1950)).

Conclusion

A person is guilty of perjury in the first degree when he swears falsely and when his false statement (a) consists of testimony, and (b) is material to the action, proceeding or matter in which it is made. Perjury in the first degree is a class D felony. (Penal Law § 210.15.) A person “swears falsely” when he intentionally makes a false statement which he does not believe to be true (a) while giving testimony, or (b) under oath in a subscribed written instrument. (Penal Law § 210.00 (5).)

In Matter of Duke v Black (77 Misc.2d 239, 353 N.Y.S.2d 680 (Fam Ct, 1974), the former wife testified in the prior divorce action that she and her husband had not "cohabited" for over a year. Four months after the divorce was granted, she gave birth. In

its opinion, the Family Court noted that the fact that "people perjure themselves in divorce actions as a matter of course" is "well-known" and "all part of the system."

In Andrew T v Yana T, (26 Misc.3d 1039, 894 N.Y.S.2d 362 (Sup Ct., 2009) rvd 74 A.D.3d 687, 902 N.Y.S.2d 818 (1st Dept., 2010)) the Supreme Court commented: "Suffice it to say that if the District Attorney was intent on prosecuting all the people who, within the context of uncontested divorce proceedings, falsely claim not to have had sexual relations with their spouses, there would be little time left for pursuing other crimes.

It appears to us that the reason why perjury is not prosecuted in divorce and custody cases is that it is difficult to prove, and it occurs so frequently that prosecution would impose a burden on the justice system.

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