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## Chair's Column

# Collaborative Divorce: A Paradigm Shift

*by Jeralyn L. Lawrence*

I am overjoyed that on Sept. 10, 2014, the governor signed the New Jersey Family Collaborative Law Act into law, and we now have a statute to govern how collaborative divorces are to proceed. The *New Jersey Family Lawyer* previously published articles on the substance of the Family Collaborative Law Act, so I will refrain from repeating the contents of those articles in this column. Instead, I will focus on what is, in my opinion, the lynchpin of a collaborative divorce.

The most critical aspect of a collaborative divorce is the paradigm shift that lawyers participating in the process must make to help ensure a successful collaborative divorce. The paradigm shift itself is rooted in the conscious decision at the inception of each case to settle the case. For some, the paradigm shift is natural and instinctive. For others, this is a foreign concept. If your reaction at the inception of a case is how the matter can best be resolved, you will likely make the paradigm shift and bring this case to completion through the collaborative process. Alternatively, if you are blinded by the potential for billable hours and litigating a matter to financial exhaustion, the shift may be more difficult.

If you have been practicing family law for even a few years, you know that no two family matters are alike, and each case yields different results. In litigation, the only constants are pleadings and applications filed with the court, the discovery process, and mandatory court appearances. Through my years of practice, I have found that these litigation components are not nearly as effective as face-to-face meetings, telephone communication between colleagues, and encouraging the parties to focus on resolution rather than spiting one another. There is no greater nuisance to me than being served a complaint for divorce without even a courtesy call from my colleague, or arguing over discovery documents and being met with demand after demand from an attorney who is only as aggressive as his or her accounts receivable will allow. The shift from these antiquated, often inefficient and ineffective components of the litigation model, to the collaborative process, can be personally and professionally rewarding, and certainly benefits the parties involved.

To successfully effectuate the paradigm shift to practice collaboratively, you may need to revamp your basic assumptions, litigator reflexes, and the way you think and speak. A great candidate to facilitate the collaborative process is one who truly believes litigation is generally inefficient, counterproductive, and destructive to children and families. These lawyers are more apt to commit themselves to the solution rather than the problem, and to finalize divorces with self-respect, dignity and grace, in order to set the groundwork for the next chapter in each party's life. In this practice, we are not naïve about the effects of a divorce on the parties, especially the children. Even the most amicable divorces can give rise to significant psychological and emotional traumas, which are certainly compounded as a case grows more litigious.

To understand the collaborative process, one must redirect the focus of any matrimonial matter. From a collaborative approach in cases involving children, the focus is turned toward the children. A goal of the collaborative process is for parents to maintain a cooperative and successful co-parenting relationship, so the children are the focal point of the process rather than being placed in the middle of the divorce. This is contrary to instances where we litigate cases, where the children are often harmed and we later realize the process was not child-focused in any way. If you have been part of a litigated case and felt as if more harm was done to a child than good, you are likely to make this paradigm shift so that during your next case involving children you will be engaged in a process where the children come first.

We all know how burdensome it is to receive a barrage of emails or be engaged in a letter-writing campaign with colleagues in matrimonial matters. It is extremely unproductive and unnecessarily costly, when a simple phone call or face-to-face meeting will do the trick. If you are to succeed collaboratively, you need to make yourself comfortable with acting and speaking differently, including conducting courteous phone calls and amicable meetings, and doing away with self-serving letters. Civility, cordiality and mutual respect are important cornerstones of the process. You must be committed to resolving the case and to seeing your colleague as your team member to cooperatively facilitate a fair and global settlement. The mutual desire to meet the clients' goals and objectives, met with open communication, full disclosure and trust, will yield a successful collaborative divorce. A paradigm shift is essential to achieve this worthwhile outcome.

For those of us who have left the courthouse bewildered at some of the cases we lost when we should not have lost, or better yet, prevailed in a case when we should not have prevailed, we might find hope in the collaborative process to assure these cases avoid a stranger in a black robe making life-altering decisions. When mediation became a viable option in our profession, there were many objections to its introduction, likely from the truest of litigators. Now, mediation is widespread in most matrimonial matters, and most judges *encourage* parties to attend mediation first, prior to litigation. It is my belief and hope that the collaborative process will make the same strides and become a practical option for our clients.

If I have made it sound as if collaborative attorneys simply hold hands and sing "Kumbaya" while working toward settlement of a case, I have done an injustice to these talented, dedicated and hard-working individuals. The collaborative process is dignified and respectful, and lawyering and advocacy are critical. You still advocate, as you have a client to represent. However, the methodology behind that representation is different. Your approach to advocacy is different. Your thoughts and dialogue change to adapt to a cooperative effort, with the sights mutually set on problem solving and resolution, rather than a win-at-all-costs mentality.

If this sounds interesting, I strongly encourage you to review the New Jersey Family Collaborative Law Act, learn more about the collaborative process, and see if it is an appropriate fit for the way you practice or hope to practice. If you already practice in this manner, thank you for the time you have dedicated to make this process a viable option for our clients. We have an incredibly important job, and it is critical that we do it well. It is critical that we be ambassadors of our profession. As for those who remain spectators and skeptics, I hope something in this article might resonate with you and provide you with some insight regarding the paradigm shift. ■

# Inside this issue

Editor-in-Chief's Column

# The Next Step in the Evolution of Alimony Law in the State of New Jersey

*by Charles F. Vuotto Jr.*

A historic event occurred on Wednesday, Sept. 10, 2014, with regard to the law of alimony in the state of New Jersey. On that day, Governor Chris Christie signed Assembly bill A-845, A-971 and A-1649, which make substantial changes to the alimony law. These changes in the law did not come about quickly or easily. Numerous family law attorneys in various groups had a hand in shaping the new law. Most notably are the contributions by the Executive Committee of the Family Law Section of the New Jersey State Bar Association. The enormous energy and commitment of the officers of the Family Law Section cannot be understated. From the beginning, the officers met with legislators, staffers, editorial boards and special interest groups in an effort to educate them on the issue of alimony. Quite often, they were given less than 24 hours to rearrange their schedules in order to once again trek to Trenton or anywhere else throughout the state to meet with anyone who could help the cause—and even those who wouldn't help. They wrote op-ed pieces and appeared on television and radio, all in an effort to influence the legislators and the public at large. I cannot imagine the countless hours each of them put into this effort. For this, I am grateful—we all should be.

The following is an overview of the major changes to the alimony statute, along with some observations of issues, potential conflicts or problems that may arise in the future.

## Permanent Alimony Eliminated

First and foremost, the designation of permanent alimony has been eliminated from our statutory framework. The Legislature has replaced the phrase "permanent alimony" with "open durational alimony."

It would appear that the phrase "open durational" implies that there should be an end to the alimony obligation. Clearly, there is some duration contemplated. The word "open" suggests that the duration would end based on some consideration other than death, remarriage, cohabitation or a substantial change in circumstances; most likely under the terms of the recent amendment, a planned good faith retirement.

## Equal Right to Lifestyle

Also of significant importance is the fact that the Legislature has now emphasized that neither party has a greater entitlement to the standard of living enjoyed during the marriage. Is this equal entitlement to the marital standard of living a legal standard that is factually impossible? Every dollar that is earned or received by the parties during the marriage is consumed in some fashion, whether it is to pay household bills or it is saved. Was the Legislature's intent that both parties are equally entitled to 'life entitlements'? If so, does this change the dynamic with regard to savings as a component of marital lifestyle? Furthermore, does equal entitlement mean equal dollars?

## *Pendente Lite* Support is a Factor

When determining whether to award alimony, as well as the amount and duration thereof, the court must now consider the "nature, amount, and length of *pendente lite* support paid, if any." The obligation to consider the *pendente lite* support in the final alimony award should always have been the rule. Practical experience, however, illustrates that was often not the case, and now there exists a specific directive to the court. As a practice point, however, does this revision to the statute now require the payor to obtain an order to receive this consideration by the court at the time a final alimony award is made? In the absence of an order, if support is being paid voluntarily will credit be obtained?

## Priority of Factors

Also of substantial significance is an express statutory requirement that no statutory factors shall be elevated in importance over any other factor unless the court finds otherwise, in which case the court shall make specific written findings of fact and conclusions of law in that regard. Included within this section is the following text: "If the court determines that certain factors are more or less relevant than others, the court shall make specific written findings of fact and conclusions of law on the reasons why the court reached that conclusion." What is meant by more or less relevant? Did the Legislature intend to mean a factor that has more impact on the specific factual matrix of that case?

## No Presumption in Favor of Any Form of Alimony

Also of substantial significance is the eradication of what some perceived as a presumption in favor of permanent alimony. Now, in any occasion in which there is a request for an award of alimony, the court shall consider and make specific findings on the evidence about all of the statutory factors set forth in the statute. The court no longer must determine that an award of permanent alimony is not warranted before being permitted to consider whether other forms of alimony could be awarded, such as limited duration, rehabilitative or reimbursement. Further, the restriction that the court not be permitted to award limited duration alimony as a substitute for permanent alimony in those cases where permanent alimony would otherwise be awarded has been eliminated.

## Duration of Alimony

Also of substantial importance is the fact that there is greater guidance regarding the duration of alimony. Although the new statute does not impose traditional guidelines regarding the amount or duration of alimony, the new statute states that "for any marriage or civil union less than 20 years in duration, the total duration of alimony shall not, except in exceptional circumstances, exceed the length of the marriage or civil union." Subject to this provision, the statute does expressly state that determination of the length and amount of alimony shall be made by the court pursuant to consideration of all of the statutory factors set forth within the statute. In addition to those factors, the court shall also consider the practical impact of the parties' need for a separate residence and the attendant increase in living expenses on the ability of both parties to maintain a standard of living reasonably comparable to the standard of living established in the marriage or civil union, to which both parties are entitled, with neither party having a greater entitlement thereto.

The statute goes on to list specific examples of "exceptional circumstances," which may allow the court to deviate from the presumption that in any marriage less than 20 years in duration, the amount of alimony should not exceed the length of the marriage. These exceptions are rather broad and in practice may eclipse the enumerated factors. They include the age of the parties, the degree and duration of dependency of one party on the other, whether a spouse or partner has a chronic illness or unusual health circumstance, whether a spouse or partner has given up a career or career opportunities, whether a spouse or partner has received a disproportionate share of the assets,[1] the impact of the marriage or civil union on either party's ability to become self-supporting (including responsibilities as primary caretaker of a child), tax consequences or any other factor or circumstance the court deems equitable, relevant and material.

In light of the foregoing, it may be that payors will be more inclined to initiate the divorce action quickly if no agreement can be reached, so the length of the marriage stops accruing. Consider whether it is malpractice to delay filing the complaint for divorce after the 20th wedding anniversary?

## Retirement

Substantial language has been added to the alimony statute providing for modification or termination upon the prospective or actual retirement of an obligor. There is now a rebuttable presumption that alimony shall terminate upon the obligor spouse or partner attaining full retirement age.[2] The rebuttable presumption may be overcome if, upon consideration of various factors (listed in detail within the new statute) and for good cause shown, the court determines alimony should continue. If the presumption is overcome, the court is then instructed by the new statute to apply the alimony factors set forth initially in the statute to the parties' current circumstances in order to determine whether modification or termination of alimony is appropriate. If the obligor intends to retire but has not yet retired, the court shall establish the conditions under which the modification or termination of alimony will be effective.

It would appear that if a payor makes an application to retire and is not successful, the court must then re-examine alimony. It appears to trigger an automatic review, *de novo*, of alimony. Further, both the obligor's application to the court and the obligee's response to the application shall be accompanied by a current case information statement (CIS) or other relevant documents as required by the Rules of Court, as well as the case information statements or other documents from the date of entry of the original alimony award and from the date of any subsequent modification. As such, an obligor who may have experienced a change of circumstances but is uncertain about whether they would meet their initial burden, and who is in a position to file a prospective application for termination based on retirement, can obtain the obligee's CIS when he or she may not have been otherwise able to do so. There is also a new provision addressing an obligor who seeks to retire prior to attaining full retirement age. Determination of the reasonableness of prospective or actual retirement is to be made based upon a list of new factors added to the statutory scheme.

## Modification by Non-Self-Employed/ Self-Employed Obligor

Regarding modifications of alimony awards, significant text has been added to the statutory scheme listing separate sets of factors for "non-self-employed" parties and "self-employed" parties. With regard to applications by non-self-employed parties, the court is now permitted to make a determination on whether a temporary remedy should be fashioned to provide adjustment of the support award from which modification is sought, and the terms of any such adjustment, pending continuing employment investigation by the unemployed spouse or partner. More importantly, in cases where the changed circumstances arise from the loss of employment,[3] the length of time a party has been involuntarily unemployed or has an involuntary reduction in income shall not be the only factor considered by the court when an application is filed by a non-self-employed party to reduce alimony because of involuntarily loss of employment. The court shall determine the application based upon all of the enumerated factors; however, no application shall be filed until a party has been unemployed or has not been able to return to or attain employment at prior income levels, or both, for a period of 90 days.[4] Nevertheless, the court shall have discretion to make any relief granted retroactive to the date of the loss of employment or reduction of income.

Does this provision modify the statute barring retroactive modification of child support? Consider whether it's appropriate for the court to require an obligor who may have legitimately experienced a substantial change in circumstances to continue to pay support from assets. Also, does the language allowing the court to enter any other order it finds appropriate to assure fairness and equity to both parties permit previously disallowed approaches such as escalator clauses? These new statutory provisions essentially reverse existing case law that suggests no relief may be granted to an alimony obligor unless he or she has been out of work for about 20 months.

When a self-employed party seeks modification of alimony because of an involuntary reduction in income since the date of the order from which modification is sought, that party's application for relief must include analysis that sets forth the economic and non-economic benefits the party receives from the business, and which compares these economic and non-economic benefits to those that were in existence at the time of the entry of the order.

Further, when assessing a temporary remedy the court may temporarily suspend support, or reduce support on terms; direct that support be paid in some amount from assets pending further proceedings; direct a periodic review; or enter any other order the court finds appropriate to assure fairness and equity to both parties.

## Cohabitation

The alimony statute has been further revised to change the impact of cohabitation upon alimony obligations. Specifically, the statute now provides that alimony may be suspended or terminated if the payee cohabits with another person. Cohabitation is now defined in the statute to involve "a mutually supportive, intimate[5] personal relations in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union *but does not necessarily maintain a single common household*." (emphasis added) When assessing whether cohabitation is occurring, the court shall consider six specific factors delineated within the statute, plus a seventh catchall regarding "all other relevant evidence." The fifth factor is "sharing household chores." Does that mean if you don't take out the garbage you're not cohabiting?

Of great importance is the concluding paragraph in the cohabitation section of the new statute, which states, "in evaluating whether cohabitation is occurring and whether alimony should be suspended or terminated, the court shall also consider the length of the relationship. *The court may not find an absence of cohabitation solely on grounds that the couple does not live together on a full-time basis*." (Emphasis added) Should the word "*may*" in this last sentence be "shall"? Does this mean a court may find no cohabitation if they aren't living together?

## Effective Date of New Law

At the very end of the statute, it states that the act shall take effect immediately and shall not be construed either to modify the duration of alimony ordered or agreed upon or other specifically bargained for contractual provisions that have been incorporated into: (a) a final judgment of divorce or dissolution; (b) a final order that has concluded post-judgment litigation; or (c) any enforceable written agreement between the parties. Paragraph 2 of the statute regarding its effective date presents interesting questions. For instance, if the parties' marital settlement agreement (MSA) has dealt with issues of cohabitation and retirement to some degree, can they take advantage of the new language in the statute? What controls—the MSA or statute? Will this determination depend upon how much detail is contained in a party's MSA? The author expects significant litigation over these issues.

*The author thanks Mark H. Sobel, managing partner of Greenbaum, Rowe, Smith & Davis, LLP, for his insightful observations and contributions to this column.*

## Endnotes

1. At the end of the statute, it now defines "full retirement age" to mean the age at which a person is eligible to receive full retirement benefits under Section 216 of the federal Social Security Act (42 U.S.C. s.416).
2. Is this factor appropriate? If it is appropriate for there to be a disproportionate distribution of assets based upon the equitable distribution factors, why should it be a deviating factor for the duration rule?
3. Based on *Mani v. Mani*, 183 N.J. 70 (2005), the Court has substantially moved away from considerations of fault in the alimony calculus. However, with the inclusion of this factor when a non-self-employed seeks modification of alimony (*i.e.*, the reasons for any loss of income), it seems to reintroduce those fault considerations. For instance, if an obligor's loss of employment is due to criminal action or other malfeasants, is that a consideration in denying the obligor's application?
4. Is this 90-day period always fair? What if an obligor is employed and in a union that has made concessions requiring the obligor to earn less money or have to contribute to medial insurance?
5. Consider the kind of inquiries that must be made in order to determine whether a relationship is "intimate."

## Executive Editor's Column

# *Maeker v. Ross*: Supreme Court Missed a Chance to Find Compulsory Counsel Was Unconstitutional

*by Ronald G. Lieberman*

The 2010 amendment to the statute of frauds required palimony agreements to be in writing and both parties to have "the independent advice of counsel" before making the agreement.[1] The recent New Jersey Supreme Court decision in *Maeker v. Ross*[2] reversed the Appellate Division decision[3] and held the 2010 amendment did not apply retroactively to oral agreements existing before the amendment.[4] Our state's Supreme Court did not, however, address the problematic issue of whether a party can be compelled by law to have the independent advice of counsel. The Appellate Division chose not to address that issue, even though "the claimed constitutionality infirmity relates to the requirement that parties to a palimony agreement must consult with counsel before memorializing such agreements,"[5] because the moving party "failed to raise that argument before the trial court."[6] In the future, a party should consider raising at the trial level the issue of the constitutionality of compelling parties in civil litigation to have the independent advice of counsel before entering into a contract. Once raised, it is believed a trial court's finding can only be that the 2010 amendment to the statute of fraud is unconstitutional.

Some background is necessary to see why that conclusion has been reached.

Federal law mandates the right to counsel in criminal matters. The Sixth Amendment of the United States Constitution provides in a criminal prosecution, "the accused shall enjoy the right…to have the Assistance of Counsel for his defence." In *Adams v. United States ex rel. McCann*, the Court held an individual has a "correlative right to dispense with a lawyer's help."[7]

Decades later, the Court held a state may not "constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense."[8] In so holding, the Court cited to another Supreme Court decision, wherein nothing in due process "denies a person the right to defend himself…."[9] In sum, "[to] thrust counsel upon the accused, against his considered wish, thus violates the logic of the [Sixth] Amendment…An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction."[10] But, under federal law, "in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of…counsel…."[11] Thus, counsel cannot be forced upon a litigant either in federal criminal or civil courts because *pro se* litigants are entitled to meaningful access to the courts.[12]

Given that sufficient access to the courts is a right protected by the due process clause of the 14th Amendment of the United States Constitution,[13] and the First Amendment of the United States Constitution,[14] all persons are permitted full access to the courts.[15] Yet in New Jersey, a person seeking to enforce a palimony agreement made in writing will be denied that enforcement if he or she did not have independent counsel. How can our state's preclusion stand when meaningful access to the courts is a constitutional right under federal law?[16]

Article One, Paragraph 10 of the New Jersey Constitution parallels the Sixth Amendment of the United States Constitution by guaranteeing a criminal defendant the right to counsel.[17] A defendant in this state can waive his or her right to counsel in a criminal matter after the appropriate inquiry.[18] If that inquiry cannot be satisfied, counsel will be appointed for the defendant because of the need "to protect the integrity of the State's interest in fair trials and permits courts to ensure that their judgments meet the high level of reliability demanded by the Constitution."[19] But the mandatory counsel requirement has no relevance to the 2010 amendment to the statute of frauds.

This state has the conundrum of compelling a party to have counsel before enforcing a palimony agreement, while counsel is not provided in domestic violence final hearings. In *D.N. v. K.M.*, the Appellate Division held "indigents mounting a defense or presenting allegations of domestic violence are not entitled to appointed counsel [because] [t]he entry of a domestic violence FRO…does not result in a 'consequence of sufficient magnitude' to warrant the mandatory appointment of counsel."[20] Does a palimony agreement constitute a consequence of sufficient magnitude, which would warrant the appointment of counsel? Is the consequence greater than the results of a domestic violence matter? If not, why does the 2010 amendment to the statute of frauds compel each party to have counsel?

There also is the twist of counsel being compelled in this state when a party who wins a lottery prize wishes to assign it. He or she must obtain a court order of assignment with the order, finding "that the winner has retained, and consulted with, independent legal counsel who has advised the winner of the winner's legal rights and obligations."[21] A party who seeks to assign an annuity jackpot similarly must obtain a court order of assignment with that order, stating "that the winner has retained and consulted with independent legal counsel who has advised the winner of the winner's legal rights and obligations."[22]

Putting aside that both lottery assignment statutes require a court order to disclose the contents of attorney-client discussions, one rationale behind them was "[t]he lottery winner, whether or not he needs the *parens patriae* protection of the State, is legislatively insulated from his own human frailties and the possible excesses to which he would otherwise be subjected by suddenly coming into possession of an enormous amount of cash."[23] The other rationale was a "clear legislative purpose [of the Lottery Law]…to keep the administrative machinery geared for the payment of winnings as simple and as efficient as possible."[24]

Neither rationale has application to the 2010 amendment to the statute of frauds, wherein the Legislature stated the amendment was created to "overturn recent 'palimony' decisions by New Jersey courts by requiring that any contract must be in writing and signed by the person making the promise."[25] That legislative history does not at all answer the question of why counsel was mandated in the 2010 amendment.

The right of self-representation is a "right [that] has deep roots in the common law."[26] The Supreme Court in *Faretta* recognized that "[t]he notion of compulsory counsel was foreign to the founders of the Constitution…and those who wrote the Bill of Rights [] surely…understood the inestimable worth of choice."[27] The compulsory counsel provision in the 2010 amendment thus ignores the inestimable worth of choice.

There is no legislative history in the 2010 amendment mentioning the mandatory counsel provision, and there is no case law supporting the mandate of parties entering into a contract to have attorneys or else lack an enforceable deal. Given the lack of legislative history or supporting case law, coupled with the determination that compulsory counsel in criminal matters where life and liberty is at stake is impermissible, the conclusion to be reached is that the 2010 amendment to the statute of frauds is unconstitutional. That question was not addressed in *Maeker v. Ross,* and awaits the practitioner's guiding hand. ■

## Endnotes

1. N.J.S.A. 25:1-5(h).
2. ___ N.J. ___ (2014)(2014 LEXIS 910).
3. 430 N.J. Super. 79 (App. Div. 2013).
4. *Maeker, supra*, ___ N.J. ___, slip op. at p. 10-11.
5. *Maeker, supra*, 430 N.J. Super. at 93.
6. *Id*. at 92.
7. 317 U.S. 269, 279 (1943).
8. *Faretta v. California*, 422 U.S. 806, 807 (1975).
9. *Id*. at 815, *citing Carter v. Illinois*, 329 U.S. 173, 174-175 (1946).
10. *Faretta, supra*, 422 U.S. at 820-821.
11. 29 U.S.C.A. 1654.
12. *Bounds v. Smith*, 430 U.S. 817, 823 (1977).
13. *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974).

14. *Cruz v. Beto*, 405 U.S. 319, 321 (1972).
15. *Johnson v. Avery*, 393 U.S. 483, 488 (1969).
16. *Bounds, supra*, 430 U.S. at 828; *Johnson, supra*, 393 U.S. at 485.
17. *State v. Crisafi*, 128 N.J. 499, 508-509 (1992).
18. *State v. Buonadonna*, 122 N.J. 22, 35 (1991); *State v. Davis*, 45 N.J. 195, 199 (1965).
19. *State v. Reddish*, 181 N.J. 553, 580, 587 (2004).
20. 429 N.J. Super. 592, 604 (App. Div. 2013), *certif. denied*, 216 N.J. 587 (2014).
21. N.J.S.A. 5:9-13d(15).
22. N.J.S.A. 5:12-100.1d(16).
23. Report of the New Jersey State Lottery Planning Commission, 23 (Feb. 9, 1970).
24. *Karafa v. N.J. State Lottery Comm.*, 129 N.J. Super. 499, 504 (Ch. Div. 1974).
25. Assem. Judiciary Comm. Statement to S. No. 2091, 213th Leg., 2d Sess. 1 (Dec. 3, 2009); S. Judiciary Comm. Statement to S. No. 2091, 213th Leg., 2d Sess. 1 (Feb. 9, 2009).
26. *State v. Buhl*, 269 N.J. Super. 344, 357 (App. Div.)(*citing* 3 Halsbury's Laws of England 1141 at 624-625 (4th ed. 1973)) *certif. denied*, 135 N.J. 468 (1994).
27. *State v. Wiggins*, 291 N.J. Super. 441, 449 (App. Div. 1996)(*citing Faretta, supra*, 422 U.S. at 833-34).

# Notes from the Family Law Section Executive Committee (FLEC)

*by William M. Schreiber*

A meeting of the New Jersey State Bar Association Family Law Section Executive Committee (FLEC) took place on Oct. 14, 2014, at the Law Center in New Brunswick. After opening remarks and approval of the minutes, FLEC grappled with positions to be taken on various family law-related bills pending before the Legislature. Topics included denying alimony to domestic violence offenders; visitation when children are in the custody of the Division of Child Protection & Permanency; non-emancipation of children if due to drug addiction; and electronic monitoring of certain individuals charged/convicted of violation of a final restraining order. After heated discussions on various bills, votes were cast. The results will go to the NJSBA Board of Trustees for consideration and further action.

Updates were supplied on *amicus* briefs filed by the section in *Major v. Maquire* and *Maeker v. Ross* before the New Jersey Supreme Court.

Thereafter, various committees reported on issues concerning the elective share; college contributions and "Kids Count." There were also reports from county liaison representatives on developments in various counties around the state. Action will be taken as required by the officers on some of the issues raised.

It was discussed that there would be a 50th anniversary party for the section on Friday, Jan. 23, 2015, coinciding with the Family Law Symposium. This would take place at the Hyatt in New Brunswick.

Reports were also made concerning the Family Law Retreat, which is scheduled to take place in Key West from March 1 through March 15, 2015.

There were also additional reports from other committees dealing with nominations for the Tishler Award, nominations for the Serpentelli Award, and nominations for the next secretary of FLEC.

After a rather lengthy meeting there was a motion to adjourn, which was passed unanimously. ■

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# Unchartered Territory of Amending Prenuptial Agreements

*by Jonathan W. Wolfe and Thomas J. DeCataldo Jr.*

Mr. Smith seeks to hire you to enforce a prenuptial agreement that was amended during his marriage. He explains that he and his wife had executed a prenuptial agreement 20 years ago, prior to their marriage, and then amended their agreement on July 15, 2013. The Smiths were represented by counsel when they executed their prenuptial agreement, and had made all necessary financial disclosures at the time. He explains they were happily married with three children when they amended their agreement because Mrs. Smith's premarital business proved far more successful than either party had anticipated. The business, which was valued at $2 million at the time of the marriage, had grown in value by an estimated $18 million during the marriage. Both its original value and the appreciation were deemed exempt under their prenuptial agreement.

Mr. Smith explains that both spouses were concerned about the financial imbalance created by the terms of their existing agreement. To address this disparity, they hired lawyers, made financial disclosures, and amended the agreement to provide him with a payment in exchange for his waiver to the appreciation of her business. Mr. Smith argued he should receive 40 percent of the appreciated value at the time of divorce, but the parties ultimately agreed his payment would be limited to $5 million—not tied to any percentage of the business's value or appreciation. Mrs. Smith preferred this approach because she wanted to avoid a formal valuation at the time of the amendment and any divorce (and, Mr. Smith believes, because she anticipated the business would continue to appreciate).

The amendment did not address Mr. Smith's business, which had been valued at $800,000 prior to the marriage and was believed to be worth the same or less at the time of the amendment. In Jan. 2014, Mrs. Smith's business collapsed after a defect in its top-selling product injured a customer. In April 2014, to everybody's amazement, Mr. Smith sold his company to Facebook for net proceeds of $17 million.

In July 2014, Mr. Smith discovered his wife was having an affair. He now seeks to enforce the parties' agreement and the amendment. Mrs. Smith's business is worthless. The parties have a home with equity of $1.5 million and savings of $8.5 million, both of which are considered 'marital' under their agreement, leaving both parties with the right to receive $5 million. If the amendment were enforced, Mrs. Smith would be required to pay Mr. Smith $5 million for his share of her defunct business. She would be left with nothing, and Mr. Smith would retain *all* $10 million of marital assets *plus* the $17 million sale proceeds from his business.

What standard will be employed by the court to assess the enforceability of the parties' prenuptial agreement? How about the amendment? Is the standard the same or different? Is consideration required for the amendment? Will the agreement be subject to review based upon the change of circumstances? What about the original agreement?

The operative standards governing the enforceability of prenuptial agreements and mid-marriage agreements—namely, agreements entered into during the marriage by spouses without prenuptial agreements—have been widely addressed by the New Jersey Legislature and courts. However, parties that elect to *amend* a premarital agreement have little guidance concerning the standard of review that will be applied to their amendment.

## Background

Under New Jersey law, prenuptial agreements have historically been treated very differently than mid-marriage agreements, with the former more commonly enforced and the latter being subject to a heightened scrutiny in divorce. Under New Jersey's Uniform Premarital and Pre-Civil Union Agreement Act (UPA),[1] such agreements may be amended during divorce *without consideration*. Yet there is no precedent governing whether such an amendment will be reviewed under the standard for prenuptial agreements or the heightened mid-marriage agreement standard.

Further complicating matters, the UPA was significantly amended effective June 27, 2013. Even if amendments to prenuptial agreements were to be reviewed under the standard applicable to prenuptial agreements, not mid-marriage agreements, there may be many parties like the Smiths that entered into their original agreement before the change in the law, and entered into their amendment after the new standard became effective.

This article addresses the disparate legal standards governing the enforceability of prenuptial and marital agreements in New Jersey, the lack of precedent governing the standard for enforceability of amendments to prenuptial agreements in New Jersey, and conflicting approaches adopted elsewhere to address this issue.

## Enforceability of Prenuptial Agreements

The 2013 amendments to the New Jersey UPA substantially limited a challenging spouse's ability to set aside a premarital agreement by: 1) narrowing the scope of what will be considered unconscionable, and 2) limiting the focus to a review of facts as they existed at the time the agreement was entered, removing prior authority to review circumstances as they exist at the time of the agreement is enforced. The new standard applies to all agreements entered into on or after the effective date of June 27, 2013.

Under the revised statute, a party seeking to set aside a prenuptial agreement may only do so after proving the agreement was executed involuntarily, or it was unconscionable at the time it was executed because a party did not have an opportunity to retain independent counsel or full and complete financial disclosure.[2] The statute further limited the discretion of a reviewing judge, providing that "[a]n agreement shall not be deemed unconscionable unless the circumstances set out in [the act] are applicable."[3]

Agreements entered into prior to June 2013 are still subject to review based upon the prior broader definition of unconscionable under N.J.S.A. 37:2-32C, pursuant to which a party may demonstrate unconscionability by proving he or she will be left without a means of reasonable support, or that enforcement will provide a standard of living far below what was enjoyed before the marriage. Under this prior version of this statute, a reviewing court is afforded far wider discretion, and examines the appropriateness of the agreement based upon the facts and circumstances at the time the agreement was made *and* when it is sought to be enforced.

Since the current form of New Jersey's UPA was only codified in June 2013, there is an absence of precedent testing the new standard and its limitations.

## Enforceability of Mid-marriage Agreements

Parties without prenuptial agreements that enter into an agreement during their marriage to define their rights and obligations in the event of divorce are treated very differently under New Jersey law.[4] In *Pacelli*, the court explained the rationale for treating mid-marriage agreements differently than prenuptial agreements, as follows:

> Here, unlike the pre-nuptial bride, [the Wife] had entered into the legal relationship of marriage when her husband presented her with his ultimatum. Moreover, the marriage had produced two children. Thus, [the Wife] faced a more difficult choice than a bride who is presented with a demand for a prenuptial agreement. The cost to [the Wife] would have been the destruction of a family and the stigma of a failed marriage.[5]

The court concluded that "placing a mid-marriage agreement in the same category as a pre-nuptial agreement is inappropriate," noting that the "dynamics and pressures involved…are qualitatively different."[6] Accordingly, the court ruled that mid-marriage agreements must be "fair and just" and will be "closely scrutinized" at the time they are executed *and* based upon the facts that exist at the time of enforcement.[7]

In *Nicholson*, the Appellate Division affirmed the enforceability of a reconciliation agreement entered into during the parties' marriage.[8] The court ruled, "where…the marital relationship has deteriorated at least to the brink of an indefinite separation or suit for divorce, a spousal promise that induces reconciliation will be enforced if it is fair and equitable."[9] The court held that the "consideration" for the property conveyed by the husband to the wife during the marriage was her agreement to reconcile (after discovering his repeated infidelities) and that "there is no reason why a valid reconciliation agreement should not be enforced."[10] The court held, however, that such agreements are subject to a heightened level review, and 1) "must have been conscionable when the agreement was made," 2) the "party seeking enforcement must have acted in good faith," and 3) "changed circumstances must not have rendered literal enforcement inequitable."[11]

## Standard of Review for an Amendment to a Prenuptial Agreement

There are no cases in New Jersey addressing the appropriate standard of review to be utilized for assessing the enforceability of an amendment to a prenuptial agreement. However, the UPA explicitly contemplates such amendments.[12] Moreover, while mid-marriage agreements require consideration to be enforceable, the UPA specifically provides that an amended prenuptial agreement "is enforceable without consideration."[13] Not only are amendments explicitly authorized by statute without consideration, parties amending their agreement during their marriage are in a decidedly different position than parties who never had an agreement in the first place. They have already been through the process, prior to their marriage, of negotiating and entering into an agreement defining their legal rights in the event of divorce, presumably with the benefit of legal counsel and financial discovery. That being said, to the extent there is a "qualitatively different" dynamic as described in *Pacelli*, negotiating an agreement during the marriage, that difference, it could be argued, exists equally for couples negotiating an amendment during their marriage.

Given their dramatically different standard of review, whether the amendment will be treated as a premarital agreement or a mid-marriage agreement may determine the outcome of the client's matter. This particularly will be the case given the 2013 amendments to the UPA. For example, unlike the new UPA, *Pacelli* and *Nicholson* require an examination of whether there has been a change of circumstance that would render enforcement of the agreement unfair.

The Connecticut Superior Court, in *Hornung v. Hornung,*[14] addressed this issue of what standard to apply to an amendment to a prenuptial agreement. In *Hornung*, at the time the parties negotiated a prenuptial agreement, the husband had estimated his interest in his business was worth between $275,000 and $550,000, and the parties agreed the business and its appreciation would constitute his separate property. Three years into the marriage, the husband sold his interest for approximately $37 million. Eight years later, the parties amended their agreement to provide the wife an additional payment of $3.5 million, but otherwise left her waiver to his business intact.

The *Hornung* court arrived at a hybrid approach. First, *Hornung* held, because the modified agreement had its origins as a prenuptial agreement, consideration was not required because Connecticut law, like New Jersey's UPA, provides that consideration is not required for an amendment to a pre-marital agreement.[15] Second, the court decided that the "special scrutiny" standard for mid-marriage agreements would apply to the amendment.[16] In so ruling, the court noted the parties had "entered into the agreement as a married couple with no intention to end the union," and "what sets any postnuptial agreement apart from prenuptial…agreements is the status of an intact marriage."[17]

In applying the hybrid standard, the court remarkably upheld the prenuptial agreement and the amendment, notwithstanding its findings that: 1) "the difference between the husband's estimate [of the business value] and its actual value…renders the initial estimate 'implausible' at best,"[18] 2) the husband was "a controlling, emotional bully"[19] and had misled his wife into believing the purpose of the amendment was estate planning when it was really to protect his assets upon divorce,[20] and 3) the husband had "fail[ed] to adequately disclose his income for the year and one-half preceding the execution of the agreement…."[21]

A dramatically different approach may be found in the 2012 Premarital and Marital Agreements Act adopted by the Uniform Law Commission (ULC), which seeks to apply the same legal standard to both premarital and mid-marriage agreements. In its review of the 1983 Premarital Agreement Act, the model act upon which New Jersey's UPA was originally based, the ULC noted the disparate treatment most states afford to premarital agreements and postnuptial agreements. It also considered the potential problems that could ensue from applying different legal standards to these agreements, particularly when a premarital agreement is amended during a marriage.

In a note to the 2012 act, the ULC indicated that "[w]hatever its faults, [the 1983 act] has brought some consistency to the legal treatment of premarital agreements, especially as concerns rights at dissolution of marriage."[22] On the contrary, however, "the situation regarding marital agreements has been far less settled and consistent."[23] The ULC indicated the commission's "general approach of this act is that parties should be free, within broad limits, to choose the financial terms of their marriage."[24]

Accordingly, the 2012 act has been redesigned for premarital agreements and marital agreements to be governed "under the same set of principles and requirements."[25] Even the act's title was changed to include both premarital and marital agreements, with the act now known as the Uniform Premarital *and Martial Agreements* Act.

The act, at Section 2(2), defines "marital agreement" as follows:

> an agreement between spouses who intend to remain married, which affirms, modified, or waives a marital right or obligation during the marriage or at separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event. The term includes an amendment, signed after the spouses marry, of a premarital agreement or marital agreement.

The 2012 act has been approved by the American Bar Association, has been adopted in two states, and is being presented for legislation in multiple jurisdictions.

## Conclusion

For practitioners counseling clients amending an existing premarital agreement, be sure to include in any agreement the legal standard that the parties seek to govern the enforcement of their agreement, and the agreement's purpose for their amendment. For parties like Mr. Smith, seeking to enforce an amendment to a prenuptial agreement, stay tuned, as this unchartered area of the law continues to develop. ■

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## Endnotes

1. N.J.S.A. 37:2-31–41.
2. *See* N.J.S.A. 37:2-40.
3. *Id.*
4. *See Pacelli v. Pacelli*, 319 N.J. Super. 185 (App. Div. 1999) *cert. denied* 161 N.J. 147 (1999) (setting aside a mid-marriage agreement); *compare Nicholson v. Nicholson,* 199 N.J. Super. 525, 529 (App. Div. 1985) (upholding enforcement of reconciliation agreement).
5. 319 N.J. Super. at 191.
6. *Id.* at 195.
7. *Id.* at 198 (holding changed circumstances, for the better or worse, could render enforcement "inequitable)."
8. 199 N.J. Super. at 531-2.
9. *Id.*
10. *Id.* at 529.
11. *Id.* at 532.
12. *See* N.J.S.A. 37:2-37 ("After marriage…a premarital… agreement may be amended…only by a written agreement signed by the parties, and the amended agreement…").
13. *Id.*
14. 2014 WL 1568631, *1 (Super. Ct. March 20, 2014).
15. *Id.* at ** 3, 5.
16. *Id.* at *5.
17. *Id.* at *4.
18. *Id.* at *3.
19. *Id.* at *2.
20. *Id.* at *6.
21. *Id.* at * 7.
22. *See* Uniform Premarital and Marital Agreements Act, at 1.
23. *Id.*
24. *Id.*
25. *Id.* at 2.

# Postnuptial Agreements: Considerations for Drafting and Enforcement under New Jersey and New York Law

*by Stephanie F. Lehman and Ashley B. Slobodkin*

New Jersey attorneys often represent clients who have jurisdictional ties to both New Jersey and New York. In these instances, the attorney is obligated to analyze the law of both states to appropriately counsel the client. This issue frequently arises in the context of spousal agreements, including postnuptial agreements. There is a vast difference between New York and New Jersey law regarding the standard of review for enforcement of postnuptial agreements. This article provides an overview of the requirements for drafting a postnuptial agreement in each state and the disparity between New York and New Jersey law. While postnuptial agreements present a dilemma for attorneys in either state, a greater potential for enforcement unquestionably exists under New York law.

## New Jersey's Postnuptial Agreement Law

The enforceability of postnuptial agreements in New Jersey remains unsettled, making it difficult and risky for attorneys to recommend them to their New Jersey clients. A postnuptial agreement is differentiated from both a prenuptial agreement—where the party presented with an unfavorable proposition remains free to walk away—and a property settlement agreement, which is entered into when the marriage has already 'died,' and the parties are adversarial and are assumed to be negotiating in their own self-interest. The courts distinguish between parties to a postnuptial agreement and those contemplating either a prenuptial or settlement agreement because parties to a postnuptial agreement have already entered into, and intend to remain in, the legal relationship of marriage.

The leading case regarding postnuptial agreements in New Jersey is the Appellate Division's decision in *Pacelli v. Pacelli*, where the court found the parties' postnuptial agreement was unenforceable.[1] The court declined to issue a bright line rule stating postnuptial agreements are *per se* unenforceable, and instead concluded the agreements must be closely scrutinized and carefully evaluated. However, approximately 11 years later, the court in *Ward-Gallagher v. Gallagher* stated that "*[g]enerally*, mid-marriage agreements are unenforceable as they are 'inherently coercive'..."[2] Thus, the enforceability of postnuptial agreements in New Jersey appears highly questionable and should not be relied upon to alter the financial relationship between spouses.

To constitute a potentially enforceable postnuptial agreement, the agreement must be executed when the parties' relationship has genuinely deteriorated and must not be entered into merely to enable one spouse to exact a financial gain over the other. For example, in *Pacelli* the court found the husband artificially created a marital "crisis" to take advantage of the wife's desire to keep the parties' marriage and their family intact. The court further found the context in which the husband made his demand—in essence, sign an agreement or I will divorce you—was "inherently coercive," as the wife's decision to sign the agreement was dictated by her desire to preserve her family rather than by a consideration of her legal rights. Notably, the fact that the wife was represented by independent legal counsel, who advised her not to sign the agreement, was of no consequence.

In addition, a postnuptial agreement must be fair and equitable both when it is made and when enforcement is sought. It is important to note this dual inquiry makes the standard of review for postnuptial agreements different than the standard applicable to prenuptial agreements, which are governed by N.J.S.A. 37:2-38 and which are evaluated for unconscionability only at the time of execution.[3]

For an agreement to be deemed fair at the time of execution, full and accurate disclosure must be made. The court will examine the agreement as a whole, considering its total effect, including the division of assets, provisions for alimony and rights upon a spouse's death.

The agreement must also be equitable at the time enforcement is sought. Changed circumstances must not have made enforcement inequitable, and the court in *Pacelli* notes two reasons for this inquiry. First, a marriage may survive for many years after such an agreement, and it may be inequitable to preclude the non-moneyed spouse's participation in post-agreement wealth, particularly when the family's prosperity is due, in part, to the contribution of a spouse in the role of homemaker and caregiver to the parties' children. Second, the postnuptial agreement may be inequitable to the obligor if a family's assets are worth less at the time of enforcement than when the agreement was executed.

Although New Jersey law presumably favors the enforcement of marital agreements, the "law affords particular leniency to agreements made in the domestic arena and similarly allows judges greater discretion when interpreting these agreements."[4] As stated in *Lepis v. Lepis*, "contract principles have little place in the law of domestic relations."[5] Courts will, however, review each agreement on a case-by-case basis and have found agreements between spouses to be enforceable under the appropriate facts and circumstances.[6] Thus, while it appears postnuptial agreements will be enforced under the appropriate facts and circumstances, extreme caution should be exercised when altering the financial relationship between spouses.

## New York's Postnuptial Agreement Law

Unlike their New Jersey counterparts, postnuptial agreements in New York are addressed by statute. Domestic Relations Law §236(B)(3) provides "an agreement by the parties, made...during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded." The agreement must be signed and acknowledged simultaneously.[7]

Ordinary principles of contract law apply, with the *caveat* that "[b]ecause of the fiduciary relationship that exists between spouses, postnuptial agreements are closely scrutinized by the courts and are more readily set aside on grounds that would be insufficient to nullify an ordinary contract."[8] The spouse seeking to set aside an agreement bears the burden of showing the agreement was the result of fraud or overreaching, or that its terms were unconscionable.[9]

A postnuptial agreement may be set aside upon a showing of either actual or constructive fraud. Unlike with actual fraud, a finding of constructive fraud does not require a demonstration of fraudulent intent; rather, "[t]he law regards the making of a misrepresentation by a defendant who possesses a position of superiority and influence over the plaintiff by reason of the confidential relationship between them as a breach of duty actionable as constructive fraud."[10] The doctrine of constructive fraud is applicable in the context of postnuptial agreements since spouses share a confidential relationship requiring the utmost good faith when contracting with each other. A finding of fraud is not, however, required to set aside an agreement, as relief will be granted if the agreement is manifestly unfair because of the other spouse's overreaching.[11]

If the terms of a postnuptial agreement are manifestly unfair to a spouse when the agreement was executed, the inference of overreaching[12] arises.[13] The terms of a postnuptial agreement must also not be unconscionable when the agreement was executed. An unconscionable agreement has been defined as "one which no person in his or her senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense."[14] Spousal support provisions, however, must be fair and reasonable upon execution of the postnuptial agreement, and must not be unconscionable at the time of enforcement.[15]

Agreements between spouses involve a fiduciary relationship, which requires each spouse to make adequate financial disclosure. Property should be identified as specifically as possible, and any agreement that references "attached schedules" must be accompanied by those attachments.[16] In addition to financial disclosure, each party should be represented by independent counsel, and should be afforded adequate time to reflect upon the terms of the agreement to minimize the likelihood it will be held unenforceable.[17]

## Conclusion

New York is clearly more protective of the letter of its postnuptial agreements, while New Jersey is less interested in the contract itself and more concerned with what appears equitable at the time of enforcement. Further, while New Jersey law's baseline is that postnuptial agreements are 'generally' unenforceable, New York law specifically provides for these agreements and is much more likely to enforce them.

The stark contrast between the standard for enforcement of postnuptial agreements in New York and New Jersey makes it clear why attorneys considering postnuptial agreements for clients with jurisdictional ties to both states must carefully consider the law of the state in which the agreement is to be interpreted. If you represent the client who is likely to fare better if the agreement is upheld in its entirety, then a choice of New York law is indisputably in your client's best interest.

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## Endnotes

1. *Pacelli v. Pacelli*, 319 N.J. Super. 185 (App. Div. 1999).
2. *Ward-Gallagher v. Gallagher*, 2010 WL 3257916m at *6 (App. Div. 2010)(*quoting Pacelli, supra,* 319 N.J. Super. at 190-191)(Emphasis added).
3. Applies to prenuptial agreements entered on or after June 27, 2013.
4. *Massar v. Massar*, 279 N.J. Super. 89, 93 (App. Div. 1995)(*citing Guglielmo v. Guglielmo,* 253 N.J. Super. 542 (App. Div. 1992)).
5. *Lepis v. Lepis*, 83 N.J. 139, 148 (1980).
6. *See Massar, supra* (finding an agreement that limited the grounds under which a party could file for divorce enforceable).
7. *See Galetta v. Galetta*, 991 N.E.2d 684, 692 (N.Y. 2013); *see also*, *D'Elia v. D'Elia*, 788 N.Y.S.2d 156, 157 (N.Y. App. Div. 2005).
8. *Einhorn v. Einhorn*, 899 N.Y.S.2d 59, at *6 (N.Y. Sup. Ct. 2009)(citations omitted).
9. *Id.* at *7.
10. *Abbate v. Abbate*, 441 N.Y.S.2d 506, 512 (App. Div. 1981)(citations omitted).
11. *Christian v. Christian*, 365 N.E.2d 849, 856 (N.Y. 1977).
12. Overreaching is defined as "the concealment of facts, misrepresentation or some form of deception." *In re Phillips' Estate*, 58 N.E.2d 504, 508 (N.Y. 1944).
13. *Petracca v. Petracca*, 956 N.Y.S.2d 77, 80-81 (App. Div. 2012).
14. *Einhorn*, *supra,* 899 N.Y.S.2d., at *7.
15. *See* D.R.L. §236(B)(3); *see also Einhorn*, *supra*.
16. *See Darius v. Darius*, 665 N.Y.S.2d 447, 450 (App. Div. 1997).
17. *See C.S. v. L.S.*, 980 N.Y.S.2d 274, at *6 (N.Y. Sup. Ct. 2013).

# Tax Consequences of the Alimony Trust (Part II)

*by Katrina Vitale*

This article continues the analysis of the use of the alimony trust where economically feasible and what we can learn from its development over time and through litigation involving the alimony trust. The first installment of the article addressed the progression and application of the alimony trust. This second installment concerns issues arising with drafting and improvement of the alimony trust's viable use by legal practitioners and state courts leading into the future. As set forth in the *New Jersey Family Lawyer*, Volume 35, Issue 2, the alimony trust is a trust that is generally established for the payment of a support obligation of one spouse or former spouse to another, which may or may not provide a security fund for payment of the obligation beyond the lifetime of the payor spouse. Highly technical requirements for the establishment of a valid and effective trust support careful consideration of using the services of other professionals to properly proceed.

## Utilizing the Services of Other Professionals

### Attorney as the Scribner

Generally, the estates lawyer will be primarily responsible for drafting the alimony trust. The estates lawyer is familiar with the preparation and administration of similar legal instruments, including the *inter vivos* trust, testamentary trust, revocable and irrevocable trusts, and irrevocable life insurance trusts. However, the need for such alimony trust drafting generally does not arise in the estate-planning context; it usually arises in the context of a pending divorce. Therefore, the divorce attorney must be able to spot the issue.

Given the hybrid nature of the alimony trust, it is crucial for the divorce lawyer to consult with a qualified estates lawyer. While not a guarantee to produce an alimony trust immune from attack, the combination of legal expertise in the two fields can create a draft that will work rather than run the risk of limited analysis or oversight of key concepts. The family lawyer offers valuable input into the rights and obligations of parties with respect to the state law applicable to alimony and its modification or termination. These underlying rights and obligations must be fully explored in the drafting of any alimony trust to avoid an unknown or unforeseen loss of the rights of a payor or payee.

That being said, the attorney must continue to act in oversight of the drafting of an alimony trust to ensure compliance with their ethical obligations of competence and diligence.[1] Both attorneys must have a full understanding of the resulting draft and its implications. While this may appear obvious, so is the need for emphasis.

### Input of Accountants or Another Tax Expert

Tax treatment of the alimony trust will be determined based on the terms of the trust. Drafting techniques can also affect the taxable estate of the grantor and the beneficiary. A qualified accountant or another tax expert offers needed perspective relative to tax and financial implications of the alimony trust, not limited to legal aspects upon which the attorney will focus. Additionally, the accountant or tax expert should be regularly updated on changes in tax law that will prove to be useful as time passes during the course of drafting and from one case to another.

Tax law involves complexities that rapidly change and vary from one situation to another, not to mention exceptions within exceptions that can be buried in the tax code and regulations. To complicate matters, there is a combination of authority that dictates the tax benefits and burdens in the trust and estate area. There are filing and reporting requirements and deadlines that must also be met, presently including Tax Form 1041,[2] to be filed by the trustee for the trust, and Tax Form 1040,[3] to be filed by the beneficiary in recognition of income received. If overlooked, this can financially devastate the client and give rise to a legal malpractice claim against the attorney. It is, therefore, most imperative that tax expertise be solicited in alimony trust planning. Considering the primary purpose in preparing the alimony trust is to meet the financial goals of the client, tax experts should be involved throughout the duration of the alimony trust planning and drafting process.

### Input of Corporate Trustees

In all trust situations, the trustee will play a crucial role in administering the terms of the trust and carrying out the known intentions of the grantor. The alimony trust is no different in this respect. An ability to consider practical implications of trust administration involving the future trustee will offer a more fully developed perspective for application of the trust.

A corporate trustee confronts administrative issues in carrying out the terms of any given trust on a routine basis. The input of such expertise is beneficial at the drafting stages. This does not necessarily mean the designated trustee must be consulted in advance, although certainly such input may be preferred. Rather, at the very least, the input of an experienced corporate trustee can produce a more developed draft in view of implications not readily projected by the scrivener or unwary parties to the alimony trust.

From another viewpoint, failure to consult a corporate trustee can lead to interpretation issues if, for example, a term of the alimony trust cannot be implemented due to practical considerations. This can arise from inclusion of a trust term that conflicts with standard procedures of the trust department anticipated to administer the trust. The time involved in revising such a term in an active trust can be unwieldy compared to revision in the drafting stages. Quite simply, the benefit gained from anticipatory review may prevent future legal and practical problems from arising.

## Future Changes and Applications

### Areas of Improvement

One issue that can present as a problem for the payor with the alimony trust includes no deduction for payments by the payor. This can be a problem for the payor who agrees to a revocable alimony trust. It is not necessarily the issue for the payor in the instance of a properly drafted and implemented irrevocable alimony trust who may have achieved the tax goal of removing the asset from his or her estate. To the extent distributions are paid to the payee from principal rather than from interest income (and consequently failing to meet a tax shifting goal), the payor may be concerned that he or she cannot claim a tax deduction. If the payor otherwise makes such payment as alimony outside of the trust, he or she may claim a tax deduction under the tax code. This is the effective shift of income by the payor to the payee considering the payor was previously required to pay taxes on such funds when received as income and can later claim a deduction when paid as alimony. However, the tax code does not allow such tax deduction for any payments to the payee in the case of an alimony trust. The tax deduction under Code Section 71(b) is lost.

Other than avoidance of underfunding an alimony trust, one possible alternative to the inflexibility of non-deductible *corpus* payments would be future legislation that would allow for a tax deduction for payments disbursed from principal, and not from income, while meeting all other requirements of code Section 71(b). The effect would be to treat such a payment as alimony from the hands of the payor. This is rationally based on the principle that the funds transferred to the trust might have a reversionary interest, and thus are not wholly removed from the estate of the payor. This is especially true where the trust is revocable or otherwise subject to modification.

For now, however, the negative consequence can be avoided with a properly funded trust and distributions made from income on the trust *corpus* without tapping into the principal. In this way, the *corpus* of the trust can be preserved for the intended beneficiaries of the payor pursuant to the terms of the trust and without invasion by the payee.

Another way to avoid the negative consequences necessitates reconciliation between code Sections 682 and 71 pertains to tax-altering treatment of child support. In the 1961 Supreme Court decision *United States v. Lester*, the Court held that support payments specifically designated as child support were not deductible by the payor and were not includable in the gross income of the payee spouse.[4] No payment would be presumed to be child support unless specifically so designated.[5] As such, there would be no determination "by inference or conjecture."[6] Once a payment (or portion of the payment) is expressly earmarked for children's support, it would be nondeductible to the payor, even though he or she actually supports the children in addition to making the payment. Support payments that can be characterized as child support cannot be treated as alimony under Section 71, yet if the parties specifically designate a portion of support in a Section 682 alimony trust, they can alter that characterization. This author believes these code sections should be amended to allow for consistency. One option for the reconciliation is to amend Section 682 consistent with the *Lester* rule as it implicates alimony trusts.

This author believes there can also be improvement under Section 682 by adding clear language for an exception from the six-year rule and the alimony recapture rules. At this time, practitioners remain at risk in relying on the regulations that otherwise suggest there exists such an exception. Any practitioner should remain cautious in counseling clients before reliance on the regulations given the language of Section 71.

Another aspect of Section 682 this author feels requires clarification includes the below-market interest rules of Section 7872. Clarification is needed to determine the extent to which the below-market interest rules of Section 7872 could apply to short-term trusts in which the payor retains a reversionary interest. This issue is left open in the language of Section 682 and the subchapter J provisions, and remains a trap for the unwary.

## Expansion of Use

Based upon the nationwide focus on alimony reform and the recent revisions to New Jersey alimony law,[7] one can expect that the alimony trust will receive more attention from divorce and estate lawyers because Section 682 offers viable, alternative tax planning. Consequently, the alimony trust is a more attractive tool for the payor today. With the population living longer, there is an added interest today to secure payments from an obligor. This alternative offers the payee a more secure interest in ongoing payments without interruption.

## Development of the Law

As the plain language of Section 682 of the code reveals, trust income can be allocated to a spouse who receives the income distribution of a qualified alimony trust, thereby shifting the income otherwise tied to assets in the name of the other spouse. The alimony tax-planning tool of Section 682 exists as an option to parties who wish to combine their tax planning with their alimony obligations upon separation or divorce. Attentive attorneys take advantage of this unique tax-planning device to serve client goals on multiple levels when resolving family matters. It is perhaps an underused tool by the state courts, however.

In the same manner that the state courts have the power to allocate an equitable distribution of assets, the same courts have the power to direct the use of an alimony trust to serve the purposes of removing income derived from assets and allocate them to the other spouse as an alternative to assessing Section 71 alimony. State courts likewise have the power to direct the use of an alimony trust to ensure payment of alimony through secure means to a dependent spouse, as an alternative to direct payment, "under a decree of divorce or of separate maintenance." What is missing is the artful lawyering to establish such a claim in the appropriate circumstances. An option overlooked from many viewpoints, the alimony trust is yet another alternative for review as legislators, practicing attorneys, and clients seek answers for alimony reform.

## Conclusion

The time to revisit alimony trust legislation and its utility is ripe for review. In appropriate circumstances, the alimony trust is a viable tool for both divorce and estate lawyers, and is given more favorable tax treatment today as compared to its pre-1984 tax treatment. The family law attorney must recognize the opportunity for use of an alimony trust when feasible, advocate the effective use of the alimony trust upon which state courts may rely, and then work with the estates lawyers to carefully frame out key terms while relying upon input of other qualified professionals, such as tax professionals and corporate trustees, to meet client goals.

Properly utilized, the alimony trust remains available to offer tax advantages, when financially applicable, for both parties to a divorce, and to offer security for a payee spouse. Attention to its utility and improvement is essential to the development of alimony trust law. ■

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## Endnotes

1. *See* ABA Model Rules of Professional Conduct 1.1 and 1.3.
2. *See* I.R.C. § 6012(a)(4). Form 1041 is used to report the income, deductions, gains, and losses of a trust. The trustee must file a tax return on Form 1041 if the trust estate has gross income of $600 or more during a tax year. A trust income tax return must be filed if the trust has any taxable income for the year or gross income of $600 or more. *See* Treas. Reg. §§ 1.641(a)(2) and 1.61-1(a).
3. *See* I.R.C. § 6012(a)(1)(a). Depending on the circumstances, Form 1040, Form 1040A, or Form 1040EZ will be used to report income distributed from a trust where the taxable year gross income equals or exceeds the applicable exemption amount plus any applicable basic standard deduction.
4. *United States v. Lester*, 366 U.S. 299 (1961).
5. *Id*.
6. K-6192 Payment for Support of Husband's Minor Children—Under Pre-'85 Decrees, *Fed. Tax Coordinator*, 1997 WL 521096 (2nd ed. 2014).
7. N.J.S.A. 2A:34-23 (2014).

# The Thrift Savings Plan: When Federal Law Trumps Common Sense

*by Carrie A. Lumi*

The equitable distribution of pension and retirement accounts remains a minefield for attorneys. Family lawyers often rely, sometimes blindly, upon actuaries retained to craft an order to effectuate the intended distribution of the plan. With countless retirement plans, however, come countless regulations governing the distribution and payment of benefits. While each plan presents its own unique set of hurdles, this article focuses on the federal Thrift Savings Plan (TSP) and the quagmire its mandates present for attorneys and their clients.

## What is the TSP?

The TSP is a defined contribution plan available to United States civil service employees and retirees as well as to members of the uniformed services. The TSP is one of three components of the Federal Employees Retirement System (FERS). The other two components are the FERS annuity and Social Security. The TSP is crafted to resemble the 401(k) plans offered in the private sector and is administered by the Federal Thrift Investment Board. With more than 4.6 million participants in the TSP, family lawyers cannot afford to be uninformed about the subtleties of this plan.[1]

Five funds are primarily available in the TSP, ranging from conservative to aggressive: G (Government Securities); F (Fixed Income Index); C (Common Stock Index); S (Small Cap Stock Index) and I (International Stock Index). Depending on the composition of the investments, the plan participant may have an aggressive, moderate or conservative investment blend. The plan composition on the complaint filing date, or other designated entitlement date, is the critical component utilized in calculating the earnings and losses on the account through the date of distribution.

## Distribution of a TSP Account

When a matrimonial settlement agreement provides for the distribution of a defined contribution plan like the TSP, it typically contains language indicating 50 percent of the marital portion of the plan, or a specified amount, shall be distributed to the former spouse, with adjustments for interest or earnings based upon the investment experience of the account. This language is carried over into the terms of the order providing for distribution of the plan. In the case of the TSP, however, the devil is surely in the details.

A participant's benefits under the TSP are distributed through a qualifying retirement benefits court order (QRBCO). The QRBCO will state the former spouse's benefit as well as whether and how interest or earnings will be awarded. Attorneys should take no comfort if the QRBCO provides the plan administrator will adjust the former spouses' award for interest or earnings based on the investment experience of the account unless there is a clear delineation of how the investment experience will be calculated. If an acceptable calculation method is not contained in the language of QRBCO, the TSP will default to the Code of Federal Regulations (CFR) for direction. The CFR, however, has no regard for the parties' intent in distributing the retirement account or in ensuring that intent is effectuated.

The QRBCO approved by the TSP does not typically define how the investment experience in the account through the distribution date will be determined nor will the TSP necessarily reject the QRBCO because this analysis is not stated in the order. The reason for this is the TSP finds its guidance in the CFR, which provides for the calculation of entitlements under the TSP. Much like a landmine is not discovered until it is too late, the mandates of the CFR that may thwart the parties' intent are often not discovered until the TSP account has already been distributed.

## Interplay Between the CFR and the TSP

Title 5, Chapter VI of the CFR governs retirement benefits court orders for TSP accounts. Section 1653.4(e) states "[i]f a court order describes a payee's entitlement in terms of a fixed dollar amount and a percentage or fraction of the account, the TSP will pay the fixed dollar amount, even if the percentage or fraction, when applied to the account balance, would yield a different result."[2] It is, therefore, critical to ensure the QRBCO accurately states whether the payee's entitlement is expressed in terms of a fixed dollar amount or a percentage or fraction of the account. The TSP will not determine whether it is more beneficial to use the fixed dollar amount or the percentage/fraction if both are stated in the QRBCO.

More importantly, the CFR directs how the TSP investment experience will be credited, an analysis often taken for granted. The issue is typically considered closed once the order is signed and submitted to the plan for implementation. Section 1653.4(f), however, confirms why this may not be the case. The regulation provides:

> (f) The payee's entitlement will be credited with TSP investment earnings as described:
>
> (1) The entitlement calculated under this section will not be credited with TSP investment earnings unless the court order specifically provides otherwise.
>
> (2) If earnings are awarded and a rate is specified, the rate must be expressed as an annual percentage rate or as a per diem dollar amount added to the payee's entitlement.
>
> (3) If earnings are awarded and the rate is not specified, the Agency will calculate the amount to be awarded by:
>
> (i) Determining the payee's award amount (e.g. the percentage or fraction of the participant's account);
>
> (ii) Determining, based on the participant's investment allocation as of the date used to calculate the entitlement, the number and composition of shares that the payee's award amount would have purchased as of the date used to calculate the entitlement;
>
> (iii) Multiplying the price per share as of the payment date by the number and composition of shares calculated in paragraph (f)(3)(ii) of this section.[3]

At first blush, this language seems relatively straightforward, but upon further consideration the potential pitfalls become apparent. Strikingly, clients who are savvy with their investments and manage their accounts according to changing market conditions are at the greatest risk to be affected by this regulation.

Section 1653.4(f) is, in essence, a default provision. Critically, the former spouse's entitlement will only be credited with investment earnings if the QRBCO specifically provides for the adjustment.[4] Also, if the QRBCO includes the rate at which investment experience will be awarded, the TSP will utilize that rate, provided it is expressed as an annual percentage rate or as a per diem dollar amount. If no rate is specified, the plan defaults to the mechanism contained in §1653.4(f)(3).

In implementing the default calculation, the TSP determines the composition of the account as of the entitlement date, which is typically the complaint filing date or other specified tolling date. The plan then calculates earnings and losses on the payee's entitlement from the funds in which the employee was invested on the entitlement date. For this calculation, the TSP uses the account balance on the entitlement date to determine a percentage of the total account balance and the corresponding number of shares to which the payee is entitled for payment. On the date of distribution, these shares are multiplied by the value of the shares at the time of payment to determine the payee's new disbursement amount.

The danger in the default provision is that the TSP is solely concerned with the composition of the account on the date of complaint or other designated entitlement date. This composition is the touchstone of all calculations performed under §1653.4(f)(3). The TSP gives no consideration to the actual composition during the period between the entitlement date through the date of distribution. If no changes are made to the account from the entitlement date to the distribution date, the risk of an unintended or inequitable result is minimized. In contrast, if changes to the account composition were made from time to time after the entitlement date through the distribution date, the risk for an unintended outcome is significant, as the calculation of investment experience is based essentially on supposition.

By way of demonstration, if the employee was invested primarily in aggressive funds on the date of complaint but then periodically modified those investments to a moderate or conservative blend based upon market instability, the parties' actual intent is jeopardized by the TSP default provision unless the QRBCO specifies how the investment experience should be calculated. The TSP would utilize the aggressive account composition on the date of complaint and calculate the value of those same shares on the distribution date to determine the investment experience in the account awarded to the former spouse, regardless of the changes in account composition during that period. Accordingly, if the value of the shares in the account on the complaint date has increased on the distribution date, the former spouse stands to unjustly benefit from the TSP calculation because he or she would receive the investment experience on those aggressive shares even though the account composition had changed to moderate or conservative resulting in less dramatic earnings. This unintended result may not be discovered until the TSP issues the notice of distribution of funds to the former spouse, causing the client to look to the attorney for an explanation of why the intent expressed in the settlement agreement was ignored and the implementation of the QRBCO resulted in a financial detriment to the client and a windfall to the former spouse.

A similarly precarious issue may arise if the attorney does not properly counsel the client who is the account holder regarding his or her duty to manage the investments in the account. A contrary outcome could result if the account holder does not responsibly manage the investments, and the account value substantially decreases from the entitlement date through the distribution date because of mismanagement. For example, if the employee maintains, on the date of complaint, an aggressive, high-risk account composition in an unstable market, and the shares have plummeted on the distribution date, the client may again look to the attorney for answers when the former spouse seeks to hold the account owner responsible for the decrease in the benefits paid because of the client's negligent management of the account.

## Strategies for Navigating TSP Pitfalls

Without question, awareness of the CFR provisions is essential when representing a client who is either a TSP account holder or will receive retirement benefits under a TSP account. Attorneys must be mindful that determinations by the TSP are final, leaving parties to seek relief from the court when implementation of the QRBCO yields an unintended result. Invocation of the default provision may be avoided if the calculation of investment experience is specified in the QRBCO in a manner acceptable to the TSP. One potential avenue for avoiding the default provision is to include in the QRBCO a dollar amount representing the calculation of the actual investment experience on the account from the entitlement date to the date the QRBCO is submitted to the TSP for approval. Recognizing it may take approximately 60 days for the TSP to approve the order, the QRBCO should contain a provision that earnings and losses will be calculated from the date the QRBCO is submitted for approval (in essence, the new entitlement date) to the distribution date. The parties' settlement agreement should also include an express acknowledgment by the account holder that he or she will not alter the account composition during the 60-day period to ensure the integrity of the TSP's calculation of the investment experience on the account during that period.

If an inequitable, unintended distribution of the TSP account occurs because the default provision has been utilized, and the issue cannot be resolved between the parties by consent, the attorney may file an application with the court requesting the entry of an order effectuating the parties' intent expressed in the settlement agreement and directing the appropriate transfer of funds from the overpaid party to the party who was financially harmed by the implementation of the QRBCO. The motion may also include a request for relief pursuant to Rule 4:50-1 as a protective measure in recognition of the hesitancy among trial courts to make modifications absent an application pursuant to that rule.

The courts are bound to enforce matrimonial settlement agreements according to the original intent of the parties.[5] Agreements are "necessarily infused with equitable considerations and are construed in light of salient legal and policy concerns."[6] While agreements may not, as a general rule, be reformed by the court absent fraud, overreaching or unconscionability, they must "reflect the strong public policy and statutory purpose of ensuring fairness and equity in the dissolution of marriages."[7]

While no New Jersey case appears to have addressed a situation where the TSP default provision trumps the parties' intent, the Court of Appeals of Virginia has confronted the precise issue in *Overcash v. Overcash*.[8] In *Overcash*, the wife appealed from an order requiring her to reimburse the husband for an alleged overpayment from his TSP account contrary to the language of the parties' settlement agreement. The trial court found it was "'within the inherent power of the Court to do equity' and, therefore, to modify the distribution of funds from the TSP account."[9] The appeals court affirmed the lower court's order, finding the court possessed the statutory authority to enter the order to effectuate the original intent of the parties.[10]

The distribution of retirement benefits is unquestionably fraught with complexity and imposes upon attorneys a tremendous duty to ascertain the legal and procedural nuances of each plan they encounter in representing clients in dissolution cases. The TSP presents a unique challenge because of the seemingly latent default provision that strains logic and has the potential to create post-judgment havoc for attorneys and clients, particularly when the account holder has made changes to the account composition after the entitlement date. If the adage forewarned is forearmed is followed, then an attorney faced with facilitating the distribution of a TSP account on behalf of a client should be forearmed with knowledge of the federal regulations governing the TSP. ■

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## Endnotes

1. Thrift Savings Fund, Financial Statements Dec. 31, 2013 and 2012.
2. 5 C.F.R. §1653.4(e).
3. 5 C.F.R. §1653.4(f).
4. 5 C.F.R. §1653.4(f)(1).
5. *J.B. v. W.B.*, 215 N.J. 305, 326 (2013); *Pacifico v. Pacifico*, 190 N.J. 258, 266 (2007).
6. *Konzelman v. Konzelman,* 158 N.J. 185, 194 (1994).
7. *Miller v. Miller*, 160 N.J. 408, 418 (1999).
8. *Overcash v. Overcash*, Record No. 0621-05-3 (Va. Ct. App. 2006)(unpublished decision).
9. *Overcash, supra*, at *4.
10. *Overcash, supra*, at *1.