New Jersey Family Lawyer

Volume 23 • Number 4
May 2003

Newsletter

CHAIR'S COLUMN

Litigation, Arbitration, Mediation and Negotiation

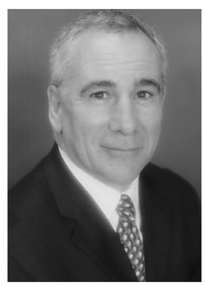
by Michael J. Stanton

As a result of my varied experiences with economic mediation, my opinion of the mediation process has vacillated over the past few years. Initially, I was ardently opposed to the concept of mediation because it conflicted with my view of the role of the advocate within the adversarial system. Now that several of my cases have been settled with the assistance of capable economic mediators, I believe economic mediation can sometimes be appropriate.

I believe the only way my client can be assured of getting the best possible result is by having an advocate concerned exclusively with obtaining the best result for the client. The bottom line is that I believe in the adversarial system.

I consider myself an advocate. I perceive my role is to obtain the best possible result for my client. I believe the only way my client can be assured of getting the best possible result is by having an advocate concerned exclusively with obtaining the best result for the client. The bottom line is that I believe in the adversarial system.

Why is the adversarial system better than mediation? I believe the answer may be found by analyzing the



most frequent reason for divorce, which in my opinion may be stated in one word — control. Almost every other reason for divorce is merely symptomatic of the fundamental struggle for control, which causes the disintegration of the marital relationship.

Jean-Paul Sartre, the Nobel Prize-winning philosopher, novelist and playwright, lived for many years with his companion, Simone de Beauvoir, herself a philosopher and writer, without the *benefit* of marriage. Sartre said he and de Beauvoir would never marry. He philosophized that to be successful, marriage requires each person to give up part of one's self, to compromise some aspect or aspects of his or her individual personality, leaving the resulting person less than who they otherwise are capable of being. He believed that, absent this sacrifice of one's individuality, marriage inevitably devolves into a struggle for control. He said of his relationship with de Beauvoir: "It is in itself splendid that we were able to live our lives in harmony for so long."

Knowingly or unknowingly, our clients choose to make the sacrifice and compromise associated with marriage. Unfortunately, about half of every couple that makes that choice eventually ends up in a struggle for control, otherwise known as divorce. You may ask, what does this have to do with the dichotomy of mediation and advocacy? The answer is that most often one of the spouses has dominated the marital relationship and has controlled his or her spouse. If the parties are in mediation, who is going to protect the dominated spouse from being dominated in the mediation? Who is

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going to prevent the dominating spouse from dominating the mediator? If the answer is that the adversary attorneys must be present during the mediation in order to ensure fairness and protection of the dominated spouse and the mediator, then why bother with mediation at all? Having the adversary attorneys present and participating results in an adversarial atmosphere that is more appropriate for arbitration than it is for mediation.

Our divorce cases are resolved by way of mediation, arbitration, negotiation or litigation.

Each of these methods of resolving a divorce case has its appropriate place. We know the statistics, that well over 90 percent of all divorce cases in New Jersey are settled without the necessity of starting a contested trial. Some of those cases that start trial are settled before the conclusion of trial. Although some cases need a trial, they constitute a very small minority.

Some cases are suitable for mediation because the parties are conciliatory and respectful of each other, even though they cannot live together as a married couple. I posit that this, too, constitutes a very small minority.

This leaves us with negotiation and arbitration. The vast majority of our cases must be resolved by skillful and professional negotiation between adversary attorneys. This requires preparation and more preparation. Know the law and know the facts. Be professional and objective, and do not be reticent about wanting to *win* the negotiations on behalf of your client. It is possible to reconcile competitiveness and professionalism.

I haven't forgotten about arbitration. In my opinion, arbitration is the real future of complementary dispute resolution. I think mediation is overrated, and has been oversold. Arbitration allows for all of the skill of advocacy and the benefits of the adversarial system, while at the same time relieving some of the burden placed upon our understaffed and overburdened family courts. ■

FROM THE EDITOR-IN-CHIEF

Strategic Techniques to Ameliorate the Taxability of Stock Options in the Distribution of Assets Pursuant to a Divorce Proceeding

by Mark H. Sobel

Death and taxes — unfortunately they are both inevitable. The same, however, cannot be said for stock options and taxes. With effective planning, the tax effect of stock options can be greatly reduced and/or eliminated within the confines of a matrimonial action. It is imperative for the practitioner to understand the impact of the Internal Revenue Code on the distribution of stock options and how to utilize that impact to effectively negotiate distribution of such assets.

The starting point for such an analysis is, unfortunately, a review of two sections of the Internal Revenue Code: Section 83 and Section 1041. Section 1041(a), in overly simplistic explanation, provides that the transfer from one spouse to another of property incident to a divorce is not a tax realization event. Thus, there is neither a gain nor a loss reported by the person making the transfer, nor income to be derived by the person receiving the transfer. That results from Subsection 1041(b), which generally provides that such property, when so transferred, is assumed to be a transfer as if it were a gift by the transferor to the transferee. The effect of such a hypothetical is that the transferee's basis in the property is the adjusted basis of the transferor's. As a result, the net effect is that the transfer of stock options from one party to another would not be an immediate tax realization event.

The above treatment is clearly contrary to the normal provision that such transfers, absent donative intent, would be deemed an exchange normally resulting in a tax realization event. While the initial treatment of the immediate division of the stock option is thus not a tax realization event, the more intricate and important analysis is the implication of such a transfer on the assignment of income doctrine, which generally provides that income is ordinarily taxed to the person who earns it, and that the incidents of income taxation may not be shifted by an anticipatory assignment. Such a transfer of a stock option may be deemed an anticipatory assignment.

In view of such a potential, a review of Internal Revenue Code Section 83(a) is required. Section 83(a) sets forth the principle that if property is transferred to any person in connection with the performances of services, the excess of the fair market value of the property over the amount, if any, paid for the property is included in the gross income of the person performing the services. Section 83 does not apply to the grant of an option, since it is determined that the option does not have a readily ascertainable fair market value at the date of the grant. In view of that, it is the exercise of the option or any money, which would be the tax realization event.[1]

With effective planning, the tax effect of stock options can be greatly reduced and/or eliminated within the confines of a matrimonial action.

Thus, two of the key factors to keep in mind are as follows:

1. Who will be authorized to exercise the option, since the timing of the exercise will trigger a taxable event?
2. Who will bear the tax burden of this taxable event, and what is the effect of that tax burden?

With respect to the first item, it should always form a part of the agreement that the person receiving the stock option has the ability to determine when it is to be exercised. This may require specific language and the establishment of a constructive trust, if the particular grant of the option does not allow non-participants to make such exercises. Such language should then be inserted into the property settlement agreement and/or a separate constructive trust document. In addition, there must be a requirement for periodic review of information to make the effective exercise of the option as prudent an economic decision as current information would allow. That should include, but not be limited to, the fact that there be a requirement that the transferor, if he or she is keeping any of the stock options, immediately notify the transferee if they have elected to exercise any portion of the stock option. That is often a good barometer that it is time to exercise the option.

Upon the exercise of the option, generally the transferee, rather than the transferor (*i.e.* the person who is actually receiving the option) would realize gross income to the extent determined under Internal Revenue Code Section 83(a). That section provides that the income is includable in the non-employee spouse's gross income to the same extent as if the non-employee spouse were the person who actually performed the services. This requires some pre-planning to determine when the stock option is likely to be exercised, what the tax effect would be and whether or not losses in the same tax year can be utilized to offset the gain or income realized from the exercise of the option.

It is important to understand that these assets are not distributed tax free, and that a tax calculation must be made if these assets are being traded off for other post-tax assets or assets not likely to result in any taxable event. The primary example of this would be the trading of stock options for an interest in a home, where the individual is of sufficient age or the gain would be small enough not to result in a tax upon the subsequent sale of that home. If that is not done, one party will be receiving a net tax benefit far in excess of the other party.

As a corollary to the above, the Internal Revenue Service has issued proposed rules to explain how the Federal Insurance Contributions Acts (FICA) and the Federal Unemployment Tax Act (FUTA), as well as income tax withholding, apply to a transfer of interest in such stock options. Currently those rules indicate that the transfer of the option that remains unexercised does not result in a payment of wages for FICA or FUTA tax purposes. Therefore, it is important when doing the after-tax calculations of such stock options not to deduct FICA or FUTA currently from the options, since they will not be paid currently. However, in the future, especially if the option increases dramatically in value, there will be (or could be) some significant FICA or FUTA tax in addition to the income tax requirements. All of those taxes should be calculated to arrive at a net taxable effect of the stock option. That is because such stock options are clearly, under the Internal Revenue Code's current regulations, subject to both FICA and FUTA taxes at the time of the exercise by the non-employee spouse to the same extent as if the options had been retained by the employee spouse and exercised by the employee spouse.

The above provision is of critical significance because then-existing FICA and FUTA requirements of the employee spouse, post-divorce, may have a tax impact upon the non-employee spouse at the time of the exercise of the stock option. Thus, there may need to be a reporting requirement regarding such income information to verify the applicable FICA and FUTA requirements.

The bottom line is that the following should be kept in mind when dealing with stock options as a part of an overall equitable distribution package:

1. Stock options which remain unexercised are not immediately taxable;
2. Stock options, however, are assets which will likely have a tax impact at some future date, and that tax impact needs to be calculated when trading off post-tax assets, such as a home or, more likely, cash accounts in a bank account;
3. There will be an income tax realization event upon the exercise of the stock option at some time in the future, and a present value calculation of that tax realization event needs to be made to determine the ultimate net tax value of such a stock option; and
4. The exercise of such stock options at some future date will result in both FICA and FUTA taxes, in addition to income taxes.

As a result of the above, effective tax planning needs to be completed in the year of the exercise of the stock option by the transferee spouse to minimize the tax impact of such an exercise. Furthermore, that effect must be calculated at the time of the divorce settlement to arrive at a fair net tax value for the asset being obtained by the transferee spouse as part of the equitable distribution. ■

ENDNOTE

1. *See* Internal Revenue Code §83(e).

FROM THE EDITOR EMERITUS

Is There Another Judge Krafte Out There?

by Lee M. Hymerling

More trial-level opinions concerning matrimonial matters should be written and published. Authoring a trial court matrimonial opinion is an art form that was perfected by retired Superior Court Judge Conrad Krafte of Bergen County. The plea of this editorial is that more family part judges should render formal opinions, and a fair percentage of those opinions should find their way into the New Jersey Superior Court Reports.

There is a crying need for more trial-level opinions to be written and published. Such opinions would provide much-needed guidance…to a matrimonial bar that must assist clients in resolving issues that will never be decided by a judge.

Modern family law practice focuses upon negotiation and trial-level proceedings. On a percentage basis, far fewer than two percent of all divorces filed end up tried to a conclusion. Only a small percentage of those proceedings are ever seen by the Appellate Division, and only an infinitesimal number of cases wend their way to be decided by the Supreme Court. Far more common than trials, is motion practice, both pre- and post-judgment. There is a crying need for more trial-level opinions to be written and published. Such opinions would provide much-needed guidance, not only to those who sit in the Family part and must decide these matters, but, even more importantly, to a matrimonial bar that must assist clients in resolving issues that will never be decided by a judge.

Judge Krafte understood this, and during his lengthy judicial service authored numerous published opinions which aided a generation of New Jersey family lawyers. Often, Judge Krafte addressed nitty gritty issues which strike at the core of what we as lawyers and those sitting on the bench must deal with daily. It would be impossible to recognize each and every one of Judge Krafte's opinions, but, to make the point, several have been selected.

The breadth of Judge Krafte's writings span the wide scope of what we do, from pre-trial to trial to post-trial. In *Marxe v. Marxe*,[1] Judge Krafte addressed the issue of whether the employment of a former trial judge's law clerk precluded the continued representation of the plaintiff by the hiring firm or, alternatively, whether the sitting judge must recuse himself. The matter came before Judge Krafte on a stipulation by the parties to the effect that the court could resolve the issue on motion. Judge Krafte, analyzing the issue in detail, ruled that the *status quo* could be preserved without prejudice to any of the parties.

In *Lerman v. Lerman*,[2] Judge Krafte addressed when it would be appropriate to declare an adverse party's witness as "hostile *per se*" thereby according the other party "broad latitude" to examine the witness through the use of cross-examination without being bound by such testimony. Analyzing the federal and state Rules of Evidence, as well as out-of-state authority, Judge Krafte ruled that "it is well within the discretion of this court to permit the procedure where a party to a divorce action may be called by the opposition."

In *Finelli v. Finelli*,[3] Judge Krafte addressed the question of when rehabilitative alimony should be deemed an appropriate remedy, and reminded that, by definition, before a court could consider rehabilitative alimony, evidence had to be presented which could form the basis for such an award. Most helpfully, Judge Krafte outlined the factors that had to be proven for a court to make a reasonable and rational decision. In that particular matter, Judge Krafte suggested that such information as the type of degree sought; the colleges providing same; costs of attendance; hours necessary; availability of sitters; costs of sitters; whether the party who sought rehabilitative alimony could pursue schooling full time; whether studies could be coordinated with her duties and obligation as a mother; and whether she could gain admission to college all had to be taken into account.

In *Schulmeisters v. Schulmeisters*,[4] Judge Krafte ruled upon a motion for partial summary judgment on an attempt made to obtain a divorce without settling all of the ancillary issues which normally accompany a divorce action. In that matter, there existed a continuing New York action for divorce, which could provide the parties with full and complete relief on all issues, including not only the divorce but equitable distribution and a possible alimony award. Addressing the full faith and credit clause, Judge Krafte found that the New York proceeding had time priority in becoming the legal and proper forum to proceed with the entire case.

But Judge Krafte not only gave the parties his judicial answer, as he did in every opinion he wrote, he explained why. He reminded that considerations of comity forbid interference with the prosecution of a proceeding in a foreign jurisdiction capable of affording adequate relief. He explained the scope of judicial discretion and the need to explore whether there existed "special equities." In granting the defendant's application to dismiss the complaint in New Jersey, he held that to have granted relief would have created "utter chaos in the interstate aspects of divorce."

The body of law Judge Krafte created from the trial bench reflected his thoughtfulness, his thoroughness, and the fairness with which he ruled. But he did something more. He took the time not just to research but also to write. And the system responded. What he wrote was frequently published. Although Judge Krafte's tenure ended almost a decade ago, his legacy continues. That legacy is not only in the justice he did for the parties who came before the court, but also in the writings that were enormously helpful to those of us, be we lawyers or judges, who practice in the vineyards of the family part.

While the burdens placed upon family part judges increase from year to year, and while it might be difficult to juggle legal writing with reading motions, hearing domestic violence matters, supervising early settlement programs, and even trying those few cases which ultimately must be heard to a conclusion, our system should encourage trial judges to write. When the family part is confronted with an interesting and important issue, the system must give the judge the time to write. When they do, the system should reward such efforts by a published opinion.

Judge Krafte was not the first, nor will he be the last, trial-level judge to author a published opinion. Judge Consodine and others preceded him. Others have followed, but no one trial-level judge since Judge Krafte has made so large a contribution to our decisional law.

It is perceived that there is, amidst the trial bench, the feeling that were they to write, there is little hope that something would be published. If that perception is the reality, the reality should change. It is perceived that there is a feeling among the trial bench that given the scope of what they do, writing opinions deserves a low priority. If that is the perception, it must be changed.

Judge Krafte understood that for an opinion to be important, it did not have to be long. Judge Krafte also understood that there was, in the family law, a myriad of mini issues, many of which deserve a written opinion.

Although it is not the intention of this editorial to create a shopping list of topics about which a judge might write, let me suggest a limited few. Every day in many family part courtrooms the bench is confronted with reviewing case information statements. Budgets are scrutinized every Friday. It would be extremely helpful if trial judges would write about whether, *pendente lite*, savings should be considered as an appropriate expense. Every day in a family part courtroom, somewhere in the state, judges are asked to grant injunctive relief to *preserve the status quo*. It would be extremely helpful for a family part judge to address what showing of irreparable harm should be required before injunctive relief is granted. Are the standards the same in the family part as in the general equity part? Every day in a family part courtroom somewhere in New Jersey, judges are called upon to address the hearsay rule. Is hearsay in the family part, as many believe, different than hearsay elsewhere? Each of these topics might not deserve Supreme Court-level analysis, but a trial court's discussion of each would aid in understanding and developing the law.

This editorial began with a question — whether there is another Judge Krafte out there. The answer is a hybrid. Certainly there are many family part judges who are capable of doing, if they made the commitment and had the time, what Judge Krafte so ably did as he expanded our decisional law. Perhaps, however, that is too much to ask of a single judge. But it is not too much to ask of every judge, as he or she decides each case, to cull from the myriad of issues each decides every day those few special issues where guidance in the form of a written opinion would aid the process. And it is not too much to ask the system when judges write to publish. Our system should recognize the reality that most family law is not made in the Appellate Division but in the trial courtroom, and that most family law cases are not settled in the courtroom but in the conference room. The more that is written, the better the family part will be able to decide matters consistently, and the better able the bar will be to settle those matters so that no judicial decision is ever necessary.

ENDNOTES

1. 238 N.J. Super. 490 (Ch. Div. 1989).
2. 245 N.J. Super. 312 (Ch. Div. 1990).
3. 263 N.J. Super. 403 (Ch. Div. 1992).
4. 281 N.J. Super. 216 (Ch. Div. 1993).

Kinship Legal Guardianship: The New FL Docket

by Mary E. Coogan

The recently enacted Kinship Legal Guardianship Law took effect January 1, 2002. This new law creates another option to establish permanency for children who cannot reside with their parents due to a long-term incapacity or inability to perform the regular and expected functions of parenting. Families who have assumed the care of children because of a parent's incapacitation can now formalize that relationship legally in order to ensure permanency for that child. The law supports family decision making. In cases involving litigation initiated by the Division of Youth and Family Services (DYFS), it offers another mechanism to achieve permanency for a child without terminating parental rights.

Although the birth or prior adoptive parents will no longer have rights to legal custody and guardianship, their parental rights will not be terminated. The parents reserve their rights to visitation, their duty to support and the power to consent to adoption. The right to visit with siblings, and/or extended family can be preserved. Such an arrangement does not affect the child's rights to inherit or to other government benefits.

WHAT ARE THE BASIC ELEMENTS OF THE LAW?

Kin is broadly defined. The person(s) seeking to become the kinship legal guardian can have a legal, biological or psychological relationship with the child. The kinship legal guardian is one who has made a commitment to and has the ability to raise the child to adulthood, evidenced by the fact that the child has been in their home for a least one year.

Families who have assumed the care of children because of a parent's incapacitation can now formalize that relationship legally in order to ensure permanency for that child.

The child has resided with the kin for at least the last 12 consecutive months. The kinship caregiver must have provided "care and support for the child, while the child has been residing in the caregiver's home, for at least the last 12 consecutive months." This one-year prerequisite is not arbitrary. In most cases, family members will volunteer to assist in emergencies. The situations to be addressed through this new law are not emergencies. Having cared for and supported the child for at least one year allows the kinship caregiver to assure the judge that he or she can make a long-term commitment.

The court needs to know that issues concerning daycare, school, vacation, medical needs, and financial concerns have already been addressed. The kinship caregiver has to be able to represent to the court that they can support the child. After a year or more of paying the bills, they know they can support the child until adulthood.

The kinship legal guardianship law is to formalize a relationship that already exists, not create a new one. If granted, the final order will be more permanent than a custody order. It is not an obligation that a relative or other kin should assume lightly.

An assessment is required before the petition is filed. The family part will not accept petitions for filing without the statutory-required assessment being completed. In the non-DYFS cases, a person interested in becoming a kinship legal guardian should contact the Kinship Navigator Program (1-877-816-3211) to initiate the assessment process.

The program has regional contract providers who will complete the assessment, which will include a criminal history record background check, a domestic violence central registry check, and a child abuse registry check of the caregiver and any other adult residing in the caregiver's home. The assess-

The new form of legal guardianship will provide stronger legal protection for the child and the kinship caregiver, who has become the consistent nurturing *parent* to the child, without terminating the birth parents' rights.

ment will also contain information regarding the circumstances of the kinship relationship; the nature of the parents' incapacity; the whereabouts of the parents and their wishes, if known; the child's property and assets if known; and the caregiver's commitment and ability to raise the child. Once that is done, a petition can be filed.

DYFS will complete a similar assessment in open active litigation cases, and in cases where the family has been involved with the division within the last 12 months. The division may then file a new petition or seek to amend its Title 9 or Title 30 complaint to petition the court to make the present caregiver the kinship legal guardian as a disposition to the litigation. If granted, the court will issue a final order under a family kinship legal guardianship (FL) docket, and dismiss the prior litigation. A parent may, with notice to DYFS, request that the court consider a kinship legal guardianship arrangement as an alternative disposition. The division may complete the assessment for non-litigation DYFS placement cases, although the caregiver will be responsible for filing the petition.

The standard is parental incapacity. The wording setting forth the standard was taken from New Jersey's private adoption statute. The plaintiff must show that the parents' "incapacity is of such a serious nature as to demonstrate that the parents are unable, unavailable or unwilling to perform the regular and expected functions of care and support of the child [and that] the parents' inability to perform those functions is unlikely to change in the foreseeable future." Circumstances which advocates sought to address through this new law are situations where a parent is serving a long-term sentence; a parent has serious, documented mental health disabilities; a parent has a serious, long-term drug or alcohol problem or a parent has been missing for a significant period of time, thus abandoning the child to the care of others.

The burden of proof is clear and convincing. The plaintiff must be able to provide the family court judge with *clear and convincing* evidence of the parents' incapacity or inability to assume their regular parental duties for the foreseeable future. But parental incapacity alone is not sufficient to grant the petition. In making a final decision, the judge must find that the potential kinship legal guardian can provide a safe and permanent home, and that awarding kinship legal guardianship is in the child's best interest.

Judges will use a multitude of factors to make a determination of what is in the child's best interest, including:

- whether proper notice was provided or was attempted to be provided to the child's parents;
- the wishes of the parents, if known;
- the wishes of the child age 12 or older unless inappropriate;
- the commitment, ability and suitability of the kinship caregiver to raise the child to adulthood;
- the results of criminal history, domestic abuse background checks, and child abuse registry checks on the caregiver and any other adult(s) living in the caregiver's home;
- the results of the caregiver's home review.

It is anticipated that most of the hearings will be summary in nature, similar to custody cases in the non-dissolution docket. The order of guardianship will delineate the specific rights of the kinship legal guardian as set forth in the statute.

To modify or change the final order, clear and convincing evidence must be shown that the parental incapacity is no longer present, and that termination of kinship legal guardianship is in the child's best interest. An order may also be vacated if a court finds that the guardian failed or is unable to provide proper care of the child, or if the guardianship is no longer in the child's best interest.

Rights Obtained. The kinship legal guardian assumes the same rights, responsibilities and authority relating to the child as the parents. These include, but are not limited to: making decisions concerning the child's care and well-being; consenting to routine and emergency medical and mental health needs; arranging and consenting to educational plans for the child; applying for financial assistance and social services for which the child is eligible; applying for a motor vehicle operator's license; applying for admission to college; responsibility for activities necessary to ensure the child's safety, permanency and well-being; and ensuring the maintenance and protection of the child. The new form of legal guardianship will provide stronger legal protection for the child and the kinship caregiver, who has become the consistent nurturing *parent* to the child, without terminating the birth parents' rights.

The birth or prior adoptive parents would no longer have rights to legal custody and guardianship, but their parental rights would not be terminated. The parents reserve their rights to visitation, their duty to support and the power to consent to adoption. The right to visit with siblings, and/or extended family can be preserved. Kinship legal guardianship does not affect the child's rights to inherit or to other government benefits.

WHY CREATE THIS ADDITIONAL OPTION?

For years advocates have sought to legally formalize the relationship between relatives or other kin and the children in their care. Until now, these individuals have had informal physical custody or obtained legal custody of the child through the family court. They may seek the child-only grant through county welfare services or struggle to support the child from their own funds. Some caregivers are able to put the child on their own health insurance; others may apply for New Jersey FamilyCare or Medicaid.

Sometimes a relative is directed by DYFS to initiate a private custody action under a family non-dissolution (FD) docket complaint due to an allegation of abuse or neglect, rather than the division filing a Title 9 child abuse and neglect complaint. These arrangements can be short-term or continue indefinitely. The relative placement can have both elements of an out-of-home placement, like foster care, or a family placement, leaving the plan for a child's permanent home unclear. The division does not have the same obligations to exercise reasonable efforts toward reunification, as is required in cases where DYFS makes the placement.

The child may experience confusion and uncertainty about where he or she belongs, especially if temporary custody orders are unsuccessfully contested on a regular basis, because the parent's problems or circumstances have not improved. This continuous litigation often becomes disruptive. The impermanence of the situation creates insecurity for the child and the caretaker.

In 1995, an Association for Children of New Jersey (ACNJ) report titled *Relative Care: A System in Need of Repair* identified a relative care system in a state of disarray. Within DYFS cases, practices varied from county to county, caseworker to caseworker, family to family. The report identified key issues concerning relative caregivers. These included lack of relative identification, resulting in children being placed in foster homes rather than with relatives in initial placement, lack of standards in assessing relative homes, and inadequacy of financial supports and services.

Many of these concerns are applicable to non-DYFS cases as well. But there were broader policy considerations in the non-DYFS situations. Questions arose concerning the appropriate level of involvement by the state in situations where the family makes the decision. What, if any, financial obligation does the state have in such situations? And if the state provides assistance, what is its obligation to assess the quality of the home and the suitability of the caregiver now being supported through state funds?

The New Jersey Assembly Task Force on Grandparenting held public hearings and studied the issue, issuing a report in January 2000. Grandparent groups have formed throughout New Jersey in an effort to pool resources and share information through informal networks. In May 1999, then Senator Donald DiFrancesco introduced legislation to support kinship care providers. A group of advocates began meeting in the fall of 1999, struggling with definitions of kin and levels of support. One of the primary obstacles was determining the actual number of kinship families needing assistance. The problems vary in complexity depending on the family circumstances. One aspect was clear; the child ultimately needs to reside with a caretaker who has some formal permanent legal authority over the child. Kinship legal guardianship provides this mechanism.

DYFS, the state agency mandated to investigate allegations of abuse and neglect, offers services to the family if the child can remain safely in the home, and places the child elsewhere when the child cannot safely remain in the home. In most cases, the division must then provide reasonable efforts to reunify the child with his or her parent(s). DYFS is required to examine cases where a child has been in foster care for 15 of the previous 22 months, and file a Title 30 complaint seeking to terminate the parents' rights to allow the child to be placed for adoption, unless a statutory exception is met.

Adoption is the ideal resolution for children who cannot be reunified with birth parents. However, for different and legitimate reasons, some relatives or kin willing to raise the child do not wish to terminate the birth parents' rights. The child still needs a *legal* permanent placement, which will provide stability for the child to at least age 18, if not longer.

The legislative changes made to New Jersey law pursuant to the federal Adoption and Safe Families Act of 1997 (ASFA) properly limit the amount of time a child may remain in foster care. While pushing more cases toward permanency decision making, the law allows different options to achieve permanency. Under ASFA, legal guardianship "means a judicially created relationship between child and caretaker, which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and decision making. The term legal guardian means the caretaker in such a relationship."[1]

One of the statutory exceptions to filing a Title 30 termination of parental rights complaint is "[t]he child being cared for by a relative *and a permanent plan* for the child can be achieved without termination of parental rights."[2] While DYFS guidelines state that a permanent placement with a relative who is willing to become the child's legal guardian may constitute an exception to the filing of a Title 30 action, until now New Jersey law did not provide a mechanism to legally effectuate this arrangement.

Some relatives are willing to make the permanent commitment, although unwilling to participate in the termination of the parental rights of their own son or daughter, niece or nephew. Likewise, parents who recognize their inability to assume their parental responsibilities may want to have their child placed permanently with a relative. Kinship legal guardianship would ensure permanency for the children involved, simultaneously allowing for the resolution of litigation cases to the satisfaction of parents and caretakers, DYFS and the courts. Should this option be chosen, the court must also find that the division's reasonable efforts were unsuccessful or unnecessary, and that adoption of the child is neither feasible nor likely.

A kinship legal guardianship arrangement to resolve Title 9 or Title 30 litigation would be handled by the respective attorneys already assigned to represent DYFS, the parents and the children pursuant to NJSA 9:6-8.43 and NJSA 30:4C-15.4. The division may not have to file a Title 30 complaint in some cases. This mechanism should bring litigation to the end more quickly if all are amenable to the kinship guardianship arrangement, thus achieving permanency for the child on a timelier basis.

FINANCIAL ASSISTANCE FOR KINSHIP FAMILIES

By allowing families to make their own arrangements regarding a child's care when a parent becomes incapacitated, these relatives will avoid having to seek involvement in the DYFS system just to obtain financial help. Becoming the child's kinship legal guardian is the threshold to obtaining the additional funds through the Department of Family Development.

Recognizing that relative caregivers need assistance, the state created the Kinship Navigator Program, an information and referral resource for kinship caregivers that provides wraparound services and childcare subsidies for eligible caregivers. Caregivers up to age 60 are eligible for assistance if their income does not exceed 350 percent of federal poverty guidelines. Those over age 60 with incomes up to 500 percent of federal poverty also qualify for services.

In addition to funding for the Kinship Navigator Program, the FY 2002 budget also contains funding for three new types of kinship caregivers. Funds will be available for up to 2,000 kinship legal guardians who have assumed care of children under the care of DYFS. For the non-DYFS cases, there is funding for up to 8,000 kinship legal guardians who have a household income of 150 percent of federal poverty or less. Caregivers must understand that although there is money in the state budget for 2002 to provide some financial assistance, the kinship legal guardian's duty to support the child is not contingent on the state's budget allocation.

The division also has funding to assist a third group of relative caregivers that need the additional funds to support the initial placement. In these cases, DYFS will still provide services to the parents, and if reunification is unsuccessful and termination of parental rights is not deemed appropriate, the relative caregiver can apply to become the kinship legal guardian.

Informed Decision Making is Critical

To determine whether to file a custody or kinship legal guardianship complaint, the relative or kin needs to understand the difference between each option in terms of requirements and standards to be met, the extent of state intrusion to assess suitability, parameters of responsibility to the child, and potential supports. Generally speaking, the greater the level of support, the greater the level of state intrusion.

Relatives who are willing to commit to a short-term kinship care arrangement can continue to obtain the child-only Temporary Assistance to Needy Families grant. There is no income eligibility and no in-depth intrusive assessment. Relatives who have had children living in their home may want something more permanent.

To determine the most appropriate arrangement for child(ren) placed because of abuse or neglect, DYFS must inform all relatives contacted of all options along with the level of DYFS involvement connected to each option. Accurate information becomes even more critical in DYFS placements, because of the division's obligations to work with the parents and statutory timeframes for achieving permanency.

The financial and service supports to a relative who becomes a foster parent are much different than those given to a relative obtaining custody through the family part FD docket at the division's direction. Relatives are often not informed of their right to apply to become a foster parent when the children are placed in their home. It is only through informed decision-making that families can make the best permanent arrangements for their children.

All assisting caregivers through the legal kinship guardianship process need to review any and all benefits a caregiver receives to make sure the caregiver understands any potential impact additional funding received as a kinship legal guardian may have upon those benefits, and their obligation to support the child(ren). Caregivers should be informed of all available services. ■

ENDNOTES

1. ASFA, Public Law 105-89 Sec 101(b), 42 U.S.C. 675(7.)
2. N.J.S.A. 30:4C-15.3. [emphasis added]

***Mary E. Coogan** is the director of the Children's Legal Resource Center at the Association for Children of New Jersey, and the chair of the NJSBA Children's Rights Committee.*

The Conflict Between Public Policy and Valuation Principles

What We Can Learn From *Brown*

by Frank Loius

When the Appellate Division decided the issue of marketability discounts in *Brown v. Brown*,[1] it not only determined that the value of assets for equitable distribution cannot be reduced by virtue of a marketability discount, it also provided a framework for analysis of other equitable distribution and support issues by basing its decision on policy grounds. Since the policy dictated the result, the implications of *Brown* are enormous in other areas, and in particular, whether marketability discounts still remain an issue in distributing assets under N.J.S.A. 2A:34-23.1. While the issue of deducting marketability discounts from the value of an asset seemingly has been addressed by the Appellate Division in *Brown*, that decision does not stand for the absolutist principle that marketability discounts are to be entirely disregarded and have no place in the equitable distribution analysis.

Secondly, the *Brown* linkage between the ultimate result and the public policy issue provides the framework for resolution of previously undecided equitable distribution and support issues that will arise. Such issues require an examination of policy and its inter-relationship with how law develops. The correct legal result should always mirror the statutory policy upon which equitable distribution is based. Issues of policy have always been viewed uniquely; the word idiot comes from the Greek name for the man who ignored public policy matters.[2]

Whether the valuation standard in a divorce is fair market value, or a standard similar to equitable distribution value, fair value, or value to the holder, while interesting, is an issue that need not be resolved to determine whether a marketability discount should be utilized in determining the non-titled spouse's distributive share. The specific issue confronting the *Brown* court was whether a court should reduce the amount subject to distribution as a consequence of imposing a marketability discount as opposed to the economic reality which might require such discounts being considered as a factor in the fairness of a distribution under N.J.S.A. 2A:34-23.1. Phrased another way, the issue is whether the circumstances that normally suggest the applicability of a marketability discount nevertheless still create an issue regarding valuation or distribution, an issue *Brown* did not address.

This article will attempt to provide a broad overview of the policy considerations implicit in equitable distribution and their inter-relationship with a marketability discount and how, after *Brown*, the issue should be addressed. At the same time, the analysis may well provide the framework to resolve other issues that arise when accounting and valuation principles conflict with the policy of our dissolution statutes. How these conflicts have been resolved provides guidance and insight on how future issues should be addressed.

POLICY CONSIDERATIONS

Brown presented a direct conflict between accounting or valuation principles and divorce law. While an examination of how previous conflicts were resolved will be helpful, the broader based policies reflected by N.J.S.A. 2A:34-23.1 provide the appropriate context to analyze and ultimately resolve potentially conflicting principles. Equitable distribution, how it has been implemented by the courts and the policy it seeks to implement, logically should first be reviewed. Distribution of assets is a reflection not only of specific statutory provisions, N.J.S.A. 2A:34-23.1, but the policy imperative which mandates that when a marriage ends spouses must treat each other fairly. More than any other aspect of matrimonial law, asset distribution reflects what we as a society perceive a marriage to be, and the responsibilities spouses have to each other when it ends. Houses are not sold because of the policy concern that a divorce-related forced sale may adversely impact upon the children. Similarly, the percentage allocation is based on the fairness of the distribution, since an appropriate and fair distribution requires not only an application of legal principles to a particular set of facts, but consideration of the public policy underpinning our equitable distribution statutes. Premarital assets which have appreciated have been treated differently than the marital assets, primarily because the policy considerations are arguably different.[3]

It is the implementation of this fundamental policy that goes to the very heart of who we are and the principles society values. Marriage is fundamental to our society; our law must reflect societal values, and courts should compel spouses at the end of this important relationship to treat each other fairly. Elevation of fairness as the *sine qua non* of any distribution does more than implement a statutory scheme; it reaffirms the type of society we believe we should be and the importance of marriage as an institution central to our cultural values.

Viewed in a broader sense, this single most important policy consideration was noted by the Supreme Court in *Miller v. Miller*.[4] In language that is eloquently simple, the Court crystallized the entire thrust of our dissolution law in terms elevating fairness not only as the goal, but as a fundamental bedrock principle. The concept of *Miller* fairness should be the prism through which the marketability discount should ultimately be addressed. The *Miller* Court, when noting the equitable theory of courts to modify agreements, emphasized spousal agreements "must reflect the strong public and statutory purpose of ensuring fairness and equity in the dissolution of marriages."[5] As the issue of discounts is analyzed, a court should always ask a simple question: Would imposition of discounts on the facts presented in this case further the strong public and statutory purpose of ensuring fairness and equity in the dissolution of marriages, or, alternatively, is it an argument predicated on generalized accounting principles that have no relevance to the facts or the legal context in which the court's decision is to be made?

An analysis of these broad-based policy principles establish the legal context in which courts have interpreted equitable distribution. For instance, in *Goldman v. Goldman*,[6] Judge Herbert Glickman rejected certain legal principles since their rigid application would prevent him from carrying out "the legislative mandate to distribute marital assets equitably."[7] In New Jersey, marriage is considered a "shared enterprise" and "akin to a partnership."[8] As *Rothman* emphasized, only when it is "clearly understood that far more than economic factors are involved, will the resulting distribution be equitable within the true intent and meaning of the statute."[9]

The relationship between the development of divorce law and society's interest and concerns is in part a reflection of the role spouses play and the vital interest society has in those roles. Society's interest in parents, children and the institution of marriage cannot be overstated; that interest, quite properly, should be reflected in how the law develops. In every divorce the state has a legitimate interest in how issues are resolved, and that interest must be reflected in how new issues are resolved. While, for instance, there is a strong interest in permitting parties to freely contract, society, through the instrumentality of the courts, will not allow parents to waive child support or to unilaterally terminate parental rights, emphasizing that when policies conflict the state's interest prevails. There is no better evidence of the societal impact on the development of divorce law than the longstanding principle that courts can only enforce spousal support agreements that are fair and equitable.[10] That is a distinctly different standard than utilized in non-matrimonial settings, where concepts of free enterprise only allow the state to intervene if the contract is either unconscionable or void as being contrary to public policy.

This distinction in legal standards is warranted by disparate policy considerations. It highlights the importance of fairness in a divorce, and focuses the court's analysis on whether the state's interest in assuring that parties treat each other fairly when their marriage ends is advanced by mandating discounts predicated upon sales which will not occur. In most cases there will not be a sale of the assets being distributed. Given that factual reality, why impose a marketability discount which is predicated on a sale that will never occur? Two separate concepts converge, implementing the policy and fairness concepts embodied in N.J.S.A. 2A:34-23.1 and applying each to the evidence presented and the factual reality of the case being decided.

With the issue placed in context, it is appropriate to analyze the inter-relationship between law and policy, principles firmly rooted in our jurisprudence. Our law does not develop in a vacuum. There is a well-defined jurisprudential basis for resolution of unique judicial issues; if there is one consistent strain in the development of law in New Jersey, it is that our law evolves in response to what courts perceive to be sound public policy. The genesis of this developmental principle might well have been Oliver Wendell Holmes' landmark work, *The Common Law,* where he linked public policy and development of the law.[11] New Jersey courts have recognized this linkage, and have liberally quoted Holmes when confronted with a previously undecided issue. It is logical for there to be a rational relationship between public policy and concepts of justice. The two concepts should and do go hand in hand.

An excellent example is *Falcone v. Middlesex Co. Medical Society*.[12] *Falcone* involved a doctor's admission to a county medical society. Justice Nathan Jacobs went back to Holmes, emphasizing, "the vital part played by public policy considerations in the never ending growth and development of a common law."[13] Holmes had noted, and it was cited by Justice Jacobs, that "every important principle which is developed by litigation is in fact and at bottom the result of more or less definitively or definitely understood views of public policy."[14]

In his analysis, Justice Jacobs concluded the "dominant factor" in development of our common law is the "common law principles," which "soundly serve the public welfare and the true interest of justice."[15]

In recent years, our Supreme Court has followed Holmes' linkage of public policy and the development of law. In *Shackil v. Lederle Laboratories*,[16] the Supreme Court rejected the market share liability theory advanced by certain plaintiffs concerning childhood vaccinations, reasoning it would frustrate the public policy of development of safer vaccines. Similarly, in *Kelly v. Gwinnell*,[17] the Court, in an attempt to reduce the number of drunken drivers, concluded imposing social host liability would advance that salutary public policy. *Kelly* relied on *Palsgraf v. Long Island R.R. Co*.[18] for the proposition that in determining whether a duty of reasonable care existed the answer depended upon "an analysis of public policy."[19]

Support for the proposition that unique legal questions are determined on public policy considerations can also be found in cases decided by our Supreme Court in matrimonial law. In *Kinsella v. Kinsella*,[20] the Court found the psychologist/patient privilege was not absolute:

> considerations of public policy and concern for proper judicial administration have led the legislature and the courts to fashion limited exceptions to the privilege. These exceptions attempt to limit the privilege to the purposes for which it exists.[21]

Justice Stein later noted courts should be mindful of the public policy considerations behind the psychologist/patient privilege, concluding, in some respects, it was even more compelling than the attorney/client privilege.[22] Such reasoning reveals how courts, in determining unique legal issues, mirror Holmes' perceptive reasoning and base their decisions on what sound public policy would be. By analyzing the legal issue in context, its resolution will be, more likely than not, consistent with the statute. Certainly, each party should be required to show why their position advances not rejects the policy reflected by N.J.S.A. 2A:34-23.1. A recent example of law following policy was the Appellate Division's rejection, on policy grounds, of permitting a position taken at a settlement conference to satisfy the "further acts" requirement of a malicious abuse of process claim.[23]

A good example in an equitable distribution context is the already noted *Goldman v. Goldman*,[24] where Judge Glickman was confronted with a unique situation involving "special circumstances."[25] In resolving the distributability of a car dealership which had significant value as of the valuation date but virtually none at trial, he not only analyzed the issue in the context of the existing law but the public policy considerations. He reached his result by implementing the policy reflected by N.J.S.A. 2A:34-23.1. As the Appellate Division noted in affirming his decision:

> …the Trial Court here correctly recognized that he was confronted with a unique situation and that application of a rigid categorical analysis would have only hindered him in fulfilling his ultimate obligation to effectuate a distribution of marital assets which, overall, was equitable to both parties."[26]

Goldman stands for the proposition that in determining unique distribution issues, you first analyze the law then the public policy relating to equitable distribution and finally be assured the end result was fair. This concept of fairness, therefore, must be included as a criteria for determining the unique legal issues that arise.[27]

HOW THE CONFLICT BETWEEN ACCOUNTING AND VALUATION PRINCIPLES HAVE BEEN RESOLVED

With the primacy of policy having been established, it is useful to examine the instances where courts have addressed the conflict between accounting principles and the public policy relating to matrimonial cases. Both legislatively and judicially, government has recognized that abstract, but nonetheless, legitimate and market-based accounting principles, must give way when they conflict with implementing the broader divorce-related policy considerations.

It is a general accounting principle that when assets are sold, a taxable event occurs, creating a liability for payment of capital gains taxes by the selling party. Yet, that broad-based principle was not applied to divorces. The policy determination was made that it is inappropriate to tax people who are selling assets to each other "incident to a divorce." To implement this societal determination that people should not be taxed when they divide their assets in a divorce, Section 1041 of the Internal Revenue Code was adopted. That provision provides that sales, denominated as transfers, between spouses are not taxable events so long as they are "incident to a divorce." This emphasized the principle that as long as the sale or transfer between spouses was related ("or incident to") to divorce, public policy considerations precluded treating such transactions as taxable events. Thus, if a transaction between former spouses occurs, even if it is the byproduct of a divorce, but nonetheless was not incident to the divorce, the safe harbor provisions of Section 1041 do not apply. Certain time limits were established which were quite liberal to distinguish between transactions incident to and those which merely might occur between former spouses. If the transfer occurs within six years, it is presumed to be incident to the divorce.[28] If the transfer is more than six years after the divorce, it is presumed not to be related to the cessation of the marriage.

This policy determination was implemented in the Deficit Reduction Act of 1984, (P.L. 98-369) where Congress overruled the 1962 Supreme Court decision in the *United States v. Davis*.[29] *Davis* had held transfer of property from one spouse to another incident to a divorce required recognition of gain or loss. By enacting Section 1041 of the Internal Revenue Code as part of the 1984 amendments, Congress made it clear that for income tax purposes, no gain or loss will be recognized by the parties when there was a transfer of properties incident to a divorce. The policy determination to provide spouses special treatment is also exemplified by gift law, which is philosophically related to the Section 1041 transfers; in each instance spouses may make unlimited gifts to each other without gift tax consequences. Even children are not treated so liberally, since parental gifts are subject to gift tax rules. Only spouses have the unrestricted freedom to do as they please, and that determination flows from the status of marriage as a fundamental societal institution which policy considerations mandate be treated differently than commercial contracts.

Another illustration of divorce law trumping accounting principles was the provision in the regulations relating to Section 71 of the Internal Revenue Code (IRC) permitting parties to designate otherwise taxable income, *i.e.* alimony, as non-taxable income. As with divorce-related property transfers, the determination was made that in transactions involving spouses, there was no public policy reason to have a bright line rule that alimony must be deductible by the payor and includable in the recipient's income. This distinction is particularly significant; it emphasizes that divorce-related transactions have traditionally been treated differently than other accounting transactions. For example, even if a person was an employee of a charitable organization, *e.g.* Mother Theresa, regardless of the societal benefits of the employer, the employee must report their salary as part of their gross taxable income. Only if people marry do they have the right to designate income as tax-free income.[30] A related, but different, area is child support income. It is an obvious policy determination to designate that cash flow to be tax free.

In fact, the alimony deduction itself is yet another example of policy dictating law. Until 1942, alimony was neither taxable to the recipient nor deductible by the payor.[31] In that year, to relieve the financial hardship imposed on the payor of paying alimony with after-tax income, Congress amended the Revenue Act to provide for deductibility. This provision was ultimately embodied in IRC Sec. 71 (215). Policy and the fairness it reflected, dictated the result.

Marriage and what it meant to our society, coupled with simple concepts of fairness, have always trumped accounting principles developed for use in a commercial setting. Yet, another example involves theoretical taxes. According to the American Institute of Certified Public Accountants (AICPA), accountants are required to treat theoretical taxes in a certain fashion on personal financial statements. For that reason audited financial statements must include provisions providing for theoretical taxes as a liability. From an accounting standpoint, the logic is clear and compelling; as a potential liability, accountants are required, in applying generally accepted accounting principles, to reflect the theoretical tax. For a long time, theoretical taxes in divorces were treated disparately across the state. Accountants who applied basic accounting principles relied on the AICPA standards; it was common practice to deduct theoretical taxes from the gross value. In other words, applying accounting methodology if the asset was valued at $1,000,000 they subtracted $200,000 for theoretical taxes in every case. This meant the amount subject to distribution was $800,000, not $1,000,000.

Many attorneys, in contrast, argued that such a strict application of accounting principles was contrary to the policy embodied by equitable distribution statute, and was unfair and prejudicial to dependent spouses. The tax was not being incurred, and for many reasons might never be incurred. The author has previously argued the linkage between law, logic and policy in a somewhat related context.[32] *Orgler* was predicated on the distinction between marital and commercial transactions, and was analyzed through a prism of fairness. It provides not only the framework for analyzing marketability discounts but the methodology to be utilized.

Ultimately, the Appellate Division recognized the need to address this issue, and did so in *Orgler,* where the husband appealed a trial court determination alleging error had been committed because the court had not deducted the theoretical taxes involved with distribution of a Midas Muffler Shop. The husband advanced the position of the accountants and relied specifically on the AICPA statement. Yet, the court analyzed the issue from the standpoint of policy, not accounting, thus highlighting the salutary approach taken by courts. Confronted with the conflict between unambiguous accounting principles and the policy reflected by equitable distribution, the court declined to follow the AICPA ruling. *Orgler* was a triumph of statutory construction over accounting principles; it reaffirmed the principle that if fairness was the standard, equity, if not common sense, meant mandatory reductions in value because of sale-related reductions without an actual sale made no sense. Nonetheless, both the statute and *Orgler* suggest the contingency relating to sale (*i.e.,* the hypothetical tax or the difficulty in selling) may still be considered on the fairness of the distribution.

Another example of the disparate treatment between matrimonial and accounting law are rules governing the passive/active dichotomy. For tax purposes, unless a taxpayer is engaged in the trade or business of owning and investing in real estate,[33] the investment is deemed passive. As a consequence of its passive treatment, losses generated are not available to the taxpayer for use in the year they are incurred. Yet, in matrimonial law, the legal consequences of a real estate asset being passive and active is different; they are bottomed upon disparate public policy considerations. The IRS's concern was to minimize deductibility and increase tax collections; the divorce-related concern is to fairly compensate the non-titled spouse for appreciation caused by the active efforts of the party which created the value during the marriage. Given that goal, it was immaterial whether the titled owner was engaged in the trade or business of real estate or simply had one piece of property purchased for investment. It is yet another example of policy determining the legal standards to be applied.

Similarly, there is a substantial difference when addressing issues of depreciation. For tax purposes, a commercial real estate investment property, for example, may have its book value decrease because the owners utilize depreciation, which reduces the book value. Yet, in a divorce case, where the goal is to fairly compensate spouses who acquire assets during a marriage, the depreciated value is not binding; rather, it is the actual value. Thus, the same asset made for tax purposes may have its value decreased; yet, for marital purposes, its value increases, once again linking the policy implicit in N.J.S.A. 2A:34-23.1 with a result which is directly contrary to the result applying strict accounting principles.

Yet, another example is the treatment of cash flow. In applying strict accounting principles, monies paid under an accumulated adjustment account in a Sub-Chapter S Corporation (the AAA Account) or repayment of an officer loan would have no effect from an accounting standpoint; it would nonetheless be highly relevant in a matrimonial setting. Once again, the conflict between accounting principles where the cash flow effectively does not exist since it is not reported as taxable income, and the matrimonial setting where not only does it exist but must be considered by the court is patent. It is a reflection of the differing public policy considerations involved. The analysis of the discount issue is furthered by a review of what is really being valued under N.J.S.A. 2A: 34-23.1.

Analyzing the issue from this logical standpoint, the Appellate Division's conclusion in *Brown* that it was inappropriate to utilize a marketability discount in the valuation analysis because, as in most cases, the asset is not and will not be sold, was not only logical but consistent with the *Miller* fairness imperative. It is similarly inappropriate to mandate a marketability discount as part of the fair market value equation where, as in most cases, the asset is not and will not be sold. As *Orgler* rejected a reduction in value for a hypothetical tax, *Brown* correctly refused to deduct a percentage from value because of a sale-related marketability discount.

Importantly, an examination of the full panoply of equitable distribution cases decided by the Supreme Court, there is no suggestion in valuing assets there should be a discount for a marketability discount. Logically, if a marketability discount is to be applied in any case, it should be applied in every case, leaving the inevitable question of why our courts, in all of the reported equitable distribution opinions, do not routinely suggest the discount be applied. The only time the Supreme Court mentioned discounts in the context of equitable distribution was in *Lawson, Mardon, Wheaton, Inc. v. Douglas Frederick Smith, et. al.,*[34] when they noted with approval that one of the seminal equitable distribution cases, *Lavene v. Lavene*,[35] declined to apply a discount in valuing a minority (not marketability) interest in a closely held corporation for equitable distribution purposes. It is not accounting that should dictate the correct policy result; matrimonial law should develop when viewed thru the prism of fairness after interrelating the evidence and the facts presented. How such issues are resolved is critical and will affect divorce practice throughout the state. Simply put, it will effect every case courts hear. The *Brown* court's conclusion that a marketability discount could not be utilized to reduce the value is correct since it is inconsistent with the purpose of N.J.S.A. 2A:34-23.1; as such, it is fundamentally unfair unless the asset, by virtue of the facts or the distributive scheme, is to be sold.

Equitable distribution is a statutory creation that has been reviewed twice by the Legislature — once in its initial formulation and again in 1988 when the statute was amended. Each time, the Legislature did not determine how assets subject to distribution were to be valued. The 1988 amendments required courts consider the statutory factors "in making an equitable distribution of property." The factors, by virtue of a literal reading of the statute and how they have been interpreted (*Orgler* being a good example), are not valuation but distribution factors. Certainly, no one would argue that Factor K, which directs courts consider the "present value of the property," represents a legislative determination that assets are to be valued at trial — thus overruling *Painter*. As the Appellate Division considered tax consequences as a factor in *Orgler*, the present value of property (immune or not) are factors evaluating the fairness of a distribution. Neither in the initial enactment or the subsequent amendment did the Legislature determine as a matter of law or policy that fair market value and the accounting principles that flow from it must be considered.

During a speech before the Monmouth County Bar Association, Associate Justice Virginia Long explained the difference between decision making on the Supreme Court and the process followed during her long tenure in the Appellate Division. Cases were selected to be heard by the Supreme Court because they involved questions of broad public policy that needed to be determined or required clarification. As Justice Long might have said in emphasizing the primacy of policy, it is not so much where we stand, but in which direction are we headed? The correct direction may be gleaned from the logic of the Supreme Court's decision in *Dugan v. Dugan*,[36] which discusses what is being valued in a divorce case and why rigid adherence to propositions keyed to a sale, such as discounts, inevitably lead to an unfair result.

Dugan involved distribution of an interest of a one-person law practice. Mr. Dugan argued since the then-existing canon of ethics precluded the sale of his practice, by definition, the practice could not have a fair market value since it could not be sold. He therefore reasoned there could be no good will. The Court was confronted with the practical problem. If it utilized the accepted definition of fair market value, a willing buyer and willing seller were needed. Yet, if there could not ethically be a sale, how could there be a willing buyer or willing seller, and how could Mrs. Dugan be fairly treated for the obvious good will that existed. In resolving the seemingly insolvable dilemma, the Court recognized the public policy considerations by finding it would be "inequitable to ignore the contribution of the non-attorney spouse to the development of that economic resource," *i.e.* the ability of the attorney to enjoy the good will (the enhanced earnings potential) after the divorce that was nonetheless developed during the marriage even though it could not be sold.[37] The Court reasoned an inability to sell the asset did not eliminate good will, and concluded "equitable distribution does not require conveyance or transfer of a particular asset." Quite obviously, the Court never reduced Mrs. Dugan's interest by a marketability discount, nor should it have done so.

Dugan stands for a simple proposition; in resolving valuation and distribution questions under N.J.S.A. 2A:34-23.1, the answer is not found in rigid or mechanical accounting principles. The answer is in the policy sought to be implemented. Since Mr. Dugan's practice had value to him, and since that value had been created during the marriage, it was of no moment the asset could not be sold. The parameters of a hypothetical sale are constrained by the statute's policy. If the fair market value standard is used, it may well not be the same fair market value applied in a commercial setting, since the hypothetical or fictional nature of transactions must effect accounting rules developed for an actual, not hypothetical transaction.

The issue presented highlights the uniqueness of valuation issues in equitable distribution. Traditionally, assets are valued as if they were being sold but with the recognition by everyone that the asset is not being sold. Utilizing a marketability discount is to ask a Court to decrease the distributable value of an asset because of economic factors relating to sale when no party is requesting a sale.

It may well be useful from an analytical standpoint to step back and reflect upon what is really occurring when assets are distributed at the end of a marriage. The basic philosophy of our law is that marriage is a partnership, and that at the end assets the partnership acquired must be divided in a fair way. In other words, since the parties are not going to jointly own assets, the non-titled spouse must fairly be compensated for their distributable share of what the partnership acquired. If they are not going to own the property going forward, the titled owner will continue to receive the benefits of ownership, as did Mr. Dugan.

Wadlow v. Wadlow[38] provides some guidance on the issue. In *Wadlow*, the Appellate Division found "unwarranted" the trial judge's decision that a hypothetical brokerage commission was appropriate to be deducted from the parties' equity in the marital residence.[39] Courts should base their decision on the facts and the record presented. The Appellate Division concluded since there was nothing in the "record" to support the hypothesis that a real estate commission constituted "a reasonably foreseeable expense incident to the present and future disposition of the property", it should not be deducted. The Court noted that the record was "barren" of any intention to sell the property in the future or, if it did, that the real estate commission would be incurred. Therefore, following the *Wadlow* reasoning if there is nothing in the record to support a claim that an asset is being sold no marketability discount should be imposed.

Wadlow, interestingly, was decided before *Orgler*. A fair analysis of the Real Estate Commission would be to consider it as a factor in the fairness of the distribution if it is reasonable to assume that within a relatively short period of time the commission will be incurred. In other words, the testimony at trial is that the non-titled spouse wishes to receive the home to avoid disrupting the education of a junior in high school, but the house would be sold after senior year, then is the Real Estate Commission truly hypothetical? If it is not to be subtracted, should it not be considered in the fairness of the distribution, which would result in something other than a 50/50 allocation of the asset, particularly when it is transferred to one spouse as opposed to the other?

Justice Garibaldi, in *Balsamides v. Protameen Chemicals, Inc.,*[40] emphasized the distinction between a marketability and minority discount:

> A minority discount adjusts for lack of control over the business entity, while a marketability discount adjusts for a lack of liquidity and one's interest in an entity. Even controlling interests in nonpublic companies may be eligible for marketability discounts, as the field of potential buyers is small, regardless of the size of the interest being sold.

Notwithstanding the conclusion in *Brown,* that a marketability discount should not be applied in valuing an asset distributed under N.J.S.A. 2A:34-23.1, the economic reality reflected by the discount should not be ignored in the overall distributive scheme. Nonetheless, it should not rigidly be applied to an asset that is not being sold. It represents, along with all other factors, part of the risk of ongoing ownership which the titled spouse continues to be burdened with, and thus must be considered in some fashion linked to the facts of the individual case. As emphasized earlier, an analogy can be drawn to theoretical taxes addressed by the Appellate Division in *Orgler v. Orgler*. If the impact of the marketability discount is reasonably foreseeable, either based upon the distributive scheme imposed by the court or by other extrinsic facts including, importantly, the age of the title owner, it may be considered in one of two ways, or perhaps even both.

When an appraiser reaches an opinion regarding value, assuming the valuation methodology is Revenue Ruling 59-60 and Revenue Ruling 68-609, selection of an appropriate capitalization rate is part of the valuation process. One of the most significant factors in selecting a capitalization rate is risk. The risk contingency associated with an inability to readily market shares in a business is a legitimate factor to be considered in the capitalization rate. An even more direct, and perhaps more appropriate, recognition would be in the percentage allocation, although a court must be aware of the risk of double counting the impact. Since the ultimate equitable distribution result is a reflection not only of the specific statutory factors (which are distribution and not valuation factors), but the view expressed by the Supreme Court in *Miller* that spouses must treat each other fairly at the end of the marriage, distribution is a reflection of society's perception of a marriage and the responsibilities spouses have to each other. Ignoring legitimate economic factors does not further the ultimate goal of assuring the distributive scheme is fair.

In an earlier article titled "The Art of Equitable Distribution," the author noted:

> The essential element of any distribution is that it be fundamentally fair given the totality of the economic circumstances. *Equitable* distribution requires more than a narrow focus on how a particular asset is divided. Rather, the focus must be upon how fair is the distribution in light of all economic factors in the case. This article will address some of the considerations that bear on the fairness of a distribution. If the distribution is fair, not only has society's collective conscience and sound public policy been served; but courts, in the most graphic yet simple way, have reaffirmed the policy imperative that at the end of a marriage there is an obligation to deal with your spouse fairly. It is the implementation of this fundamental public policy that goes to the very heart of who we are and the kind of society we seek to be. Marriage is fundamental to our society; our law must reflect our societal values and courts should compel spouses, at the end of their relationship, to treat each other fairly. Elevation of fairness as the sine qua non of any distribution does more than implement a statutory scheme; it reaffirms the type of society we believe we should be.

The degree to which this legitimate distributive factor is to be considered is directly related to the facts of a particular case. If a fact finder reasonably believes the spouse's interest in the entity could and would be purchased by existing partners, the issue of marketability discounts is not only not significant, it may largely be irrelevant. If, however, the entity is owned solely by one person, or the other partners are not found to be possible purchasers, then a court should consider the difficulties the seller would have in actually marketing the property for sale, *i.e.* ultimately receiving the value which the court is distributing to the non-titled spouse under N.J.S.A. 2A:34-23.1. Coupled with the likelihood of any sale in the near future, the difficulty of actually selling an asset must be considered in the distributive scheme (in the percentage allocated to the non-titled spouse unless the difficulty is speculative or not reasonably foreseeable).

Inter-related with this analysis is timing, since age and the likelihood of sale must also be considered. The significance of a marketability discount may well vary if the business owner is 62 as opposed to 35. In the final analysis, none of the policies which underpin distribution of assets is served by utilization of a marketability discount where no sale is sought or contemplated. Instead, the marketability discount is a factor, along with all other factors to be considered either in the capitalization rate selected by the expert, or in the fairness in the distribution with that later consideration reflected in the percentage allocation of the asset to the non-titled spouse. ■

ENDNOTES

1. 348 N.J. Super. 466 (App. Div. 2002).
2. Edith Hamilton, *The Greek Way* (1930).
3. *See Valentino v. Valentino,* 309 N.J. Super. 334, 340 (App. Div. 1998) (the Appellate Division approved a 10 percent distribution of the incremental marital appreciation).
4. 160 N.J. 408, 418 (1999).
5. *Miller* at 418.
6. 248 N.J. Super. 10 (Ch. Div. 1991) *aff'd* 275 N.J. Super. 452 (App. Div. 1994).
7. *Goldman* at 16.
8. *Rothman v. Rothman,* 65 N.J. 219, 229 (1974).
9. *Id.* at 229.
10. *Lepis v. Lepis,* 83 N.J. 139, 149 (1980).
11. Holmes, *The Common Law* (1881).
12. 34 N.J. 582 (1961).
13. *Falcone* at 589.
14. Holmes, *The Common Law* 35 (1881) *cited in Falcone* at 589.
15. *Citing Collopy v. Newark Eye and Ear Infirmary,* 27 N.J. 29 (1959); *Henningsen v. Bloomfield Motors, Inc.,* 32 N.J. 358 (1960); Cardozo, *The Nature of the Judicial Process,* 10 (1921).
16. 116 N.J. 155, 177 (1989).
17. 96 N.J. 538, 545 (1984).
18. 248 N.Y. 399 (1928).
19. Kelly at 544.
20. 150 N.J. 276
21. *Kinsella* at 298.
22. *Id.* At 329-30.
23. *Baglini v. Lauletta,* 338 N.J. Super. 282, 296 (App. Div. 2001).
24. 248 N.J. Super. 10 (1991) *aff'd* 275 Super. 452 (App. Div. 1994).
25. *Goldman* at 248.
26. *Id.* at 457.
27. *See Miller* at 418.
28. *See* Temp. Treas. Reg. Section 1.1041-IT; Q/A 7.
29. 370 U.S. 65 (1962).
30. *See* Reg. 1.71(T) Q8.
31. *Gould v. Gould,* 245 U.S. 151 (1917).
32. *See* Louis, Consideration of Theoretical Tax Consequences In Equitable Distribution, 8 *N.J. Fam. Law,* 153, 155 (1989) cited in *Orgler v. Orgler,* 237 N.J. Super. 342 (App. Div. 1989).
33. *See* IRC 469(C)(7).
34. 160 N.J. 383, 399 (1999).
35. 162 N.J. Super. 187, 202 (Ch. Div. 1978) 36. 92 N.J. 423 (1983).
36. *Dugan* at 434.
37. *Id.* At 434.
38. 200 N.J. Super. 372, 384 (App. Div. 1985).
39. *Wadlow* at 383.
40. 160 N.J. 352.

***Frank Loius** is with Louis, Roe & Wolf in Toms River, and is a former chair of the Family Law Section.*

The Unreported Appellate Division Decision of *Moynihan v. Moynihan*

Highlighting the Need to Reform the Case Information Statement as it Pertains to Monthly Expenses

by Patrick Judge Jr.

The family part case information statement (CIS), in its current form, can be found as Appendix V of the Rules Governing the Courts of the State of New Jersey. This document should not be unfamiliar to those in the family law practice, as Rule 5:5-2(a) requires the CIS to "be filed and served in all contested family actions, except summary actions, in which there is any issue as to custody, support, alimony or equitable distribution." The CIS is divided into eight parts, Parts A through H. This article will focus on Part D, which requires an itemization of the monthly expenses of the individual submitting the CIS. The expenses are to be reflective of the "standard of living established during the marriage."

Part D (monthly expenses) is divided into three schedules: Schedule A (shelter expenses); Schedule B (transportation expenses); and Schedule C (personal expenses). Each schedule contains individual budgetary line items, as well as an opportunity for the individual submitting the CIS to add case-specific expenses not otherwise listed.

Part D (monthly expenses) contains two columns. The first column requires the individual submitting the CIS to list that individual's expenses for him or herself, combined with the expenses of any children residing with that person. The second column requires a listing of expenses the individual has paid for his or her spouse and/or children not residing with that person.

The current version of the monthly expenses section of the CIS is reproduced on the next page.

The problem with the monthly expenses section of the CIS is that it does not separate the individual's personal needs from those of his or her children. Accordingly, when a court is called upon to make rulings concerning the issues of alimony and child support, it is provided with an inadequate tool to assist in that process. This very issue was the subject of a recent unreported Appellate Division decision, *James M. Moynihan v. Kathleen M. Moynihan*, A-115-00T5, decided *per curiam* on January 31, 2003.

As reported in the opinion, the Moynihans were married on May 15, 1982. Mr. Moynihan was 27 at the time, and Ms. Moynihan was 26. It was a first marriage for each party. Three children were born of the marriage, all unemancipated minors, both during the *pendente lite* phase and when the matter came before the court for trial.

Mr. Moynihan filed his complaint for divorce on October 27, 1993. In November 1993, Ms. Moynihan filed an answer and counterclaim. The trial in the matter commenced on September 16, 1998, and concluded on February 4, 2000. The trial judge issued a written decision on June 6, 2000, which was memorialized in a dual final judgment of divorce, which was entered on July 25, 2000.

Ms. Moynihan sought an award of permanent alimony. The trial judge imputed income to Mr. Moynihan of $104,615 per year, and found Ms. Moynihan's gross annual income to be $30,645.45. Based upon an analysis of the factors set forth in N.J.S.A. 2A:34-23(b), the trial court found that an award of permanent alimony to Ms. Moynihan was appropriate. The trial court made this ruling, "primarily finding that [Ms. Moynihan] was unable to meet her reasonable budgetary needs from her income and that [Mr. Moynihan] had the ability to pay alimony to enable her to meet those needs."[1] The Appellate Division found that there was substantial, credible evidence in the record to support the trial court's factual findings in this regard.

The trial court began its analysis with Ms. Moynihan's CIS dated August 20, 1998, which claimed monthly expenses of $8,280.91. The trial judge, after considering each budgetary line item, reduced the budget to $6,520, finding that amount constituted "a reasonable monthly budget for [Ms. Moynihan] once the house is sold."[2]

The trial court found Ms. Moynihan's monthly net income to be

PART D – MONTHLY EXPENSES (computed at 4.3 wks/mo.)
Should reflect standard of living established during marriage, but not repeat those income deductions listed on Part C

	Yours and children (#___) residing with you	Expenses paid for spouse and/or children (#___) not residing with you
SCHEDULE A: SHELTER		
If Tenant:		
Rent	$ ______	$ ______
Heat (if not furnished)	______	______
Electric & Gas (if not furnished)	______	______
Renter's Insurance	______	______
Parking (at apartment)	______	______
Other Charges (Itemize)	______	______
If Homeowner:		
Mortgage	$ ______	$ ______
Real Estate Taxes (unless included w/mortgage payment)	______	______
Homeowners Insurance (unless included w/mortgage payment)	______	______
Repairs and Maintenance	______	______
Heat (unless electric or gas)	______	______
Electric & Gas	______	______
Water and Sewer	______	______
Garbage Removal	______	______
Other Mortgages or Home Equity Loans (Specify)	______	______
Snow Removal	______	______
Lawn Care	______	______
Maintenance Charges (condo/co-op)	______	______
Other Charges (Itemize)	______	______
Tenant or Homeowner:		
Telephone	$ ______	$ ______
Mobile/Cellular Telephone	______	______
Service Contracts on Equipment	______	______
Cable TV	______	______
Equipment and furnishings	______	______
Internet Charges	______	______
Other (Itemize)	______	______
TOTAL	$ ______	$ ______
SHELTER COMBINED TOTAL	$ ______	
SCHEDULE B: TRANSPORTATION		
Auto Payment	$ ______	$ ______
Auto Insurance (number of vehicles ___)	______	______
Registration, License, Maintenance	______	______
Fuel and Oil	______	______
Commuting Expenses	______	______
Other charges (Itemize)	______	______

TOTAL	$ ______	$ ______
TRANSPORTATION COMBINED TOTAL	$ ______	

SCHEDULE C: PERSONAL

Food at Home and household supplies	$ ______	$ ______
Prescription Drugs	______	______
Non-prescription drugs, cosmetics, toiletries and sundries	______	______
School Lunches	______	______
Restaurants	______	______
Clothing	______	______
Dry Cleaning, Commercial Laundry	______	______
Hair Care	______	______
Domestic Help	______	______
Medical (exclusive of psychiatric)*	______	______
Eye Care*	______	______
Psychiatric/psychological/counseling*	______	______
Dental (exclusive of orthodontic)*	______	______
Orthodontic*	______	______
Medical Insurance (hospitalization, etc.)*	______	______
Club Dues and Memberships	______	______
Sports and Hobbies	______	______
Camps	______	______
Vacations	______	______
Children's Private School Costs	______	______
Children's College costs	______	______
Parent's Educational Costs	______	______
Children's Lessons (dancing, music, sports, etc.)	______	______
Babysitting	______	______
Day Care Expenses	______	______
Entertainment	______	______
Alcohol and Tobacco	______	______
Newspapers and Periodicals	______	______
Gifts	______	______
Contributions	______	______
Payments to Non-Child Dependents	______	______
Prior Existing Support Obligations		
(this family)	______	______
(other families – specify)	______	______
Tax Reserve	______	______
Life Insurance	______	______
Savings/investment	______	______
Debt Service (exclusive of mortgage)	______	______
Parenting Time Expenses	______	______
Pet/Veterinarian Expenses	______	______
Professional Expenses (other than this proceeding)	______	______
Other (specify)	______	______

*Unreimbursed only

TOTAL	$ ______	$ ______
PERSONAL COMBINED TOTAL	$ ______	

SUMMARY OF MONTHLY EXPENSES (Computed at 4.3 wks./mo.):

	Yours & Children (#___) Residing With You	Expenses paid for spouse and/or Children (#___) Not Residing with you	Combined Total Expenses
Schedule A.: Shelter	$ ______________	$ ______________	$ ______________
Schedule B.: Transportation	______________	______________	______________
Schedule C.: Personal	______________	______________	______________
Grand Totals	$ ______________	$ ______________	$ ______________

$2,265 (including a meal allowance provided by her employer). From that $2,265 monthly net income, the trial court subtracted Ms. Moynihan's reasonable monthly budget of $6,520, and found her financial need to be $4,255 per month.[3] It was this amount of $4,255 per month that the trial court awarded her in permanent alimony.

After undertaking this analysis, the trial court then applied the child support guidelines to compute Mr. Moynihan's child support obligation. The court found his obligation to be $48 per week. The court correctly listed the $982 per week alimony obligation as income to Ms. Moynihan, and as a direct deduction from Mr. Moynihan's gross income. The court also applied an other-dependent deduction, recognizing Mr. Moynihan's obligation to a child outside of this family.[4]

Mr. Moynihan, on his appeal, argued that the trial court erred when it awarded Ms. Moynihan permanent alimony. Mr. Moynihan further argued that in the event the trial court was correct in awarding alimony, the trial court erred when it determined the amount of alimony to be paid to Ms. Moynihan, in part, because the trial court erred when it calculated Ms. Moynihan's needs.

One of the issues raised by Ms. Moynihan on her cross appeal was that the trial court erred in awarding her only $4,255 in alimony per month because the trial court failed to consider the tax consequences of the alimony award.

Upon a review of the record below, the Appellate Division affirmed the trial court's award of permanent alimony. On the other hand, the Appellate Division found the methodology utilized by the trial court to arrive at the amount of alimony (Ms. Moynihan's monthly net income minus her budgetary needs which included her needs and those of the three children) to be deficient.

In this regard, the Appellate Division at pages 29-32 held as follows:

> The expenses contained in defendant's August 20, 1998 CIS represented defendant's assertion of the *combined* budgetary needs of defendant *and* the three children. The expenses of the children must be separated from those of the defendant in order to determine defendant's true needs. For example, the court noted that the "personal expenses" category listed $3,950 in monthly expenses. The judge proceeded to reduce that amount to 3,215 by deducting $215 for domestic help; $100 for counseling; $220 for veterinary and kennel; and reducing the "vacations" line item from $400 to $200. However, the column under which each line item of the personal expense category is listed is designated as reflecting the personal expenses of defendant *and* the three children. Thereby, line items such as "food," "clothing," "entertainment," "school lunches," "dry cleaning, commercial laundry," "sports and hobbies," and others are either partially or wholly budgetary expenses of the children.
>
> We recognize that the separation or allocation of expenses for many of the line items contained in each of the categories of the CIS is difficult. That process does not lend itself to the application of a mechanist formula, but rather must be based upon an analysis of the testimony of the parties, each item advanced as an expense, and the exercise of sound judgment and discretion by the court. Here, the result of the trial court's analysis of defendant's CIS is that the quantum of alimony awarded necessarily includes monies needed to support the children. Nevertheless, we also note that there was no evidence, testimony, or argument presented to the trial court by either party that attempted to present the court with a basis for making the requisite allocation between the needs of defendant and those of the children.
>
> As we have noted, the finding by the trial court that the reasonable monthly budgetary expenses of defendant, "once the marital residence is sold," are $6,520 is based upon substantial, credible evidence in the record, consisting of defendant's CIS and her testimony concerning the amounts needed to meet the listed expenses. The problem, of course, is that those expenses encompass and represent her expenditures on behalf of the children.
>
> This problem was compounded by the child support guidelines calculation. The basic child support awards contained in the guidelines "include the child's share of expenses for housing, food, clothing, transportation,

entertainment, unreimbursed health care up to $250 per child per year, and miscellaneous items." Pressler Current N.J. Court Rules, Appendix IX-A to R. 5:6A, "Considerations in the Use of the Child Support Guidelines; 8. Expenses Included in the Child Support Schedules" (2003). Accordingly, the award of child support improperly provided additional support for items that are already included within the alimony award.

Based upon the analysis set forth above, the Appellate Division remanded the matter to the family part and instructed the trial court to allocate the reasonable budgetary needs of Ms. Moynihan between those of her and those of the children; to consider the tax consequences of the alimony award; and to reconsider the amount of the permanent alimony award based upon an analysis of all of the statutory factors of N.J.S.A. 2A:34-23(b).[5]

Once the alimony amount is determined, the Appellate Division directed the trial court to make a determination of Mr. Moynihan's child support obligation, either through application of the child support guidelines or, if the trial court found the guidelines to be inapplicable, then by an analysis of the statutory factors in N.J.S.A. 2A:34-23(a).[6]

The Appellate Division's decision is consistent with the mandate contained in Section 19 of Appendix IX-A of the Rules of Court, addressing situations in which alimony and child support are determined simultaneously. Section 19 reads as follows:

> **19. Determining Child Support and Alimony or Spousal Support Simultaneously** – If child support and alimony, maintenance, or spousal support are being determined simultaneously (for the same family), the court shall determine the amount of alimony, maintenance, or spousal support before applying the child support guidelines, except when the court establishes pendente lite support. When applying the guidelines, the amount of alimony, maintenance or spousal support shall be deducted from the paying parent's income (after adjusting for tax benefits, if known) and added to the recipient's income to determine each parent's gross income. This transfer method reflects the availability of income to each parent for the purpose of paying child support.[7]

The *Moynihan* case brings to the fore the slippery slope created by the CIS monthly budget section, which combines a parent's expenses with those of his or her child/children. In its current form, it is an inadequate resource to assist our courts in carrying out their duty to first determine alimony and, thereafter, to determine child support. If the expenses of an individual seeking alimony are commingled with those of his or her children, the court is not being provided with the necessary information to appropriately make rulings as to *the actual need* of the party seeking alimony, an integral component of the first factor in N.J.S.A. 2A:34-23(b).

The remedy to the problem here exposed may be as simple as dividing the first column of the CIS budget into two separate columns, one representing the individual's own expenses and the second column representing the expenses of his or her children residing with him or her. It may also be time to eliminate the current second column which seeks "Expenses paid for spouse and/or children (#__) not residing with you." It is suggested that the primary purpose of the CIS budget section is to provide the *need* information necessary to establish or modify alimony and/or child support. After reviewing the facts and circumstances of the case, an award may have one spouse pay certain in-kind expenses of his or her spouse/children (seen most frequently in the *pendente lite* context). That however is the *end* result, whereas it is contended that the CIS is the *means* to the *end*. Accordingly, it is suggested that the current first column be separated into two columns – the first column representing the individual's expenses and the second column representing the expenses of the children residing with the individual. It is further suggested that the current second column ("Expenses paid for spouse and/or children (#__) not residing with you") should be eliminated from the CIS form. This possible reform is illustrated on the following page.

Will this be more difficult for family law attorneys and litigants before the family part to complete? Yes, but to ignore the problem will simply continue the current situation of providing the court, counsel and the litigants with less than full and complete information to prepare a case and ultimately try it. The Appellate Division recognized the difficulty when it wrote in *Moynihan* as follows:

> We recognize that the separation or allocation of expenses for many of the line items contained in each of the categories of a CIS is difficult. That process does not lend itself to the application of a mechanist formula, but rather must be based upon an analysis of the testimony of the parties, each item advanced as an expense, and the exercise of sound judgment and discretion by the court ….[8]

Of the three schedules (shelter, transportation and personal), the expenses set forth in Schedule C (personal expenses) will in most cases be most easily separated. In fact, some of these expenses are generally separate at the time the expense is incurred. Such expenses may include the following: prescription drugs, cosmetics, school lunches, clothing, dry cleaning and commercial laundry, hair care, medical, eye care, psychiatric and psychological counseling, dental, orthodontic, club dues and memberships, sports and hobbies, camps, children's private school costs, children's college costs, parent's educational costs, children's lessons, babysitting, day care expenses, alcohol and tobacco, newspapers and periodicals, gifts,

PART D – MONTHLY EXPENSES (computed at 4.3 wks/mo.)
Should reflect standard of living established during marriage, but not repeat those income deductions listed on Part C

	Yours	Children (#______) residing with you
SCHEDULE A: SHELTER		
If Tenant		
Rent	$ __________	$ __________
Heat (if not furnished)	__________	__________
Electric & Gas (if not furnished)	__________	__________
Renter's Insurance	__________	__________
Parking (at apartment)	__________	__________
Other Charges (Itemize)	__________	__________
If Homeowner:		
Mortgage	$ __________	$ __________
Real Estate Taxes (unless included w/mortgage payment)	__________	__________
Homeowners Insurance (unless included w/mortgage payment)	__________	__________
Repairs and Maintenance	__________	__________
Heat (unless electric or gas)	__________	__________
Electric & Gas	__________	__________
Water and Sewer	__________	__________
Garbage Removal	__________	__________
Other Mortgages or Home Equity Loans (Specify)	__________	__________
Snow Removal	__________	__________
Lawn Care	__________	__________
Maintenance Charges (condo/co-op)	__________	__________
Other Charges (Itemize)	__________	__________
Tenant or Homeowner:		
Telephone	$ __________	$ __________
Mobile/Cellular Telephone	__________	__________
Service Contracts on Equipment	__________	__________
Cable TV	__________	__________
Equipment and furnishings	__________	__________
Internet Charges	__________	__________
Other (Itemize)	__________	__________
TOTAL	$ __________	$ __________
SHELTER COMBINED TOTAL	$ __________	
SCHEDULE B: TRANSPORTATION		
Auto Payment	$ __________	$ __________
Auto Insurance (number of vehicles ____)	__________	__________
Registration, License, Maintenance	__________	__________
Fuel and Oil	__________	__________
Commuting Expenses	__________	__________
Other charges (Itemize)	__________	__________

TOTAL	$ ______	$ ______
TRANSPORTATION COMBINED TOTAL	$ ______	

SCHEDULE C: PERSONAL

Food at Home and household supplies	$ ______	$ ______
Prescription Drugs		
Non-prescription drugs, cosmetics, toiletries and sundries		
School Lunches		
Restaurants		
Clothing		
Dry Cleaning, Commercial Laundry		
Hair Care		
Domestic Help		
Medical (exclusive of psychiatric)*		
Eye Care*		
Psychiatric/psychological/counseling*		
Dental (exclusive of orthodontic)*		
Orthodontic*		
Medical Insurance (hospitalization, etc.)*		
Club Dues and Memberships		
Sports and Hobbies		
Camps		
Vacations		
Children's Private School Costs		
Children's College costs		
Parent's Educational Costs		
Children's Lessons (dancing, music, sports, etc.)		
Babysitting		
Day Care Expenses		
Entertainment		
Alcohol and Tobacco		
Newspapers and Periodicals		
Gifts		
Contributions		
Payments to Non-Child Dependents		
Prior Existing Support Obligations		
(this family)		
(other families – specify)		
Tax Reserve		
Life Insurance		
Savings/investment		
Debt Service (exclusive of mortgage)		
Parenting Time Expenses		
Pet/Veterinarian Expenses		
Professional Expenses (other than this proceeding)		
Other (specify)		

*Unreimbursed only

TOTAL	$ ______	$ ______
PERSONAL COMBINED TOTAL	$ ______	

SUMMARY OF MONTHLY EXPENSES (Computed at 4.3 wks./mo.):

	Yours	Children (#___) residing with you	Combined Total Expenses
Schedule A.: Shelter	$ ______	$ ______	$ ______
Schedule B.: Transportation	______	______	______
Schedule C.: Personal	______	______	______
Grand Totals	$ ______	$ ______	$ ______

contributions, payments to non-child dependents, prior existing support obligations, tax reserve, life insurance, savings and investments, debt service, and professional expenses.

Other personal expenses may more appropriately be subject to a *pro rata* allocation (unless the expense can be attributed solely to either a parent or the children). Such expenses may include the following: food at home and household supplies, non-prescription drugs, toiletries and sundries, restaurants, domestic help, medical insurance (unless the additional cost to add to the children can be ascertained), vacations, entertainment, and pet/veterinarian expenses. However, as one considers whether a *pro rata* allocation is appropriate, be mindful of the following:

> As the number of children rises, the marginal cost of each child does not increase proportionately (i.e., due to economies of scale, the sharing of household goods and the redistribution of adult spending). Expenditures on two children are less than twice as much as spending on one child (i.e., depending on the estimation method, two children cost from 1.40 to 1.73 more than one child). Also, three children cost less than three times as much as one child (the range is about 1.56 to 2.24 more than one child).[9]

The more difficult task will likely be allocating Schedule A (shelter) and Schedule B (transportation) expenses between a parent and his or her children. Although certain of the expenses may be able to be separated or allocated on a *pro rata* basis (*i.e.* cellular telephone and automobile expenses for older children), it is suggested that the majority of these expenses do not lend themselves to a separation or *pro rata* allocation approach. For example, in a case where a parent resides in a four- or five-bedroom home with two children, would it be fair to allocate one-third of the housing expenses (mortgage, taxes, insurance, utilities, etc.) to the parent and two-thirds to the children? It is suggested that such an approach would not reflect a fair allocation of the expenses. This example begs the question — what would be a fair allocation of these types of expenses?

In the example above, one possibility might be to allocate the monthly shelter expenses of a smaller residence (*i.e.* townhouse) to the parent with the additional expenses between such a residence and the four- or five-bedroom home being allocated to the children. Similarly, in the case of a family renting a multiple-bedroom apartment, the answer might be to allocate the cost of a single-bedroom apartment to the parent and the additional cost to obtain the larger unit to the children.

With respect to transportation expenses, the number of children in a family may necessitate a larger vehicle than a parent would drive if he or she did not have children. The additional costs associated with the larger vehicle (*i.e.,* vehicle payment, insurance and fuel costs) might properly be assigned to the children with the estimated costs of a smaller vehicle being assigned to the parent.

Another approach to allocating expenses between a parent and his or her children may be derived from the child support guidelines. Section 5 of Appendix IX-A (Considerations in Use of Child Support Guidelines) sets forth the economic basis for the child support guidelines as follows:

> **5. Economic Basis for the Child Support Guidelines** At the foundation of the child support guidelines are estimates of what parents in intact families spend on their children. Determining the cost of raising a child is difficult because most goods and services purchased by families are shared by adults and children. Economists estimate that approximately 65% of the household spending is for pooled items (e.g., a car, a washing machine, or a box of laundry detergent used in common by all household members). Even for goods that are privately consumed (e.g., clothing, food), expenditure surveys are not detailed enough to link individual household members (adults or children) to a particular expenditure. Together, pooled and privately consumed goods account for about 90% of the total household expenditures. Since most expenditures on children cannot be observed directly, economists use an indirect method of determining child-rearing costs

> known as marginal-cost estimation. Marginal-cost estimation attempts to find the added cost of a child to a family by comparing the expenditures of families considered equally well-off economically and have different numbers of children. For example, if two families (one with and one without a child) are equally well-off, the additional expenses of the family with a child are assumed to be the marginal-cost of the child ....

The child support schedules in Appendix IX-F and Appendix IX-G are based upon an analysis of child-rearing estimates published by Dr. David Betson of the University of Notre Dame. A summary of the workings of Dr. Betson's analysis is set forth as part of Section 5 of Appendix IX-A.

The child support schedules in Appendix IX-F and Appendix IX-G are estimates of what families spend on children based upon available net income. For example, if the family has a combined net income of $1,000 per week, the schedules estimate that 21.4 percent of that net income would be spent on one child. If that same family had two children, it is estimated that 30.9 percent of the net income would be spent on the two children. If that same family had three children, it is estimated that 36.3 percent would be spent on the children. The schedules contain estimates for families having up to six children and a combined net income of $2,900 per week. (See Appendix IX-A, Section 20 for a discussion of obligors with net income less than the U.S. poverty guideline as well as situations in which the combined net income of the parents exceed $2,900 per week.)

Appendix IX-A sets forth that expenses of children are divided into three broad categories: fixed costs; variable costs; and controlled costs. Section 14(f) defines each as follows:

> *Fixed costs* are those incurred even when the child is not residing with the parent. Housing-related expenses (e.g., dwelling, utilities, household furnishings and household care items) are considered fixed costs.
>
> *Variable costs* are incurred only when the child is with the parent (i.e., they follow the child). This category includes transportation and food.
>
> *Controlled costs* over which the PPR, as the primary caretaker of the child, has direct control. This category includes clothing, personal care, entertainment, and miscellaneous expenses.

Section 14(g), addressing assumptions of the shared-parenting adjustment, states that "relative spending on children in the three broad consumption categories is as follows: 38% fixed expenses, 37% variable expenses, and 25% controlled expenses."

By way of example, an argument could be advanced that if the child support schedules estimate that a family with two children and $1,000 per week in combined net income spends 30.9 percent of their net income on their children ($309 per week), then 38 percent of that $309 per week or $117.42 per week is attributed to the children's fixed expenses (shelter expenses). This figure would then have to be converted to a monthly figure for inclusion on the CIS. The same type of analysis could be done for variable expenses (37 percent) and controlled expenses (25 percent). To the extent overnights of the parent of alternate residence impact the variable expenses, an adjustment would have to be made.

A cautionary note is here provided when separating the expenses of an individual from his or her children. Recall that the current child support guidelines require the determination of alimony before the establishment of child support. If an alimony award is fashioned to permit a supported spouse's budget to be met without consideration of his or her child support obligation yet to be calculated, that portion of the child support obligation assigned to the supported spouse will create a situation where the supported spouse's budget will not be able to be met. For those representing the supported spouse, this is an issue that needs to be addressed when separating the expenses of the client from his or her children.

The suggestions set forth above for the separation of expenses between a parent and his or her children are meant to be illustrative, not exhaustive. Thought and creativity will be necessary as these issues are dealt with family by family, expense by expense. Although separating expenses will be difficult, it is also necessary to allow for the proper evaluation of alimony and child support claims. The current CIS monthly expenses section is an inadequate tool for this purpose. It is suggested that a modification to the current CIS monthly expenses section is needed to separate the budgetary needs of an individual from those of his or her children. ■

ENDNOTES

1. *Moynihan* at 27.
2. *Id.* at 29.
3. *Id.* at 17 and 28-29.
4. *Id.* at 17-18.
5. *Id.* at 35.
6. *Id.* at 35-36.
7. Pressler, Current N.J. Court Rules, Appendix IX-A to R. 5:6A, "Considerations in Use of the Child Support Guidelines; 19. Determining Child Support and Alimony or Spousal Support Simultaneously" (2003).
8. *Moynihan* at 30.
9. Pressler, Current N.J. Court Rules, Appendix IX-A to R. 5:6A, "Considerations in Use of the Child Support Guidelines; 6(i). "Economic Principles Included in the Child Support Guidelines" (2003).

Patrick Judge Jr. *is an attorney in the matrimonial department of Archer & Greiner, P.C., and is a member of the executive committee of the New Jersey State Bar Association's Family Law Section.* *(The author wishes to thank William J. Thompson, Esq., Archer & Greiner, P.C., and Patricia Garity Smits, Esq., Smits & Solotoff, for their insights during the drafting of this article.)*.

Facts

New Jersey Law Center
One Constitution Square
New Brunswick, NJ 08901
1.800.24NJLAP 1.800.246.5527

NEW JERSEY STATE BAR ASSOCIATION
New Jersey Law Center
One Constitution Square
New Brunswick, New Jersey 08901-1500
(732) 249-5000

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