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LEE M. HYMERLING
Section Chairman

Chairman's Report

As the first year of my chairmanship draws to a close and the second year begins, it seems appropriate to pause and take stock of the many events that have occurred in the light of our Section. Similarly, as the new year begins, it is appropriate to look toward the future and address the challenges that lie ahead.

The past 12 months have been marked by considerable accomplishments—successes that have resulted from the dedicated work of many persons. The most gratifying accomplishments have included the creation of the *New Jersey Family Lawyer,* the revitalization of a strong Section Executive Committee, the maintenance of meaningful dialogue with the judiciary, the establishment of a meaningful relationship with the Legislature founded upon mutual respect and cooperation, and the sponsorship of stimulating programs that have attracted wide response from our membership. During the past year, our Section has become a vigorous and respected spokesman for family lawyers throughout our state.

Clearly, the creation of the *New Jersey Family Lawyer* represents the single most significant event of last year. This publication has offered to New Jersey's Bench and Bar a model to be emulated. The ambitiousness of the project, however, may result in its never being duplicated. This issue represents the ninth and last of Volume 1. Volume 2 will begin with June's issue. Looking back over the first nine issues, one must marvel at the contribution the publication has made to the advancement of matrimonial justice. As I travel throughout the state, the most frequent comment I hear about our Section's activities relates to the *Family Lawyer.* My compliments, and the thanks of all Section members, must go to Alan Grosman and Barry Croland, as well as the other editors and the contributors who have literally created a publication from the ground floor up.

Revitalization of Executive Committee

At the outset of my term 12 months ago, I viewed the revitalization of our Section's Executive Committee as among my highest priorities. With no criticism intended to my predecessors, over the past few years the Executive Committee became dormant, rarely meeting and even less frequently becoming substantively involved. In part, the former ineffectiveness of the Executive Committee was a function of its size. Consisting primarily of the officers, together with a limited number of trustees, the Executive Committee did not contain geographical breadth to make it a vital and representative organ. Similarly, in years past the Executive Committee did not contain sufficient divergent viewpoints to assure meaningful debate. As anyone who has attended a recent Executive Committee meeting knows, that comment can no longer be made.

Our current Executive Committee consists of approximately 30 members, composed of geographic representation throughout the state. Over the past year, the Committee has tackled virtually every major problem confronting the Matrimonial Bar. The Executive Committee has become a vital tool in assuring that our Section's leadership remains attuned to the needs and wishes of our Section's membership.

Dialogue with Judiciary

During the past year, we have succeeded in maintaining an excellent rapport with the Matrimonial Bench. In addition to frequent informal sessions with matrimonial judges throughout the state, the past year marked the first formal meeting between representatives of the Family Law Section and the New Jersey Matrimonial Judges Conference. That session, held last winter, will be duplicated on a regular basis in years to come.

Certainly, an integral part of our Bench-Bar program has been our Section's informal conferences with the Supreme Court. In this regard, the Section's views concerning the original pro-

Chairman's Report *(continued)*

posed retainer rule, as well as the need for multiple amendments to R. 4:79, have been conveyed to the Court and, hopefully before the fall term, will find favorable response. I am hopeful that prior to the beginning of the fall term of the Court, whatever retainer agreement rule that is adopted will bear far greater resemblance to the rule advanced by our Section, as contrasted to the rule originally promulgated for comment. Similarly, I am hopeful that before the commencement of the fall term the court rules will be amended to eliminate the necessity of filing a Preliminary Disclosure Statement in default and settled matters. Additionally, I am hopeful that over the summer months the Supreme Court will propound rules addressing the sensitive issue of the attachment of tax returns to the Preliminary Disclosure Statement, as well as the rule—now observed in the breach—which requires matrimonial lawyers like all other advocates to submit proposed forms of Order in connection with motion practice.

Our dialogue with the Bench at all levels has been founded upon mutual respect and an awareness of the importance of mutual cooperation. It has been a tenet of my administration that confrontation must, whenever possible, be avoided.

Legislative Input

A similar approach characterizes our current dealings with the Legislature. As I have said so frequently in prior columns, the recent past has been marked by a legislative resurgence in our substantive area of the law. Similarly, through its legislative co-chairmen, our Section has kept pace. During the past year, our Section and the Women's Rights Section were instrumental in the adoption of the New Jersey Support Enforcement Act. Similarly, our Section was instrumental in causing the veto by former Governor Byrne of S-1508, a bill which in addition to statutorily authorizing rehabilitative alimony would have literally wreaked havoc upon the substantive law of spousal and child support in this state. The responsible fashion in which our Section addressed important legislative topics during the past year has been instrumental in according us significant current access to key legislators and committees. Our Executive Committee, in cooperation with the Commission on Sex Discrimination in the Statutes and key members in both the Senate and General Assembly, is now in the process of reviewing and commenting upon six important bills now pending in Trenton. My special thanks go to Assemblymen Herman and Gormley, as well as to Senators Di Francesco and Lipman, for permitting our Section to become far more involved in the legislative process than was ever previously the case. The importance of that involvement cannot be understated. It is critical that the organized Family Bar closely monitor the legislative process.

Program Sponsorship

Finally, the past year has been marked by a vastly expanded Section program of seminars and social functions. Last September and October, more than 400 lawyers attended dinner meetings sponsored by the Section to discuss the Pashman Report. Last fall, more than 150 attorneys and health care professionals attended a Section-sponsored ICLE program dealing with custody matters. Several months ago, more than 300 attorneys and accountants attended another Section-sponsored ICLE program which brought to our state our nation's foremost authority on matrimonial tax matters, Professor Frank E. A. Sander of the Harvard Law School. Similarly, our Section sponsored a tumultuous program at the NJSBA Mid-Year Meeting in Acapulco featuring appearances by Justice Pashman and Judge Glickman. Last year also marked the largest attendance in recent memory at our Section's annual dinner held at Mayfair Farms.

A review of last year's agenda as set forth above leaves small doubt why the past 12 months have seen an enormous increase in Section membership. In a single year, our membership has increased by close to 50 percent. Undoubtedly the Section will continue to grow and that growth must be encouraged.

Special Thanks

No column cataloging the events of last year could be complete without according proper thanks to those who have worked so hard, frequently under trying circumstances. My greatest thanks must go to my current fellow officers, Vice-Chairman Jeff Weinstein and Secretary David Wildstein. Both Jeff and Dave have spent literally hundreds of hours in Section work. As the Section has become more active, the demands on the Section's officers have increased. It is for that reason that the officers and the Executive Committee have proposed the creation of a fourth officership. By the time you read this column, that issue will have been addressed at our Section's Annual Meeting in Atlantic City.

Additional thanks must go to former Section Vice-Chairman Charles De Fuccio, who during his tenure provided valuable guidance. Similarly, all members of the Executive Committee are deserving of special thanks. It is gratifying to be able to report that when work has had to be done, invariably the members of our Executive Committee served as ready volunteers.

Family Court

What lies ahead? Obviously, during the next year the greatest single challenge will deal with the Family Court. Historically our Section has endorsed the Family Court concept. As a Family Court approaches realization in New Jersey, it is vital that the organized Bar actively participate in its implementation. Hopefully, lawyers will be able to participate in the implementation process "from the inside" as members of applicable Supreme Court committees. Regardless, it is essential that

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Disarmament in the Divorce Wars by The Hon. Frank J. Testa

The Cumberland County Matrimonial Early Settlement Program

Seventy-three contested matrimonial actions venued in Cumberland and Cape May Counties were presented to the Cumberland County Matrimonial Early Settlement Program between October 23, 1980 and April 2, 1982. Of the 73 cases presented, 57 were fully settled based on the recommendations of the Early Settlement Panels who heard them. Thus, 78.1 percent of cases presented to a panel were settled based on panel recommendations.

11 programs operating

In 1981, the bar associations of 11 New Jersey counties were operating Matrimonial Early Settlement Programs, MESP. The success of the MESP is evident in Rule 4:79-4, effective since September 14, 1981, which formalizes participation in existing MESP's. Under the rule, the Court has discretion to order participation in the program. The first MESP in Vicinage One, which is made up of Atlantic, Cape May, Cumberland and Salem Counties was established in Atlantic County under my direction. The Cumberland County MESP was set up in September 1980 and its panels presently hear cases venued in Cumberland and Cape May Counties. Cape May has recently commenced its own program.

The purpose of the MESP is settlement of cases through negotiations rather than through protracted contests. Early settlement saves the time of the courts, counsel and litigants, and consequently reduces financial outlay for all three. The program achieves its purpose because its panels are equipped to handle the gamut of issues presented in matrimonial cases: custody, alimony, support, equitable distribution, visitation and counsel fees. An outstanding feature of the program is its practicality: panel members frequently look beyond support formulas to recommend psychological rehabilitation for a party about to re-enter the working world.

Panels hear cases

In Cumberland County, all parties have an opportunity to present their cases to Early Settlement Panels. The Matrimonial Clerk notifies counsel of the availability of the Matrimonial Early Settlement Program once a case is approved for trial. The notice sent by the clerk explains that if the panel settles all contested issues, the case may then be concluded on the record immediately, since it is then uncontested. The Court has authority under R.4:79-4 to order participation in the program. Requests to participate are, however, routinely granted.

Once counsel and their clients consent to participate in the program, either attorney requests that the chairman of the Early Settlement Committee set the case down for panel hearing. The chairman then appoints the panel and notifies counsel of its members. A substitute panelist is appointed if either counsel indicates that the appointed panelist creates a conflict.

As soon as a case is listed for a panel hearing, counsel and the panelists begin to prepare for the hearing. The chairman provides counsel with forms designed to elicit all information necessary to the panelists' consideration of the case. This information consists of: 1) the caption, docket number and names of counsel (this information is provided only to the committee, not to the court); 2) the dates of marriage and separation; 3) a list of pleadings; 4) a list of children and other dependents; 5) a list of assets subject to equitable distribution and not subject to equitable distribution, together with valuations; 6) a description of the parties' backgrounds, including age, education, employment history and income; 7) a monthly budget and monthly income statement; and 8) a list of issues to be submitted to the panel for resolution.

Counsel must also provide all other relevant information to the panel, including answers to interrogatories and Preliminary Disclosure Statements completed pursuant to R.4:79-2. All information is to be provided to the panelists at least five days before the hearing date, together with a check in the amount of $15 to defray out-of-pocket costs. In the event that both counsel certify that little or no assets are involved in a case, the discovery rules, but not the fee requirement, may be relaxed.

Recommendations made

The panel hearing takes place in a conference room in the courthouse of the county of venue. Counsel are requested to make certain that the parties are present in the courthouse on the hearing date; the parties are further instructed by counsel that the panel hearing is confidential and its recommendations nonbinding. The clerk prepares and circulates a calendar of cases to be heard that day, and the panel, consisting of three or occasionally two attorneys, then calls in counsel for the hearing.

The panelists first ascertain whether the parties have already settled any of the issues initially in dispute. The panel then focuses on the issues to

Hon. Frank J. Testa

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The Cumberland County Matrimonial Early Settlement Program *(continued)*

be resolved. The panelists question counsel, based on the information provided. Their questions follow no set format. At the close of the question-and-answer period, each attorney has the opportunity to set forth the remedies sought. Counsel are then asked to leave the conference room while the panel deliberates. Each panelist prepares an individual set of recommendations; together these are modified and consolidated into a single set of recommendations. Counsel are then recalled and informed of the panel's proposals. Following a brief discussion among the panel and counsel, counsel are free to present the panel's recommendations to their clients.

Parties have options

If the parties are dissatisfied with the recommendations of the panel, the panel may call in the parties to discuss settlement directly with them, in the presence of their counsel. If both parties find the recommendations acceptable, counsel will reconvene before the panel and inform the panelists that a settlement has been reached. The panel, in turn, informs the matrimonial judge, who then proceeds with a plenary hearing on the cause of action for divorce. The terms of the settlement are then placed on the record. Alternatively, parties and counsel may elect to place a matter on the uncontested calendar pending formulation of a written settlement agreement. If some but not all of the panel recommendations are acceptable to the parties, at least the foundation of settlement has been provided, and negotiations may continue until the time of trial. At the close of the panel hearing day, the chairman of the Early Settlement Committee records the number of cases heard by the panel, and whether or not settlement was reached. The names of litigants and their counsel are not retained.

Volunteers staff panels

The panel hearings have gone smoothly from the start owing to the well-designed structure of our county's program. The Cumberland County MESP has held 28 panel hearing days since its inception, 20 in 1981—the program's first full year of operation. Two or three hearing days are scheduled monthly, September to June. Sixteen Cumberland County attorneys have served as panelists between October 23, 1980 and April 2, 1982. Panelists are selected by the chairman of the Early Settlement Committee on the basis of their experience in matrimonial law; they serve as volunteers without compensation. On the average, each panelist has thus far served on 4.4 hearing days. A panel hears, again on the average, two to three cases per hearing day; the minimum was one, the maximum five. There appears to be a trend toward handling more than three cases per hearing day.

The success of the Cumberland County MESP is well demonstrated by statistics. As noted, 78.1 percent of cases heard by a panel between October 23, 1980 and April 2, 1982 were fully settled. Of the fifteen unsettled cases, one was dismissed with cause, one was settled in a settlement conference and two were rescheduled. Further, numerous cases listed for panel hearings are settled on the hearing date prior to the panel hearing. These latter are not included in the above statistics; it is obvious, however, that panel listing is a strong impetus to settlement.

Cooperation is key

The key to the success of the program has been cooperation. The atmosphere of the panel hearing is one of cooperation. Panelists and counsel are peers; counsel are therefore flexible in their demands, and the panelists are therefore flexible in their recommendations. Several panelists have remarked that their duties have provided them with a "view from the bench" which proved useful in their own practices.

Most litigants have been receptive to the panel format. Counsel can and usually do communicate to their clients that matrimonial litigation is not a win-lose situation, and that the spirit of negotiation may reduce their financial outlay and emotional wear-and-tear. Because parties in matrimonial actions are so personally affected by their litigation, they are often motivated to settle quickly.

Cooperation between counsel has been perhaps the one area overlooked. To ensure and maintain the quality and efficiency of panel hearings, two provisions are in order. First, an attorney should be thoroughly prepared on every aspect of his client's case prior to the hearing. Second, the panel is not and should not be utilized as a discovery tool.

The Matrimonial Early Settlement Program has aided the Court by reducing caseload. Settlement avoids unnecessary and expensive trial time for counsel, minimizes acrimony between the litigants and reduces counsel fees. The enormous success of our program is largely attributable to the energetic and creative efforts of the attorneys who help to operate it.

Distribution of Military Benefits—The Need for Reform

by Robert D. Arenstein

As a result of the *McCarty v. McCarty*[1] decision of the Supreme Court of the United States, an opportunity for gross inequity has arisen in matrimonial actions involving service men and women. Until June 26, 1981, the Courts of many states recognized and awarded spousal interests in military retirement pay as marital property of the parties. In New Jersey, our Supreme Court had ruled in *Kruger v. Kruger*[2], that military retirement pay constituted property subject to equitable distribution in a divorce action. On June 26, the Supreme Court of the United States handed down a ruling in the case of *McCarty v. McCarty* that preempted the State Court's authority in divorce actions to determine property rights in pension benefits where those benefits are derived from military service.

The Supreme Court of the United States ruled that such pension benefits are solely the property of the military member, notwithstanding any Court decree to the contrary. In so doing, the Supreme Court of the United States has materially and adversely intruded on the practice of family law in the State Courts. This decision has created doubts and uncertainty involving many divorce decrees in the country.

In particular in New Jersey, it would appear that the *Kruger* decision has now been overruled as a result of *McCarty.* New Jersey must now consider military pension benefits as non-marital property for the purpose of equitable distribution. The Court in *McCarty* did not address the issue of retroactivity, so it remains to be decided whether pre-McCarty cases which followed *Kruger* are valid today.

It appears that the United States Supreme Court has extended the *McCarty* ruling to other areas. On November 10, 1981, the Supreme Court of the United States decided the case of *Ridgway v. Ridgway*[3] which preempted the State Court's authority to consider another federally created benefit. The *Ridgway* decision concerned Servicemen's Group Life Insurance. It reversed a ruling by the Supreme Judicial Court of Maine, which had held as a matter of state law, that the three children of a divorced army sergeant were entitled to proceeds of his $20,000 Servicemen's Group Life Insurance Policy when the serviceman died a year after the divorce. As part of the divorce decree, the sergeant, Richard H. Ridgway, explicitly agreed to keep his life insurance policy in force "for the benefit of the parties' three children" but he remarried four months after the divorce and, six days after the remarriage, made his new wife the beneficiary. When he died five months later, both the second wife and the first wife, who acted on behalf of the children, claimed the benefits. The first wife argued a constructive trust on behalf of the children and the second wife argued that the benefits were solely hers.

The Supreme Court reversed an award of the insurance to the second wife. Justice Blackmun in his opinion wrote that under the Constitution and Supremacy clause, "a state divorce decree, like other laws governing the economic aspects of domestic relations must give way to clearly conflicting federal enactments." Considering *McCarty* and *Ridgway,* one can argue that the Court has determined that military benefits are the personal property of a serviceman, regardless of property settlement agreements to the contrary, creating grave doubts as to the enforceability of agreements with respect to military benefits.

The retirement benefit or pension is generally the major asset produced during the marriage of a family with the possible exception of the marital home. In the case of service personnel, at least in the enlisted ranks, it may be rare for them to own a home. The parties generally live up to their means and hence the marital "pot" available for distribution between the parties often consists of little more than a TV and household furnishings.

One might be less concerned if the divorce court, in making an award of marital property, could offset the pension benefit to compensate for its inability to distribute the military pension with the rest of the marital property. However, the Supreme Court, in the case of *Hisquierdo* v. *Hisquierdo*[4], made it clear that such an offset was impermissible. Hence it could be ruled that any consideration of military benefits in the distribution by the Court would taint a Court's decision or be grounds for reversal.

As a result of *McCarty,* the Family Law Section of the American Bar Association at their Annual Meeting in August 1981 in New Orleans passed a resolution which it hoped would move to correct the inequities of this decision. Subsequent to that meeting, the *Ridgway* decision was handed down by the Supreme Court and the Family Law Section's resolution came before the American Bar Association House of Delegates in its January 1982 mid-year meeting in Chicago. The House of Delegates unanimously passed this resolution which refers to all federal employees and reads as follows:

> "RESOLVED, that the American Bar Association calls upon Congress to enact legislation making all deferred compensation derived from federal employment, such as pensions, retired pay and other income of that nature, subject to state property law, except as specifically exempted by explicit federal legislation."

Prior to that resolution and *McCarty,* in August

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Distribution of Military Benefits *(continued)*

1979, the House of Delegates of the American Bar had adopted a similar resolution for Armed Forces personnel which stated:

> "RESOLVED, that the American Bar Association supports the enactment of legislation which basically requires the Secretary of the Armed Forces to recognize state court decrees of divorce, annulment, a legal separation, which recognizes spousal interest and divide retired or retainer pay."

Justice Blackmun, in both *McCarty* and *Ridgway,* in his opinions called upon Congress to enact legislation to correct the inequities of these two decisions. In *Ridgway* he stated, "A result of this kind, of course, may be avoided if Congress chooses to avoid it. It is within Congress' power. Thus far, however, Congress has insulated the proceeds of SGLIA insurance from attack and seizure by any claimant other than the beneficiary designated by the insured or the first one in line under the statutory order of preference. That is Congress' choice. It remains effective until legislation providing otherwise is enacted."[5]

Congress has begun to hear arguments, both pro and con about legislation correcting the inequities of these two decisions. The Senate Committee on Armed Services, Subcommittee on Manpower and Personnel, has held several hearings and is presently considering at least three bills to have state law apply in these instances. However, in the bill most likely to pass this Committee[6], many restrictions have been included such as a requirement of a minimum of five years of marriage and a minimum of five years of service in the military before any entitlement to the spouse is given; and, it limits alimony, child support and property rights to be awarded out of the pension to a maximum of 50% of the net receivable pension.

On the House side, similar bills are also pending. It appears that the Senate Committee will report out a bill this year but a report on a bill from the appropriate House of Representatives Committee cannot be anticipated in the foreseeable future. Family law practitioners are urged to write their Congressman and urge passage of one of the bills which would correct the inequities in *McCarty.*

Further dangers are that the reasoning in *McCarthy* and *Ridgway* can possibly be extended to the private pension area. The Employment Retirement Income and Security Act of 1974 as amended[7] is the mainstay for most pension plans today. The statute and its legislative history show a clear expression of congressional intent for federal preemption of state property law in the pension area.

Will the Supreme Court extend the *McCarty* and *Ridgway* arguments to the private pension area? Hopefully, the Court will limit itself solely to military benefits and personnel recruitment problems of the armed services. Even if the Court does limit itself to the military issues, Congress must correct the inequities of the *McCarty* and *Ridgway* decisions, and they must do it soon before incalculable harm is done to countless spouses of service personnel.

FOOTNOTES

1. —US—, 101 S.Ct. 2728 (1981)
2. 73 N.J. 464, 375 A.2d 659 (1977)
3. —US—, 102 S.Ct. 49 (1981)
4. 439 U.S. 572 (1979)
5. Slip Opinion 80-1070 at page 16.
6. S.1814 introduced Nov. 4, 1981 by Senator Jepsen
7. USC §1001 et seq.

Recent Cases

by Myra T. Peterson

COUNSEL FEES — Prior attorney becomes third-party beneficiary in counsel fees award.

Attorney A represented the plaintiff-wife for one year. Thereafter, attorneys B represented the wife for the six months until final hearing. Attorney A and attorneys B separately moved for counsel fees from the defendant. The defendant sought to dismiss attorney A's application claiming that he did "not have the right to apply for counsel fees."

The Court found: 1) regarding counsel fees, the terms "party" and "attorney" are synonymous for "all practical purposes"; 2) the plaintiff had the right to make application to the Court for payment of all or a portion of her counsel fees by the defendant; 3) attorney A's application "may better have been made by separate inclusion in the [counsel fee] application of [attorneys B] ...."; 4) the Chancery Court has the jurisdiction to entertain a counsel fee application by a *former* attorney of record. The attorney has status as an "equitable third-party beneficiary."

[Comment: The husband's argument that fees can only be awarded against him in favor of the then *attorney of record for the wife makes absolutely no sense. A matrimonial party may be represented by an attorney, two attorneys or a succession of attorneys during a litigation. Assuming no overlapping of work, compensation for representation to the litigant, no matter what the identity of the representing attorney, is what is being sought in a counsel fee application. The Court has the right to apportion fees among attorneys representing a party as well as to disallow counsel fees to an attorney or attorneys representing a party.]*

Tagliabue v. Tagliabue, M-22387-79 (Bergen: Krafte, J.J.D.R.C. (t/a), Dec. Feb. 19, 1982)

CUSTODY — Jurisdiction under U.C.C.J.A. should be forum in which child resides at time of custody/visitation application.

The parties married and had a child in 1969. They separated either before or just after the birth of the child. In a 1971 divorce, custody of the child was awarded to the plaintiff-mother.

In 1976, the plaintiff applied to the New Jersey Court for permission to move to Pennsylvania. The

Recent Cases *(continued)*

defendant consented to the move, and visitation to the defendant was provided for one six-hour period per month. In 1977 and 1978, various motions were heard in the New Jersey Court because of non-cooperation as to visitation.

At the time of the last New Jersey Notice of Motion as to visitation, the plaintiff applied for relief in Pennsylvania. Before the Pennsylvania action was decided, the parties settled the matter in conference in chambers in New Jersey. The Pennsylvania action was not formally dismissed, but the defendant was told he need not appear in that action.

In April, 1978, both the Pennsylvania Court and the New Jersey Court entered orders reflecting the terms of the New Jersey settlement. There was no further action until 1981 when the defendant-husband, who still resided in New Jersey, moved to increase visitation and to have the child known in school by his, rather than the child's stepfather's, surname.

The plaintiff-wife responded by seeking a stay of proceedings in New Jersey and asserted that Pennsylvania, the state in which she and the child had resided for six years, was the appropriate forum under the Uniform Child Custody Jurisdiction Act [U.C.C.J.A.].

The motion judge, indicating that he probably would not have entertained a custody application, found that New Jersey had jurisdiction for the purpose of the motion and crossmotion, as a divorce had been granted in New Jersey and the defendant still resided there. The Court determined a visitation schedule and the plaintiff appealed.

The plaintiff contended on appeal, as she had done in the trial court, that the proper forum was Pennsylvania; the defendant argued that New Jersey was not an inappropriate forum. Both parties agreed that the U.C.C.J.A.. governed.

The Appellate Division viewed the U.C.C.J.A. conservatively and stated:

> [O]ur common sense is offended by the concept that simply because a case is originally started in this state that all subsequent proceedings between the parties involving the original subject matter should be regarded as commenced here.
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> [T]he home state of the child should be determined at the time of the filing of the immediate application being considered by the Court .... [I]n view of the long interval between the proceedings, the home state of the infant was to be determined as at the time of the filing of the 1981 application. Inasmuch as that state had been Pennsylvania since 1976 the Chancery Division did not have jurisdiction under N.J.S.A. 2A: 34-31(a)(1).

The Court buttressed its position with reference to several out-of-state decisions and an analysis of the chronological facts of this case vis-a-vis the provisions of the U.C.C.J.A. The Court held a comment to the U.C.C.J.A. to be appropriate:

> [I]ts purpose is to limit jurisdiction rather than proliferate it ... [J]urisdiction exists only if it is in the *child's* interest, not merely the interest or convenience of the feuding parties .... There must be maximum rather than minimum contact with the state.

[Comment: The parent whose child is to be removed from New Jersey and who may need in the future to seek redress or defend an action as to custody of or visitation with that child should be forewarned that when the child lives in another state, the more likely it will be that that state will have jurisdiction for custody/visitation purposes. A parent who enjoys joint custody in New Jersey may find a more conservative state hostile to such an arrangement and thus a New Jersey joint custodial parent may find his or her custody/visitation rights limited when a child leaves this jurisdiction. While perhaps a remote probability, a parent could also forum-shop seeking to limit visitation.

The Court's decision, as sensible as it was in the case sub judice*, should perhaps be construed as narrowly as it construed the statute.]*

L.F. v. G.W.F., A-2806-80T1 (Feb. 24, 1982, Allcorn, Francis, Greenberg, J.J.A.D.)

Chairman's Report

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the organized Family Bar approach this issue responsibly, recognizing its implications for the future.

It is vital that the organized Matrimonial Bar keep its channels of communication open to the judiciary and to the Administrative Office of the Courts in order to assure that those who implement the Family Court in New Jersey have the benefit of the experience of our Matrimonial Bar. Many of our members, particularly those in New Jersey, are mindful of the problems that have marked the establishment of a Family Court in New York State. It is essential that New Jersey learn from the mistakes of others; it is also critical that those who implement the Family Court in New Jersey have a healthy awareness of the many merits of our existing system. The Family Court should be viewed as a way to make a good system better, rather than creating experimental programs for their own sake.

Studies Continue

In the immediate future, our Section will have to conclude its investigation of the desirability of using referees to resolve domestic relations matters, as well as to conclude its study of mediation as an alternative to the adversary process. Responsible and unemotional consideration of both of these controversial topics is unquestionably required.

Future Agenda

During the next year, our Section will cosponsor with ICLE the Second Bi-Annual Symposium on Advanced Topics in Matrimonial Law. The First Bi-Annual Symposium was held in 1980 and was

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The Personality of the Matrimonial Lawyer

by William G. Mulligan

So many matrimonial lawyers are inherently decent, friendly, and even rather scholarly types that one wonders why they should suffer from a miserable public image and frequently poor private relationships inside the profession.

Three recent successful movies depict the family lawyer in damaging ways. *Kramer v. Kramer,* a fictional custody case, shows the lawyers, in Court and out, as inept or incompetent. The result they obtain is so wrong that the winning parent elects to reverse it. *Shoot the Moon* is a dramatic scenario of the very family disasters which the consummate skills of the better matrimonial lawyers manage to prevent. While this community property divorce story does not expressly lay the blame for its finale of raw havoc upon the lawyers in the case, it does nothing to absolve them of culpability either. *Divorce Wars,* presented on ABC-TV in prime time, is the story of a divorce lawyer's own divorce, brought on by his professional success leaving no time for the cultivation and care of his marriage.

Tom Selleck, who plays the successful but overly competitive divorce lawyer in *Divorce Wars* is an oustandingly handsome actor who renders a solid performance as a man who has come up from the wrong side of the railroad tracks to become the guy to engage in any matrimonial case in his community. Throughout the picture there are inserted quotations from judicial rulings in favor of his client, some heard as scripts on the tape deck he operates while jogging, and sometimes as voice-overs during relatively silent scenes. As the yarn unwinds we see insets of the tortures inflicted on a husband whose wife Our Hero represents—a genuine enough picture of marital-case harassment. Second to the hero in standing at the divorce bar in the community is Max, his older friendly rival who, when Our Hero's own marriage breaks down is, naturally, engaged by Our Hero's wife Vickey to represent her against her husband, Jack, the great divorce lawyer. We see scenes of Jack's courtroom technique which include some ethically abominable conduct on his part, and we are then treated to the critical conversation between Jack and Vickey in their home:

"JACK

Maybe you should live in the real world.

VICKEY

That's the world you live in. Is that the real world? Where you get to work so hard you don't have time to pay attention to anything else. Where you get to distract yourself with beating the hell out of somebody in court, or getting up at six o'clock in the morning, driving your body for five miles with depositions and declarations plugging into your ear instead of making love—

She walks out of the living room and toward the bedroom. He follows.

JACK

You expect too damn much.

VICKEY

(throwing over her shoulder)

I expect to be happy—I want a divorce."

So the lawsuit opens with Vickey suing Jack for exclusive occupancy of the marital home, custody of the two beautiful children, Max representing Vickey and one of Jack's female associates representing him. Vickey wins the motion. Now we see what Our Hero is really made of: we learn that previously and without Vickey's knowledge he has placed title to the marital home and its contents in his P.C., which immediately puts the property up for sale without notice to Vickey. In a consultation with Max, Vickey is told where she stands:

"MAX

Good. Now all Jack's done is show us how far he's willing to go. He hasn't *won* anything yet. The sale of the house is a harassment—it'll take a week or two to get it cleared up—in the meantime, you can either leave, don't open your door, or expect visitors. He's borrowed against his half of the house and put it up for sale. Now he can't do that—but the fact that the house is in the company's name—

VICKEY

The company—

MAX

Yes—actually much of what you and Jack have is actually owned by the partnership, and even though his share of the assets of the corporation are community property—it's going to be harder to get. He—he has also signed his share of the partnership over to Larry Davis, which essentially means he has little or no assets.

VICKEY

He's crazy.

MAX

Like a fox. It's a brilliant tactic, but it's just a signal. He knows we can eventually get through all that and you'll get a substantial portion, if not all your share. He's telling us it is going to cost dearly. If he's this angry, he can take another step, which puts him out of our reach. He can leave the country.

VICKEY

He wouldn't do that. What about his practice —what—

MAX

I think he would.

I think he would because he is hurt and angry and will do anything for revenge. He's a very smart lawyer; your husband understands as much about divorce law as I do—what he doesn't understand is what I'm trying to tell you: At a certain point none of it is worth it.

VICKEY

So we just let him do whatever he wants—we let him have his way—

MAX

Is that what it means to you? Think of what you started out wanting."

Vickey doesn't quite understand what he means.

The snide maneuvers by Our Hero leave Vickey no choice but to move with the kids to her father's house. Finding herself in this bind she authorizes Max to settle and the lawsuit ends.

Over a drink to discuss the settlement Jack and Max have a few words:

"JACK

Say, Max—how have you managed to stay married to the same woman for thirty-five years?

MAX

I guess in our generation—we just didn't expect so much of each other—and ended up getting more."

The subtitle of Divorce Wars is "A love story." Another subtitle might be "Matrimonial lawyer as rat fink."

These movies are poor portrayals of the matrimonial lawyer in the everyday practice of family law, striving to reconstitute for faltering human beings the ideal of a loving and gratifying

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Personality *(continued)*

life they so honestly sought in taking the marital vows, or else to give them another chance at the realization of these hopes and dreams. The experienced family lawyer knows that neither spouse can be said to be at fault for the collapse of this dream of happiness, this act of faith, in any sense in which fault can be provable by objective evidence. The family practitioner must deal with the pain, anxiety, grief, guilt, remorse, and despair of the average client, must find a way to reenergize a deflated person, and, unlike the orthopedic surgeon, has at hand no standard operation for repair; the imagination and creativity which go into the management of a difficult matrimonial case—a truly awesome responsibility —make calls on the practitioner above and beyond anything taught in the law schools or the continuing legal education courses. It is pitiful that these attributes go unnoticed in most of the dramatizations. What is the Matrimonial Bar to do about it? Go out and engage a public relations firm to gussy up the lawyers' image? It is at least questionable whether artificial hype is any use for influencing the media in a free country, where the tendency is, after all, to present the facts as they appear to detached observers. The questions seem to be: Is the disfigurement of the matrimonial lawyer a distortion or a true-to-life recording? And if the picture is reasonably true, to what extent does it derive from unfortunate interactions between colleagues practicing the same profession?

Whether it is because the matrimonial lawyer is exposed to the contagion of clients who are emotionally disturbed or because the matrimonial lawyer tends to be overworked, there surely are abrasive interchanges among matrimonial adversaries. Sometimes gorges are aroused, some practitioners gossip and even enjoy inciting antipathies by passing along derogatory observations which, while justified when made, leave sores that fester.

We might consider three such instances of overkill, two of them aftermaths of contested custody trials. In one of these the successful lawyer sued the client for an unpaid fee, whereupon the client engaged another matrimonial attorney who interposed a counterclaim against the suing lawyer for malpractice on the ground, would you believe, of failure to object to allegedly objectionable questions asked by opposing counsel (the loser) during trial. In the other, a case in which the custody issues were settled by stipulation in the course of the trial, the counsel for the mother, who became the custodial parent pursuant to stipulation, is representing the mother in a suit against the father and the father's matrimonial attorney for alleged malpractice, prima facia tort, and conspiracy between the father and his attorney, in the bringing of the custody proceeding.[1]

In a third case the defendant's lawyer moved for an order to incarcerate his adversary for failing to comply with an order he had not even served, directing her to deposit certain monies in escrow. On thus learning of the order, she unearthed it and hastened to comply. He then without notice to her sued out an *ex parte* order to show cause why she should not be fined on a daily basis for failing to deposit the money she had in fact already deposited in the required escrow account. That the issuing Court later vacated the order to show cause as improvidently granted did not erase the barbarism of a proponent who, when he came to the ordeal of civility, must have taken the overpass.

We are all prone to find the justification Oliver Wendell Holmes described:

> "Possibly such a justification is a little like that which an eminent English barrister gave me many years ago for the distinction between barristers and solicitors. It was in substance that if law was to be practised somebody had to be damned, and he preferred that it should be somebody else."[2]

As womenpersons began appearing on the professional scene and gravitating into the field of family law, there was grumbling among the brothers at the bar that these sisters were unnecessarily shrewish—holding adversaries to the letter of every rule and being niggardly in the grant of continuances.

In the measure that this was true it typified minority insecurity. The gradual increase in the ranks of the sisterhood has been reducing that cause until now—with female presence so manifest at the bar and on the bench[3]—the shortfalls and fulfillments of professional equilibrium have become gender neutral. Misconceptions as ancient as the Greeks, who gave us the root for hysteria, hystera (the womb) because they thought this abnormality more common to women than to men, have been discarded by the medical and psychiatric disciplines as unsound.[4] Similarly homely humbugs, such as that it is the unstable or neurotic lawyer who drifts into the untamed hinterland of matrimonial work, have dissolved as the family law field has attained respectability.

Soreheads, creeps, and poor losers will ever exist to add to the sufferings of those conscientious and gentle souls who, as we inside the bar do know, give our specialty its genuine class.

Representing separated parties to a failing or failed marriage is ceasing to create an adversarial relationship with all its traditional battling, snarling and animalistic behavior. Rationality brought to marital dissolution through law reform is just as available to the professionals as to the spouses and parents who are their clients. It just hasn't yet overtaken *all* the family lawyers. When it does, and decorum improves, so will the public conception of the matrimonial specialist.

About the footnotes...

Owing to space limitations, the footnotes to this article could not be published. Copies of the footnotes may be obtained by writing to: *New Jersey Family Lawyer,* 172 West State Street, Trenton, NJ 08608.

1981-NJFL-137

Equitable Distribution of Assets in Divorce Cases by Judith Mabry Knepper

The purpose of this article is to report the results of a study designed to show that factors other than those suggested in New Jersey case law influence the proportion of the total assets awarded to the wife in divorce property settlements.

The writer approached the study with three hypotheses (1) that monetary contributions of the wife to the accumulation of assets are significant in determining the proportion of assets awarded to her in a divorce settlement; (2) that the amount of total assets affects this proportion negatively; and 3) that unfaithful wives are penalized for their adultery by receiving a smaller proportion of the marital assets.

New Jersey case law beginning with the landmark decision of *Painter v. Painter*[1] in 1974 has set forth guidelines to aid judges in their decisions and provides a wide range of relevant circumstances to be considered. Although the original legislation in 1971 required only that the court make an "equitable" distribution,[2] subsequent case law has identified just what assets qualify for distribution, as well as those circumstances which diminish a spouse's right to the assets. *Gibbons v. Gibbons,*[3] in 1980 included recognition of the need for assessing the nonmonetary contributions of a non-income-producing spouse. Marital fault was specifically excluded as a criterion in determining equitable distribution in *Chalmers v. Chalmers.*[4]

Although an equitable distribution is an attempt to provide a basis for evaluating the relative contributons of the marriage partners, judges are given great discretion in evaluating those contributions and the onus of proof is on the individual. A spouse who has kept no records of financial contributions, such as unreported part-time earnings, savings accounts accumulated prior to marriage and used to defray expenses after the marriage, is at greater peril in proving an actual monetary contribution than an income-earning spouse.

Note that the *Painter* guidelines[5] include no recognition of nonmonetary contributions that entitle a spouse to claim a right to some portion of the assets. It is this general lack of recognition of nonmonetary contributions, *Gibbons* notwithstanding, which weighs heavily on dependent spouses who have chosen to be homemakers, usually with encouragement from their husbands, and have thus foregone the development of their income-earning capacity and career options.

The Sample, Data and Variables

The sample used for this study was a random sample of 50 cases where divorce was granted in 1979 in Union County, New Jersey. This county was chosen for the diversity of income classes, encompassing lower income cities and higher income suburban communities and provides a good mix of industrial, blue collar and professional workers. Data for these cases were taken from the original files, which are public information. Since official forms for the gathering of financial data are not standardized, limits to the study had to be imposed and account for much of the missing data encountered in this study. This project was funded by Douglass College, Rutgers University. While the sample is relatively small, it nevertheless provides an overview of how courts, attorneys and individuals are responding to the financial reorganization of families due to divorce.

Relationships were tested between the proportion of assets awarded to the wife (the dependent variable) and the duration of the marriage, the value of total assets accumulated during the marriage, and the occasion of infidelity on the part of the wife or the husband. The duration of the marriage was calculated from the date of the marriage to the date of separation, as indicated in court documents. This variable was used as an indicator of the strength of the union (years of commitment to the partnership) and was expected to be positively related to the proportion of assets awarded to the wife. That is, it was expected that the longer the marriage, the greater would be the proportion of the assets awarded to her.

The value of the total assets was measured by summing the value of all assets, both financial and nonfinancial. Unrealized appreciation associated with real property was ignored unless verified by an independent appraiser. All financial assets were valued as of the date of separation of the couple. Other assets such as cars, furniture and personal effects were assigned an estimated fair market value. This variable was included as a potentially negative predictor. Since greater flexibility in distribution is achieved when a larger amount is to be distributed, it is at the higher levels of assets that one could expect to see the more subtle ramifications of legal decisions, or, more realistically, of negotiated settlements which undoubtedly reflect the values of our society as a whole. Indeed, when there are few assets to be divided, the degree to which the disposition reflects application of the law is tenuous. A negative correlation with the dependent variable was expected due to a generally prevalent acceptance of the husband's greater relative contribution to the accumulaton of large estates.

Variables relating to infidelity were included for each partner to test whether the incidence of adultery brought a financial penalty to either party in spite of the *Chalmers rule* excluding fault as a criterion. A partner was considered unfaithful for

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Judith Mabry Knepper, who will graduate this May from Douglass College with honors in economics, made the study on which this article is based under the 1981 Dean's Summer Student Research Fellowship.

Equitable Distribution of Assets *(continued)*

the purposes of this study if a complaint of adultery brought by the spouse was not challenged or if the judgment was granted on grounds of adultery. Experiences related by divorced wives suggested that a wife's adultery is penalized while the husband's is not.

The duration of the marriage and total assets influence the proportion of the assets awarded to the wife in the way I expected. The wife's adultery was not (statistically) significant as a predictor; however, the husband's adultery was significantly related to the proportion of assets awarded to the wife and surprisingly was inversely correlated. That is, a husband's infidelity is associated with a smaller proportion of assets awarded to the wife. It may be wise to point out that in regression analysis, no causation is to be inferred, merely "association" of two or more variables.

Possibly the act of unfaithfulness by the husband is viewed as an indication of the wife's failure to please her husband and consequently of an inadequate fulfillment of her role as supportive mate. Divorced women have long contended that the husband's infidelity has been ignored by the court while their own resulted in a financial penalty.

It may be even more curious that, in fact, their own adultery is ignored while their husband's adultery invokes the financial penalty. This is clearly an unexpected finding and needs to be investigated further before drawing a conclusion. Here again, we may need to remind ourselves that most often cases in the sample were negotiated between attorneys and not a judicial outcome. Any supposition that the adulterous behavior itself causes a reduction of proportion of assets awarded to the wife is, at best, speculation.

Sociologist Dr. Marilyn Johnson suggests another plausible explanation. When men have another woman in their lives (possibly with marriage in mind), they are more aggressive in protecting their assets. They become tougher in negotiating a property settlement and may be more likely to retain a better attorney to attain that goal. However, as one attorney has observed, men also often try to assuage their guilt over an affair by settling generously with the wife.

Though simple correlations can be misinterpreted, it is nevertheless instructive to note the actual proportions of assets going to women within certain categories. While overall women in the sample received on average 49% of the total assets, there was a wide range of variation. These correlations are, as follows:

Duration of Marriage	Average %
1- 5 years	28
6-10 years	53
11-14 years	44
16-21 years	71
21+ years	45

Employment Status	Average%
Full-time	54
Part-time	47
Unemployed	30

Conclusions

The results of this study point to a tendency of courts to view the function of equitable distribution as a means to provide a level of support for the wife (a cushion until she can be self-supporting, or in the event of a very long marriage where employment prospects are very limited, sufficient assets to provide what the court deems an adequate living consistent with her past standard of living.)

"The development of the equitable distribution concept with its emphasis on the economic value of the services of the wife as homemaker is intimately related to new ideas about the purpose and duration of alimony . . . since alimony awards and equitable distribution awards are inextricably related."[6]

The foregoing statement tends to support the idea that equitable distribution is related more strongly to the concept of support (with alimony a tradeoff) than it is to the idea that the wife has vested ownership rights in all property acquired during the marriage. Yet it is the latter notion which is being advocated by women's rights groups across the country.

Laws in Arkansas and Wisconsin provide alternative models to follow.[7] In those states there is a presumption of a 50-50 split with any deviation from that arrangement to be stated in writing with the reasons for that deviation. This forces judges to be explicit in their reasoning and provides each partner with a clear understanding of the rationale for the decision. This requirement may also make appeals less necessary, although women's economic circumstances militate, in any event, against lengthy and expensive appeals.

It is the function of equitable distribution which needs clarification. The obstacles to this clarification are political. Legislators are loathe to alter laws regarding fundamental and traditional views of marriage. No one wishes to be held responsible for making divorce easier. It would also be naive to overlook the fact that most legislators are in fact members of the group of people which have the greatest investment in maintaining the status quo vis-a-vis divorce laws (i.e., white middle and upper-middle class males).

In the final analysis, any determination of what is equitable as it applies to women presumes an acceptance of the belief that women's nonmonetary contributions ought to be evaluated against some ideal. It seems, at best, a paternalistic approach. Women who choose not to enter the marketplace are no less productive than those who become wage earners. They merely produce goods that are not evaluated in the market. If marriage is to have legitimacy for these women, their contributions ought not to be scrutinized in production terms and assessed monetarily. It would be more valuable to recognize marriage as an equal partnership and split any assets accumulated during the marriage on a 50-50 basis.

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Chairman's Report

(continued from page 135)

marked by an enormous turnout, as well as considerable critical acclaim. I am confident that the Second Bi-Annual Symposium will evoke a similar favorable response.

During the year ahead, our Section hopes to again sponsor programs of interest to the Matrimonial Bar, including a return by Professor Sander to discuss additional tax topics.

The agenda for the forthcoming year will be no less frenetic than that of the year just passed. By no means, however, should our future agenda be considered as having been closed. I welcome your thoughts. I welcome your suggestions. Many of the past year's ideas came from the Section's membership. If you have any ideas for the future as to what you would like your Section to be doing, please contact me.

In closing this portion of this column, let me simply say "Thank you"—"Thank you" to all of you who have worked so hard, and "Thank you" to you, our membership, for giving me the opportunity to lead our Section at such a critical and exciting time.

Juvenile Law Committee Merger

Although devoting the bulk of this column to a discussion of our Section's past and future agenda, let me share with you an exciting development which has only recently occurred. Several months ago, I was contacted by the chairperson of the Juvenile Law Committee of the State Bar, who inquired whether it might be feasible to incorporate that Standing Committee into our Section. I was very pleased to receive that request because I have long felt that, particularly within the context of a Family Court, there is an inherent linkage between family and juvenile law. I am pleased to report that at its April meeting our Executive Committee approved this merger. Effective with its June meeting, our Executive Committee will include three new members representing the Juvenile Bar. Further, effective in June, our Section will create a Juvenile Law Committee whose responsibility it will be to monitor juvenile law practice. Future columns within this publication will address juvenile law topics on a regular basis.

My thanks go to Wilma Solomon, chairperson of the Juvenile Law Committee, for having taken the initiative. Welcome to the Family Law Section!

Equitable Distribution of Assets

(continued from page 139)

Footnotes

1. See *Painter v. Painter,* 65 N.J. 196 (1974).
2. N.J.S.A. 2A:34-23.
3. 174 N.J. Super. 107, 112-113 (App. Div. 1980), reversed on other grounds, 86 N.J. 515 (1981).
4. 65 N.J. 186, 193 (1974).
5. Supra, fn. 1.
6. Grosman, Alan M., "Equitable Distribution under the New Law in New York," Equitable Distribution Reporter Seminar, (1980) at 148.
7. Ark. Stat. Ann. § 34-1214 and W.S.A. § 767.255.