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Chairman's Report

by Jeffrey P. Weinstein

Since the Family Law Section rendered its report on the issue of mediation, much has been written about our report and much has been said about the report. I believe I should clarify certain misconceptions.

Section's position on mediation

Last year, the Executive Committee of the Family Law Section unanimously endorsed the Mediation Committee report which appeared in the January 1983 edition of the *New Jersey Family Lawyer*. We stated, in that report, "the conclusion reached in this report is that mediation as a concept, other than as applied to certain well defined areas, is so fraught with problems as to militate against its endorsement by the organized Bar." The position of the Family Law Section is that the unlawful practice of law is occurring in certain services rendered by non-lawyer mediators. This position has not been changed. The Family Law Section position, previously articulated, on the ramifications of a lawyer who involves himself in mediation, also has not been altered. The lawyer may be at considerable ethical peril in involving himself as a practitioner of mediation. The Family Law Section in its report indicated that mediation is not viewed as a desirable alternative to the adversary process. The report is consistent with positions taken subsequent to the issuance of the report. The Family Law Section has always stated that mediation-like approaches may be desirable in certain circumstances. If mediation were to be simply defined as intervention by a third party, and if mediation were limited to court sanctioned processes involved in custody or visitation disputes, the Family Law Section could not and has not, in the past, opposed mediation. In fact, the Family Law Section strongly endorsed the recommendation of the Family Court Committee concerning mediation. The Family Court Committee recommended that there should be one mandated mediation session in issues involving custody. The Family Court Committee recommended that there should be voluntary mediation in domestic violence disputes. The Family Court Committee did not recommend economic mediation. Once again, the recommendations of the Family Court Committee, endorsed by the Family Law Section, do not involve the concept of general divorce mediation as practiced by private practitioners. The Family Law Section is opposed to such practice and has always been opposed to such practice.

I took considerable offense at an article which I read in the publication entitled, "New Jersey Council on Divorce Mediation." Samuel L. Margulies, the president of the New Jersey Council on Divorce Mediation, stated in said article, "The attitude at the national level is paralleled by a similar response at the state level. We understand that after the trustees of the Bar Association in New Jersey repudiated the report of the Family Law Section, that section has pretty much dropped its formal opposition . . . " This statement is inappropriate and inaccurate. He was wrong and it is wrong. Firstly, the Trustees of the New Jersey Bar Association did not repudiate the report of the Family Law Section. In fact, we were allowed to send a representative to the American Bar Association expressing the views, as stated hereinabove on mediation. The Trustees authorized James P. Yudes, one of our Executive Committee members, to appear before the American Bar Association with a report of the Mediation Committee and inform the American Bar Association that said report is the view of the Family Law Section, as updated by our endorsement of the Family Court Committee's recommendations.

I was amused by some other statements set forth in the message of Samuel L. Margulies. Mr. Margulies stated that "The new Family Court, it now appears, will institutionalize custody mediation. Although the Family Court Committee found general divorce mediation too controversial to endorse at this time, we expect that there will be some experimentation with general mediation in at least several counties . . . " I know that Mr. Margulies was not a member of the Family Court Committee. I do not know how he could state that the Family Court Committee found general divorce mediation too controversial to endorse. I believe that Mr. Margulies, who happens to be an attorney, should know that there is not a "new Family Court." Rather, there is a Family Part of the Superior Court, Chancery Division. I do not believe that Mr. Margulies follows the ancient saying that people who live in glass houses should not

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Editor's View

Is 59 Enough?

by Lee M. Hymerling, *Editor-in-Chief*

The policy of the ***Family Lawyer*** *is that the subject matter, although not the text, of all editorials is discussed among the editor-in-chief and the three editors. All editorials represent at least a majority view of this group. This editorial does not, however, necessarily represent the position of the New Jersey State Bar Association or its Family Law Section.*

Appearing in the January 19 issue of the *New Jersey Law Journal* was the Chief Justice's Assignment Order for the period from January 1 through August 31 of this year. That Order reflects that 59 judges have been assigned to the Family Part. The question that presents itself is: Is 59 enough?

A review of the *1984 Lawyers Diary* reveals that a total of 30 judges were assigned on a full or part-time basis to hear Chancery Division, Matrimonial causes. That total includes many judges temporarily assigned from either the District Court or the Juvenile & Domestic Relations Court. The same diary reveals within the Juvenile & Domestic Relations Court total bench strength of 50 full or part-time, permanent or assigned, judges. There is no question that there is some overlapping in the numbers; nonetheless, one is forced to the conclusion that when the two courts were combined, fewer judges were assigned to the combined courts than had been assigned to the two courts standing alone. If this has occurred, the development is most unfortunate.

The report of the Family Court Committee to the June 24, 1983 Judicial Conference revealed that in 1980 a total of 25,910 divorces were granted in New Jersey. That same report indicated in the 1981-82 court year 238,000 of the 716,000 cases added to our county level trial calendars were family related. These consisted of 98,213 juvenile delinquency cases; 11,596 cases involving juveniles in need of supervision (JINS); 99,047 domestic relations cases, as well as 29,531 matrimonial cases. During that court year, 172,000 cases were heard either by the former Matrimonial Division or by the Juvenile & Domestic Relations Court.

Has the new court been shortchanged in the assignment process? Certainly, it has not been shortchanged in the designation of the 15 new Presiding Judges. The selection of those judges merits the plaudits of the Bar. The Presiding Judges were drawn from the best the Bench has to offer. Virtually all of the Presiding Judges have had significant matrimonial experience spanning several years. Those who lack that experience will more than compensate by the energy they will devote to their newly assigned judicial station. As such, the assignments of Presiding Judges seem to satisfy the mandate of the 1981 Pashman Report which urged that ". . . considerable scrutiny be given assignments to the matrimonial bench . . . judges assigned to hear matrimonial causes must be capable not only of sophisticated legal analysis, but also compassionate decision making. The nature and volume of cases make the matrimonial assignment the most difficult and demanding in trial courts."

This having been said, however, the question still persists: Is 59 enough? We think not.

The Family Court Committee report clearly delineated the challenges that would face the new court. The report indicated that the jurisdiction of the new court will include not only matrimonial cases and juvenile and domestic relations matters, but will also entertain all cases dealing with adoptions, domestic violence, civil proceedings dealing with institutionalized persons, name changes and consent to underage marriage. Additionally, contrary to past practice, the Family Part will hear paternity matters as well as certain criminal, disorderly and petty disorderly offenses related to the family.

It should be obvious that the breadth of jurisdiction of the new court will exceed the breadth of jurisdiction of its predecessors. More, rather than fewer, judges will be needed to fulfill the added judicial functions.

Equally important, if the new court is to achieve its promise, judicial manpower will be required to supervise the diversionary programs which hopefully in the long run will not only reduce the number of cases reaching the new court, but will also assist litigants in avoiding judicial process. Diversionary services can work only if dedicated judges have time available for planning and implementation. Imagination is difficult when judges are constantly preoccupied with keeping the dockets afloat. In an age where the expression "clearing the calendar" has assumed almost religious significance, it becomes just that much more important for enough judges to be available to assure not only that the calendar is clear, but that enough time is left over for reflection as to how the system might be improved.

It is not possible for us to determine how many

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Interview With the Honorable Eugene D. Serpentelli

Ed. Note: Judge Eugene D. Serpentelli has recently been appointed to serve as chair of the new Family Part Practice Committee. What follows is an exclusive interview between Judge Serpentelli and *Family Lawyer* News Editor Richard A. Russell.

Judge Serpentelli, you have just been appointed to chair the Family Part Practice Committee by the Chief Justice. I wonder if you would give us a brief history of its origins and the official capacity in which it will function.

As you know, the Supreme Court has a number of standing committees assigned to various areas of the law and other organizational aspects of the Court. The Supreme Court for some time has been considering the formation of a committee that would function particularly in the area of family practice. The Pashman II Committee had recommended some sort of statewide, court-recognized committee of that type. The Family Practice Committee is an outgrowth of those sort of suggestions and the recommendation following the Family Court Committee report which was published last June. That, historically, is how this Committee has come about so that it will function now and be reappointed each year by the Supreme Court.

Who will comprise the initial membership of the Committee?

The Committee is made up of some of the Presiding Judges of the Family Court, practicing attorneys, some representatives of the public agencies, as well as Justice Pashman.

Are you presently aware of any other administrative or judicially appointed committees who have been assigned any special tasks related to the new Family Part?

There has been created a conference of Presiding Judges of the Family Part. The Matrimonial Judges Association and the Juvenile Judges Association have ceased to function as such and some of their efforts will be subsumed within the Presiding Judges Conference which obviously will be made up of the 15 Presiding Family Court Judges. The function of that committee has really not been completely defined. As I understand it, it will deal principally with the organizational or internal administrative issues.

What are your immediate plans for initiating your committee operations?

We have had some preliminary discussions with respect to our committee's work. We have solicited suggestions from various people and organizations including the Family Law Section as to appropriate areas of study for our committees. That has been the first step in getting the committee work going. The second step will be a meeting with the Presiding Judges in order to coordinate our function with them to be sure that we're not overlapping unnecessarily in our efforts, to determine just how much our committee can do for them, and to identify priorities in terms of those areas we should address first. It is quite obvious at this point that in this first year that there may be more to do than we can accomplish in one year, or should attempt to accomplish. We would like to try in this first year to do what would be most helpful in assisting the Family Part in stepping off on the right foot. We know also that we have work to perform with respect to the Court Rules and that the Court does want it to look at those rules which have been recently adopted. So, after the first meeting with Presiding Judges, we will then call a general membership meeting of the full committee in the beginning of February, identify the general areas of work, probably create subcommittees and proceed from there.

Can you give me an idea of any of the general subject areas that you presently feel may be addressed by your committee?

Well, I think the most I could say on that subject is that we are first going to have to ascertain what areas we had considered that might be addressed by the Presiding Judges. There have been a number of areas suggested which are possibly appropriate. First, would obviously be the rules which have been passed, that is, a review of those rules with any need for revision and supplementation. Secondly, it has been suggested that we should look at the entire area of motion practice. Thirdly, it has been suggested that we should consider early settlement programs and involve the Family Practice Committee in such questions as how those programs should be evaluated, how they might be improved, and to what extent they are presently maximizing their efforts. There is consideration being given to what we might call "bench-bar" issues, such as trial certification for family practice attorneys and the area of retainer agreements. Other suggested topics include support guidelines, custody matters, juvenile issues and domestic violence matters. So we have many possible areas of subcommittee work already identified to the extent that they will not overlap with the Presiding Judges if they move into those areas.

Do you feel that there are any particular problems that must be immediately addressed as the Family Part gets under way?

I think the most immediate issues would involve the Court Rules which have been adopted and any significant changes which would be made in the day-to-day functioning of the Courts as, for example, how the Courts are going to manage their calendars, or manage their cases differently. If that is going to impact upon the established practice, it is probably something that we are going to want to look at. So I would say, generally speak-

ing, that possible rule revision would be the first order of business and, to the extent that there has been discussion of a change in the case management, we would want to address ourselves to that right away as well.

To what extent is the Family Court presently under way?

Well, probably a good deal more than most people recognize. Each vicinage is under an obligation to submit to the Administrative Office of the Courts an implementation plan, and that plan has to be in place by April 15. The plan involves such things as how the entire organizational structure of the Family Court will be shaped in that vicinage from the support level right up through the judges; how the cases will be distributed among the judges, such as whether that will be on some regional basis, a "one family, one judge" basis or some other approach or combination of approaches; and, then, of course, how the support units will service whatever the approach is. All of the vicinages have appointed case managers. All of those case managers are working in conjunction with their Presiding Judge, and the Trial Court Administrator or Assistant Trial Court Administrator in devising these plans so that while at the present there may not be too much obvious change, there is a great deal internally working towards a significant change. I would think that within the next couple of months that is going to become more obvious to the bar and public as a whole.

I just want to get a few of your impressions, Judge, on the substantive impact of the Family Court. What is your impression of how we are going to get the outside professions more involved in the process of family litigation, and of how the court is now going to undertake coordination of the related professions such as counselors and mental health services in our court operations?

I think the underlying assumption of the legislation is that we are to respond to the family in crisis by taking a unified approach to the family, and that is by dealing with the family's problems with a greater overview so that juvenile, domestic relations or divorce and nullity problems arising out of the same family will be seen with that setting. Secondly, we should be dealing with them on the basis of the involvement of other professionals, and the implementation of greater intake capacity so that the adversarial nature of the process may not be as emphasized as it was before. That is not to say that attorneys won't be involved, but they will be involved in a different setting. We are going to respond with greater sensitivity to the needs of the family than we have before. So yes, we can expect, I think, to see more intake, and, hopefully, if the funding is there, a greater facility to deal with the underlying problems of the family in crisis, a greater degree of mediation in custody and visitation matters, and all of those type of things which will make us more sensitive to the underlying problem which has brought the people to the Court in the first place.

Is this new effort going to foster in your opinion some judicial specialization or some new judicial expertise in this area?

I think that the creation of the Family Court from the standpoint of the judge does a lot to undermine the old widely-spread thought that judges do not want to be in this assignment. It is going to present a much broader diversity of opportunities for the judges while at the same time giving the judge the ability to develop expertise in this field. I think that we will see more judges willingly, happily, specializing in this area. I know based upon the present assignments of Presiding Judges throughout the state, that we have a group of people who are dedicated to this concept and willing to give a significant part of their judicial career to the Family Part. I believe that any attorney who is principally engaged in family practice will conclude that we have an extremely high-quality, dedicated group of Presiding Judges—and that bodes well for the future.

Do you think that this entire system as it impacts on the bar will also foster a sense that there should be more specialization within the bar itself?

I don't think that one can avoid the fact that the law has reached the stage at which a lawyer cannot be all things anymore and that family law itself has become so complex over the years that it's most difficult to avoid being an expert if you are going to do a great deal of it. It's difficult work; equitable distribution has added a new dimension that didn't exist before, and I think that that in itself has fostered specialization. Now, with the scope of this new Court, and the fact that an attorney who is going to be in a Court which will be dealing with the entire family, a family practitioner is going to be compelled to broaden his own discipline and be as familiar, for example, with what we formerly called juvenile matters and domestic relations matters as he or she is with matrimonial matters. I think it is certainly going to heighten the specialization and that is, of course, one of the reasons we have considered including on our agenda the issue of attorney specialization.

Are there any other areas of concern for you as the Family Court process gets under way, and how may we, as family practitioners, participate in that process?

I strongly believe that the Family Part has the capacity to effect important, positive change in the manner in which family cases are dealt with in a judicial setting. I hope all who are involved in this exciting venture also share my perception of the opportunity we have available. It would concern me if any significant number of people, and in particular, any large segment of our practi-

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Motion Practice—The Need for *Deliberate* Speed

by John E. Finnerty

Introduction

Most agree that motions in matrimonial cases are more significant than perhaps in any other civil litigation, excluding summary judgment motions. Motion determinations:

- set the parties' expectations;
- create perceptions and attitudes and thereby leverage for bargaining; and
- color a judge's attitude about "the file" and subsequent pre-trial input from him.

Earlier commentaries in this periodical have made the same point. See Honorable Michael R. Imbriani, "Motion Practice Problems" III NJFL 59 (November, 1983); Editorial, III NJFL 78 (December, 1983).

Current motion procedures do not work as effectively as they should. Decisions frequently are unfair, without explanation and therefore confusing. Interlocutory appeals usually are doomed to failure. I am not now talking about routine discovery problems, which should not become motions if lawyers know what they are doing, but rather with substantive *pendente lite* determinations concerning money and children.

To a large extent, the confusion and frustration that exists in the matrimonial motion practice stems from the systemic tension that exists between calendar control—expeditious processing of cases, or perhaps, at this point, just processing of cases—and the rendering of substantial justice. Nowhere does that tension more significantly evidence itself than in the disposition of matrimonial motions.

Oral argument and the need for reasoned decisions

Many trial courts around the state routinely decide motions where the material "paper" testimonial assertions are in absolute conflict, without oral argument and without explanation. Implicitly the only way a decision can be made in the face of conflicting testimonial assertions is by accepting one set of assertions and rejecting the other. In effect, credibility is being determined on the papers, and that simply is impossible, unless one party has failed to controvert a material fact alleged, or a "smoking gun" document exists.

Moreover, decisions made in such a fashion make predictability impossible, frustrate meaningful client counselling, and breed client contempt for and anger at the litigation system, thereby undermining its entire operation. More importantly, however, it is simply not fair, in any given case, and offends notions of fair play, substantial justice and due process.

Our court rules (*R.* 4:79-11) provide that oral argument should *customarily* be granted on matrimonial motions that are substantive and on non-routine matrimonial discovery motions. The reality of practice—in many counties—is that oral argument is *routinely not granted,* even when requested.

There is good reason for the rule's presumption of oral argument. Although papers must frame well the factual and legal issues, oral argument—if controlled by a judge who knows the motion and who can direct discussion—is really an opportunity for the judge to discuss the case with another lawyer and to give and get input. Lawyers usually find reasoning and insight is helped by being able to "strategize" issues, policy and logic with another lawyer. A law clerk, who has basically no legal experience, and because of age, little life experience, does not offer the same advantages, no matter how industrious he or she is. In addition, oral argument is more likely to facilitate full replies and a general overview and analysis of all testimonial assertions. The time available between receipt of a response—usually Monday of the motion week if mailed the prior Friday—does not always enable preparation of a meaningful reply.

Moreover, our cases are unequivocally clear that the life of the law is logic and that decisions should be based upon factual findings and conclusions of law that are related thereto. There are, as Judge Goldman pointed out in *Testut v. Testut,* 34 N.J. Super. 95, 100 (App. Div. 1955), strong reasons for this fact finding principal. As Judge Goldman stated:

> Often a strong impression that on the basis of the evidence the facts are thus and so gives way when it comes to expressing that impression on paper.

However, this bedrock principle gives way on matrimonial motions where the frequent disposition—if there is no oral argument—is a filled in order or phoned decision highlights, without any meaningful explanation. Conflicting testimonial assertions set forth on paper cannot be resolved if they are contradictory simply on the basis of the paper submissions. There must be more, and an explanation for decisions, if substantial justice is to be rendered.

John E. Finnerty

John E. Finnerty, a member of the firm of Effron & Finnerty, Esqs., in Paramus, was the prevailing counsel in *Lepis v. Lepis, Nehra v. Uhlar,* and *Davis v. Davis.* He is the author of the "Equitable Distribution" pamphlet for the New Jersey Practice Series on Marriage, Divorce and Separation.

It can be argued that to compel trial judges to state reasons for their decisions on motions will be unduly burdensome. Certainly, it will be burdensome, but the burden must be alleviated in some manner other than by simply undercutting the very essence of the judicial process. If it is important, in order to render justice, that a difficult task be performed when judging, then it must be done. In this regard, how many chancery lawyers recall vividly the late Merit Lane reading on a chancery motion day 30 to 40 well reasoned, tightly written decisions before inviting argument. His motion calendar usually was concluded by the luncheon recess.

Putting aside for a moment these "systemic undermining" procedural irregularities, some might argue that a materially excessive *pendente lite* award may be corrected during final settlement discussions, or at final hearing, by retroactive adjustments and vacation of arrears. Thus, some might argue, apart from procedural problems, there is no need for mid-case intervention or systemic revision.

Unfortunately, although such a substantive adjustment is common sensible, it cannot be predicted to occur from case to case, or judge to judge. In my firm's experience, many trial judges simply will not reduce arrears that have accumulated under a *pendente lite* order, even if they find at final hearing that the facts are different then they originally thought when reviewing the *pendente lite* affidavits, and that further continuation of the old support award is not defensible.

Moreover, even if a judge were so inclined, there is no guarantee under our assignment system—depending upon the county of vicinage—that the judge to whom the case is assigned for trial will be the same judge who signed the *pendente lite* order. If the judges are different, then to be sure the chances are very slim that the second judge will retroactively change a *pendente lite* support award made by the first judge, months before, based upon papers that the second judge will not be aware of, much less have read.

An adversary who has obtained for his client an excessive pre-trial award has leverage during settlement negotiations that cannot easily be relinquished in view of his relationship with his client. Consequently, arrears on an award that never should have been entered are only seriously discussed as extra money due from the other spouse's equitable distribution share. Settlement discusssions are thus seriously undermined, if one represents a spouse who believes that he or she has been unjustly dealt with by an award and does not wish to capitulate. Then too, in this *milieu,* there is the burden of dealing with usually never ending relief to litigant and incarceration motions, which probably take up *more* of the court's time than a fully reasoned disposition or hearing would have taken in the first place.

What is to be done?

Although we must process motions and move cases, and help people continue their lives, if our system is to retain the little confidence it has, we cannot afford to do so without attempting to render substantial justice, no matter how imperfect the results. Judge Imbriani's article pointed out the volume of work, and the personal sacrifices that a judge must make even to *review* his motion papers (nine minutes per motion from 7 to 10 p.m. at night), let alone to analyze them thoroughly. See Imbriani, III NJFL at 60. Although I do not agree with Judge Imbriani that we should have only 12 motion days per year (one a month), I do believe that we should cut them down somewhat so that the burden of preparation and decision is not as frequent. If motion days were scheduled every three weeks, then the volume pressure would not be as great.

Moreover, if we create a motion part, or assign one judge to motions for a fixed period of time (say six weeks, two motion days), and thereafter rotate other judges in the matrimonial section to that part, we would be creating in each judge an expertise for motion disposition. In addition, we would be freeing him of most or many of his other responsibilities so that he could focus his energies exclusively during this period on motions, their review, argument and decision. Moreover, there would not necessarily be a specific need to decide all motions, or hear all motions, on the same day, but rather, if the court were prepared to take oral argument on motions on a particular day, because it had just completed review, then a telephone conference could be arranged pursuant to the rules that now exist. The pressures of having to be a trier of fact during the day, deal with administrative matters for a period thereafter, and then go home to spend nine minutes per motion, could very well be dispensed of completely.

Guidelines with respect to support based upon income level ranges, and numbers of children (*always* able to be relaxed), also could very well be helpful, both to process motions and to eliminate the inadvertent intrusion of personal values.

Although it is somewhat an aside in the context of this article, in no area of law is the danger of subconscious intrusion of personal values upon the judicial process more likely to occur than in domestic matters. Matrimonial issues are substantially about lifestyle (money), children and emotions between men and women. Obviously, these are bedrock issues about which any human being has deeply charged attitudes and values ingrained by upbringing and life experiences. Each judge's decisions *must* be affected by his attitudes and values, and we can ask only that judges be aware of how their attitudes are affecting their decisions so that subconscious prejudices can be screened. The *less* time invested in motion review and decision, the *more* likely it is that such biases are going to affect unknowingly the decision-making process.

Regarding limitation on filed documents, I do not agree with Judge Imbriani's suggestion that

certifications be kept to a minimum length. Although it is important that what has to be stated be stated succinctly and emphatically, it is also important that it be written well and that word follow into word, line into line, paragraph into paragraph, so that a story is told and the reader's attention riveted, or at least not lost. Such an accomplishment is not always related to brevity, but rather to the clarity and non-repetitious manner of declaration. However, *meaningful* documents which establish with little ambiguity the fact asserted always should be annexed as exhibits ("a picture is worth a thousand words"). The exhibits must be clearly marked to allow the court to follow from text to exhibit and back to text.

We also should set uniform standards for filing and service of papers in accordance with whatever timetable is set for the new three-week motion cycles. It should not be that in one county, papers must be both filed and served (meaning have in your adversary's hands) on the same day (Friday) and that in another county it is sufficient if the court have the papers on the Friday, and adequate if the papers are *mailed* that day to the adversary, who will not receive them sooner than the following Monday. Lawyers should not have to guess, or scurry around to find out, how each county or each judge within the county resolves those issues. There should be uniform standards throughout the state and they should be followed by all counties.

Similarly, attorneys should not have to guess as to whether or not they will get oral argument and have the criteria for that guess vary from county to county. If the rule makers intend the rule to mean what it says, that oral argument should be presumptively granted except in calendar and routine discovery motions, then it should be so granted in every county in the state. If they do not intend it to mean what it says, then they should change it. However, we urge an interpretation of the rule based upon the facial language and its implementation throughout the state, along with the other procedural and systemic revisions here proposed.

Conclusion

The process of judging is difficult. It creates great pressure for judges, not only with respect to the decisions they must make about people's lives, but also because of the sheer mass of material that must be digested. We appreciate the tendency, especially among administrators, to press calendar clearance concerns.

However, those pressures and objectives cannot be pursued at the expense of rendering substantial, *understandable* justice on the merits. Courts exist to resolve disputes between litigants, justly and according to the law. Nothing can further undermine confidence and create confusion, both among litigants and lawyers, than a judicial decision which impacts heavily upon litigants, which has been rendered without discussion, and which is accompanied by no *meaningful* rationale.

We perhaps must accept that all decisions will be to some degree unjust. The law, like life, is imperfect. However, we should not too quickly use the imperfection of people and their institutions to rationalize a system that needs improvement. We have not yet done all that we can do to improve the motion system. It is time for more ingenuity.

Chairman's Report

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throw stones (the saying is ancient to me because my mother always told me that). Mr. Margulies said, "Arrogance being what it is, we also expect that some matrimonial attorneys will insist that they are perfectly capable of successfully practicing mediation without the benefit of any training . . . " I would strongly caution members against practicing mediation due to ethical problems which may arise. Even if so inclined, I would not practice mediation, at this point, because of my fear of ethical problems that may ensue.

I was quite upset with the article written by Samuel Margulies. Mediation is not a viable alternative as practiced by mediators presently. Mediation, involving custody and visitation issues, in a court-sanctioned setting is desirable. It is a viable supplement to our adversary system.

Sawyer appointed liaison

The Executive Committee of the Family Law Section met on January 11, 1984 at the Hyatt Hotel in Princeton. Sidney I. Sawyer from Monmouth County has been chosen to serve as our new trustee liaison by State Bar Association President Vincent J. Apruzzese. He was welcomed to our committee and we welcome his input. Donald P. Gaydos was our trustee. Don, probably by the date of this publication, is now Judge Gaydos. Judge Gaydos served in a dual capacity; he was a member of the Executive Committee as well as the trustee liaison. Judge Gaydos was a much respected member of the Executive Committee. He would ably articulate his views. Don was always consistent in his approach and it is because of Don, and others like him, that the Family Law Section became an effective body. Don will be sorely missed by the Committee. I am sure that the Burlington County attorneys welcome him to the bench.

Annual dinner on April 3

April 3, 1984 marks the annual Family Law Section dinner meeting. The dinner meeting will take place at L'Affaire Restaurant, located in Mountainside, New Jersey, right on Route 22. L'Affaire is a very pretty place with excellent food. Judge Strelecki cannot become concerned. There will be an abundant amount of hors d'oeuvres. The Judiciary of the entire Family Part is invited to attend this affair as guests of our section. I am looking forward to this fantastic event and I promise no long speeches.

ABA Family Law Section Endorses Uniform Marital Property Act

by Alan M. Grosman

The Council of the American Bar Association Family Law Section voted to recommend ABA approval of the Uniform Marital Property Act at the Section's mid-year meeting, which was held at the Twin Dolphin Hotel in Cabo San Lucas, Baja California Sur, Mexico, from January 11 to 15.

The Uniform Marital Property Act was drafted by the National Conference of Commissioners on Uniform State Laws and will be submitted for approval to the ABA House of Delegates at its meeting in Las Vegas, Nevada in early February. The proposed Act would establish a form of community property regime in those states which adopt it, which would apply to marriage, divorce and decedents' estates.[1]

While the Council of the ABA Family Law Section endorsed the Uniform Marital Property Act by a narrow margin after extended debate at the mid-year meeting, it rejected by an equally narrow margin the related Uniform Antenuptial Agreements Act, which also had been developed by the National Conference of Commissioners on Uniform State Laws. Other interested ABA Sections, including Taxation and Real Property, Probate and Trust, have voted or will shortly vote on whether to recommend ABA endorsement of the Uniform Marital Property Act and the Uniform Antenuptial Agreements Act.

James P. O'Flarity of Palm Beach, Florida, Section chairman, presided at the meeting. Mr. O'Flarity also serves as president-elect of the American Academy of Matrimonial Lawyers.

Michael S. J. Albano of Independence, Missouri, who is Section chairman-elect, is also a member of the Board of Governors of the American Academy of Matrimonial Lawyers.

Others nominated as Section officers are Donald C. Schiller of Chicago, Illinois, chairman-elect; Beverly Anne Groner of Bethesda, Maryland, vice-chairperson; Harvey L. Golden of Columbia, South Carolina, secretary; Richard J. Podell of Milwaukee, Wisconsin, financial officer; and Mr. O'Flarity, Section delegate to the ABA House of Delegates.

Six New Jersey attorneys participated in the ABA Family Law Section mid-year meeting in Cabo San Lucas, which was attended by over 100 matrimonial lawyers and spouses from throughout the nation.

Edward S. Snyder of West Orange was nominated to a three-year term as an at-large member of the Council of the ABA Family Law Section. Mr. Snyder is a former chairman of the NJSBA Family Law Section, a former member of the Board of Managers of the New Jersey Chapter, American Academy of Matrimonial Lawyers, and is currently an executive member of the Alimony, Maintenance and Support Committee of the ABA Family Law Section.

Also in attendance from New Jersey were the Honorable Bertram Polow, who currently serves as chairman of the ABA Family Law Section's Family Court Committee and is a former member of the Council; Robert D. Arenstein of Teaneck, chairman of the By-Laws Committee and a member of the Nominating Committee; Ellen J. Effron of Paramus, a member of the Mediation and Arbitration Committee; Gary N. Skoloff of Newark, editor-in-chief of the *Family Advocate;* and the writer.

M. Dee Samuels of San Francisco, California, who chairs the Adoption Committee, presented a progress report on the Model State Adoption Act, which her committee is developing for the ABA. She indicated that the proposed model act would be put into final form in time for consideration at the Annual Meeting next August.

As the Section enters its twenty-sixth year of service to the matrimonial bar and to the public, it is embarking upon an ambitious campaign to expand membership beyond the current level of 12,000 attorneys. One must be a member of the American Bar Association in order to join its Family Law Section. The two outstanding Section publications, the *Family Law Quarterly* and the *Family Law Advocate,* alone make membership very worthwhile. There are many other benefits, including top quality continuing legal education programs and fine fellowship. For further information about membership, please write to: Mrs. Lorraine J. West, Family Law Section Staff Liaison, American Bar Association, 1155 East 60th Street, Chicago, IL 60637. Mrs. West handled all of the mid-year meeting arrangements at Cabo San Lucas in her usual very efficient and friendly manner, which has made her so valuable to and appreciated by both the Section leadership and membership.

The Family Law Section will hold its sessions at the ABA Annual Meeting at the Marriott Hotel in Chicago from August 3 to 8. Those interested in staying at the conference hotel should make their reservations as soon as possible because space is limited.

Alan M. Grosman, a member of the Short Hills firm of Grosman & Grosman, is chairman of the Alimony, Maintenance and Support Committee of the American Bar Association Family Law Section and is an editor of the New Jersey Family Lawyer.

Footnote

1. For further information about the provisions and potentially far-reaching effect of the Uniform Marital Property Act, see the articles by William P. Cantwell, "The Proposed Marital Property Act," 1983 *NJFL* 168 (May, 1983), and Alan M. Grosman, "The Uniform Marital Property Act," 1981 *NJFL* 9 (July, 1981), as well as the excellent treatise, by W.S. McClanahan, *Community Property in the United States,* Rochester, The Lawyers Co-operative Publishing Company, 1982, (1983, Cum. Supp.), which is reviewed in 1983 *NJFL* 133 (March, 1983).

Fault Is Not a Factor in Equitable Distribution, But. . . Or a Rose by Any Other Name Smells Just as Sweet

by Robert Diamond

The question of whether fault can be considered in equitable distribution has been answered time and time again by courts of this State.

> "Should matrimonial fault be one of the criteria or circumstances that may properly be taken into account? We conclude that the answer must be in the negative even though the statute speaks of 'equitable distribution'. Indeed, we are satisfied that the concept of 'equitable distribution' requires that fault be excluded as a consideration."[1]

Court decisions have pointed often to the fact that N.J.S.A. 2A:34-23 allows a court to consider the grounds for the cause of action when determining the amount of alimony or maintenance, while the statute is silent on whether the same grounds can be used when effectuating an equitable distribution of property. A careful reading of the cases, however, since the Supreme Court decisions of *Painter* and *Chalmers,*[2] makes it clear that in certain cases, fault not only may be considered but can be a significant factor in determining the appropriate division of assets to the respective parties in equitable distribution. In *Painter,* Justice Mountain cited Judge Consodine's list of factors "which may properly be taken into account by a matrimonial judge in determining in a given case how the distribution may most fairly be made." This list, however, was never intended to be an exhaustive review, but "illustrative" of those types of factors which would assist a trial judge "in seeking just and equitable results" when distributing marital property.[3]

Positive and negative criteria weighed

The source for much of the issue has been the continuing development of cases involving an additional criteria cited by Justice Mountain in the *Painter* case which was taken from Section 307 of the Uniform Marriage and Divorce Act, for the court to consider in equitable distribution cases, as follows:

> "(1) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker."

As a result of the foregoing, the court is required to take into consideration the positive criteria in connection with the contribution as well as the negative criteria, or, the failure on the part of a spouse to make a proper contribution as a homemaker. Accordingly, in a given case and using the wife as an example, the court has the right to take into consideration the failure on her part to properly take care of the needs of the children as well as the husband, failure to assist the husband in connection with his business pursuits, failure to cooperate in connection with the entertaining of his business associates, as well as a long list of other negative criteria which would indicate her failure to make a proper contribution to the marital property, to the home and to her husband. Accordingly, assuming *arguendo,* that the basis of the cause of action for divorce is extreme cruelty and same includes some of the foregoing allegations, said allegations used to prove the cause of action for divorce may be the very same grounds which the court utilizes to reduce a spouse's share of property in equitable distribution. It is far too simple to describe other factual situations to show where the same grounds for divorce are significant factors in reducing the distributive share in equitable distribution.

Disruptive influence

In *Scherzer v. Scherzer,*[4] the court stated:

> "The application of the doctrine of equitable distribution should, of course, be tempered by the circumstances that the marriage between the parties was often discordant and acrimonious, which circumstance may result in a diminished award to the wife on the theory that the disruptive marriage was not conducive to or did not contribute substantially toward the husband's overall business success."

To ignore a spouse's "disruptive influence" upon a marriage and upon the employed spouse's economic success, ignores the requirement that the "matrimonial judge apportion the marital assets in such a manner as will be just to the parties concerned, under all the circumstances of the particular case." *Painter*[5]

The author acknowledges with appreciation the research assistance of his associate, Robert S. Dorkin, Esq., in the preparation of this article.

Robert Diamond

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If a homemaker's "disruptive influence" can be shown to diminish the employed spouse's earning ability or ability to accumulate assets, the trial judge should take this into consideration when apportioning marital property.

In *DiPietro v. DiPietro,*[6] the court was asked to distribute the husband's non-contributory pension plan. The court found that the wife made no contribution or sacrifices with regard to same. The court concluded:

> "Clearly, there was no effort or sacrifice on her part that created this fund. As a matter of fact, and I so find, the wife did not contribute a great deal of emotional strength to this union. Therefore, it is my opinion that a fair and equitable share in this fund is 25% or $22,100."

Husband's conduct considered

D'Arc v. D'Arc[7] represents a clear departure from the so-called restriction which bars courts in this State from considering fault when distributing marital property. In *D'Arc,* the wife proved that her husband sought to solicit her murder. The husband sought alimony and equitable distribution. The trial judge ruled that the husband was not entitled to alimony or equitable distribution of any assets. The court noted, initially, "there is no statutory bar to considering 'fault' in dividing the marital assets. Our statute is silent." Citing *Chalmers,* the court noted that "We are not dealing with the usual type of fault where the conduct of one spouse may merely be a reaction to the faults or shortcomings of the other spouse." The husband's activities so shocked the conscience of everyone that "it is inconceivable that this court should not consider his conduct when distributing the marital assets equitably."

It is significant that in addition to the traditional contribution analysis discussed in *D'Arc,* which views the marriage as an economic partnership or shared enterprise only, the court considered the husband's conduct as well. It refused to accept the partnership or shared enterprise theory as being the only way to determine how equitable distribution should be accomplished. While the *D'Arc* decision has been interpreted as an "aberration," the analysis in *D'Arc* is consistent with the language contained in *Scherzer,* requiring a court to look at the entire nature of the marital relationship between the parties. A court cannot simply close its eyes to the fact that the personal relationship between the parties may have a substantial effect on the economic status of those parties.

It is unrealistic to consider a marriage as an economic partnership only.

> "If a woman has been a listless and uncaring homemaker, and an unsupportive wife and mother, then she should not be the recipient of as much property as one who has invested great effort and energy to those advocations."[8]

It cannot be ignored that fault may be considered when "determining an amount of alimony or maintenance that is fit, reasonable and just."[9] There is a direct relationship between the nature of equitable distribution awarded to a spouse and the amount of alimony determined by the court. The twelfth factor set forth in the *Painter* guidelines states that the court must be concerned with the "effect of distribution of assets on the ability to pay alimony and support." Therefore, the language contained in the foregoing statute must be read *in pari materia* with the language contained in *Painter.*

Level of support reduced

If the court cannot "punish" a spouse by reducing the equitable distribution of marital property to that spouse, it can certainly reduce the level of support because of the supported spouse's conduct during the marriage. All of the testimony which is purportedly not relevant on the issue of equitable distribution is certainly relevant on the issue of alimony as the court may consider "the proof made in establishing the cause of action in determining the amount of alimony or maintenance." Certainly, there is no judicial economy of time by refusing to acknowledge "negative contributions" made by a spouse to a marriage. The argument that litigation is "streamlined" and the court does not consider fault when distributing marital property is meritless.

Consideration of fault when setting a level of support allows the court to reduce alimony when it cannot modify the award of equitable distribution. In this indirect manner, a supported spouse, who cannot be "punished" by limiting equitable distribution, can be "punished" by reducing the level of alimony. While equitable distribution is "awarded for recognized contributions that each spouse" makes to the marriage, the "deep and intertwining relationship between support and equitable distribution" requires the court to look at the entire financial situation the supported spouse will be left in after the divorce. *Smith v. Smith.*[10] See also, *Pascarella v. Pascarella.*[11] To state simply that fault shall not be considered when determining equitable distribution but can be considered when determining the level of support avoids the issue of the interrelationship of equitable distribution and alimony. "Generally, the relationship is inversely proportional, albeit loosely so."[12] It is the contention of the author that the more appropriate approach would be to openly recognize the negative factors which might reduce a spouse's share of marital property and therefore allow a court to set a level of alimony and equitable distribution with regard to all of the particular circumstances in the case before the court. No New Jersey cases have discussed the doctrine of unjust enrichment when reviewing the allocation of marital property between husband and wife. No spouse should be awarded his or her wrongdoing which limits, hinders or reduces the total marital estate.

New York opinions

Whether a negative contribution can be labeled fault or otherwise, two New York trial courts have recently recognized fault specifically as a proper factor when allocating marital property. While this article is not intended to be an indepth review of the various cases throughout the United States, New York has experienced an unusual phenomena within the past year. The New York Supreme Court (trial court) has handed down three opinions on the issue of considering marital fault when allocating marital property. Two cases have allowed the use of evidence of marital fault and the third has not. In *M.V.R. v. T.M.R.,*[13] the trial court ruled that the marital fault could not be considered in equitable distribution proceedings. While the New York statute was modeled on the Uniform Marriage and Divorce Act, the statute was silent on the issue of consideration of marital fault and left the issue open by "neither expressly including or excluding" marital fault, but by adding "catch-all" language which would allow a court to use "any other factor which the court shall expressly find to be just and proper." The court found there were three major policy considerations which led it to excluding evidence of fault when allocating marital property. The three major policy considerations were as follows:

"1. The notion of marriage is an economic partnership;
2. The difficulty of determining fault; and
3. The potential to introduce evidence and weigh considerations which have no place in the law and which may result in unfair and/or unlawful discrimination." 8 FLR 2707.

Relying heavily on the *Chalmers* decision, this New York court felt that reviewing marital fault presented "an entirely impossible task" which opened up the door to highly prejudicial evidence, however, it is clear that these policy considerations attempt to avoid the real problems simply because they are complicated. The fact that these issues are difficult should not be an excuse to allow a court to sidestep these problems. Evidence of fault will be admissible on the issue of support regardless of the court's position on the fault issue when allocating marital property. The court in *M.V.R., supra,* was concerned about the possible abuses which might come to fruition if fault was to be considered in an unreasonable manner.

Subsequent to the *M.V.R., supra,* case, the New York Supreme Court, Nassau County, decided *Blickstein v. Blickstein.*[14] The court in *Blickstein, supra,* rejected specifically the reasoning used in *M.V.R.* as the husband abandoned his wife and two infant children. The husband's abandonment of his family, "(was) the proximate cause of the dissolution of the parties' marriage as well as the detrimental economic consequences which flow from such situation . . . ."[15] Because of the husband's conduct, the wife would be subject to a myriad of detrimental economic consequences. The *Blickstein* court was not persuaded by the statement in *M.V.R., supra,* that fault should not be considered because of the difficulty in determining marital fault.[16]

Further, citing the language which allowed the court to consider any other factor which it deemed "just and proper," the *Blickstein* court concluded that the meaning of this provision was clear; it could exercise its discretion in considering marital fault as a factor in the disposition of marital assets. The court in *Blickstein* felt the *M.V.R.* decision was rested ". . . solely upon the economic aspect of the partnership and the detrimental consequence that flows from its precipitated unjustified dissolution by one partner."[17]

Again, the narrow view taken by the court in *M.V.R.* did not allow the court to view the marriage as a "lifelong commitment and union."[18]

Finally, in *Farenga v. Farenga,*[19] a New York Supreme Court, Nassau County Judge rejected the reasoning in *M.V.R., supra,* and considered in detail the defendant wife's testimony with regard to numerous violent assaults committed by plaintiff husband, the husband's abandonment, the husband's efforts to minimize his income and his efforts to hide assets. Criticizing the narrow approach of looking at a marriage as a balance sheet filled with debits and credits, the court in *Farenga, supra,* found it "unrealistic" to ignore the "brutal" attacks of the faulting partner:

> "In other words, in certain situations, the faulting party could mistreat his or her spouse in any and every manner with impunity when there was a divorce action and an equitable distribution. It would almost be tantamount to granting a license to fault . . .
>
> How, then, can the court in good conscience and in the proper exercise of sound discretion fail to consider fault as a proper factor in making its award herein?"[20]

The "catch-all" phrase allowing the court to consider any factor which was "just and proper" gave the court the opportunity to consider these special matters when allocating the marital property between husband and wife.

Parallel can be drawn

The trilogy of New York cases cited above indicate the wide range of opinion on this issue; the three New York cases were all decided within a six month period by courts of equal jurisdiction. While the New York cases hinged upon the courts' interpretation of the "catch-all" phrase contained in the New York Domestic Relations statute, a clear parallel can be drawn to the status of this issue here in New Jersey.

First, as noted in *D'Arc, supra,* N.J.S.A. 2A:34-23 is silent on the issue of fault when dividing marital assets. Secondly, as noted in *Painter, supra,* Section 307 of the Uniform Marriage and Divorce Act recognizes the contribution of each

spouse to acquisition of marital property. Third, one cannot simply ignore the fact that testimony with regard to fault is admissible with regard to the issue of support and is heard by trial judges in this State as a matter of course. Finally, in *Painter, supra,* Justice Mountain recognized that marital assets must be apportioned with regard to "all of the circumstances of the particular case." While the language "under all of the circumstances of the particular case" is not contained within N.J.S.A. 2A:34-23, this "catch-all" language is very similar to the language contained in the New York Domestic Relations statute discussed above.

Whether one labels a "negative contribution" as marital fault or not, the reality of the situation remains that some courts have utilized this concept, but have refused to acknowledge it except for Judge Imbriani's opinion in the *D'Arc* case. The courts of our State are charged with the duty of distributing equitable property in an equitable manner. This article raises a serious question as to whether this can be truly accomplished if the court ignores the devisive conduct of a spouse. The application of "negative contributions" or a spouse's "disruptive influence" as factors in determining equitable distribution have not been decided in a consistent manner in the courts of our State. Perhaps it is time to spell out in a crystal clear manner exactly what is meant by "marital fault" or the "negative criteria" as one of the "special discretionary tools" a court can use in exercising its power to equitably divide marital property. We submit that this would allow the matrimonial bar the opportunity to properly prepare cases with advanced knowledge as to exactly what the trial court would consider in connection with the foregoing subject.

Footnotes

1. *Chalmers v. Chalmers,* 65 N.J. 186 (1974). See also, *Painter v. Painter,* 65 N.J. 196 (1974).
2. *Supra,* fn. 1.
3. *Rothman v. Rothman,* 65 N.J. 219 (1974) and *Gibbons v. Gibbons,* 174 N.J. Super. 107 (App. Div. 1980).
4. 136 N.J. Super. 397 (App. Div. 1975).
5. *Supra,* fn. 1.
6. 183 N.J. Super. 69 (1982).
7. 164 N.J. Super. 226 (aff'd. in part, rev'd. in part) 175 N.J. Super. 598 (App. Div. 1980).
8. John E. Finnerty, "The Property Distribution Decision: An Analysis," 97 N.J.L.J. 473, 483.
9. N.J.S.A. 2A:34-23.
10. 72 N.J. 350 (1977).
11. 165 N.J. Super. 558 (App. Div. 1979).
12. Skoloff, *New Jersey Family Law Practice,* 4th Ed., §6.2, pages 6-8.
13. 8 FLR 2707 (N.H. Sup. Ct. 1982).
14. 9 FLR 2158 (N.Y. Sup. Ct., Nassau County 1982).
15. *Id.,* at 9 FLR 2158.
16. "Difficulty in making a required determination is not a basis for a court to shirk its duty or responsibility to do so." Id., at 9 FLR 2159.
17. *Id.,* at 9 FLR 2159.
18. *Id.,* at 9 FLR 2158.
19. 9 FLR 2343 (Sup. Ct. Nassau County 1983).
20. *Id.* at 9 FLR 2344.

Psychologists Recommended as Consultants to Attorneys

Neil Hurowitz, a prominent Philadelphia-area divorce lawyer, in a recent lecture recommended that matrimonial attorneys make a practice of consulting with psychologists and psychiatrists to aid them when representing emotionally disturbed clients.

Mr. Hurowitz, an attorney from King of Prussia, who is vice-president of the Pennsylvania Chapter of the American Academy of Matrimonial Lawyers, was the principal speaker at the December dinner meeting of the New Jersey Chapter of the Academy held at the Somerset Hilton Hotel, Somerset.

The speaker was introduced by Anne W. Elwell of Upper Montclair. Alan M. Grossman of Short Hills, New Jersey Chapter president, presided at the meeting.

Reasons outlined

Mr. Hurowitz summarized his reasons for using an expert in human behavior with emotionally disturbed clients, as follows: (1) to handle your client better; (2) to lessen the amount of tension; (3) to protect against malpractice; (4) to get the best fee; (5) to win the case; (6) interest; (7) excitement; and (8) fun.

Dr. Samuel Shrut, an experienced psychoanalytically trained psychologist from New York City, added a most interesting dimension to the discussion by providing his comments following the presentation by the principal speaker.

Mr. Hurowitz indicated that some years ago he developed what has become a routine approach for him in handling his matrimonial cases, which is to use psychiatrists and psychologists as consultants in the area of human behavior with emotionally disturbed clients.

"We may be experts in matrimonial law, but we know very little about human behavior. I began using selected experts as my consultants on a regular basis with great results," Mr. Hurowitz said.

"Consulting with experts in human behavior is a concept that all of us should do regularly. Look to psychologists, psychiatrists, and other therapists who possess not only excellent training in the field, but who manifest those special instincts in dealing with behavior. Use them to counsel you," Mr. Hurowitz recommended.

"After all, the matrimonial practitioner really dispenses psychiatric law. We have not learned this subject in law schools. We have no required program to train ourselves. Dare we risk dispensing advice to emotionally disturbed clients without really knowing the true nature of our counseling, the possible reactions, how to control different personality disorders? We can protect ourselves and successfully handle these cases by calling upon our *own* experts in human behavior. Begin now," he advised.

"Outer-spacer" represented

The following are types of clients whom Mr. Hurowitz has successfully represented by consulting with experts in human behavior: the paranoid, the manic depressive; the sociopath; the psychopath; a combination of the above; the mildly and the profoundly depressed; those suffering from the "seizure and fit" syndrome; the closet homosexual/lesbian; the totally hopeless; the alcohol and drug addicted; the royalty-peasant syndrome; the angry and hostile; the so-called genius; the Marine-killer mentality; the recluse; the cultist; the emotionally deficient; the woman hater/man hater; the "gangster"; the "out-of-spacer"; the bizarre; the romantic/dreamer; the sub-normal intellect; the viciously insane; the suicidal (financial and physical); and the controller.

Mr. Hurowitz provided case histories of a number of these behavioral types, one of whom he described as "the outer-spacer." One bizarre "outer-spacer" whom he represented was a delightful person raised by multi-millionaire parents, who always had servants and could not do anything on her own.

Mr. Hurowitz noted that she had a live-in guru, a live-in psychic, a handwriting expert and a bevy of other advisers. He indicated that in the beginning of their attorney-client relationship he was having trouble communicating with her and therefore he turned to one of his human behavior specialists for guidance. He was advised to enter her world of unreality. He did, learning about gurus and psychic phenomenon. She taught him how to throw her I-ching sticks. "Only then was I able to communicate with her. Entering her world enabled me to understand her, prepare her for trial, control the case, and negotiate the terms of a most favorable settlement," he said.

While normally Mr. Hurowitz calls upon the psychologist or psychiatrist as *his* consultant in dealing with an emotionally disturbed client, on occasions where the client so authorizes he works with the client's own psychiatrist. He described one fascinating and financially rewarding case involving a client diagnosed as a "paranoid, manic-depressive, sociopath."

Areas of assistance

He listed the following as the areas in which the psychiatrist assisted him in this case: (1) as a consultant on the phone and in the courtroom; (2) to control the client's mood swings; (3) as an expert for the Court in the custody portion of the case; (4) as a reference for protection from possible legal malpractice claims; (5) to receive a complete diagnosis; (6) to deal with other members of the client's family; (7) to create the expert "team approach" for the client and his family; (8) to soften the receipt of his legal fees (on a monthly basis); (9) to explain to the client how important his work was—that he had the "best attorney in the county," which is what he needed to hear; (10) to arrange for his admission into a psychiatric hospital.

Also, (11) to warn potential victims of the client's threats instead of having him arrested; (12) to discuss the client's social relationships; (13) to discuss the client's medications and the effects on him; (14) on how to tell when the client *wasn't* on the medication; (15) to discern the truth from the client's lies; (16) to handle the client's explosive anger against me; (17) to defuse a bad situation at the court house; (18) to keep the client from blowing the settlement conference; (19) to handle the client's mood changes in the courtroom, where he went from crying, to extreme hostility, to faking blindness; (20) in the court room by letting me know when the client was near the deep end, affording me a chance to request a timely recess; (21) for his psychiatric analysis in the courtroom at the end of the case, explaining everything the client went through, using examples from his testimony and behavior in the courtroom to underscore his need for help; and (22) to advise on handling the client and his family during conferences in his office.

Research and strategy

With regard to billing for these consultations, Mr. Hurowitz said that he bills under the heading of "research and strategy" and has, on occasions, prepared an authorization form. He added that when a client has admitted in words or by behavior to being ill, having psychological problems, and possibly needing help, he asks him or her to rely upon his abilities and his good sense in consulting on his behalf with a specialist in human behavior as required.

Mr. Hurowitz is the author of *Pennsylvania Support Practice—The Complete Lawyer's Handbook of Successful Techniques* (1980), with 1984 Supplement, *Divorce—Your Fault, My Fault, No Fault* (1981) and is a member of the National Board of Governors of the American Trial Lawyers Association.

Dividing Retirement Plan Benefits—Part II

by Richard J. Flaster

Tax Consequences of Equitable Distribution of Retirement Plan Rights

As a general matter, in a *Davis* case jurisdiction, the husband (employee-spouse) may be subject to immediate taxation when his rights to plan benefits are *currently* conveyed to his wife. Under the *Davis* rule of taxability, the transferor-husband would be taxed on the difference between the fair market value of such plan rights (as discounted to a present value to reflect any deferred payment mechanism) less the husband's basis in such rights (which would be the sum of any of the employee's contributions to the plan which were not deductible by him when made plus any of the employer's contributions which were taxable to the employee when made). (This rule of taxation should not be confused with the nontaxable situation of an equal division of pension plan interests in a community property jurisdiction. Private Letter Rulings 7952045, 8003109 and 8097024.) However, from the perspective of the recipient-wife, there would be no recognition of gain on the transfer, and she would presumably receive a tax basis for such rights stepped up to current fair market value at the time of transfer. As a result, such increased basis would produce lower gain upon her ultimate receipt of such plan benefits. See IRC Sections 72 and 402. Although in such event the employee-spouse should not be ultimately (again) taxed on benefits actually received by the nonemployee-spouse (see Private Letter Ruling 8309144), whenever possible, such assigned benefits should be paid by the plan directly to the nonemployee (transferee) spouse.

Notwithstanding the foregoing rules (which apply generally to the transfer of interests in qualified retirement plans), there is a safe-haven offered by the tax law for transferring a spouse's interest in an Individual Retirement Account (a so-called "IRA") pursuant to a divorce decree or a written instrument incident to divorce. See IRC §408(d) (6) and Private Letter Ruling 8032040. Such a transfer will not be taxable to the transferor spouse, and thereafter the IRA will be treated as if it were an IRA of the transferee-spouse. Of course, this will mean that any distribution of benefits to the transferee-spouse before attainment of age 59 will subject the transferee-spouse to the usual 10 percent penalty tax for "premature distributions." Further, it should be noted that such non-taxable transfer can be made at any time—even if the IRA could then be placed in pay status at the option of the employee-spouse. As a result an IRA can be an important vehicle for tax planning. Through its use, a small amount of personal funds might be contributed to the IRA in anticipation of divorce and then the IRA transferred without taxation to either party.

More importantly, the husband-employee might "rollover" his interest in a pension plan to an IRA and then transfer the IRA without taxation. See Private Letter Rulings 7948054 and 8225121. However, utilization of this rollover technique requires care:

First, the distribution must be "qualifying rollover distribution."[1]

Second, to the extent that the distribution is not "rolled over" to an IRA or another qualified plan within 60 days, it will be taxed as ordinary personal service income and will not be eligible for special 10-year income averaging. See IRC §402 and Senate Committee Report on P.L. 95-458.

Third, although IRC §402(a)(5) generally provides that the rollover may be made to any eligible retirement plan, if the portion of the funds which are not transferred to an IRA (which is then transferred to the wife) are rolled back to the *same* plan from which they originally came, the transaction will not qualify for rollover treatment since it will fail to meet the IRC §402(a)(5)(A)(i) requirement that the employee must receive "the balance to his credit in the trust." As a result, the entire original distribution (including the part transferred to the IRA) would be taxable. See Private Letter Ruling 8312119. However, if the employee-spouse rolls over part of the qualifying rollover distribution to an IRA which he then transfers to his wife and, within 60 days from the date of the original distribution, rolls over the remainder to a *new* qualified plan (perhaps even if the plan were sponsored by the same employer and even if it were the same general type of plan as that from which the original distribution was made), the entire transaction should qualify as tax-free. See Private Letter Ruling 8225121.

Potential Conflict: Federal (Pension) Law v. State (Domestic Relations) Law

Aside from the issues of taxation to the spouses resulting from the distribution of plan rights, there are also the issues of whether such a state court mandated distribution can be enforced in light of the federal pension law proscription against alienation of benefits, and if so, whether such distribution can jeopardize the tax status of a qualified retirement plan by causing it to violate the Federal tax requirements for qualification. If so, such court mandate would have import beyond the marital proceeding and would raise issues of taxation for all other plan participants. Regrettably, the answers to these issues are still not all clear.

It is now fairly well established that the nonalienation and federal law preemption

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Mr. Flaster was assisted in the preparation of this column by his partner, Donald J. Mann. This is adapted from the forthcoming Second Edition of Flaster, Tax Aspects of Separation and Divorce *(ICLE 1984), updated with Mr. Mann.*

provisions of ERISA [26 USC §401(a) (13) and 29 USC §1056(d)] do not apply to prohibit sequestration or garnishment of either private or federal retirement plan benefits to enforce valid alimony or child support orders. See *e.g., Pepitone v. Pepitone,* 436 N.Y.S. 2d 966 (1981); *Western Electric Co. v. Traphagen,* 166 N.J Super. 418, A.2d 66 (App. Div. 1979); *Biles v. Biles,* 163 N.J. Super. 49, 394 A.2d 153 (Ch. Div. 1978); *Ward v. Ward,* 164 N.J. Super. 354; 396 A.2d 365 (Ch. Div. 1978); *Cody v. Reiker,* 454 F. Supp. 22 (E.D. N.Y. 1978); *Cartledge v. Miller,* 457 F. Supp. 1146 (S.D. N.Y. 1978); *American Telephone and Telegraph v. Merry,* 592 F.2d 118 (2d Cir. 1979). Nor does ERISA necessarily preempt state law in matters of property settlements. See *Pilatti v. Trustees of the Operating Engineers Pension Trust,* ___ Cal. App. 3d. ___ (1979) cert. denied, 100 S. Ct. 1276 (where the California Court of Appeals held that ERISA did not preempt the state's vital interest in administering its domestic relations laws and ordered the pension subject to community property division); *accord, Carpenter's Pension Trust for Southern California v. Kronschnabel,* 460 F. Supp. 978 (C.D. Cal. 1978) and *In re Marriage of Gilmore,* 113 Cal. App. 3d. 319, 169 Cal. Reptr. 811 (1980); See *e.g., Operating Engineers Local #428 Pension Trust Fund v. Zamborsky,* 9th Cir., 1981, F.2d___. But see *General Motors Corp. v. Townsend,* No. 6-72159 (E.D. Mich. 1976); *Francis v. United Technologies Corp.,* 458 F. Supp. 84 (N.D. Cal. 1978).

Although *Hisquierdo v. Hisquierdo,* 99 S. Ct. 802 (1979), held that benefits under the Railroad Retirement Act could not be the subject of a community property division because of federal preemption (based on that Act's rather unique legislative history), the Supreme Court expressly suggested that different considerations might apply to similar language under ERISA in the case of *private* retirement plans. Similarly, in *McCarty v. McCarty,* 101 S. Ct. 2728 (1981), (recently overruled by statute. See the Department of Defense Authorization Act of 1983, P.L. 97-252), although the Supreme Court held that military retirement pay may not be the subject of division between spouses under either community property or equitable distribution laws, it based its findings on the particular Federal preemption interest found in preserving military pay as a "personal entitlement" of the serviceman who is not entirely free to choose his place of residence, thereby suggesting the possibility of a different holding for the general class of private pension cases which raise this issue outside the context of military personnel management concerns.

As a result, it now seems that a private retirement plan may comply with a valid state court order to effectuate a distribution of vested benefits in *pay status* to a nonemployee-spouse, to satisfy a judgment for back alimony, without jeopardizing its qualified tax status. See Rev. Rul. 80-27, 1980-1 C.B. 85; Private Letter Rulings 7939026 and 7950065. Further, it seems that the qualification of a plan will not be jeopardized by the sequestration of plan benefits for future support payments (even if the plan is not then in pay status) provided that actual payment pursuant to the sequestration order did not take place until the plan entered pay status. Private Letter Ruling Number 8120045. In addition, Private Letter Ruling 8243124 holds that a qualified retirement plan will not be disqualified if the trustee complies with a court order requiring sequestration of plan benefits and that order is made in recognition of the property rights of the non-participant spouse (in a community property state). Accord, Private Letter Ruling 8252159. However, compliance with a court order to distribute vested benefits which are not currently in pay status (whether to satisfy a court order for support or equitable distribution) could cause a disqualification of the plan. See *e.g., Valley Bank of Nevada v. Dobson,* 629 P. 2d. 229 (Nevada, 1981). See Rev. Rul. 80-27, 1980-1 C.B. 85; Private Letter Rulings 8304089, 8248139 (Keogh Plan) and 8010051.

Footnote

1. A "qualifying rollover distribution" is defined by IRC §402(a)(5)(D)(i) as one or more distributions—(1) within one taxable year of the employee on account of a termination of the plan or, in the case of a profit sharing or stock bonus plan, a complete discontinuance of contributions under such plan, (2) which constitute a lump sum distribution (generally, the distribution or payment within one taxable year of the recipient of the balance to the credit of an employee which becomes payable to the recipient—(a) on account of the employee's death, (b) after the employee attains age 59½, (c) on account of the employee's separation from service, or (d) after the employee has become disabled), or (3) which constitute a distribution of accumulated deductible employee contributions.

Editor's View

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judges are enough. What is clear, however, is that the new court should have at least the number of judges assigned as did its predecessor courts. Additional judges should be assigned as experience warrants. To do otherwise would be to send a signal to those who observe the judicial scene that the importance assigned to the Family Part is something less than the importance assigned to its predecessors. Such a signal would be contrary to all the expressions that have emanated from Trenton concerning the new Family Part and throw a pall over the new court's prospects for the future.

Just as the judicial staffing problems represent a challenge to the Administrative Office of the Courts and to our Supreme Court, so too do they present a problem to our Legislature. Judges cost money. In the past, the Legislature has voiced its commitment to the Family Part concept by approving all necessary implementing legislation. It is only reasonable to expect the Legislature to put money behind its prior conceptual approval.

Recent Cases

by Myra T. Peterson

ALIMONY—Rehabilitative alimony can be awarded in addition to permanent alimony and supporting spouse may be required to bear educational costs for spouse to be rehabilitated.

The parties were married for 18 years and had three children, ages 17, 15, and 9, at the time of the divorce. When the complaint was filed the husband earned $49,500 per annum but at the time of trial, he, having changed jobs, had total income (including perquisites) of over $90,000 per annum. The wife who had no significant non-household employment during the marriage wanted to become a hair stylist for which schooling cost $3,800 for one year. She indicated that she would need two years after her schooling "to hone her skills."

The trial court found that the standard of living to which the wife was accustomed was one supported by income of $49,500 per annum and that the wife would not be able to earn income "anywhere near that sum." The court also found that the husband, a Vice President of Sales and Marketing, developed most of his employment "skills, contacts and confidence" during the marriage.

The court, therefore, ruled that the wife should be able to develop her career with assets accumulated during the marriage and that "the full cost of her schooling" was to be paid from the marital assets before such were distributed.

With regard to the wife's right to support, the court made a two-part ruling:

a) While the wife was in school, and for two years thereafter, the wife would need support of $1,100 per month to maintain her former standard of living, $350 per month in rehabilitative alimony and $750 per month in permanent alimony, (The husband contributing separately "to the support and education of the children").

b) After three years, the rehabilitative alimony would terminate and the wife would thereafter receive $750 per month in permanent alimony.

Although the court found that after three years, the wife should earn more than the $350 per month she would have been receiving in rehabilitative alimony her permanent alimony would not decrease by reason of her increased earnings because inflation would cause her expenses to rise, the husband's income could be expected to continue to rise, and the husband's net alimony expense would be moderate because of his tax bracket and the deductibility of alimony.

[Comment: This is the first reported decision in New Jersey which clearly notes the propriety of the overlap of rehabilitative alimony and permanent alimony. (Theoretically, given the holding in Mahoney v. Mahoney, *91 N.J. 488 (1982) an alimony award could be tripart—rehabilitative, permanent, and reimbursement.) A number of foreign jurisdictions have approved the concept that if the spouse to be rehabilitated (usually the homemaker-wife) will not be able to achieve a standard of living commensurate with the marital standard of living by reason of her rehabilitation and employment, permanent alimony is an appropriate mechanism for supplementation of her earnings in order to allow her to live at the marital standard of living. See cases cited in Croland, "Rehabilitative Alimony—A New Remedy in Need of Judicial Reflection and Precedent,"* Second Biannual Family Law Symposium, *I.C.L.E.,* 1982, 1-38. December, 1982, at 64.

The case was decided on September 15, 1982, *and the opinion submitted for approval for publication at that time. Inexplicably, it was not then approved for publication. It was recently resubmitted for publication and approved for such leaving an unfortunate time warp during which the matrimonial bar could have received guidance as to this emerging area but did not.]*

Kulakowski v. Kulakowski, (Docket No. M-27717-80, Chan. Div., Somerset, Decided Sept. 15, 1982) (Imbriani, J.S.C.)

CHILD SUPPORT—Father who willingly became estranged from children required to hew to agreement requiring him to pay for children's college education. If college age child willingly becomes estranged from father, father not required to pay for college education.

Plaintiff-mother sought to enforce a separation agreement incorporated into the Judgment of Divorce; defendant-father sought to have his obligation for support terminated because each of his sons had reached the age of 18 and because he had had no relationship with the children for the past six years other than as a provider of money. The trial court, *inter alia,* had denied the defendant's application to terminate child support on the eighteenth birthday of each child and had ordered him to pay college expenses for the children in accordance with the agreement. That court found the estrangement between the children and their father to have been the defendant's doing. The Appellate Division affirmed.

The Appellate Division stated that the defendant himself severed his emotional relationship with the children. The defendant had declared, "While I have sired children, as far as I am concerned, I have no children by that marriage." The Appellate court found that statement not to be words "of a man intent on having a father-son relationship with them. . . ." However, the Appellate Division noted:

> If defendant had made any *bona fide* efforts within the past several years to be a father, rather than a stranger, to his sons and they had rejected and disavowed him, it would be unfair for defendant to have to pay for their college education and support them while in college. Ordinarily, they should not be enti-

tled to have defendant foot the bill for their college educations after they have reached the age of emancipation if they accord defendant no other function than to underwrite them financially.

Agreeing with the trial court that the estrangement had been at the father's doing, the Appellate Division affirmed the trial court's order.

[Comment: The Appellate Division per curiam *opinion is not precise. It states that the father of a child who is estranged from him does not have the duty to support that child or pay for college for that child past the age of emancipation if that estrangement is caused by the child. However, the age of emancipation in recent cases dealing with college is not age 18 but instead later if a child is attending college (or even graduate school) past the statutory age of majority.*

As early as 1949, in Cohen v. Cohen, *6 N.J. Super 26, 30 (App. Div. 1949), the court recognized that in some families, a college education for a child is expected and the duty of a parent to support that child, although he is over the age of majority, continues. In* Limpert v. Limpert, *119 N.J. Super. 438, 442 (App. Div. 1972) the Court noted that it was the child's status with the custodial parent vis-a-vis emancipation that was controlling.*

What the Appellate Division appears actually to say in the case sub judice *when read with other case law on the issue is:*

1) If it would be expected and is appropriate that a child have post-high school or post-age-of-majority formal schooling and the child has a relationship with the supporting or partially supporting parent and that parent can afford to pay for that education and/or continue child support, he or she will be required to do so; the child is not emancipated until completion of that schooling;

2) If it would be expected and is appropriate that a child have post-high school or post-age-of-majority formal schooling and the child does not have a relationship with the supporting or partially supporting parent by the child's choice (once he is old enough to make that choice), while the child may not be "emancipated" vis-a-vis the other parent, he is emancipated as to the supporting parent despite that parent's ability to support;

3) If it would be expected and is appropriate that a child have post-high school or post-age-of-majority formal schooling and the child does not have a relationship with the supporting or partially supporting parent because of that parent's action or inaction (i.e., failure to press for visitation or foster a relationship), the child will not be penalized. The supporting parent will be required to continue supporting past the age of majority and to contribute to the costs of higher education if he has the means;

4) If it would be expected and is appropriate that a child have post-high school or post-age-of-majority formal schooling and the child does not have a relationship with the supporting parent because of the custodial *parent's interference, if the custodial parent has the means to support the child and pay for his schooling, economic sanctions against that interfering parent may be appropriate; she may have to foot the bills.*

What has not been answered is the following: If it would be expected and is appropriate that a child have post-high school or post-age-of-majority formal schooling and the child does not have a relationship with the supporting or partially supporting parent because of the custodial parent's interference, if the custodial parent does not *have the means to support the child or pay for his schooling, should the child be penalized? Is there an affirmative responsibility by the child to attempt to repair the damaged relationship? If so, in what time frame must this peace making be begun?*

Liebowitz v. Rosen, (Docket No. A-5272-81-T1, App. Div., Decided Oct. 24, 1983) (Antell and Joelson, J.J.A.D.)

CHILD SUPPORT—If Agreement provides that husband will support son from whom he is estranged while child attends college and that parties will attempt to mend rift between father and son, husband required to support son even if rift not repaired.

The parties were divorced in June, 1982 by Judgment of Divorce incorporating an Agreement which provided that:

1) The defendant-husband was to pay child support of $100 per week to plaintiff-wife for their son until the child was emancipated, such payments to be applied by the plaintiff to the son's college expenses; and

2) The parties agreed to cooperate to mend the rift between the defendant and son and between the son and his older brother.

In October, 1982, the defendant moved to modify the Judgment and eliminate his obligation to pay child support "until [the son] and the plaintiff comply with that portion of the Judgment of Divorce requiring them to cooperate with the defendant to overcome the rift between the defendant; and [the son] and between [the son] and his brother."

The trial court denied the defendant's motion. The Appellate Division affirmed.

Noting that the estrangement of which the defendant complained was the very same circumstance in existence at the time of the Judgment of Divorce and that there was nothing to suggest that the "plaintiff failed to cooperate in bringing about a reconciliation between the brothers and between defendant and the . . . son, "the father was required to continue to support the son while the son attended college. There had been no change of circumstances from the time of the Judgment of Divorce justifying modification of the Judgment.

[Comment: Not mentioned in the Appellate

Division opinion but made clear in the trial court opinion was the fact that the son's estrangement from the father was caused by the father's drunkenness and violence. It would appear that if fence-mending is to be required of an estranged child in order for that child to receive support during college from the parent from whom he is estranged, it is not required if the estrangement is justifiably caused by the estranged parent's behavior even in light of the other parent's stated responsibility to mend the rift.]

Reale v. Reale, (A-1586-82T2, App. Div., Decided Nov. 29, 1983) (Antell, Joelson, McElroy, J J.A.D.)

EQUITABLE DISTRIBUTION—Judgment of Divorce entered March 31, 1982, which excluded from equitable distribution husband's military pension, reopened so as to permit inclusion of military pension in distributable marital estate.

In *McCarty v. McCarty,* 453 U.S. 210 (1981) (decided June 26, 1981), the United States Supreme Court ruled that military pensions were not includible in the marital estate for purposes of equitable distribution. In reaction to that decision, the United States Congress passed the Uniformed Services Former Spouses Protection Act, [U.S.F.S.P.A.] 10 U.S.C. 1408, which became effective February 1, 1983 and which permitted military pensions to be includible in a marital estate for purposes of equitable distribution subject to a particular state's laws, from June 26, 1981, the date of the *McCarty* opinion.

* * *

The parties were divorced on March 31, 1982 and the settlement incorporated into the Judgment did not include the husband's military pension, per *McCarty.* In the summer of 1983, the defendant-wife moved to modify the Judgment by reason of the non-inclusion of the military pension in the distributable estate.

The court noted that the legislative history of the Uniform Services Former Spouse's Protection Act made it "clear that the Act was intended to apply to court orders finalized on the date of or after the *McCarty* decision" and "that the provisions of the bill reversing the effect of the *McCarty* decision are retroactive to the date of the decision." The court also noted that it was clear from the legislative history that the intent of the Act was that "[f]ormer spouse's divorced in the interim period between the *McCarty* decision and the effective date of this law [would] have the opportunity to return to court to have their decrees modified in light of this legislation."

Stating that courts of our sister states have ruled that judgments entered between June 26, 1981 and February 1, 1983 "may be reopened to address the pension question" and that "[r]etroactive application of New Jersey's equitable distribution statute has been sustained, the court held that "[t]he stated congressional intent, the equities of reopening the Judgment as against not doing so, the attendant equal protection and due process arguments that could persuasively be made by not permitting a reopening, and the fact that U.S.F.S.P.A. has removed federal pre-emption from this subject matter" make it appropriate to retroactively apply the Act in New Jersey with regard to equitable distribution of a military pension. The court held that the defendant-wife's application to open the final Judgment was timely made and directed that the Judgment of Divorce be reopened in order to receive evidence and argument with respect to valuation and equitable distribution of the husband's pension. The court ruled that whether or not the Judgment would be amended would abide a plenary hearing on the issue. Discovery "as may be required" was allowed within 90 days of the order permitting reopening.

[Comment: Obviously, since alimony and equitable distribution are interrelated, a judgment cannot be reopened on one issue without affecting the other. Thus, in certain circumstances, one may not wish a judgment to be reopened even in light of the possibility of receipt of additional equitable distribution.

Query whether it is incumbent upon a practitioner to review all cases which he or she handled in which a judgment of divorce was granted between June 26, 1981 and February 1, 1983 to determine whether a military pension was excluded from equitable distribution because of McCarty *and whether that practitioner's former client must be notified the possibility of reopening the judgment.]*

Castiglioni v. Castiglioni, Docket No. M-29872-79 (Chan. Div.: Family Part, Bergen County, Decided January 5, 1984) (Sorkow, J.S.C., P.J.F.P.)

Ed. Note. While the New Jersey Family Lawyer *receives all decisions approved for publication, given the length of time between issuance of a decision and its publication and the fact that so many opinions remain unreported, New Jersey practitioners should be aware of significant, even unreported, decisions. If you are involved in a case in which a novel opinion is issued, so that the opinion may be shared with our readers, kindly send the opinion to:*

Myra T. Peterson, Esq.
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Bornstein, P.A.
One Mack Centre Drive
Paramus, New Jersey 07652

Please be cognizant of the strictures imposed by R.1:36-3 if an unreported opinion is to be cited. As of this writing, only *Kulakowski* has been approved for publication.

Notice

At its annual dinner meeting on Tuesday, April 3, 1984 at L'Affaire in Mountainside, the Section will be asked to vote upon a revised set of By-Laws. All words appearing in brackets have been added. These revisions were approved by the Executive Committee of the Section at its last meeting on January 11, 1984. The Executive Committee recommends the adoption of these revised By-Laws. All interested in voting upon these By-Laws should plan to attend the annual dinner meeting.

FAMILY LAW SECTION
NEW JERSEY STATE BAR ASSOCIATION
BY-LAWS

ARTICLE I
Name and Purpose

1. This Section shall be known as the Family Law Section of the New Jersey State Bar Association.

2. The purpose of this Section shall be to improve the administration of justice in the field of Family Law by study, conferences, publication of reports and articles, with respect to both administration and legislation in all matters pertaining thereto.

ARTICLE II
Membership

The membership of this section shall consist of all members in good standing of the New Jersey State Bar Association who shall signify their desire, in writing, to become members of this section [and who shall satisfy the dues obligations imposed by these by-laws.]

ARTICLE III
Officers

1. The officers of this Section shall be a Chair, a Chair-elect, a Vice-Chair, and a Secretary.

2. The officers of this Section shall be elected in a manner hereinafter provided at the annual meeting of this Section, and shall hold office for a term of one year beginning at the close of the following year's annual meeting, or until their successors shall have been elected.

3. No officer may be elected to a second consecutive term in that office, but shall again become eligible for election to said office after not having served as an officer for at least one term.

ARTICLE IV
Nomination and Election of Officers

1. The slate of officers shall be nominated by a Nominating Committee and said slate shall be published in the *New Jersey Family Lawyer* no later than six weeks prior to the Annual Meeting of the New Jersey State Bar Association. Additional nominations may be made by petition signed by twelve members of the Section in good standing. Said petition shall be submitted to the Chair of the Section no later than three weeks prior to the Annual Meeting of the New Jersey State Bar Association.

2. The Nominating Committee shall be composed of the immediate past Section Chair, who shall preside, and two additional members who shall be appointed by the present Section Chair. If the immediate past Section Chair cannot act, the present Section Chair shall appoint someone to act in his place and stead.

3. Election of officers shall be conducted by voice vote or by show of hands or by secret ballot, and each office shall be filled by that person receiving the majority vote of members of the Section present at the Annual Meeting.

ARTICLE V
Duties of Officers

1. The Chair shall preside at all meetings of the Section. The Chair shall formulate and present at each Annual Meeting of the New Jersey State Bar Association a report of the activities of the Section for the then past year. The Chair shall further perform such other duties as usually pertain to such office.

2. The Chair-elect shall, in the absence of the Chair, perform the duties of the Chair. In the event of the death, resignation or disability of the Chair, the Chair-elect shall automatically succeed to the office of the Chair.

3. The Vice-Chair shall perform such duties as the Chair may reasonably request.

4. The Secretary shall be the custodian of all books, papers, documents and other records which are the property of the Section, including its finances, and shall keep a true record of all proceedings.

ARTICLE VI
Vacancies

In the event of a vacancy in office, that vacancy shall be filled by appointment by the Chair, such appointment being for the balance of the unexpired term and shall not be a prohibition against eligibility for office as provided in Article III, Section 3.

ARTICLE VII
Meetings

1. Meetings of this Section shall be held at the same time and place as the Mid-Year and Annual Meetings of the New Jersey State Bar Association, and special meetings at such other times and places as the Chair may deem necessary.

2. The annual meeting of the Section shall be held at the time and place of the Annual Meeting of the New Jersey State Bar Association.

3. Action by the Section shall be by the majority vote of members of the Section present entitled

to vote, and such action shall be binding upon the Section.

4. All activities of this Section shall be subject to the By-Laws of the New Jersey State Bar Association, and no action of the Section or its officers shall be deemed the action of the Association.

5. Meeting notices shall be published in the *New Jersey Family Lawyer* or such other publication of the New Jersey Bar Association as the Chair of the Section shall designate.

ARTICLE VIII
Committees

1. The sole standing Committee of the Section shall be the Executive Committee [which shall be chaired by the Section Chair].

2. The members of the Executive Committee shall be appointed by the chair and shall [consist of the four (4) officers of the section, the three (3) previous section chairs and thirty-two (32) additional persons including representatives from each of the fifteen (15) vicinages. The Executive Committee shall meet no less than six (6) times per year at a time and place designated by the Section Chair].

3. Such additional committees as shall be deemed appropriate shall be appointed by the Chair.

[4. The Executive Committee shall establish policy for the Section and resolutions adopted by the Executive Committee shall be considered adopted by the Section.]

ARTICLE IX
Section Dues

Annual dues for this Section shall be [as designated by the Executive Committee subject to approval by the Trustees of the New Jersey State Bar Association].

ARTICLE X
Amendments

[Upon fourteen (14) days notice,] the By-Laws may be amended at any meeting of the Section by a majority of the members of the Section present and entitled to vote, subject to approval by the Trustees of the New Jersey State Bar Association.

Interview

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tioners, did not share the same enthusiasm. Ironically, there are times when changes create more indifference—perhaps because of the view which some hold that it is just some more "tinkering" without any real meaning. That type of attitude, if ever justified, is certainly not appropriate here.

The family practitioners can best participate in the process by giving it their wholehearted support in thought and deed. From what I have seen so far, and as the actions of your Family Law Section typify, I am very confident that the Bar is responding in an exemplary manner.

Thank you, Judge Serpentelli.