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LEE M. HYMERLING
Section Chairman

Chairman's Report

This column will be devoted to two separate topics of great concern to our Section membership. First, I will comment at some length upon the many rule amendments affecting matrimonial practice which will become effective on September 14. These amendments appeared in the Thursday, August 13, 1981 issue of the *New Jersey Law Journal.* Second, I will comment briefly upon Assembly Bill No. 3428 creating the Family Court.

Rule Amendments

There can be little doubt that the multiple rule Amendments which have been adopted will have a great bearing upon matrimonial practice. Insofar as they deal with family law, the amendments stemmed primarily from the deliberations of the Pashman Committee. Additional amendments have been made to rules of general application which will also have significant impact upon matrimonial practitioners. It is imperative that all family law practitioners immediately familiarize themselves with these important rule changes.

Motion Practice

First, special attention must be paid to the multiple changes that have been made with regard to motion practice. Particular attention must be focused upon the important distinctions which have been drawn between general motion practice and motion practice in the matrimonial courts.

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UCCJA in New Jersey

by James P. Yudes

The Uniform Child Custody Jurisdiction Act (UCCJA) was approved and recommended by The National Conference of Commissioners of Uniform State Laws on August 1, 1968. The Act was adopted in New Jersey, effective July 3, 1979.

UCCJA Purposes

The express purposes for the creation of the UCCJA are:

- To avoid jurisdictional competition between states in custody matters where jurisdictional problems have heretofore apparently licensed the shifting of children from state to state.
- To promote cooperation rather than competition between states in custody matters.
- To assure that custody is litigated in the most appropriate forum.
- To encourage stable child custody determinations.
- To deter child snatching.
- To minimize the relitigation of custody determinations.
- To facilitate the enforcement of custody decrees in sister states.

It should be noted that the UCCJA is a procedural rather than a substantive statute; hence, once the jurisdictional issue has been resolved, the Act has satisfied its limited purpose.

Initial Pleadings

Pursuant to N.J.S. 2A:34-27 each party has the affirmative duty in the initial pleadings to supply the court with the information necessary for determination of jurisdiction pursuant to the Act. Hence, in the initial pleading or in an affidavit attached to that pleading, each party must state under oath whether:

a. there has been any other custody proceeding concerning the child in which the actor has participated;

b. the actor knows of any other pending custody proceedings; or

c any person who is not a party is claiming custody or visitation rights with the child.

Each party must update this statement made in the initial pleadings if the statements become incorrect at any time during the litigation.

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A review of the rule changes indicates that R. 1:6-2 has been dramatically changed. The amended rule requires that a proposed form of Order be submitted with the motion. Presumably, the rule was drafted to assure that Orders are entered in timely fashion. It will be recalled that the Pashman Report incorporated a proposed *pendente lite* Order. Evidently that rule will now gain wide acceptance throughout the state.

Oral Argument

More important, however, are the changes presaged by R. 1:6-2(b), (c), (e) and R. 4:79-11. These rules focus upon the controversial issue of oral argument. As we all well know, the trend in New Jersey has been away from oral argument. Indeed, the rules as drafted confer upon trial judges broad discretion in determining whether motions shall be orally argued. The general presumption created by the rule changes is that most motions will *not* be argued. Fortunately, however, a distinction has been made with regard to matrimonial motions. Thus, R. 4:79-11 specifies that in exercising its discretion ". . . as to the mode and scheduling of disposition of motions, the court shall ordinarily grant requests for oral argument on substantive and non-routine discovery motions and ordinarily deny requests for oral argument on calendar and routine discovery motions." What this and the other rule changes say is that henceforth practitioners will have to request oral argument in order to get it.

Editorializing for a moment, I encourage matrimonial practitioners to request oral argument only when it is truly needed. Although no precise definition is given in the rules, most experienced matrimonial practitioners will be able to distinguish between substantive and non-substantive, and routine and non-routine motions.

Preliminary Disclosure Statement

A number of other crucial changes appear within the rules. Clearly, the Preliminary Disclosure Statement required by R. 4:79-2 will demand a substantial time commitment on the part of all matrimonial practitioners. My personal views with regard to the Preliminary Disclosure Statement are well known. I believe in it very strongly. I believe that matrimonial practitioners should not regard as burdensome the furnishing to the Court and one's adversary of detailed information at an early stage in the proceedings. Nonetheless, some practitioners will regard the rule as onerous. Is not this rule less onerous, however, than would have been the suggestion advanced in the original Pashman Report that standard interrogatories be completed within 20 days?

One aspect of the Preliminary Disclosure Statement rule requires specific comment. Thus, attention is directed to R. 4:79-2(c) which confers upon parties, ". . . a continuing duty to inform the Court of any changes in the information supplied on a Preliminary Disclosure Statement. . .". This obligation continues as final hearing approaches. Thus the rule requires that all amendments to the Statement must be filed with the Court prior to 20 days before the final hearing.

A careful review of the Preliminary Disclosure Statement rule suggests that some amendments to the rule would probably be well founded. Query: Whether the rule should apply to default or settled cases. I would appreciate hearing from members of our Section as to whether our Section should endorse an amendment to the rule excepting default and settled cases from the requirement.

The adoption of the Preliminary Disclosure Statement rule poses a number of interesting questions. What happens if a litigant or practitioner fails to comply with the rule? What sanctions, if any, should be imposed? Will judges enforce the rule consistently? I personally encourage judges throughout the state to adopt a uniform position with regard to the rule. Practitioners in Bergen County should not be treated differently from practitioners in Camden County. If the rule is to be meaningful, a consistent approach to the rule must be adopted throughout the state. In this regard, our Section officers hope to meet sometime in September or early October with representatives of the Matrimonial Judges Conference. I hope that in a future column I will be able to report on that meeting.

R. 4:79-5

R. 4:79-5 also represents a major change in our law. No longer will matrimonial practitioners be forced to file motions in order to obtain the right to depose litigants as to non-cause of action issues. Such depositions will now be permitted as of right. This amendment represents a dramatic departure from the past. Although little known to matrimonial practitioners, the fact of the matter has been that this amendment, although frequently discussed in the Civil Rules Committee, never found sufficient support for adoption. I feel that most of our membership will regard this change as salutory.

Custody Investigations

Similarly, I find salutory the amendment to R. 4:79-8 dealing with custody investigations. No longer will judges be forced to require a Probation Office investigation in all cases. Instead, the Court will be required to do so only when a specific finding has been made that "a genuine and substantial issue" exists. More important, the rule requires that custody matters proceed with expedition. Thus, not only must the Probation Office investigation be completed within 45 days but, even more significant, the final hearing must take place within three months after issue has been joined.

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Alimony and Support Orders

Special attention is also directed to the important changes contained within R. 4:79-9 dealing with the enforcement of alimony and support Orders. The rule must be read in the light of the clear thrust of the Pashman Report to the effect that greater attention must be paid to enforcement. The clear thrust of the Pashman Report, as well as of the rule, is that Orders should not be entered if they are not going to be enforced. The new rule directs judges either upon application of the parties or upon the Court's own motion to ". . . assess a late interest charge against the adverse party . . ." at the rate prescribed by the rules. Query: Does this rule confer upon matrimonial practitioners an obligation to file a new motion seeking interest in all cases in which arrears now exist? This question is not idly posed.

The discussion of rule changes contained in this column is not intended to be exhaustive. Indeed, many of the rule amendments contain nuances which will undoubtedly be the subject matter of additional articles which will appear in *The New Jersey Family Lawyer.* Suffice it here to say that the rule amendments deserve not only careful, but immediate, consideration by every lawyer who ventures into the matrimonial courts.

Family Court

The second topic I will deal with in this month's Chairman's Column relates to the proposed Family Court. As you have read in past legislative reports, wending its way through the Legislature as a portion of a comprehensive juvenile justice package is Assembly Bill No. 3428, which establishes a Family Court or a Family Part of the Superior Court.

At its meeting in early August, the Executive Committee of our Section endorsed the Family Court bill. The endorsement followed similar endorsements of the Family Court concept by the Trustees of the New Jersey State Bar, the Pashman Committee and the *New Jersey Law Journal.* In my view, the position taken by our Executive Committee was the only position the Committee could, under the circumstances, have taken. At this time, it would appear that the Family Court legislation will be adopted. If that is the case, it is imperative that our Section actively participate in the process of determining what a Family Court will look like in New Jersey.

The proposed legislation is vague; it does no more than authorize the creation of the proposed Court and the abolishment of the Juvenile & Domestic Relations Court. The legislation does not, however, address many issues which immediately come to mind. Will there be separate matrimonial, juvenile, domestic relations and custody divisions? Will judges specialize? Will calendars be mixed? What filing fees will be charged in each division? What rules will apply?

Blue Ribbon Committee Appointed

Recognizing the need to be at the forefront of these discussions, I have appointed a Blue Ribbon Committee to propose a plan for the implementation in New Jersey of a Family Court. I have appointed as chairman of that Committee our Rules Committee Chairman, David Ansell of Monmouth County. Also serving on the Committee will be David Wildstein, James Yudes, Lynne Strober and Thomas Zampino. The Committee has already met on one occasion and will continue to meet over the next several months. The task is monumental. The importance of their work cannot be gainsaid. As their deliberations proceed, you will be kept posted of their work through periodic reports which will appear in this publication.

In the meantime, your comments with regard to the proposed Family Court would be most welcome. Might I suggest that anyone who has any thoughts in this regard communicate directly with David Ansell.

From the Editors

This is the second issue of *The New Jersey Family Lawyer.* We hope that the new publication of the Family Law Section will develop into a significant vehicle for communication of activity of Section committees, and of ideas, information, legislative and case law developments in the increasingly complicated field of family law.

The New Jersey Family Lawyer has now moved to sixteen pages per issue and will be published ten times per year. Holes have been punched in the margin to enable readers to keep the issues in a binder for future reference. An annual index will be published.

Every effort will be made to keep our readers abreast of the latest issues and developments in family law in New Jersey and in other jurisdictions.

The editors cordially invite and encourage members of the New Jersey bench and bar to contribute articles to *The New Jersey Family Lawyer.* Those interested in contributing should communicate with the editors about their ideas by calling or writing to the State Bar or directly.

Division of Business Interests

by Alan M. Grosman

Where stock in a closely held corporation operated by one spouse is found to be marital property, courts seek to award it to that spouse with compensating payments to the other spouse, as far as possible. It is not always possible. Some of the public policy considerations are eloquently set forth in the leading New Jersey case, *Borodinsky v. Borodinsky,*[1] which stresses the desirability of separating parties as business partners after divorce.

Where the business is the only substantial marital asset and there are serious problems with regard to compensating payments, the only fair division may be a division in kind.[2] There must be sufficient assets to justify eliminating any form of joint control or ownership.

The property rights of the non-owner spouse, usually the wife, in the closely held corporation of the owner spouse should not be sacrificed to ensure his continuing control of the business. The Vermont Supreme Court faced this issue in the 1977 decision in *Hutchins v. Hutchins,*[3] where the only asset was a closely held corporation, valued at $160,000, run by the husband. The trial court decision to split the 930 shares, awarding 500 to the wife, 430 to the husband, and giving the husband the right to run the business and the *option* to purchase the wife's shares for $74,000 plus interest at 8¼% to the date of purchase, was affirmed. The Court noted that the other assets were not sufficient to achieve an equitable division without some form of stock division. The Court stated that:

> In our view, the judgment below represents a careful compromise between the desirable objectives of protecting the interests of both parties, by giving the plaintiff security for sums to which she will be entitled, still leaving the defendant with incentive to operate the corporation profitably and make possible his recapture of the stock.[4]

There are a number of interesting California cases involving business interest divisions. *In re Marriage of Brigden,*[5] was a case in which the court decided there should be an in kind division of shares in a closely held corporation. The husband was a founder, director and senior vice-president of a computer science systems engineering company, traded on the American Stock Exchange. He owned a valuable block of stock, which was 7.6% of the total. The court termed this a helpful power base, but found it not sufficient to ensure his election to the board of directors or continuation as an officer. There were insufficient marital assets to offset the value of the award of the entire block of stock to the husband. Nor did the husband have the ability to compensate the wife for award to him of all of the stock.

The court in *Brigden* found that a "helpful power base" was not a sufficient justification under those circumstances for awarding the entire block of stock to the husband.

Of course, California is a community property state. Its Civil Code requires partition in kind in equal portions of all marital property, except where economic circumstances warrant.

While our concern as lawyers in a common law jurisdiction is with business property division issues that differ somewhat from those in community property states, the well-reasoned decision in *Bridgen* can be helpful in many situations We should not mechanically assume that in every situation shares of stock in a corporation in which one spouse is active should be awarded to him.

The nature of the business interest is very important. In a leading Washington decision, *Brewster v. Brewster,*[6] the court distinguished between two types of closely held corporate stock. One was a chain of retail cigar stores, organized and run by the husband. The other was a cigar manufacturing company in which the husband held a minority interest and had no management responsibilities. The court awarded the former to the husband with compensating payments to the wife, and made an in kind division of the stock he owned in the other.

Similarly, in a recent Florida decision,[7] where the husband and wife owned and operated a very successful barbecue business, the court held that they should continue to operate the business as tenants in common, because if found sufficient cooperative activity to justify this.

Where control is important and the court decides that one spouse should be the owner, protection must be provided to the non-owner spouse. The types of payment that can be made to the non-owner spouse include the following: (1) award of an asset or assets of comparable value; (2) installment payments; and (3) interest on the unpaid balance. Security to guarantee these payments can take the form of promissory notes, a mortgage encumbering the owner spouse's separate property and the like.

When representing the person who is receiving the offsetting payment, it is important to consider and to attempt to provide protection against contingencies, such as the following: (1) subsequent sale of the business; (2) subsequent merger of the business; (3) bankruptcy; and (4) death of the owner spouse.

Subsequent sale can be protected against by a provision that the balance comes due upon such sale and that payment must come out of the proceeds of such sale. Similar provisions can be inserted with regard to merger. Bankruptcy is more difficult to guard against. Whatever collateral exists should be pledged where necessary. Death of the controlling spouse can be guarded against by requiring life insurance on his life with the non-owner spouse as beneficiary to the extent of the unpaid obligation.

FOOTNOTES

1. 162 N.J. Super. 437, 393 A.2d 583. There the court stated: "It seems almost doctrinal that the elimination of the source of strife and friction is to be sought by the judge in devising the scheme of distribution, and the financial affairs of the parties should be

separated *as far as possible.* If the parties cannot get along as husband and wife, it is not likely that they will get along as business partners." (Emphasis added)

2. See *Wetzel v. Wetzel,* 35 Wis.2d 103, 150 N.W.2d 482 (Sup. Ct. 1967), cited in *Borodinsky, supra.*
3. 376 A.2d 744 (Vt. Sup. Ct. 1977).
4. *Id.* at 747.
5. 80 Cal. App. 3d 380, 145 Cal. Rptr. 716 (Ct. App. 1978). See also, *In re Marriage of Tammen,* 63 Cal. App. 3d 927, 134 Cal. Rptr. 161 (Cal. Ct. App. 1976); *Carmichael v. Carmichael,* 216 Cal. App. 2d 674, 31 Cal. Rptr. 514 (Ct. App. 1963); *In re Marriage of Clark,* 80 Cal. App. 3d 417, 145 Cal. Rptr. 602 (Ct. App. 1978).
6. 113 Wash. 551, 194 P. 2d 542 (Sup. Ct. 1920).
7. *Farrington v. Farrington,* 390 So. 2d 461 (Fla. Ct. App. 1980)
8. See *Borodinsky,* fn. 1, *supra,* at 633, where the Appellate Division sets forth the following guidelines with regard to business interest divisions and funding them: "We point out that after the judge determines the value of defendant's interest in the corporation, he should then determine not only plaintiff's distributable share thereof but also the manner of her receipt of that share. The judge will, of course, be free to direct, if necessary to avoid impairment of the business itself, installment payments at such rate of interest and secured by such collateral as it deems appropriate."

UCCJA in New Jersey *(continued from page 13)*

Jurisdictional Tests

Under N.J.S. 2A:34-31, the Superior Court of New Jersey has jurisdiction to render an initial child custody decree if it is satisfied that it meets the jurisdictional requirements of the Act. The jurisdictional requirements are set forth in descending order of priority and basically adopt the standards enunciated in the Second Restatement of Conflicts of Law, but these requirements are set forth in a more structured manner in the statute.

The first jurisdictional test is the child's "home state," that is, the state where the child has resided for a period of at least six months prior to the commencement of the custody action, or if the child is less than six months old, where the child has resided since birth. If New Jersey is the child's home state and the child is removed from this state by an individual claiming custody, then the action may be commenced in New Jersey at any time up to six months subsequent to the child's removal. (Note: The term "custody" includes visitation rights.)

A second test for jurisdiction is where at least one of the parents has a significant connection with New Jersey and there is located in New Jersey substantial evidence that would be necessary in a custody proceeding. This test is the primary test where no state is in fact the "home state."

In most instances the second test would be utilized in situations where the court is dealing with highly mobile families and no state qualifies as a "home state" or where both parents have moved from the "home state" prior to the commencement of a custody proceeding.

The third test allows the New Jersey courts to take jurisdiction in emergency situations based purely upon the child's presence in the state. The commissioner's notes to the Uniform Act indicate that this test should be reserved for extraordinary situations, as the provisions of the Act could be effectively thwarted if this particular jurisdictional predicate is too liberally construed.

The fourth test provides jurisdiction where there is no state that has jurisdiction or where the state with jurisdiction has declined to exercise it.

Custodial vs. Non-Custodial Parent

An interesting problem under the UCCJA, which is presented for purposes of illustrating the manner in which the Act functions, is where a custodial parent of the child in State A, the child's "home state," sues the non-custodial parent in New Jersey for divorce but refuses to submit the issue of custody in New Jersey under the UCCJA.

Solution to this dilemma should be an application in State A by the non-custodial parent requesting that state to decline jurisdiction under the UCCJA. The application in State A could be based on the *forum non conveniens* rule 2A:34-35, since it could be argued either that by not filing in New Jersey the custodial parent has agreed on a forum or that the exercise of jurisdiction by State A would allow the wife to forum shop, thus violating one of the clear purposes of the statute. Alternatively, State A could decline jurisdiction on the grounds that the wife's attempt at forum shopping constituted reprehensible conduct. See N.J.S. 2A:34-36.

However if State A asserts its right to jurisdiction, then the New Jersey action should be dismissed; otherwise there would be litigation in different forums of related matters that are more appropriately joined in one proceeding.

It should be noted that once a custody determination has been made by a state which has adopted the UCCJA or has adopted standards substantially similar to the standards set forth in the UCCJA, then other UCCJA states may not modify this custody determination unless the state of original jurisdiction declines to exercise jurisdiction over an application for modification of the custody award.

Committee Seeks Volunteers

The Family Law Section Matrimonial Specialization Committee is headed by Frederick J. Sikora. Mr. Sikora requests that members of the Section, interested in this subject, please contact him to volunteer to serve on the Committee.

Mr. Sikora has already contacted the Administrative Director of the Court about matrimonial specialization and has received materials. He has also written to several states which have matrimonial specialization for information about their criteria and standards.

This is a very important subject and it is hoped that members will respond to this request. Please call Mr. Sikora at (201) 757-8800.

Pensions and Equitable Distribution
by Richard H. Singer, Jr.

One of the most complex problems still facing practitioners in the area of equitable distribution involves pension plans. To fully appreciate and understand the complexity of this area, it is necessary for the matrimonial practitioner to become more than casually familiar with the various types of pensions that are subject to distribution, how to gather information relevant to the valuation of said pensions and methods of valuation of said pensions.

No practitioner should attempt to value a pension plan for purposes of equitable distribution without the assistance of pension administrators and actuaries. Corporate printouts indicating information regarding pension plans rarely, if ever, give an accurate determination of the value of the participants' interest in that plan. To work from a benefit book or benefit statement is dangerous and can only illustrate the practitioner's failure to understand the nuances of this area of law.

Essential to your success is a set of interrogatories which seeks to elicit the information that you need. Failure to ask the right questions can be fatal. Your requests for information must be precise in order that your analysis be mathematically correct and legally sound.

William M. Troyan, Inc., Pension Administrators and Actuaries, located in Red Bank, New Jersey, has prepared a form of pension interrogatories, which is printed in this issue. These pension interrogatories are just sample form interrogatories and should not necessarily be used as presented, but should be modified after discussion between the attorney and actuary so as to enable the attorney to request only those items which are meaningful in each situation.

Bill Troyan has also been kind enough to prepare for us a glossary so that we might all become more familiar with, and have a better understanding of, the terminology that is used in this complex area. This glossary is also being printed in this issue.

I hope that these interrogatories and this glossary will begin to assist practitioners in dealing with this area of equitable distribution.

It is the intention of the Pension Committee in subsequent months to provide more material on this subject to members of the Section so as to further educate our membership and to improve the quality of our representation to clients.

Interrogatories — Pension Plan

1. State the corporate identification number.
2. State the date of incorporation of the Corporation.
3. State the corporate fiscal year of the Corporation.
4. Attach a copy of the Trust document and all amendments.
5. Attach a copy of Form 5300, 5301 or 5307 sent for determination.
6. Attach a copy of original and last Internal Revenue Service determination letter.
7. Attach copies of 5500/5500-C, 5500-A and 5500-B, if applicable, for the past 3 years.
8. Attach a copy of PBGC-1 Form, if applicable.
9. Attach a copy of the Summary Plan Description.
10. Attach copies of corporate resolution adopting Plan/Trust and any subsequent resolutions pertaining to approval.
11. Attach the completed employee census sheet for **ALL EMPLOYEES** as of most recent Plan anniversary. (Data sheet attached.)
12. Attach a copy of the Trust asset statement as of the most recent Plan anniversary. (Data sheet attached.)
13. Attach a record of all individual life insurance or annuity contracts in force as of last Trust anniversary. (Cash value as of that date and at normal retirement date; also date purchased, premium amount and face amount), if applicable. *If actual policies are sent, we will obtain all of the information we need ourselves.*
14. If this is a Profit-Sharing or Defined Contribution Pension Plan, attach a listing of individual account balances as of the last valuation date.
15. State the name of Directors of the corporation.
16. State the names of all Officers of the corporation and their titles.
17. State the names of Shareholders of the corporation and the percentage of stock owned.
18. State whether there are any other qualified Plans in effect in your corporation, and if so state the details.
19. If this is a Defined Benefit Plan, attach a copy of the latest actuarial valuation, giving *cost methods* and all actuarial *assumptions*, together with costs and liabilities for each participant in the Plan.
20. State the salary of the party for the last 5 years, on a year by year basis.
21. Have there been any loans from the Plan? If yes, please provide a copy of note in support of loan.
22. Does any form of employment agreement or contract exist? Please furnish executed copy.
23. List all other protions of the employee's benefit package, e.g., life, health or disability insurance, stock options, any benefit designed or intended to avoid inclusion in the employee's estate which is payable to someone other than the employee.
24. Date of birth.
25. Date of birth of spouse.
26. Date of hire.

Glossary of Terms

ERISA: Employee Retirement Income Security Act. P.L. 93-406 9-2-74 Cumulative Bulletin 1974-3.

ERISA Section 514(a): ERISA shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan.

ERISA Section 206(d)(1) and Internal Revenue Code Regulation 1-401(a)-13: Qualified plan benefits may not be assigned or alienated. The regulation goes further; a plan won't be a qualified plan unless it provides that plan benefits can't be alienated, assigned, anticipated or subject to attachment, garnishment or levy, etc.

ERISA Section 404(a)(1): A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries.

Internal Revenue Code Section 412(a)(2): A plan must not have an accumulated funding deficiency.

Forms

5500 Series: Annual Reporting Forms for Qualified Plans filed with the I.R.S. Encompasses Forms 5500/5500C/5500K/5500R, 5500 Schedule A, 5500 Schedule B and 5500 Schedule S.S.A.

5500 Schedule B: Actuarial Certification filed for a Defined Benefit Pension Plan attesting to whether or not the Plan meets the Minimum Funding Standard account required by the Internal Revenue Code Section 412.

Form 5330: A form submitted to the Internal Revenue Service reporting a funding deficiency and any excise tax due for a Defined Benefit Pension Plan or Defined Contribution Pension Plan. This means that a Corporation has not made the required contribution to a Qualified Plan for a given year.

Common Terms

1. **Account Balance:** The contributions, earnings, appreciation and/or depreciation accumulated in a Defined Contribution Pension Plan or Profit-Sharing Plan for a Plan Participant.
2. **Actuarial Tables:** Pre-established or individually designed turnover and mortality tables used in the determination of Plan costs.
3. **Asset:** The investments accumulated in a Qualified Trust under Section 501(a) of the Internal Revenue Code which have been purchased by Corporate contributions to a Plan.
4. **Beneficiary:** The person(s) or entity named to receive benefits from a Qualified Plan in the event of the Participant's death.
5. **Break in Service:** A Plan Year in which a Participant does not complete over 500 hours of service with the employer.
6. **Compliance:** A Plan that has met the requirements of all final I.R.S. and Department of Labor Regulations as required and has a letter of favorable determination to substantiate that compliance.
7. **79-28 Compliance:** Final I.R.S. and Department of Labor Regulations which were required to be incorporated in a Qualified Plan to continue to be in compliance.
8. **Excess Benefit Plan:** A special form of Deferred Compensation provided to highly compensated individuals.
9. **Favorable Letter:** A letter issued by the Internal Revenue Service giving an advance determination that a specific Plan and Trust qualify under Section 401(a) and 501(a) of the Internal Revenue Code.
10. **Forfeiture:** That portion of a Participant's benefit which is not vested and non-forfeitable at his point of separation of service.
11. **Funding Method:** An actuarial method of calculating the cost for a Defined Benefit Pension Plan. Common methods are Aggregate, Individual Level Premium, Entry Age Normal and Frozen Initial Liability.
12. **Joint and Survivor Option:** An annuity settlement option which guarantees a benefit not only for the life of a Plan participant but also for the life of his spouse. You can have a Joint and 100% Survivor option, Joint and 2/3rds Survivor Option, Joint and 50% Survivor option or a Joint and 25% Survivor option. The percentage denotes what portion of the initial annuity dollar amount continues to the survivor upon the first death.
13. **Lump Sum Distribution:** The entire amount due a Participant upon the attainment of a specified event, such as death, disability, separation from service or attaining Normal Retirement Age. To qualify as a Lump Sum Distribution the entire amount must be distributed within one calendar year.
14. **Multi-Employer Plan:** A Plan that covers employees who have negotiated their benefit under a collective-bargaining agreement. This can be a Plan that several employees contribute to or a single employer.
15. **Multiple-Employer Plan:** A Plan to which more than one Corporation makes contributions for its employees. This Plan is not negotiated by a collective-bargaining agreement.
16. **Non-Qualified Plan:** An executive perk which provides an individual with potential retirement benefits as a substitution for or in addition to his Qualified Plan.
17. **Participant:** An employee who has met the eligibility requirements of a Plan and is accruing benefits under that Plan.
18. **Past Service Credit:** A Defined Benefit Pension Plan which credits a Plan Participant for each year of past service he has been employed by that Corporation.
19. **Payouts Other Than Lump Sum:** Optional modes of distribution available to a participant in a Plan such as Annuities or equal annual installments over a designated number of years.
20. **Present Value:** The discounted value of a future cash benefit. In other words, the cash required today to grow to a future dollar amount at specified rate of interest.
21. **Rollover:** An amount received by a Participant as a distribution from a Qualified Plan and rolled over into another Qualified Plan or conduit Individual Retirement Account to defer taxation.
22. **Special Averaging (49-72 election):** A method of calculating the tax on a Lump Sum Distribution from a Qualified Plan.
23. **Trustee:** The person(s), Corporation or Institution listed in a Trust document as the entity to administer the Trust Assets.
24. **Valuation:** Actuarial Report prepared for a Defined Benefit Pension Plan outlining the required contributions for the Corporation for a given year.
25. **Vesting:** A schedule which specifies the percentage of a participant's benefit which is nonforfeitable at a given point of time.

Types of Qualified Plans

1. **Defined Benefit Pension Plan.** A Plan that sets forth or *defines the monthly pension which will be provided to a Plan Participant at his Normal Retirement Age.* This plan is the most complicated to value and the most difficult to obtain all of the required data for review.

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Recent Cases
by Bonnie M.S. Reiss

Raybin vs. Raybin (Appellate Divison, Decided May 19, 1981)

Where a wife files a Complaint for Separate Maintenance which includes allegations of extreme cruelty after she has met state residency requirements for divorce and she thereafter leaves the state for a period, returns and files an amended Complaint for Divorce on the grounds of extreme cruelty, the Complaint for Divorce relates back to the original date of the filing of the Complaint for Separate Maintenance and the Court correctly exercised jurisdiction.

Defendant challenged jurisdiction notwithstanding the fact that he had conceded that the wife met the jurisdictional requirements when she filed her Complaint for Separate Maintenance and that he himself had sought the aid of the Court by filing a Counterclaim. The Appellate Division, however, purported to sustain jurisdiction without regard to defendant's acts, holding that parties to litigation cannot invoke jurisdiction by agreement.

The finding that the amended complaint "clearly relates back to the time of the filing of the original complaint" was grounded on four bases. The claims for both separation and divorce were generated when defendant left plaintiff. The acts of extreme cruelty asserted in the amended complaint were to some extent identical to those in the separate maintenance complaint. Indeed, the allegations in the Complaint for Separate Maintenance had been incorporated by reference. The relief sought was to some extent the same in each complaint. There was no prejudice to the defendant in allowing the complaint to relate back, since there had been a long time lapse between the last act of cruelty complained of and final hearing and the defendant had remarried during the time the appeal was pending. The defendant's remarriage indicated a reliance on the fact that jurisdiction had been correctly entertained and a divorce granted.

Focusing on other issues, the court declined to enter judgment in the amount of $10,000.00 which had been escrowed for the purpose of a potential counsel fee award. Since no award had been made, the court found that there was no basis for the entry of such a judgment. It did, however, suggest that an application to the Appellate Division could result in a fee award.

The Appellate Division, in affirming the award to the wife of all of the proceeds from the sale of the marital home, which previously had been placed in escrow, refused to grant the husband a credit for *pendente lite* support which had been withdrawn therefrom when the husband failed to make payments. The court instructed the trial court to enter judgment against the defendant on the amount of arrears which had been withdrawn from the fund.

A significant aspect of the decision may be viewed as an expansion of the *Lepis* case. The court gave the statute retroactive application even in light of the fact that the wife had waived alimony in reliance upon her receipt of proceeds of the gifts. Under *Lepis,* the court found, the wife could always return to the court on the issues of alimony and support despite the fact that she had waived them by agreement.

Gibbons vs. Gibbons (Supreme Court of New Jersey, Decided July 8, 1981) (Reported 108 N.J.L.J. 138, August 13, p. 10)

N.J.S.A. 2A:34-23 as amended, which exempts from equitable distribution, gifts, devises and bequests, is to be applied retroactively to all cases presently on direct appeal or on which Final Judgment has not been entered.

This ruling came despite the fact that throughout the marriage the parties lived on a higher standard than their earnings would have allowed because of wealth received from their families, particularly the husband's family.

The court reasoned that in light of legislative history indicating that retroactivity language which had been part of a proposed draft was removed, there was no clear intent that the statute should apply only prospectively. In addition, the court found that the statute falls within three exceptions to the rule of prospectivity: the law is curative and stands as an improvement in the statutory scheme and, its passage brings the law into harmony with the expectations of donors and donees.

Beck vs. Beck (New Jersey Supreme Court, Decided July 2, 1981) (Reported 108 N.J.L.J. 129, August 13, p. 10)

Joint custody may be ordered by a trial court where it is not requested by either party in the pleadings and is strongly opposed by one parent and the children.

Trial courts were admonished, that where a request for such an arrangement is not made in the pleadings and the court believes it to be in the best interests of the children, the parties should be notified and given the opportunity to address such a possibility.

The court first found that such an arrangement is sustainable under N.J.S.A. 2A:34-23 and 9:2-4 citing a preference for custody decrees allowing full and genuine involvement by both parents. Any custody determination consists of two aspects. Legal custody, which in the case of a joint custody arrangement, would be shared at all times, and physical custody which, the court stated, is a matter of logistics and allowing the parent who has physical custody of the child to make "minor" day-to-day decisions regarding the child's welfare.

While a dissenting justice argued that by its decision the court had declared joint custody as "the preferred disposition" the majority declined to establish a presumption in its favor stating that

since all of the factors required will "coalesce only infrequently" it is acceptable in a limited class of cases.

The Supreme Court set forth four factors to be considered in determining whether a joint custody decree is most beneficial to the child. Before inquiring as to whether such an award would be practical, the trial court must make an initial determination of whether the children have developed relationships with both parents so that they would benefit from such an arrangement. Only after a potential benefit has been established, may the court ask whether both parents qualify by being fit physically and psychologically. Such fitness is to be measured by a willingness to accept such custody and a potiential for cooperation in matters involving child welfare. Thirdly, the court must consider practical issues such as the financial status of the party, the proximity of the two homes, demands of each party's employment, and the age and number of the children. The final issue to be considered by the court is the preference of the children. The weight given to this factor will be influenced by the potential for negative influence by a parent opposing a joint custody arrangement as well as the age of the children.

The Court held that in an *initial* custody determination where a change in the status quo is being sought, i.e., a change from sole custody to joint custody, the court should not invoke the test employed by the court in *Sorentino,*[1] which required the party seeking the change to prove that "the potentiality for serious psychological harm . . . will not become a reality". Since cultivating relationships with both parents is a goal to be encouraged, whereas termination of parental rights, per *Sorentino,* is not, such a demanding test is not warranted.

In *Beck,* the court reinstated the trial court's award of joint custody despite the mother's strong opposition thereto as well as opposition expressed by the children, reasoning that the children's attitude had been largely influenced by the mother. However, since the appeal had been pending for a long period of time, the trial court was directed to determine whether such an arrangement was still workable.

Loonan v. Marino (Chancery Division, Decided February 11, 1981) (108 N.J.L.J. 129, August 13, p.)

Doctrine of Forum Non Conveniens applies in custody cases.

Where, having obtained a divorce in the State of California, both parties move to New Jersey and the husband filed a Complaint to change custody in Somerset County, the court, upon application of the mother who lived with the children in Monmouth County, changed venue to that situs.

The paramount consideration articulated by the Chancery Judge was the convenience of the children and witnesses with whom they had dealt on a day-to-day basis, all of whom were located in Monmouth County. The court focused on the factors considered in other civil cases where venue was an issue, including where the proofs were located as well as factors considered in determining what *state* might have jurisdiction in a custody dispute, including the location of the child's home, where the child and his family have the closest connections, and the location of evidence.

Noting that normally the convenience of the mother would not be weighed heavily, the court stated that in this case the mother suffered from multiple sclerosis and since she had been the sole custodian of the children for five years she deserved the right to demonstrate her past performance with minimal inconvenience.

Daly v. Daly (Appellate Division, Decided June 4, 1981) (108 N.J.L.J. 138, August 13, p. 10)

Where a party must wait for enjoyment of his/her share of a major asset because the other party remains in possession, he or she is entitled to a reasonable rate of return on his share of the value which takes into consideration the potential for appreciation and the risk of depreciation of the asset.

This case is the subject of a separate article in this issue by William J. Thompson.

Lee v. Lee (Chancery Division, Decided July 1, 1981)

Where husband has declared bankruptcy after complaint for divorce was filed and wife bid on and acquired his share in the marital home after the filing of the Complaint but prior to entry of judgment of divorce, such interest was not subject to equitable distribution. A purchaser in bankruptcy acquires the right of the bankrupt which, in this case, was the right of survivorship in a tenancy by the entirety. Since the wife purchased this right from the husband, it could not be equitably distributed. Also significant was the fact that their interest in realty had been acquired after the date of the filing of the complaint and, therefore, did not constitute property "acquired during the marriage" under the *Brandenberg* test.

As a matter of policy, the court reasoned that to allow the husband to reap any benefit from his wife's purchase of said interest would perpetrate a fraud on his other creditors.

1. 72 N.J. 127 (1976)

Daly: An Opinion That Should Prompt Considerable Interest

by William J. Thompson

Frequently, in resolving equitable distribution and allocating the assets acquired by the parties, our trial courts must consider the propriety of establishing a deferred payment arrangement. In cases in which the parties lack sufficient liquidity to allow immediate distribution, the trial judge may permit payment over a period of time to prevent undue hardship on the paying party.

In the recent decision of *Daly v. Daly,*[1] our Appellate Division analyzed such a deferred payment arrangement in a typical factual pattern. The parties in *Daly* had been married for 14 years at the time of trial and had three children, ages 12, 10, and 8. Husband and wife had lived modestly during the marriage. The sole asset subject to distribution was the marital home, containing equity valued at $82,000.

The trial judge in *Daly* distributed this equity interest equally between the parties and, as both husband and wife agreed that wife should remain in the home while raising the children, further ordered husband to execute a deed to wife. Wife was directed to execute a second mortgage in favor of husband, bearing four percent simple interest, to protect husband's $41,000 equity interest in the home. All payments were deferred until wife's remarriage, wife's cohabitation with another, sale of the home or the emancipation of the youngest child. In setting the four percent simple interest rate, the trial court expressed concern that a higher rate, in light of the potential ten-year deferment, would be "somewhat unreasonable."[2]

The Appellate Division, in its opinion of June 4, 1981 reversed the trial court on the issue of equitable distribution, holding that "a 4% return on an asset frozen for possibly the next ten years or more is not a realistic and fair return."[3] Within the factual context presented in *Daly,* the Appellate Division concluded that reservation of a 50% net equity interest was "most appropriate," with wife receiving against husband's share credits for one-half of the principal reduction in the mortgage and insurance premiums paid by the wife during the deferment.[4]

At first glance, and as recognized by the Appellate Division in *Daly,* the trial court's award of a meager 4% interest rate is not particularly equitable given present economic circumstances and double-digit inflation. However, on a broader scale, the *Daly* decision contains far-reaching implications which must be considered by both the Bench and the Bar.

Does, for example, the *Daly* rationale require the inclusion of a "fair and reasonable" rate of interest for *all* deferred payments or only payments deferred over a substantial period of time? Requiring interest on all deferments is supported by the language of the *Daly* case, which at the very least implies a mandatory consideration of interest for "delayed realization":

> The husband's realization of his distributive share is delayed, perhaps until emancipation of the youngest child. This delayed realization must be recognized by a reasonable rate of interest, certainly more than 4% in today's economic conditions, or an equity interest in the asset. Imaginative counsel and trial judges must always consider the interrelationship between alimony, child support and the cost of maintenance and the ultimate disposition of the marital home in arriving at contested or consent judgments, just as they do in negotiated property settlement agreements. *See Painter v. Painter,* 65 N.J. 196,218 (1974). Any final decision should recognize (1) a fair return for delayed realization, (2) or an equity interest, and (3) the extent of each party's contribution to the protection and enhancement of the asset prior to sale.[5]

Should such a view be adopted generally, additional concerns must be raised as to the interrelationship between such interest payments and alimony awards. This issue was not directly addressed in *Daly,* as the interest payments there were not paid periodically, but deferred until sale of the marital home. As recognized both in *Daly* and in *Painter, supra,* trial courts must consider the interrelationship between property distribution and alimony in reaching an ultimate resolution. Certainly, should one party be entitled to periodic payments of interest as a result of the court's disposition of equitable distribution, this fact must be taken into account in determining that party's entitlement, if any, to alimony. Indeed, it is conceivable that such interest payments may be viewed in lieu of alimony, should sufficient amounts be involved in the deferment.

Moreover, the *Daly* decision provides little guidance in establishing a "fair and reasonable" *rate* of interest. The *Daly* court obviously considered a 4% return to be inequitable, yet chose not to remand the matter for consideration of a higher rate, stating that a mortgage with interest was appropriate only in cases involving shorter deferment periods.[6] Yet in such cases, both counsel and the court are faced with a variety of rates, which may or may not be viewed as fair rates of return under a given set of facts. Should, for example, all such interest rates be set at 12%, consistent with post-judgment interest rates under R. 4:42-11(a)? Or, should such interest awards be calculated consistent with other economic indicators, such as prevailing treasury rates, money market rates, the prime rate, or the criminal usury rate? These questions remain unanswered following *Daly,* which merely suggests

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William J. Thompson is an associate of the firm of Archer, Greiner & Read, Haddonfield. He is a graduate of the University of Pennsylvania.

in *dicta* that a "flexible interest rate, tied to a recognized indicator, may be appropriate."[7] Certainly, this potential interest differential of nearly thirty percent can have a dramatic impact upon any sizable distribution involving deferred payments.

Is there an alternative approach, or are judgments including deferments without interest subject to reversal on appeal? One alternative, not directly addressed by the court in *Daly,* would be to place the determination as to the propriety of interest within the discretion of the trial court in reaching its final allocation of assets under the three-step procedure outlined in *Rothman v. Rothman.*[8] Under such an approach, the trial court could consider the necessity or propriety of granting interest on any deferred payments within the context of the factors enumerated in *Painter v. Painter.*[9] Consideration of the question of interest at this stage of the trial court's analysis is consistent with the factors set forth in *Painter, supra,* which include consideration of the economic circumstances of each spouse when the division of property becomes effective, the effect of distribution on alimony and support, current value and income-producing capacity of the property, etc. Moreover, by analyzing the question of interest at this stage, the trial court can appropriately consider the interrelationship between alimony, child support, equitable distribution and any deferred aspects of the court's award.

This latter approach would permit a trial court in its discretion to decline to award interest, basing its decision upon its overall consideration of all aspects of a given case. In appropriate circumstances, the trial court could simply state that it had considered the interest question and had included in its analysis and distribution of assets a "fair rate of return" without specifically including a separate calculation of interest. Yet, such an approach would appear to be contrary to the implied directive of *Daly.* A fundamental question must thus be posited: Given the decision in *Daly,* would such an opinion be sustained on appeal?

The above alternatives should certainly be closely scrutinized by the Bar. Consider, for example, the following hypothetical: Husband and wife have accumulated substantial assets, valued at approximately $1,000,000. Of this total, the marital home is valued at $150,000. There exists an additional $50,000 in liquid assets (cash, stocks, etc.), with the balance consisting of relatively indivisible assets such as a closely held corporation. The trial court determines that a total equitable distribution award to the wife of $350,000 is appropriate, inclusive of the marital home and the liquid assets. Certainly, under such circumstances, a deferred payment schedule permitting payment of the balance over a period of time (i.e. one or two years) seems appropriate. Yet, in light of *Daly,* a variety of questions must be raised: *Must* such deferments include interest and, if so, how much? Or, may the trial court state that its total award of $350,000 *includes* its consideration of the deferred nature of the payments and any entitlement to interest thereon? Again, it must be questioned whether this latter approach would survive an appeal.

Or consider the same questions within the context of a self-employed professional, such as a doctor. See, for example, the unreported decision of *Lynn v. Lynn,*[10] wherein the court held that the husband's medical degree could be valued for the purposes of equitable distribution. Without comment as to whether the *Lynn* decision will be sustained on appeal, in the context of *Daly* one must question whether interest must or should be imposed upon an equitable distribution award based substantially upon the valuation of one party's medical degree.

Obviously, in the context of this article, it is impossible to reach final conclusions regarding the issues raised herein. Although *Daly* may be factually distinguishable from a given case, the issues require close scrutiny and should be approached cautiously until clarified by the courts.

FOOTNOTES

1. 179 N.J. Super. 344 (App. Div. 1981).
2. *Id.,* at 348.
3. *Id.,* at 350.
4. *Id.,* at 351.
5. *Id.,* at 350-351.
6. *Id.,* at 350.
7. *Id.*
8. 65 N.J. 219, 232 (1974).
9. *Painter v. Painter,* 65 N.J. 196, 211-212.
10. Superior Court of New Jersey, Chancery Division, Bergen County, cited at 7 F.L.R. 3001.

Types of Qualified Plans

(continued from page 19)

2. **Defined Contribution Pension Plan.** Sometimes referred to as a Money Purchase Pension Plan. This Plan *defines the amount of contribution* which the Employer must set aside for a Participant each year. At retirement the Participant is entitled to the contributions plus earnings, appreciation and/or depreciation which may occur. This is called account balance.
3. **Profit-Sharing Plan.** Also considered a Defined Contribution Plan, however, contributions are not mandatory. If there are no current or accumulated profits, the Corporation cannot make a contribution. Any contribution made is allocated to Participants based on an allocation formula in the Plan document.

Equitable Distribution in Florida

by Melvyn B. Frumkes

On January 31, 1980, the Florida Supreme Court rendered its landmark opinion of *Canakaris v. Canakaris*[1] giving Florida a firm commitment into the ranks of equitable distribution states. One District Court of Appeal judge noted that:

> . . . the *Canakaris* opinion . . . [is a] shining [example] of the ability of the common law and common law judges to accommodate legal principles to meet the demands of fairness generated by changing social conditions and needs . . . as members of the legal profession, we all have reason, in the most basic sense, to be proud of these decisions.[2]

Some ten months later in *Claughton v. Claughton*[3] the Florida Supreme Court emphasized its pronouncements that a wife, under the proper circumstances, is entitled to an equitable share of the assets of the parties accumulated during the marriage. The award to the wife, the courts opined, would "be based on . . . her marital contribution rather than her need for support," in that the trial judge "has jurisdiction to award such lump sum alimony if it is found necessary to 'compensate the wife for her contribution to the marriage.' " Thus, the vehicle in Florida for equitable distribution is lump sum alimony.

Florida, not having the benefit of a statute, has equitable distribution, but with very few guidelines. It is expected that the bench and bar of Florida will need to devote years to sorting out what to include and what principles to apply to assure equitable distribution. Florida is somewhat in the position as was New Jersey ten years ago. New Jersey cases should therefore be very persuasive to Florida judges.

In all Florida dissolution of marriage cases, the Chancellor has "broad discretionary authority to do equity between the parties and has available various remedies to accomplish this purpose, including lump sum alimony, permanent periodic alimony, rehabilitative alimony, child support, a vested special equity in property, and an award of exclusive possession of property."[4] These remedies are interrelated, and, to the extent of their use, are part of one overall scheme.[5]

In the section of its *Canakaris* opinion dealing with permanent periodic alimony, stating that same is used "to provide the needs and the necessities of life to a former spouse as they may have been established by the marriage of the parties," the Florida Supreme Court recited that "the criteria to be used in establishing this need include the parties' earning ability, age, health, education, the duration of the marriage, the standard of living enjoyed during its course, and the value of the parties' estates."[6] It leaves the question unanswered whether these or other factors should be among the variables to be considered by the courts in measuring the amount to be equitably distributed.

More than just the question of what factors are to be applied is left unanswered in Florida today. The usual first question in developing a case of equitable distribution is: to which assets are the factors to be applied? There are some Florida guidelines developing—the Florida Supreme Court stating that "a judge may award lump sum alimony to ensure an equitable distribution of property acquired during the marriage."[7] There should be no question that assets acquired by either spouse prior to the marriage are not subject to equitable distribution. While there is not yet a Florida Supreme Court case making a pronouncement on gifts, bequests, devises or the like acquired during the marriage solely in the name of one of the parties, the court made reference, in *Canakaris,* to jointly held properties which were acquired during the marriage and noted that these "were not the result of any premarital or independent source, such as a gift or inheritance."[8]

In a recent intermediate appellate court decision property acquired by inheritance or gift was held not to be subject to equitable distribution.[9] Without stating when the inheritance from grandfather and gifts from father were received by the husband (whether prior to or after the marriage) the court reversed an award to the wife of $125,000.00 lump sum alimony "since it requires a distribution of the husband's personal funds which were not obtained through the efforts of either party during the marriage,"[10] thus, not containing the requisite "justification for lump sum alimony"[11]—the property being "neither earned through activities [the husband] engaged in while his wife did her part by staying at home, nor contributed to by [the wife] in any more concrete fashion."[12] That district court did not, however, preclude, under proper circumstances, the distribution of such assets as lump sum alimony to bolster spousal support or from consideration in viewing the husband's entire estate in order to make an equitable award, applying the many remedies discussed in *Canakaris.* The same court in a later case stated "where the husband's major assets are indisputably the result of inheritance or gift and unrelated to the labors of either party during coverture, the wife, in the absence of some other justification, is not entitled to a lump sum award simply by virtue of the husband's ability to pay."[13] Thus, where that "other justification" is present, assets received as gifts or inheritance during marriage should be a part of the pie, subject to the judicial slice.

The question of whether or not property acquired after separation but before dissolution can be a part of the "kitty," to date, remains unanswered in Florida. In *Canakaris,* the parties were separated for 13 years before dissolution. A temporary support order was entered 13 years before the final judgment was entered based upon the wife's complaint for separate main-

Equitable Distribution in Florida (cont'd)

tenance. Commenting upon the extent of the assets that were accumulated by the husband to the time of dissolution, the court observed that "a substantial portion of these assets had been acquired prior to the 1963 separation proceedings."[14] One must wonder why this observation was made by the Supreme Court in its opinion. If "a substantial portion" of the assets were acquired prior to separation, then some assets must have been acquired after the separation. This leaves the door open to allow counsel to argue that post separation acquisitions may be considered as subjects of equitable distribution, yet the observation was not that critical to *Canakaris,* as there, that which the wife received as equitable distribution could not be measured in percentages of the husband's assets.

While there have been some expressions of criteria by Florida courts, there has not been set any firm parameters for the amounts to be apportioned to each spouse. The *Canakaris* court emphasized that an award of alimony should be fashioned so as to achieve equity between the parties.[15] One District Court of Appeal decision indicates that the efforts should be made to divide "fairly"[16] and another speaks of the partners being "entitled to a fair share of the fruits of their combined industry, whether performed in the office, the factory, the fields or the home."[17]

If, as often stated, "equitable is not necessarily equal," then what amount should go to one or to the other spouse? A recent appellate decision noted that Florida is not a community property state and that:

> There is no mandate for making an equal division of marital acquisitions in all cases; the matter of the division is to be left to the discretion of the trial judge, whose sole duty is to do equity under the circumstances presented by each individual case. Unless he abuses that discretion, his decision is not to be overturned.[18]

Should one wonder about the court's reference to "all cases"? Does this mean that there should be an equal division in most, but not necessarily all cases, depending upon the circumstances?

One appellate judge observed that on remand the trial court might consider, in light of the respective earning capacities of the parties and eligibility for other benefits, that the proper award might call for more than half of the parties' capital assets to go to the wife.[19] The court, in *Canakaris,* admonished that:

> A trial judge must ensure that neither spouse passes automatically from misfortune to prosperity or from prosperity to misfortune, and, in viewing the totality of the circumstances, one spouse should not be "short-changed."[20]

Based upon, and after quoting, the above exhortation, an award to the wife of all of the husband's interest in jointly owned marital assets was reversed by the Fifth District Court of Appeals. It held that such an award cannot be justified as an equitable distribution of property because it stripped the husband of everything he had, stating, or more accurately understating:

> It can readily be seen that the husband could not make this payment without substantially endangering his economic status.[21]

There is absolutely no doubt that the long existing factor of "necessity" is no longer required to support a lump sum alimony award for the purpose of equitable division of assets.[22] There are, however, two constraints established for the use of lump sum alimony in equitably distributing assets, to wit:

> (1) A justification for such lump sum payment and (2) the financial ability of the other spouse to make such payment without substantially endangering his or her economic status.[23]

The second factor is self-explanatory.[24] As to the "justification" factor, one court called it a "good reason or useful purpose."[25]

The most often referred to justification is the contribution that the wife has made to the "marital partnership" as a mother and homemaker.[26] One court felt this factor to be almost a mandate, stating:

> Lump sum alimony may, and sometimes must, be employed so as equitably to compensate the wife for the domestic endeavors now regarded as equivalent to her husband's wage earning ones.[27]

In *Vanderslice v. Vanderslice*[28] the Fourth District Court of Appeal based its justification for a lump sum award upon the facts that:

> . . . the wife has a need for the award to sustain a modest standard of living in the future; in fact, the award is necessary to insure her bare security; the marriage was of seventeen years duration; during the mar-

Melvyn B. Frumkes

Melvyn Frumkes practices in Miami, Florida. He is chairman of the Family Law Section, Florida State Bar Association, and president-elect of the Florida Chapter of the American Academy of Matrimonial Lawyers.

Equitable Distribution in Florida (cont'd)

riage, the wife contributed as a housewife and a mother in addition to her outside employment; the wife's current health status is questionable in comparison to the husband's; and the husband abandoned his duties as a provider during the term of their legal separation, while the wife dutifully sustained the needs of the household.

Justification was also found in one case where the wife had no separate property, assets or savings of her own[29] and in another case where the wife was in need of security to minimize her risk that her sole means of support would be lost to her if her husband should die.[30] Similarly, the loss of survivor benefits was found to be a justification.[31] An award of permanent periodic alimony rather than a part of the accumulated assets was held to be an unsatisfactory arrangement because should the paying spouse die first, the alimony would terminate, leaving the receiving spouse without any sustenance of any kind, and without assets.[32]

Where there was a need on the part of one spouse and the other spouse was not in a position to pay periodic or rehabilitative alimony because of his limited earnings and the obligation, including child support, required of him by the final judgment, sufficient justification was found.[33]

In affirming an award of lump sum alimony to the wife of $125,000.00 where the husband was worth $850,000.00, the justification expressed by the court was "the length of the marriage, the lifestyle of the parties, their age and health at the time of the dissolution . . ."[34]

Although Florida is in the ranks of "no fault" states, fault may very well lend the necessary factors of justification to the lump sum award. The court, in *Bird v. Bird*[35] observed that:

> The evidence warranted a finding that the husband had harassed the wife; had broken into their house; threatened her with a gun and actually fired at her on one occasion.

and in *Hartley v. Hartley*[36] the court observed that:

> The award also ensures that the parties enjoy a fair degree of independence from one another, a concern which, in light of the evidence of Mr. Hartley's violent tendencies, we believe may properly have been considered.

Also in *Vanderslice*[37] the court commented upon the fact that "the husband currently resides with a lady friend and her three minor children, and contributes, at least to some degree, to the support of that household," which undoubtedly was an influencing factor.

The fact that the receiving spouse cannot manage his or her affairs [because of, in that case, "mental and drinking problems (both properly characterized as illness)"] whose assets would soon be dissipated, was held to be insufficient justification to distribute the assets to the other spouse, as there are ways to prevent such dissipation by persons unable to protect their property. Similarly, in the same case, the district court observed that full control of the family business without interference from the other spouse may be required for its success. Yet this too will not justify a distribution of the business as there can be ways simply to prohibit interference.[38]

Perhaps one reason why there have been no more guidelines set by the appellate courts is because of the admonition of *Canakaris,* as noted in one appellate decision:

> As expressed in *Canakaris* . . . this justification is not synonymous with some rigid standard carefully delineating the circumstances in which such an award is proper. *Canakaris* disavowed this narrowly structured approach while admonishing the courts to "avoid establishing inflexible rules that make the achievement of equity between the parties difficult, if not impossible," 382 So. 2d at 1197. This is not to say that the trial judge has unbridled discretion to award lump sum alimony, but rather that he must be "guided by all relevant circumstances to ensure 'equity and justice between the parties'. "[39]

No justification was found in *Florence v. Florence*[40] where an award to the wife of the husband's share of the marital residence was reversed, the court stating:

> The wife is 31 years old, in excellent health, and this was a marriage of short duration. There are no other equitable factors which must be considered.

Likewise in *Gorman v. Gorman*[41] the husband's share of the home to the wife was reversed where it was substantially the only asset of value accumulated during the marriage.

The property which has been the subject of equitable distribution has been varied. The *Canakaris* court noted that "it may consist of real or personal property, or may be a monetary award payable in installments.[42] The most frequently referred to asset by the appellate court has been the husband's interest in the marital residence, particularly where jointly owned with the wife as an estate by the entireties.[43] Other forms of property which have been the subject of lump sum alimony for purposes of equitable distribution have been cash,[44] real estate in Florida (other than the marital residence),[45] the vacation home,[46] real estate located in another state,[47] automobiles,[48] life insurance policies,[49] cash value of life insurance,[50] an interest in a taxi cab business,[51] and an interest in husband's boat and motorcycle.[52]

An interesting fallout from the equitable distribution explosion in Florida is the potential expansion of methods of enforcement. Heretofore, contempt was not an available remedy pertaining to lump sum alimony. However, one district court of appeal recently recognized that same may be

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"out of step with the Supreme Court's recent holding which . . . authorize a judge to make a property settlement agreement" and certified an allied question for a ruling by the Florida Supreme Court.[53]

The law, being dynamic, particularly in this field, is subject to change, refinement or expansion upon the "drop of" an opinion. The pending cases awaiting final adjudication in the Florida appellate system today are legion. If Florida developments are of any concern, the practitioner will be well advised to keep a close watch upon all current developments.

FOOTNOTES

1. 382 So.2d 1197 (Fla. 1980) as clarified on denial of rehearing on March 27, 1980.
2. *Colucci v. Colucci,* 392 So.2d 577 (Fla. 3d DCA 1980), at footnote 6.
3. 393 So.2d 1061 (Fla. 1980) Oct. 23, 1980, rehearing denied March 2, 1981.
4. *Canakaris,* 382 So.2d 1197 (Fla. 1980) at 1202.
5. *Id.* at 1202. See also *Duncan v. Duncan,* 379 So.2d 949 (Fla. 1980) and *Ingram v. Ingram,* 379 So.2d 955 (Fla. 1980) which, with *Canakaris,* form a trilogy of opinions all written by the same Mr. Justice Overton and published simultaneously, each referring to the other.
6. *Canakaris, supra,* at 1201, 1202
7. *Canakaris, supra,* at 1201
8. *Id.* at 1199
9. *Rosen v. Rosen,* 386 So.2d 1268 (Fla. 3d DCA 1980)
10. *Id.* at 1270
11. *Id.* at 1271
12. *Id.* at 1272
13. *Evans v. Evans,* 398 So. 2d 943 (Fla. 3d DCA 1981)
14. *Canakaris, supra,* at 1199
15. *Stith v. Stith,* 384 So.2d 317 at 320 (Fla. 2d DCA 1980)
16. *Blum v. Blum,* 382 So.2d 52 (Fla. 3d DCA 1980)
17. *Neff v. Neff,* 386 So.2d 318 at 319 (Fla. 2d DCA 1980)
18. *Bullard v. Bullard,* 385 So.2d 1120 at 1121 (Fla. 2d DCA 1980)
19. *Colucci, supra,* at Footnote 7.
20. *Canakaris, supra,* at 1204
21. *Gallagher v. Gallagher,*__So.2d__(Fla. 5th DCA 1981) Case No. 80-1169, May 27, 1981, 6 Fla. L.W. 1240.
22. *MacDonald v. MacDonald,* 382 So.2d 50 (Fla. 2d DCA 1980) and *Lewis v. Lewis,* 383 So.2d 1143 (Fla. 4th DCA 1980)
23. *Canakaris, supra,* at 1201
24. *Costich v. Costich,* 383 So.2d 1141 at 1143 (Fla. 4th DCA 1980)
25. *Rosen v. Rosen,* 386 So.2d 1268, at 1271 (Fla. 3d DCA 1980)
26. In *Rosen id.* at pp. 1271, 1272, the court said: "The primary non-semantic effect of the *Canakaris* decision was to adopt the holdings of *Brown v. Brown,* 300 So.2d 719 (Fla. 1st DCA 1974), cert. dismissed, 307 So. 2d 186 (Fla. 1975), (a) that the contributions of the wife to the marital partnership as a mother and homemaker should be given recognition equal to the money-earning activities of the husband, and (b) that these contributions of the wife may be recompensed by lump sum alimony. In essence her domestic efforts have been made the equivalent, for lump sum purposes, of the financial considerations referred to in the *Yandell* case as arising "where the wife may have brought to the marriage, or assisted her husband in accumulating, property, 39 So.2d at 556."
27. *Colucci, supra,* at 581
28. 396 So.2d 1185 (Fla. 4th DCA 1981)
29. *Cuevas v. Cuevas,* 381 So.2d 731 at 732 (Fla. 3d DCA 1980)
30. *Stith, supra.*
31. *Cowan v. Cowan,* 389 So.2d 1187 (Fla. 5th DCA 1980)
32. *Gallagher, supra.*
33. *Lewis v. Lewis,* 383 So.2d 1143 (Fla. 4th DCA 1980)
34. *Nusbaum v. Nusbaum,* 386 So.2d 1294 at 1295 (Fla. 4th DCA 1980)
35. 385 So.2d 1090 at 1092 (Fla. 4th DCA 1980)
36. __So.2d__(Fla. 4th DCA 1981) Case No. 81-1373, June 24, 1981, 6 Fla. L.W. 1512
37. 396 So.2d 1185 (Fla. 4th DCA 1981)
38. *Gallagher, supra.*
39. *Costich, supra,* at 1143
40. __So.2d__(Fla. 1st DCA 1981) Case No. XX-24, June 26, 1981, 6 Fla. L.W. 1524
41. __So.2d__(Fla. 5th DCA 1981) Case No. 80-338, June 3, 1981, 6 Fla. L.W. 1341
42. *Canakaris, supra,* at 1201
43. *Canakaris, Id., Hausler v. Hausler,* 382 So.2d 806 (Fla. 2nd DCA 1980); *MacDonald v. MacDonald,* 382 So.2d 50 (Fla. 2d DCA 1980); *Hague v. Hague,* 382 So.2d 852 (Fla. 3d DCA 1980); *Rosen v. Rosen,* 386 So.2d 1268 (Fla. 3d DCA 1980); *Costich v. Costich,* 383 So.2d 1141 (Fla. 4th DCA 1980); *Pepper v. Pepper,* 388 So.2d 1342 (Fla. 3d DCA 1980); *Kirchman v. Kirchman,* 389 So.2d 327 (Fla. 5th DCA 1980); *Cowan v. Cowan,* 389 So.2d 1187 (Fla. 5th DCA 1980); *Vanderslice v. Vanderslice,* 396 So.2d 1185 (Fla. 4th DCA 1981). In *Hartley v. Hartley, supra,* June 24, 1981, 6 Fla. L.W. 1512 at 1513 the court commented that "the trial court could consider the relatively low expense for monthly maintenance of the marital home compared to the expense that would face the wife with her modest earning capacity in renting or purchasing a new home in today's market place." [We wonder if the court considered that the husband was subjected to a capital gain tax?]
44. *Canakaris, Id.; Nusbaum v. Nusbaum,* 386 So.2d 1294 (Fla. 4th DCA 1980)
45. *Cuevas v. Cuevas,* 381 So.2d 731 (Fla. 3d DCA 1980); *Lewis v. Lewis,* 383 So.2d 1143 (Fla. 4th DCA 1980); *Bird v. Bird,* 385 So.2d 1090 (Fla. 4th DCA 1980)
46. *Schwartz v. Schwartz,* 396 So.2d 806 (Fla. 3d DCA 1981)
47. *Cuevas, supra.*
48. *Blum v. Blum,* 382 So.2d 52 (Fla. 3d DCA 1980); *Bashaw v. Bashaw,* 382 So. 2d 1352 (Fla. 4th DCA 1980); *Lewis v. Lewis,* 383 So.2d 1143 (Fla. 4th DCA 1980)
49. *Stith v. Stith,* 384 So.2d 317 (Fla. 3d DCA 1980)
50. *Eagan v. Eagan,* 392 So.2d 988 (Fla. 5th DCA 1981)
51. *Bird v. Bird,* 385 So.2d 1090 (Fla. 4th DCA 1981)
52. *Vanderslice v. Vanderslice,* 396 So. 2d 1185 (Fla. 4th DCA 1981)
53. *Schminkey v. Schminkey,*__So.2d__, (Fla. 4th DCA 1981) Case No. 80-1073, June 17, 1981, 6 Fla. L.W. 1469 at 1470.

Legislative Report

by Jeffrey P. Weinstein

I am pleased to advise that Philip Kirschner, Esq., NJSBA Legislative Counsel, has been appointed as our liaison with the New Jersey State Bar Association.

New Laws

Three recent bills have just become law.

- **Assembly Bill 1427,** the Revised Uniform Reciprocal Enforcement of Support Act, supported by the New Jersey State Bar Association, provides for the enforcement of support orders in proceedings for or against persons residing in other states or foreign jurisdictions having reciprocal laws. This bill will become law on the 181st day after August 3, 1981.
- **Assembly Bill A-1668,** which became effective on July 9, 1981, allows for an execution order against wages when support payments are 30 days overdue. It also provides for transferability of execution orders.
- **Assembly Bill A-1330,** which became law on July 9, 1981, sets forth a procedure wherein a spouse may be restrained from the marital premises for a period of up to 72 hours in the event of an interspousal assault by the Municipal Court in the municipality in which said assault took place. There could be a direct appeal to the Superior Court, Chancery Division-Matrimonial from the Municipal Court order.

Comments Sought

I would appreciate it if you could forward your comments to either myself or David M. Wildstein, Esq., my co-chairman, concerning Assembly Bill 1948. That bill provides that a person's interest in a pension fund would be excluded from equitable distribution but pension fund payments could be used for purposes of alimony. At the present time, the bill has passed our State Assembly and is presently in the Senate Judiciary Committee.

I would also appreciate your comments concerning Senate Bill 1020, which establishes the criteria for our Courts to consider in granting rehabilitative alimony. This bill has passed the Senate and has been released from the Assembly Judiciary Committee.

There is some urgency needed to respond to both the bill which excludes pensions from equitable distribution and the rehabilitative alimony bill.

The Family Court Bill, Assembly Bill #3428, as previously commented on in this column, (July 1981) was released from the Assembly Judiciary Committee and will be before the full Assembly in the immediate future. This bill also requires some immediate action. Accordingly, I would appreciate your comments.

We have the opportunity to have our views heard on Senate Bill #1288, which provides that if a divorced person was receiving alimony and cohabits with another person, the alimony payments may be terminated, or modified, by the Court. Also of interest is Assembly Bill #1471, which provides that there be a presumption of joint custody in custody proceedings. I believe we should monitor both of these bills. Accordingly, I would ask for your comments. Once again, you may write to either David Wildstein, Esq., or myself.