New Jersey Family Lawyer

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CHAIR'S COLUMN

The Difficulty of Practicing Family Law

Part II: Help! Why Did I Take This Case?

by Bonnie Frost

Practicing family law is laden with emotional pitfalls; however, it is made more difficult when one is faced with the emotionally demanding client. Every litigant going through a divorce is justifiably emotional. However, I am speaking about the client who changes his or her mind on a daily basis regarding the strategy of the case, while at the same time demanding that what he or she wants be granted and, in the same breath, tells you he or she does not want to go to trial. This is sometimes coupled with complaints that you, the attorney, have not responded to his or her demands because the client has not gotten what he or she wanted. The next inevitable statement from such a client is that the legal bill is too expensive for what has transpired. This scenario is made even more draining for the family lawyer when the spouse is equally demanding or stubborn in his or her demands. Then the two personality types collide, placing both attorneys in the middle. It is then that you question your sanity and wish you were out of the case.

Rule 5:3-5(d)(1) states that an attorney may withdraw from a case 90 days prior to the scheduled trial date or prior to the matrimonial early settlement panel hearing, whichever is earlier.[1] After the matrimonial early settlement panel date, or after 90 days prior to the trial date, whichever is earlier, an attorney may withdraw only when a court permits.

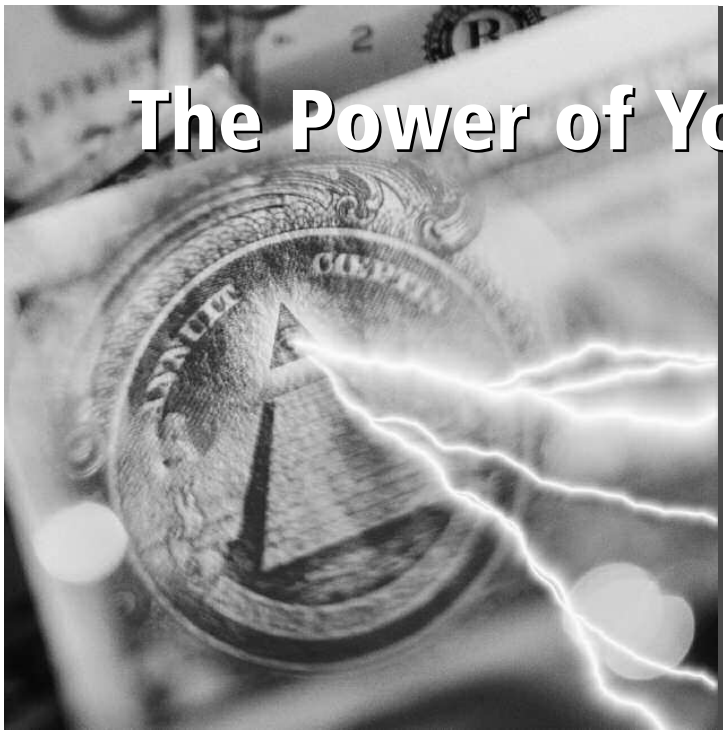
These timelines are not unreasonable in most cases. But what about the client who at first presents as a reasonable person, one we are willing to work with, and so, we accept the retainer? Then, as the case goes on, the client's true colors emerge, many times in the form of anger against his or her spouse, against you, and against the spouse's attorney. No matter what advice the attorney gives such a client, it is not the right advice, because it is not advice the client wants to hear.

The emotional rollercoaster this kind of client has orchestrated against his or her attorney then collides with the court system. As a result of the push to conform to case completion deadlines, within two months or sooner of the case being filed, courts enter case management orders that place cases on tracks and set early settlement panel dates that can be within three to four months after filing. At the time of the early settlement panel hearing, if the case is not resolved, a trial date is set.

After the early settlement panel hearing, if the client does not like the recommendation, his or her demands on the attorney to obtain the result he or she wants escalates, and the attorney/client relationship deteriorates. The client demands a certain result, which requires that more work and money for experts be put into the file at the attorney's expense, because after all, what has his or her money paid for so far? Then the client changes his or her mind regarding the case strategy on a day-to-day basis, depending on which friend he or she has spoken to last; refuses to make arrangements for the payment of his or her bill; or demands the attorney get the money from the other side. At this juncture, the client may mention bankruptcy, implying that he or she does not intend to pay the attorney the fees generated.

The attorney decides to get out of the case, but is that possible?

Because of the courts' goal of moving cases within a year, applications to withdraw at this time may not be granted even if there is another attorney willing to step in and meet the timeline for case completion. In this case, Rule 1:1-2, which states that the rules should be relaxed in the interest of justice, comes to fore. In *Tucci*



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Encouraging a **sound fiscal budget** for the Judiciary, Legal Services of New Jersey and the Office of Public Defender.

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v. Tropicana Casino and Resort, Inc.,[2] Judge Sylvia Pressler stated that the best practices rules were not designed to do away with substantial justice on the merits or preclude rule relaxation when necessary to "secure a just determination."

While Rule 5:3-5 was enacted with an eye to assist lawyers in more clearly defining their relationship with their clients, and to help get them paid during the litigation, in actuality, because judges are under pressure to move the calendar, lawyers can get stuck staying in and trying cases where the relationship with their client has broken down and they are not getting paid. Alternatively, another dismal scenario for the family lawyer presents itself. While narrowly decided on the particular facts in that case, it may be interpreted to say that in order to withdraw, the attorney must return his or her earned retainer.[3] The lack of permission to withdraw from the client and the court puts the attorney in the untenable position where the client is then positioned to allege malpractice when the case is over, because, after all, the client will never be satisfied with whatever result ensues. Next, that client can declare bankruptcy and avoid the attorney's fees.

We have all had the client who drains the emotional stamina out of us. We try to stick the relationship out, only to be caught in a situation where we must continue the representation at the expense of our emotional balance and our pocketbooks.

What can we do knowing that this kind of scenario can result?

Because the nature of a family law practice is emotional, the lawyer's relationship with the client can too easily become controlled by emotions that, if not controlled, mire the attorney in a deteriorating attorney-client relationship. While it is easier said than done, we must try to maintain a distanced and professional relationship with our clients. Be professionally compassionate, nothing more.

When a client is unmanageable during the first interview, talks over you, or ignores whatever you have to say, decline the representation. Often the client with the most money to spend, as alluring as the retainer is, is the most difficult and most demanding, and many times not worth it. The first time one sees a glimmer of non-cooperation, the lawyer should get out of the case. Sooner is better than later!

From the outset, prepare the client for an adverse outcome. Family law attorneys, like most litigators, are competitors who want to control the outcome of the case. The emotionally demanding client, however, can take over this role, almost unbeknownst to us, until it is too late. The result, when that happens, is never a good one.

We, as family lawyers can only do our best by being prepared to present the most persuasive case possible. We can do nothing more. ■

ENDNOTES

1. Upon client consent. If the client does not consent, then leave of court is required.
2. 364 N.J. Super. 48, 53 (App. Div. 2003),
3. *Fischer. v. Fischer*, 375 N.J. Super. 278, (App. Div. 2005).

FROM THE EDITOR-IN CHIEF

Steneken v. Steneken: Is it the Number or Percentage That Matters?

by Mark H. Sobel

Many matrimonial lawyers are often accused of having a somewhat voyeuristic tendency, which entices them into entering a family law practice. If so, the New Jersey Supreme Court's recent decisions in *Mani v. Mani*[1] and *Steneken v. Steneken*[2] provide both an informative analysis of key family law issues, as well as perhaps the more illuminating exposure of the intricacies of the workings of our Supreme Court. Both of those decisions were four-to-three determinations by the Court. In *Mani*, the opinion for the majority was written by Justice Virginia Long with the dissent authored by Justice Roberto Rivera-Soto. In *Steneken*, the roles were reversed. For those of you old enough to remember the original Saturday Night Live, these point-counterpoint, sometimes acerbic opinions might seem to indicate that our highest state court is as divided as it could be. Certainly, it would seem so based upon a shear numerical analysis. However, perhaps the subtleties in the reasoning contained in both opinions indicate a less divided Court then one would otherwise think.[3]

The central issue in *Steneken* was the utilization of the husband's actual income for the purpose of establishing alimony, and the use of a lower "normalized income" to value the husband's business for purposes of equitable distribution. As Justice Long did in her majority opinion in *Mani*, Justice Rivera-Soto also frames the issue in the very first sentence of his opinion:

> This appeal requires that we address whether, in setting an award of alimony and in establishing equitable distribution in respect of a closely held corporation, the trial court must use the same income determination.

The core facts are as follows: Mr. Steneken owned a closely held corporation and, predicated upon this fact, it was determined by the experts that his actual compensation was higher than what forensic accountants like to call reasonable compensation; the amount of money it would reasonably take to substitute that person's role in the company assuming a hypothetical purchaser purchased the entire entity. By inserting a lower reasonable compensation than that actually received by Mr. Steneken, the excess earnings of the company were increased, and thus, the capitalization of those excess earnings resulted in a higher value for the business. The central question is whether that procedure is fair.

The majority opinion acknowledges the fact that Mr. Steneken's income is examined in two different ways. The Court points out, however, that it is done for two different purposes. The majority holds that the utilization of different income figures for these two different purposes is not necessarily double dipping. Justice Rivera-Soto explains this apparent dichotomy:

> Much of the controversy inherent in this appeal stems from the unspoken premise that because alimony and equitable distribution are interrelated, a credit on one side of the ledger must perforce require a debit on the other side; otherwise, defendant, [Mr. Steneken] claims, the interplay between alimony and equitable distribution results in "double counting," we disagree.... although clearly interrelated, the structural purposes of alimony and equitable distribution are different.

Equitable distribution values the marital assets and distributes those assets subject to the rights of both parties. Alimony evaluates the need and ability to pay using the statutory factors to determine the appropriate type and level of alimony to be awarded. Each of these subject matters requires an analysis of different statutory factors for distinctly different purposes. Thus, it should not be surprising when the majority opinion emphasizes the fact that alimony and equitable distribution have different methodologies applied to them. As a result, the majority holds as follows:

> In specific, we hold that, for purposes of computing the proper alimony award, actual income of the paying spouse is a loadstar for determining the extent of that party's alimony obligation. We further hold, that for purpose of valuing a closely held corporation in determining the proper equitable distribution thereof, proper valuation techniques, which may include the normalization of excess salary expenses, are to be applied.

Now to the dissent.

Justice Long commences her analysis with a review of both the laws of New York and New Hampshire, illustrative of a contrary result in those jurisdictions. Justice Long, however, does not merely rely upon other jurisdiction's analysis, and proceeds with a thought-provoking dissent accepting that "to be sure what occurred in this case and what occurs in cases like it is not a dollar for dollar double counting because more than Mr. Steneken's excess earnings played a role in the ultimate valuation of Esco…nor is it the classic double dipping that has been interdicted in the pension arena."

Nevertheless, there is still the unnerving thought throughout the dissent that something less than fair is occurring where the higher actual income is utilized for paying alimony and a lower hypothetical income (normalized income) is utilized for valuation resulting in a higher valuation than otherwise would exist if the real income figure was used. It is that basic concern regarding some form of inequality that perhaps led to the disagreement between the justices. As Justice Long explains:

> Nevertheless, it cannot be denied that by using Mr. Steneken's full salary for alimony while 'pouring' a portion of it back into Esco to estimate the company's future earning capacity, thus ratcheting up its value, the court considers the same income stream twice. It is the majority's unrestrained approval of that circumstance that is the source of my disagreement.

While disagreeing with the ultimate holding of the majority, it is the subtlety in the application of that holding that bears greater scrutiny and perhaps illustrates the absence of severe disagreement amongst the justices. One portion of Justice Long's opinion helps illustrate the give and take amongst the justices as they deliberate cases. It also provides us guidance regarding the crucial fact to be taken from this opinion upon which the majority and dissent do not differ so much in terms of outcome as opposed to the method by which to achieve that just outcome. Thus, Justice Long, after rejecting the ironclad rule that the majority has established, suggests the following:

> To me, the answer is neither to allow the unfettered dual use of an single income stream nor to require the richer reconciliation adopted by the trial judge who felt compelled to use the same figure for both calculations. Rather, judges should be able to use the 'real' income for alimony and the 'normalized' income for the corporate valuation so long as the ultimate outcome recognizes that a single income source (the difference between the real and normalized income) played a part in both.

Thus, the dissent is led to the following proposed holding:

> Rather than a hard and fast rule, I would instead encourage courts to carefully analyze the facts in each case and to consider modulating either the corporate value or the alimony award to the extent that the same income was considered in both calculations.

Now just how different is that than the conclusion reached by the majority?

Although clearly the majority allows different income figures to be used for alimony and in the forensic analysis of the value of the business, ultimately the majority's end result is not that dissimilar from the dissent's. Justice Rivera-Soto explains that core outcome as follows:

> Recognizing that asset valuations involve elements of both art and science, the valuation of a closely held going concern perforce implicates what a knowledgeable buyer is willing to pay and requires that revenues and expenses be normalized. Separately, the alimony award must be made. Once the trial court is satisfied that both the alimony award 'assist[s] the supported spouse in achieving a lifestyle that is reasonably comparable to the one enjoyed while living with the supporting spouse during the marriage…and that the equitable distribution award 'affect[s] a fair and just division of marital assets…the final judicial inquiry is plainly put: whether the ultimate result, both in its whole as well as in its constitute parts is fair under the circumstances and congruent with the standards set forth at N.J.S.A. 2A:34-23 (alimony) and 23.1 (equitable distribution).

The bottom line is that the ultimate award of both alimony and equitable distribution taken as a whole must be fair and must take into account all of the statutory factors. Thus, it would seem unfair not to take into account in some fashion the fact that the income has been normalized for one purpose and not the other. Justice Long suggests "modulating either the corporate value or the alimony award;" *i.e.*, adjusting the amount of the asset to be distributed or the amount of alimony to be paid. However, just as reasonable and potentially available to the trial court is to factor in this one fact, not by adjusting the value of the asset but rather the percent to be distributed of that asset. Since we are an equitable distribution state, with a myriad of factors to be analyzed, the trial court under the precise facts of the case presented to it may adjust not the value, which is based on sound forensic accounting principles, but rather the percentage to be awarded given the income stream being utilized for both alimony and equitable distribution. The point is one of emphasis and adjustment rather than a clear-cut decisional difference between the majority and dissenting opinions.

As with *Mani*, where the majority and dissent ultimately differ less than the mere verbiage might suggest, here again, in *Steneken*, the justices differ less in terms of the ultimate outcome than the language

might suggest. While the majority clearly establishes a ruling that would allow for different incomes to be utilized for alimony and equitable distribution purposes, it certainly provides the construct that the ultimate outcome must be fair and equitable under all the factors. Similarly, the dissent comes to the exact same determination, albeit by a different route, through either modifying the corporate value or the alimony award. Thus, while the paths may differ in both the opinions, the ultimate objective is the same and can be utilized by practitioners effectively by analyzing all of the statutory factors.

The perhaps more crucial issue to be analyzed by our Court in the future is not whether in this particular fact pattern there is a double counting, but whether in *any* business in which personal services of one of the litigant provides the major component of the business value, there is a double counting. The level of the double counting may differ; the methodology may differ, but, in essence, the argument the Supreme Court may have to address in the future is, whether utilizing the same income stream in determining the appropriate amount of alimony and the fair distribution of marital assets is, in and of itself, a double counting. (when an income stream is being utilized both to provide the determining factor for alimony and to determine the value of a business), *Steneken* starts us on the road to the analysis, but that trip is far from completed. ■

ENDNOTES

1. 83 N.J. 70 (2005).
2. 183 N.J. 290 (2005).
3. As I previously devoted time in my editorial to the *Mani* opinion, I will devote time in this editorial to the *Steneken* opinion.

FROM THE EDITOR-IN CHIEF *EMERITUS*

Supreme Court Watch: Three Amazing Months

by Lee M. Hymerling

In the space of less than 90 days, between April 6, 2005, and June 30, 2005, the New Jersey Supreme Court released five important decisions that will substantially affect family law. That so many decisions were released in so short a period of time evidences the vibrancy of our practice, and the reality that family law is never static and will constantly evolve. It will not be the purpose of this column to critically analyze each of the opinions, but it is the purpose of this editorial to highlight and commend the Supreme Court for the attention it has paid to several of the most important issues that address the family part and family practice.

Significantly, in the five opinions, the Supreme Court did not always speak with one voice. In three of the decisions there were dissents demonstrating the complexities of some of the issues addressed and the reality that, in family law, every issue does not have a single answer. In our practice, the most vexing of issues rather than having a right answer, has a range of right answers, all of which fall within what we have come to know as judicial discretion.

In one matter focusing upon the role that marital fault should play in determining entitlement to alimony, a thoughtful dissent parted from conventional wisdom based upon the dissenter's careful examination of legislative history and legislative intent. Some might contend that the dissent was right on the law but not right on public policy concerns, while the majority stretched the law to accommodate those very policy concerns. In another matter, a dissent was prompted over where the line of fairness should be drawn in addressing the separate-yet-related standards that should guide the courts in determining alimony and effectuating equitable distribution.

It is also interesting that the opinions were not authored by a single justice but by several justices. While many at the bar might have felt that one particular justice was the most frequent spokesperson for the Court in family law matters, the recent rush of opinions has no fewer than three separate justices speaking for the Court's shifting majority. This development should please all of us, because it becomes evident that the whole Court is sensitive to the concerns of our practice and the importance of family law issues. Never let it now be said that our highest court lacks interest in the family part or in the work to which all of us have committed our careers.

In *Mani v. Mani*,[1] the Supreme Court finally answered the age old question of the extent to which marital fault in dissolution matters should be considered in determining alimony and counsel fees. Justice Virigina Long's opinion focused upon that portion of N.J.S.A. 2A:34-23(b) that gives courts discretion to "consider any other factors which the Court may deem relevant." Tracing backwards to early English law, and then scrolling forward through a long litany of modern New Jersey cases, Justice Long, writing for six of the justices, found that the factors contained in N.J.S.A. 2A:34-23(b) focused upon "…the economic status of the parties," while still recognizing that the 1970 Final Report of the Divorce Law Study Commission stated that, "fault, where so asserted as the grounds for relief will be a *proper consideration* for the judiciary in dealing with alimony and support."

Justice Long found it noteworthy that the statutory provision permitting consideration of fault-based proofs in determining alimony failed to specify how judges were to weigh proof of fault in determining alimony. The *Mani* opinion filled this void by adopting what it characterized as a principled approach to the relationship between alimony and fault.

It is evident that the Court concluded that fault's role in determining alimony should be narrowly confined, and that alimony awards should, in almost all cases, be based upon economics rather than blame. In being right on policy, but maybe wrong on legislative intent, the Court followed the pattern of how most of us have practiced and how most judges have judged—that alimony should not be regarded as compensation for marital wrongdoing. Undoubtedly, the Court sought to steer divorce actions away from the bitterness that all too frequently defines the divorce process. Economic practicalities should be the prime focus of divorce.

The narrow holding in *Mani* was that "to the extent that marital misconduct affects the economic *status quo* of the parties, it may be considered in the calculation of alimony.…Where marital fault has no residual economic consequences, it may not be considered in an alimony award." The Court expanded that general proposition to further include a "narrow band of cases" involving what the Court characterized as "egregious fault."

In *Mani,* the Court further advanced our case law by holding that, in dealing with counsel fees, although the good and bad faith of either party in pursing or defending an action was a proper consideration in determining fees, marital fault was not.

Justice Roberto Rivera-Soto, who authored two of the five recent decisions, was the lone dissenter in *Mani*. He held that trial courts should not be restricted in their consideration of alimony awards solely to the types of fault the majority found "abhorrent," and relied upon a plain reading of the statute. Justice Rivera-Soto could not ignore the words of the alimony statute as well as its legislative history. Although one could contend he was right on the law, he was not right on policy and, in *Mani*, policy won the day.

Steneken v. Steneken[2] obviously divided the Court. There, Justice Rivera-Soto, spoke for a divided four-justice majority. *Steneken* addressed the decades-old classic double dip counting issue of whether in setting awards of alimony and establishing equitable distribution in matters concerning closely held corporations, the trial court was required to use the same determination of what constituted income. Citing principles of fairness, Justice Rivera-Soto held that while determinations of alimony and equitable distribution were "clearly interrelated," their structural purposes were different. The Court held that "the goal of a proper alimony award is to assist the supported spouse in achieving a lifestyle that is reasonably comparable to the one enjoyed while living with the supporting spouse during the marriage." Current income and the "capacity to earn…by diligent attention to his [or her] business" were proper elements for consideration.

By contrast, in determining equitable distribution, valuation techniques require that adjustments are needed to normalize income and expenses. Justice Rivera-Soto continued:

> We find no inequity in the use of the individually fair results obtained due to the use of an asset valuation methodology normalizing salary in an on-going close corporation for equitable distribution purposes, and the use of actual salary received in the calculus of alimony.

Justice Long dissented, and was joined by Justices James Zazzali and Barry Albin. Citing out-of-state authority, Justice Long expressed the view that there could be situations in which the extent to which an asset may be looked to as a source of alimony should be influenced by the extent to which its value was distributed to the supported spouse as a part of equitable distribution. Justice Long decried the hard and fast rule she felt the majority had adopted, and encouraged courts in the future to analyze the facts in each case considering "modulating either the corporate value or the alimony award to the extent that the same income was considered in both calculations." With so slim a majority, it must be wondered how the Court might view a case in which the equities might highlight the unfairness of using different definitions of how to measure income in deciding alimony and equitable distribution.

In *Puder v. Buechel*,[3] Justice Zazzali addressed a malpractice action arising out of divorce litigation. The underlying facts of *Puder v. Buechel* were complicated. Initially, Mr. and Mrs. Buechel were able to negotiate a settlement, and despite having only engaged in limited discovery, advised the family part that their matter had been resolved. Subsequently, Mrs. Buechel changed her mind, discharged her attorney and retained alternate counsel. Following a motion to enforce the settlement, the trial court began to conduct a plenary hearing regarding whether the original settlement was binding. Approximately nine months later, while the hearing on that issue was still pending, Mrs. Buechel's former attorney commenced suit for unpaid legal fees and Mrs. Buechel counterclaimed, asserting legal malpractice. Months later, after six days of testimony, a new settlement was reached with Mrs. Buechel testifying before the family part that her new agreement was acceptable and had been entered into voluntarily. A statement was made on the record, however, that the agreement had been reached with Mrs. Buechel's understanding that her malpractice action against her former lawyer could proceed. Divorce was then granted.

Subsequently, the former attorney moved for summary judgment on the malpractice claim, asserting that Ms. Buechel had waived the right to sue by entering into the second settlement before the validity of the first settlement was determined. Summary judgment was granted. An appeal was taken and, in a reported decision, the Appellate Division reversed. Although the Supreme Court initially denied the attorney's motion for petition for certification, the Court reversed itself and permitted the matter to come before it.

On the merits, a majority of the Court reversed the Appellate Division and remanded the matter to the trial court for reinstatement of summary judgment in favor of the attorney. In large measure, the Supreme Court focused upon the policy of encouraging litigants to

settle their matters, specifically stating that in family cases, it was particularly important to foster settlement of litigation. The Supreme Court specifically citing an earlier authority that, "our courts have actively encouraged litigants to settle their disputes…."Advancing that public policy is imperative in the family courts, for matrimonial proceedings have increasingly overwhelmed the docket.

Citing *Davidson v. Davidson*,[4] the Supreme Court approvingly wrote:

> …As the Appellate Division has aptly stated: 'With more divorces being granted now than in history, and with filings on the rise, fair, reasonable, equitable and, to the extent possible, *conclusive settlements must be reached*, or the inexorable and inordinate passage of time from initiation of suit to final trial will be absolutely devastating…."

To reach its result, the Supreme Court dismissed Mrs. Buechel's argument that she believed that her rights against her former attorney had been preserved. The Supreme Court held that her knowing and voluntary acceptance of the second settlement that she stated was fair barred her from proceeding with the malpractice claim.

As in *Mani* and *Steneken*, there was a dissent. Justice Long joined by Justice Albin, reasoned that because Mrs. Buechel had stated unequivocally that she had settled the matter on condition that her settlement would not prejudice her malpractice suit, it was unfair to uphold the settlement while denying the right for the client to pursue her malpractice claim. Justice Long wrote, that the majority's opinion "… is simply not an outcome that I consider just." Maybe so, but we at the bar know how important it it is to respect settlements. We now know that the Supreme Court seems to agree.

The fourth of the five cases decided in those memorable three months was *Randazzo v. Randazzo*,[5] a matter in which the Court unanimously disapproved of *Grange v. Grange*,[6] which had held that absent consent, marital assets could not be sold and distributed prior to divorce. For years *Grange* had constricted what many felt was so critical in family law practice—the family part's ability to fashion equitable relief not only at the time of final hearing, but also earlier in the proceedings.

Grange had long been criticized. It was criticized in the 1981 final report of the Supreme Court Committee on Matrimonial Litigation, chaired with distinction by the late Justice Morris Pashman; distinguished in a series of later trial-level opinions; and again criticized in the 1999 final report of the Special Committee on Matrimonial Litigation. That committee recommended an amendment to Rule 5:3-5 that would permit the family part on good cause shown to direct the sale, mortgage or otherwise encumber or pledge of marital assets to the extent the court deems necessary to permit both parties to fund matrimonial litigation. In its administrative determinations adopting the special committee's recommendation, the Supreme Court had, in effect, disapproved of *Grange*.

Randazzo conclusively dealt with *Grange*:

> We conclude that, consistent with N.J.S.A. 2A:34-23 and Rule 5:3-5, the trial court may exercise its discretion to order the sale of marital assets in utilization of the proceeds in a manner as "the case shall render fit, reasonable and just."

The Court left to the discretion of the family part the varying circumstances that might justify the sale of marital assets and the utilization of their proceeds before final judgment. The Court explicitly disapproved of *Grange* "to the extent it stands for the proposition that absent consent, the trial court lacks authority to order the sale of a marital asset prior to the judgment of divorce."

Our section has long advocated according broad discretion to those who sit on the family part. *Randazzo* does just that.

The last of the five family cases decided by the Supreme Court was *Shah v. Shah*,[7] a domestic violence matter that dealt with whether a New Jersey court had jurisdiction to enter a temporary restraining order against a person who has no contact whatsoever with New Jersey, and further whether a final restraining order could be entered against such a person.

In a unanimous decision, the Court held that, because it was the purpose of the Prevention of Domestic Violence Act "to assure victims of domestic violence the maximum protection from abuse the law can provide," and because the Legislature directed that the act was to be liberally construed to achieve its salutatory purpose, the family part had jurisdiction to enter temporary orders when one of the jurisdictional requirements of the act was met. More creatively, the Court also held that a temporary restraining order issued by the family part could continue without end if not challenged by the party against whom the order was granted. Justice Rivera-Soto, writing for a unanimous Court, noted that the defendant could have come before the New Jersey courts or another court of jurisdiction had he been so inclined but chose not to do so. Thus, Justice Rivera-Soto concluded:

> When, as here, defendant is able by his voluntary inaction, to subvert the legal machinery designed to bring about the very closure he claims to seek, he cannot be heard to complain. Under those circumstances, the analysis must revert to the language of the Domestic Violence Act which states that, once issued, "a[n] order for emergency, ex parte relief…shall remain in effect until a judge of the

Family Part issues a further order. N.J.S.A. 2C:25-28(i).

That five separate family law-related Supreme Court decisions were rendered in so short a time was unusual. Each addressed important questions. Each advanced the state of the law. Each was explicitly designed to illuminate the issues that have concerned the family bench and bar for more than a generation.

That five cases were decided within such a short period of time is a testimony not only to the importance of the family part's work, but also an acknowledgment of the reality that it is in family law that the judicial system comes in closest contact with society at large.

Ponder for a moment the breadth of the five decisions. One clarified whether marital fault had or should be considered in alimony determinations. The answer was, not under ordinary circumstances. Another conclusively resolved what most of us had hoped—that *Grange* no longer burdens those who appear before the family part. Although touching upon a smaller percentage of society, *Steneken* will play a major role in answering the thorny questions of what type of interface now exists between alimony and equitable distribution. *Shah* defined the breadth of the family part's jurisdiction in entering TROs, while *Puder* focused upon the importance of settlements and how they might affect possible later malpractice claims.

It is significant that in three of the five matters, the Court did not speak with one voice. In two matters there were three dissenters. In another there was a lone dissenter. Family court questions are often difficult.

Our Supreme Court is to be commended for agreeing to hear and decide so many important family part issues. Yes, family court cases can be controversial. Many involve cerebral issues that test the bounds of equity. Many call for serious trial and appellate review. If there was ever any doubt that our Supreme Court is prepared to devote its time and energy to matters from the family part, the five decisions rendered in so short a period of time answers that question. The five decisions teach a lesson. When important issues exist that require determination at the highest level, seeking certification is a viable alternative. ■

ENDNOTES

1. 183 N.J. 70 (2005).
2. 183 N.J. 290 (2005).
3. 183 N.J. 428.
4. 194 N.J. Super. 547, 550 (App. Div. 1984).
5. 184 N.J. 101 (2005).
6. 60 N.J. Super. 153 (App. Div. 1978).
7. 184 N.J. 125 (2005).

Joint Legal Custody: What Does it Mean for Post-*Feldman* Parents

by T. Sandberg Durst

As family law attorneys, we have no greater obligation to our clients, and by extension their children, than to see to it that appropriate parenting time and custody arrangements are reached for the benefit of all concerned. While the marriage may be dissolved, parents are entitled to ongoing relationships with their children, and it is generally assumed that children benefit from ongoing relationships with their parents, as long as such a relationship is not detrimental to their best interests. Recent case law challenges that assumption. The definition of joint legal custody is undergoing a fundamental change that will impact how we advise our clients, how we draft our settlement agreements, and how we approach the issue of custody.

Looking at the opportunity that was made available by *Beck*, one must look at the subsequent case law to determine whether or not the right of a parent to joint legal custody has been slowly, steadily and deliberately restricted by the courts. Practitioners and litigants alike must only look at the recent decision of *Feldman v. Feldman* to realize that the promise of joint legal custody may likely go unfulfilled.

New Jersey law identifies two forms of custody, namely residential custody and legal custody. Residential custody involves a determination as to where and with which parent a child shall reside. A host of factors, including the educational needs of the children and the work responsibilities of the parents, guide a residential custody determination. In the majority of cases, practical realities dictate that there be one parent of primary residence. Consequently, the other parent is denied full access to their children, and arguably, a fuller relationship with them. In recognition of the crucial roles both parents play in the life of a child, and as an attempt to curb potential abuses by the residential custodian, New Jersey allows for joint legal custody that empowers both parents to participate in the decision-making process on fundamental issues regarding their children, or so it would seem.

Joint legal custody was first recognized as a legal status in the land law case of *Beck v. Beck.*[1] While this case may have been perceived as a victory for the non-custodial parent, a close reading of the *Beck* opinion reveals that the court was of the belief that joint legal custody would be appropriate in the minority of cases. This warning was not given the credit it perhaps deserves, and the tide shifted dramatically from strict application of the tender years doctrine to a full-fledged belief that joint legal custody should be the prevailing status for divorced families.

Looking at the opportunity that was made available by *Beck*, one must look at the subsequent case law to determine whether or not the right of a parent to joint legal custody has been slowly, steadily and deliberately restricted by the courts. Practitioners and litigants alike must only look at the recent decision of *Feldman v. Feldman*[2] to realize that the promise of joint legal custody may likely go unfulfilled.

Joint legal custody grew from humble beginnings, when *divided custody*, or sole custody, was awarded as a matter of course. This doctrine resolved custody disputes with an award of sole custody to the victorious parent, often denying decent parents and their children the natural right to contact with one another. Divided custody also levied an undue burden upon the custodial parent, who was denied the ability to share the vast responsibility of raising children with their former spouse.

Fortunately, the trend shifted by the 1930s, when several appellate courts condemned the practice of strictly divided custody among two capable parents.[3]

In New Jersey, Justice James Minturn vocalized the best interests concept in 1925:

> Manifestly, the touchstone of our jurisprudence in matters dealing with the custody and control of infants, is the welfare and happiness of the infant, and not the filial affections naturally arising from parental or family relationship *Lippincott v. Lippincott* .[4]

As our jurisprudence grew to embrace the concept of valuing the best interests of children above all

else, the desire for flexible custody arrangements grew. The contributions of each parent were recognized. If the marriage could not be salvaged, perhaps the family unit could be preserved.

By 1953, the superior court conceptualized the belief that it had the inherent power to adjudicate custody disputes and award custody of minor children as it deemed appropriate. *Clemens v. Clemens*[5] presented a wife's suit for separate maintenance, and the husband's counterclaim for custody of the minor child born of the marriage. The court of chancery awarded custody to the wife with "such reasonable visitation and partial custody in the father as might be agreed to by the parties." The Appellate Division reversed on the custody issue, finding that the evidence in the record supported an award of custody to the husband.

The appellate court affirmed that the superior court has the authority under general equity powers to rule upon custody matters, and that the "inherent jurisdiction exists" without dependence upon the statutory grants[6] and *Hachez v. Hachez.*[7]

Although the court did not find itself confounded by statutory authority, it nevertheless cited N.J.S. 2A:34-23 in support of its authority to adjudicate "the care, custody, education and maintenance of the children or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just."[8] Ultimately, the *Clemens* court utilized its general equity and statutory powers to reverse the court of chancery in favor of a custody award to the husband.

The concept of joint custody was formally entertained in 1977 in the landmark case of *Mayer v. Mayer*.[9] In *Mayer*, the parties were divorced with custody being awarded to the wife. Thereafter, the court held a three-day trial regarding, *inter alia*, post-judgment custody issues. The wife wished to relocate from New Jersey to Pittsburgh, PA, to be closer to her parents. However, as the court noted, if the wife were awarded sole custody under those circumstances, visitation with the husband would be difficult and expensive.[10]

The court's opinion begins with the crucial question of whether it has the authority to order joint custody, and if it does, what the best means of implementation would be. It found such authority in the New Jersey Constitution, Article VI, which provides that the New Jersey Superior Court has "original general jurisdiction throughout the state in all causes." Further, like the *Clemens* court, it relied upon N.J.S.A. 2A:34-23 as cited above. Therefore, under appropriate circumstances, the court held that it would be within its right to award "joint," "divided," or "split" custody, where such an award would be "fit, reasonable and just."[11]

The *Mayer c*ourt continued its analysis by promulgating the merits of a best interests analysis, as affected by the rights of parents. The parties in *Mayer* were awarded joint custody based upon the application of two bedrock principles. The first is that the primary consideration in an award of joint custody is the welfare and best interest of the child.[12] The second is that the decision must depend upon the particular facts of the case presented.[13]

In response to the particular facts of the *Mayer* case, the court evaluated the parents' desire, the proposed distance between residences, the risk of a constantly changing environment, and the children's wishes. In support of its award for joint custody, the court held that the children were:

> …entitled to know, love and respect their father just as much as they know, love and respect their mother. No order of sole custody in the mother, even with unlimited visitation by the father, could possibly give these children the contact with their father that they need and have a right to.[14]

However, the bifurcation of joint custody into legal custody and residential custody was not complete until 1981. In *Beck v. Beck*, the New Jersey Supreme Court responded to the negative effects of sole custody awards including "bitter custody contests and post-decree tension" by introducing the concept of joint custody as we know it today.[15] The court held that:

> Properly analyzed, joint custody is comprised of two elements—legal and physical custody. Under a joint custody arrangement legal custody—the legal authority and responsibility for making major decisions regarding the child's welfare is shared at all times by both parents. Physical custody, the logistical arrangement whereby the parents share the companionship of the child and are responsible for minor day-to-day decisions, may be alternated in accordance with the needs of the parties and the children.

While the court felt it prudent to award joint custody in the matter, (as distinguished from alternating custody or split custody), it held that such an arrangement would only be acceptable in a limited class of cases. It also held that if joint custody would be feasible except for practical considerations such as geographical proximity, finances, and scheduling conflicts, the court "should consider awarding legal custody to both parents with physical custody to only one and liberal visitation rights to another." This award would be most appropriate because it would preserve "the decision-making role of both parents and should approximate, to the extent practicable, the shared companionship of the child and non-custodial parent…"[16]

This history is illustrative because it demonstrates that the concept of joint legal custody has evolved through the years. *Feldman*, therefore, is nothing but the latest pronouncement on an evolving standard. So, today's matrimonial

litigants are faced with the *Feldman* standard, which vests ultimate authority with the parent of primary residence when the parties share joint legal custody. While the issue in dispute in the *Feldman* matter was the religious training and education of the parties' child, and although the court couched its decision in response to many practical considerations raised by the mother, clearly absent from the court's decision is a statement as to the limits it may place upon the residential custodian exercising unilateral authority. Parents now stand on the crest of the proverbial slippery slope with the roles and responsibilities of parents sharing joint legal custody ill-defined by the courts.

Defining those responsibilities falls upon the shoulders of forward-thinking counsel. Forethought and careful drafting can minimize what will now be known as *Feldman* disputes. Although it is nearly impossible to anticipate all of the circumstances and developments that will affect children and families subsequent to a divorce, it would be wise to craft *Feldman* language. If parties truly want to share equally in the decision making for their children, that right should be clearly detailed and explained in a property settlement agreement. Likewise, if there are issues where one parent would reasonably and willingly defer to the other, those exceptions should be noted as well. ■

ENDNOTES

1. 86 N.J. 480, 432(d)63 (1981).
2. 378 N.J. Super. 83 (App. Div. 2005).
3. 92 A.L.R.2d 695 (1963).
4. 97 N.J. Eq. 517, 519 (E. & A. 1925).
5. 20 N.J. Super. 383, 386 (App. Div. 1952).
6. *Id.* at 389-390, *citing In re: Erving*, 109 N.J. Eq. 294, 297 (Ch. 1931).
7. 124 N.J. Eq. 442, 446 (E. & A. 1938).
8. *Id.* at 390.
9. 150 N.J. Super. 556, 561 (Ch. Div. 1977).
10. *Id.* at 568.
11. *Id.*
12. *Id.* at 565, *citing Bergerac v. Maloney*, 478 S.W.2d 111 (Tex. Civ. App. 1972).
13. *Id.*
14. *Id.* at 568.
15. 86 N.J. 480, 486 (1981).
16. *Id.* at 500.

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Premarital Asset Immunity and in Contemplation of Marriage Asset Distribution

by W. S. Gerald Skey and Supti Bhattacharya

New Jersey enacted the Divorce Reform Act[1] in 1971. Pursuant to the statute, assets acquired during a marriage are subject to equitable distribution. Gifts, devises and bequests are exempt from equitable distribution pursuant to the 1980 amendment to the statute. Assets acquired by either party prior to marriage are exempt from equitable distribution. We know this from the language of the statute without the need for independent interpretation; however, through the years our courts have struggled to define what is meant by the phrase, "legally and beneficially acquired by them or either of them during the marriage."

The practitioner must not only explain the underlying statute to the client, but also try to make sense of the case law that interprets it. The job often proves virtually impossible, due to conflicting holdings that have come down from our courts over the years. One of the never-ending frustrations of matrimonial practice remains the inability to provide anything more than broad-brush guidance for clients in this regard.

Division of premarital real estate is difficult to explain to clients, as the courts have not clearly defined the law for practitioners. Generally, when a premarital asset is brought to a marriage, the statute protects the asset from distribution, as discussed in *Painter v. Painter*[2] in 1974. In *Painter*, the Court defined a marriage as beginning with the wedding and concluding with the filing of a complaint for divorce. Under that definition, assets acquired during this specific time period are subject to equitable distribution.[3] With the 1980 amendment, the Legislature broadened this definition by exempting from distribution those assets acquired through inheritance or gift.[4] Interspousal gifts, however, remain subject to distribution.[5]

Cases subsequent to *Painter* have followed the statute and concluded that premarital assets of various types are protected from equitable distribution upon divorce.[6]

Our courts have refined the principle of premarital asset immunity by dividing assets as active and passive.[7] Active assets derive their appreciation through the efforts of one or both of the parties, while passive assets derive their appreciation through market forces beyond the control of either party.[8] An exempt-passive asset is not subject to distribution either as to the original value of the asset or the appreciated value.[9]

Premarital assets themselves are immune from distribution; however, the appreciated value, if any, to which the non-owner spouse contributes, may be subject to equitable distribution.[10]

In *Mol v. Mol*,[11] the Court found that a non-owner spouse could share in the appreciated value of a marital home owned prior to the marriage to the extent that she could prove her contributions enhanced the asset's value.[12] Similarly, in *Griffith v. Griffith*,[13] the Court ruled that the value of a non-owner spouse's efforts to pay down a mortgage on a marital home owned by the other spouse prior to marriage was distributable upon divorce.

A cursory analysis of the law might lead the practitioner to think that a party owning a residence prior to marriage in his or her name alone would not have to share the original or appreciated value of that residence with the non-titled spouse, because it is a passive-immune asset. Even though there exists a substantial body of law supporting premarital asset immunity, distribution of a marital residence, whether purchased prior to marriage or during marriage with assets acquired prior to marriage, continues to present difficulties to the practitioner.

Case law has created a new breed of premarital asset that expands the statutory definition, namely a home purchased "in contemplation of marriage." For instance, if a party uses funds owned prior to marriage to purchase a residence in his or her name that is eventually used as the marital home, the Court may deem the purchase to have been made "in contemplation of marriage," and the statutorily exempt passive asset is transformed into a marital asset fully distributable upon divorce.[14]

Almost two decades ago, this issue was addressed by William J. Thompson in his article titled, "Premarital Assets Revisited: The Asset

Acquired 'In Contemplation of Marriage'."[15] In the 18 years since that article, numerous decisions have come down from our courts using the in contemplation of marriage approach to justify distributing a marital home that was one spouse's premarital asset. The authors find no explanation for this interpretation of the statute or how it can override unequivocal language that precludes such distribution. As a result, practitioners are left with no ability to counsel clients when it comes to the statutory protection of this type of premarital asset.

Weiss v. Weiss, the most oft cited in contemplation of marriage case, concerned a choice of what date should constitute the beginning of a marriage to determine which assets are subject to equitable distribution.[16] The Court held that the marital home in that case was subject to distribution. It found that it was a "major" marital asset purchased within a timeframe that fell close enough to the wedding, and it was purchased in support of the "shared enterprise" of the marriage, even though it was bought beforehand.[17] The Court transformed an otherwise exempt premarital asset into a marital asset subject to equitable distribution. The Court made no attempt to reconcile its ruling with the statutory immunity of premarital assets.

The non-owner spouse in *Weiss* participated in the decision to buy the residence, and she also made improvements to the house. The Court found that the parties intended the house to be the marital home, even though it was bought and titled in the owner spouse's name before and throughout the marriage.[18] These facts, accompanied by the proximity of the purchase date to the wedding, apparently created an asset purchased in contemplation of marriage, which thereby became distributable.[19] The time of the purchase became the controlling issue, as the Court gave no consideration to the exempt source of funds.

Similarly, in *Winer v. Winer*, the husband purchased a condominium in Atlanta, GA, with funds he inherited prior to the parties' engagement, and titled the property in his name.[20] Subsequent to the marriage, the parties lived in the condominium for approximately one year. Thereafter, the husband rented out the town home and title remained in his name. The husband never intended the home to be a marital residence, and title remained in his name alone following and throughout the marriage.[21] The trial judge concluded that the husband purchased the town home specifically in contemplation of marriage, and distributed the asset because the husband testified that when purchasing the property he considered that he and his then girlfriend could live there after the marriage.[22] The fact that the husband purchased the home more than a year before the engagement, that the parties did not use the property as their marital residence for more than a year of the marriage, and that he kept the home titled in his own name, apparently meant nothing to the Court. Despite that fact, and in disregard of the statute, the Court distributed the property.

Continuing this theme, the Court in *Raspa v. Raspa*,[23] found that money used to purchase a marital home was not immune from distribution despite its premarital source, because the wife contributed to the maintenance of the home.[24] This case is all the more confounding, since the Court noted that the husband had consulted an attorney before purchasing the home to ensure that the down payment was protected from distribution.[25] These decisions limit a practitioner's ability to advise clients about protecting premarital assets, and the only conclusive answer an attorney can provide becomes: "It depends on the judge."

The inconsistency of in contemplation of marriage case law contradicts not only N.J.S.A. 2A:34-23(h), but also other case law of this state. For example, the Court in *Mangone v. Mangone*[26] specifically stated that assets purchased during premarital cohabitation are not subject to equitable distribution, since such division is akin to contractual relief available in the palimony context, and therefore, improper in the matrimonial context.[27]

As the Court further explained:

> [t]he statute is clear and its application since adoption leaves no doubt that property separately owned at the time of the marriage remains the property of the then owner and is not subject to equitable distribution. (citations omitted). Equitable distribution is a remedy that is solely the creature of the legislature. It is created and defined by statute. The interpretation that plaintiff would attach to the statute goes beyond the plain meaning of the statute's language. This Court will not and cannot disturb the law's language and the growing line of cases that have defined equitable distribution beginning with *Painter v. Painter, supra*, by adding to distributive property that which was acquired prior to marriage when the parties lived together.[28]

Similarly, in *Wadja v. Wadja*,[29] the Court would not distribute premarital pension contributions, finding that to do otherwise would disregard the statute's restrictions on equitable distribution.[30] Furthermore, the Court stated that,

> [e]quitable distribution is not a common law remedy; it owes its existence to the legislature....A court moves beyond its proper sphere by creating a remedy of equitable distribution under some other name. If it is to be decided that the functional equivalent of marriage gives rise to a right of equitable distribution, that decision must come not from the courts but the legislature. For a court to fashion such relief would be an unwarranted judicial foray into an area where the legislature has extensively and decisively determined the public policy of this state.[31]

Cases in line with *Mangone* directly conflict with *Weiss* and other in contemplation of marriage cases, but logically follow the statute. *Weiss*, and cases like it, impose a judicial assumption that the date of purchase imposes an intent to benefit the non-titled spouse. Such thinking disregards the statutory limitations and the exempt nature of the funds used for the purchase. In fact, it creates an independent equitable right that lies neither in the premarital nor in the matrimonial world.

To date, the only case to recognize this contradiction is *Rolle v. Rolle*,[32] which specifically rejected the in contemplation of marriage line of cases and held that premarital assets are not subject to equitable distribution based on N.J.S.A. 2A:34-32. The *Rolle* Court recognized that there are,

> significant legal and practical problems with this approach. The "in contemplation of marriage" exception provides little guidance for a court or practitioner....[T]here is a significant difference between the exceptions created in *Painter* and in *Smith* from these "in contemplation of marriage" decisions. In the former, while dates other than the termination date of the marriage were utilized for equitable distribution purposes, nevertheless these dates were still "during" and "within" the marriage. The "in contemplation of marriage" case law exception would have a court expand the actual time period within which the marriage existed. Such an expansion would be to an unspecifiable and undefined date....There is no logical, equitable or legal reason for our courts to sanction different treatment of assets acquired during cohabitation by the creation of a judicial exception to a statute the intent of which leaves no doubt.[33]

The Court further noted that if equity were the issue, then litigants would still retain an adequate remedy if equitable claims to premarital assets based on contribution existed, since such claims could be recovered under contract law.[34]

The statute clearly defines what equitable interests in a marital relationship are protected, and it is the Court's role to interpret that law, not supercede it by interposing general contract law as the rule for statutory equitable distribution of marital assets. Claiming equity as the basis for disregarding statutory law undermines the constitutional relationship between the legislative and judicial branches of government.[35] The arguments in the *Weiss* line of cases contradict clearly defined, controlling statutory law and, unless and until the Legislature alters the statute to carve out an in contemplation of marriage exception to the premarital asset exemption, these cases remain inapposite to the law. Barring such a statutory change, the two diametrically opposed interpretations of premarital assets cannot rationally coexist.

Our courts, rather than attempting to wrestle with this seemingly contradictory result, have resorted to such examples as cleaning or other maintenance tasks to create an equitable interest in the premarital asset for the non-titled spouse.[36] As discussed previously, however, the Appellate Division ruled in *Mol, supra*, that such efforts should be credited, if anywhere, as limited to asset appreciation. Rulings such as *Raspa* disregard the higher Court's rulings.[37] The courts have also disregarded the rule of mortgage pay down as outlined in *Griffith, supra*, without explanation, instead using such contribution to create an equitable interest in the entire value of a premarital asset.[38]

None of these cases rationalize the distinctions, and they create parallel tracks with no common ground. In reality, it is apparent that the courts have carved out a specific exception to the *Painter* analysis when the asset in question is a residence. The difficulty with doing so is that a residence, in the main, is a passive asset regardless of emotional connection, and should be subject only to claims of active contribution to enhanced value during coverture.[39]

If a party owns 1,000 shares of IBM and exchanges them for GM shares, no one, presumably, would ever claim that the non-titled spouse has an equitable interest in either the underlying or the appreciated value. Exempt and passive assets do not lose their exempt status if the titled party retains title subsequent to marriage. In order to circumvent this principle, our case law now provides that a marriage can be made to take place prior to a ceremony, and a property purchase made in contemplation of that ceremony will not only satisfy the statutory requirement that the parties acquired the asset "during the marriage," but will also serve to transform otherwise exempt assets into distributable assets. In considering this approach, the authors are reminded of the AFLAC duck's expression after listening to Yogi Berra.

The underlying statute charges our courts with the obligation of equitably distributing assets acquired by the parties during a marriage in which either party has acquired a legal or equitable interest. As to those cases that focus on property acquired in contemplation of marriage, there exists a line of cases that select facts to support the conclusion that the property was purchased in contemplation of marriage, while the real question should be whether the non-titled spouse acquired an interest, as that term is construed within the statutory framework. In order to understand the Court's logic in in contemplation of marriage cases, one has to accept the principle that it is possible to acquire a legally cognizable interest through osmosis, as there is no substantive analysis provided that would bring the acquired interest within the statutory framework.

One of the persistent issues presented in all of these cases is whether the non-titled spouse changed the inherently passive

nature of real estate into an "active" asset. Stated in a slightly different way, if a non-titled party can demonstrate that the asset in question appreciated at a higher rate than would have been the case without his or her involvement, that party should be entitled to share in such accelerated appreciation. Absent such involvement, the non-titled spouse would share only in the debt reduction of a mortgage, assuming the asset was encumbered by a mortgage loan.[40]

If it is possible to transform an otherwise passive asset into an active asset, the next issue has to be the degree of proof required to demonstrate how the effort changed the value of the asset, and the amount of such accelerated appreciation. In *Coney v. Coney*,[41] the Chancery Division addressed the issue by dividing property into three categories: non-marital property, cohabitation property, and pre-marital property. The distinction between non-marital property and pre-marital property is that with the latter there is some involvement by the non-titled spouse that generates an equitable interest that is subject to distribution.[42] Precisely what level of involvement is sufficient to transform a non-marital asset into a pre-marital asset is case-sensitive and has no controlling principles.[43]

Perhaps the answer lies in the unique nature of a residence. Perhaps a residence has such a central place in our social conscience that denying a spouse an equitable interest becomes almost un-American. Unfortunately, the statute makes no such distinctions, although our case law seems not to worry itself about such issues.

Our courts have avoided the portion of the statute that limits equitable distribution to assets acquired during the marriage. Denying that a marriage begins with the wedding, as traditionally understood under the law and in our society, our courts have increased the size of the fishing net without considering the overall impact on parties.

In essence, the Court's inconsistent rulings in these in contemplation of marriage cases abrogate the statute, and do wholesale violence to the cited portions of *Painter* and its progeny, disregarding our Legislature's mandate that assets acquired only during the marriage be distributed.

There exists another line of cases where title to a residence is in joint names but the funds used to purchase the residence come from one party exclusively. Almost without exception, our courts have made short shrift of claims to exempt such residences from distribution by holding that one party had made a gift to the other party when the deed was placed in joint names.[44] Such a finding is perfectly consistent with the apparent intent of the parties, as the parties themselves chose to place title in joint names. If courts can understand that adult litigants make such decisions and should accept the consequences of their actions, one can only wonder why our courts refuse to recognize that the failure to place an asset in joint names is just as much of a conscious decision.

There never was any gift—implied or otherwise—with assets supposedly purchased in contemplation of marriage, as evidenced by the fact that title is kept in the owner-spouse's name alone. Our courts have resorted to another theme, therefore, that finds an implied contract through a purchase in contemplation of marriage regardless of the origin of the cash used to purchase the asset or the title to the property. In a number of cases, the implied contract notion is supported by nothing more than testimony or subjective evidence that the parties together selected the residence. This approach contradicts the Court's other rulings, such as *Mangone*, which specifically preclude what are, in essence, palimony claims in addressing equitable distribution at divorce.

Nowhere in our case law is there even a paragraph dealing with the presumed intent of the parties in not conveying the property to joint names. Consider the outcome of a case where the parties had spent time looking for a residence with the intention of purchasing but then decided not to purchase. Perhaps the reasoning was that these hypothetical parties wanted to save their money and live in smaller accommodations until they had more income or until a child arrived. Under this hypothetical fact pattern, the money originally earmarked for the purchase of a residence would remain in the account of the moneyed spouse and would be exempt from distribution. If these exempt funds were used to purchase real estate, title remaining in sole name; however, such real estate becomes distributable, but, apparently, only if such real estate is a residence.

A related fact pattern exists in cases where a party owns a residence prior to a marriage and his or her partner then moves into the residence. Eventually, and after marriage, the parties, or to be more precise, the titled party, sells the existing residence and purchases another residence with the sale proceeds from the initial residence. Problems arise when the titled party retains sole ownership of the subsequently purchased property. Applying the same statutory framework, and assuming that real estate remains a passive asset, the resulting picture upon divorce should be that of the titled party receiving 100 percent of the value of the asset and its appreciation, with the parties sharing in the reduction of the principal owed on the mortgage.

Such holdings would be consistent with the statutory scheme; however, depending on the length of the marriage and other factual considerations, such an approach could produce what many courts would perceive to be inequitable results, and once again an otherwise exempt asset becomes distributable.

As matters now stand, there exist diametrically opposed applications

of the law to be resolved on nothing more than the inclinations of the trial judge. Perhaps there is something unique and historically different about a residence, and perhaps a non-titled spouse should have an interest in a residence, as opposed to some other passive asset, regardless of whose name is on the deed and regardless of the origins of the purchase funds. The problem is that what one person thinks should be the case becomes irrelevant when the Legislature and the Supreme Court have articulated principles that yield contrary results. ■

ENDNOTES

1. N.J.S.A. 2A:34-23 *et seq*.
2. 65 N.J. 196.
3. *Painter, supra*, at 217.
4. *See* N.J.S.A. 2A:34-23h; *Dotsko v. Dotsko*, 244 N.J. Super. 668, 676-677 (App. Div. 1990) (money gifted to one spouse and the appreciated value thereof, are not subject to equitable distribution); *Wadlow v. Wadlow*, 200 N.J. Super. 372, 380 (App. Div. 1985) (premarital funds consisting of gifts and inheritances used for the downpayment of marital home were immune from distribution because of nature of their source).
5. *See Pascale v. Pascale*, 274 N.J. Super. 429, 434-435 (App. Div. 1994) (finding that husband's liquidating and applying proceeds of premarital stock to down payment of marital home, then titling home in joint name, subjected value of stock to equitable distribution).
6. *See, e.g., Wadlow, supra*, (savings account and security investment account), *Scavone v. Scavone*, 230 N.J. Super. 282 (Ch. Div. 1988), *aff.*, 243 N.J. Super. 134 (App. Div. 1990) (seat on New York Stock Exchange).
7. *Scavone, supra*, at 139.
8. *Id.*; *Valentino v. Valentino*, 309 N.J. Super. 334, 338 (App. Div. 1998).
9. *Painter*, 214, fn. 4; *Sculler v. Sculler*, 328 N.J. Super. 374 (Ch. Div. 2001) (noting public policy of balancing personal property rights with joint enterprise of marriage).
10. *See Painter*, p. 214, fn. 4; *Valentino, supra*, (increase in value of mini-strip mall was distributable because the value of the time the wife contributed to the marriage allowed the husband to work); cf., *Wadlow, supra*, at 381-382 (no distribution of premarital assets where non-owner spouse showed only minimal efforts to increase value).
11. 147 N.J. Super. 5 (App. Div. 1977).
12. *See Scherzer v. Scherzer*, 136 N.J. Super. 396 (App. Div. 1975) (matter remanded to allow non-owner spouse to demonstrate value of her contributions to increased value of husband's premarital interest in close corporation).
13. 185 N.J. Super. 382 (Law Div. 1982).
14. *See, e.g., Weiss v. Weiss*, 226 N.J. Super. 281 (App. Div.), *certif. denied*, 114 N.J. 287 (1988); *Winer v. Winer*, 241 N.J. Super. 510 (App. Div. 1990).
15. 6 *NJFL* 3 (1986).
16. *Weiss, supra*, at 286.
17. *Id.*, at 287.
18. *Id.*, at 288.
19. *Id.*, at 287.
20. *Winer, supra*, at 513.
21. *Id.* at 526-527.
22. *Id.* at 527.
23. 207 N.J. Super. 371, 385 (Ch. Div. 1985).
24. *Id.*, at 385.
25. *Raspa* at 384.
26. 02 N.J. Super. 505 (Ch. Div. 1985).
27. *Mangone, supra*, at 507-508.
28. *Mangone* at 508 (*citing Kozlowski v. Kozlowski*, 80 N.J. 378 (1979); *Crowe v. DeGioia*, 90 N.J. 126 (1982)); *see Berrie v. Berrie*, 252 N.J. Super. 635, 644-645 (App. Div. 1991) (stating that contractual or equitable rights acquired prior to marriage terminate upon marriage unless specifically reserved or agreed upon by parties).
29. 239 N.J. Super. 248 (Ch. Div. 1989).
30. *Wadja, supra*, at 256.
31. *Wajda, supra*, at 256-257.
32. 219 N.J. Super. 528, 534-535 (Ch. Div. 1987).
33. *Rolle, supra*, at 534-535.
34. *Rolle, supra*, at 535.
35. *See, e.g., Raspa, supra*, at 385 (stating that court would disregard what the statute proscribed in the name of equity).
36. *See Raspa, supra*, at 385; cf. *Valentino, supra*, at 339 (finding that cleaning and doing errands were minimal contributions and insufficient alone to create non-spousal interest in immune asset or related appreciated value).
37. *Raspa* at 385 (stating that wife's share in marital home resulted from her contribution to maintenance expenses).
38. *Id.* (stating that non-owner wife's contributions to mortgage pay down created interest in marital home premaritally owned and titled to the other spouse).
39. *See Scavone, supra; Valentino, supra*.
40. *See Griffith, supra*, at 385.
41. 207 N.J. Super. 63 (Ch. Div. 1985).
42. *Id.* at 72-74.
43. *Id.*
44. *See Perkins v. Perkins*, 159 N.J. Super. 243, 245-246 (App. Div. 1978).

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Understanding the Tax Implications of Unallocated Support

by Mark Biel

It's 2005, and you appear in court for the supported spouse in a large *pendente lite* application. The parties have two children. The court awards unallocated support of $10,000 per month for the benefit of the supported spouse and the children.

During the three ensuing years while the case is litigated, the parties file separate returns. The supporting spouse (whom we will refer to as the husband) claims all payments as alimony on his returns. The wife does not, and in 2010 an audit ensues. The Internal Revenue Service asserts that the wife had taxable alimony income of $360,000 over three years. The tax bite is huge. The parties have been divorced, and as the wife attempts to move forward with her life she is hit with this financial bombshell.

What advice did you give her initially? Did you give her any advice? Could you have provided protection for your client? Clearly, you could have provided such protection and avoided severe and unanticipated economic consequences. As a family law attorney it is critically important that you understand the tax implications of a *pendente lite* order in the light of recent case law, and that you be prepared to address those implications.

In the light of the recent Third Circuit Court of Appeals decision of *Kean v. Commissioner of Internal Revenue*, it is now clear that all unallocated *pendente lite* support payments are considered alimony, taxable to the payee, rather than child support or part of a property settlement, for purposes of income tax treatment.[1] This is so irrespective of what the parenting arrangements were during the pendency of the *pendente lite* order.

PRIOR CASE LAW

In 1999, in a case emanating from a New Jersey family court, the tax court addressed the issue in *Gonzales v. Commissioner of Internal Revenue*.[2] In that case, the family court entered an order for *pendente lite* support requiring Dr. Gonzales to pay his wife $7,500 per month, unallocated, for the support of his wife and the four children. Mrs. Gonzales was awarded primary residential custody of the children and from the $7,500 a month was directed to pay all family expenses, including the mortgage, children's school expenses, unreimbursed medical expenses and her own schooling. The temporary order failed to indicate how the payments would be treated for tax purposes, *i.e.*, whether the payments would terminate at the petitioner's death or what portion thereof represented child support. After two and one-half years of litigation, the case settled through the execution of a property settlement agreement. In the interim, the parties filed separate returns and Mrs. Gonzales only reported a portion of the unallocated support as alimony. A deficiency notice from the IRS followed, and tax litigation ensued.

Under IRC Sections 61, 71 and 215, a payment is alimony, included in a recipient spouse's gross income when:

1. The payment is made in cash;
2. The payment is received by (or on behalf of) the spouse under a divorce or separation agreement;
3. The instrument does not designate the payment as non-alimony;
4. The spouses reside in separate households;
5. The spouses do not file a joint return; and
6. The payor's liability does not continue for any period after the spouse's death.[3]

In *Gonzales*, the parties stipulated that the disputed payments met the first five criteria enumerated above, and accordingly the analysis centered on the last requirement, *i.e.,* whether the obligation would have terminated upon the death of the payee. The tax court opined that whether such an obligation exists is to first be determined by the terms of the applicable instrument or, if the instrument is silent on the issue, by existing state law. In *Gonzales,* the temporary order did not indicate whether the support payments would cease at the petitioner's death, and accordingly the court turned to New Jersey law to ascertain whether it would imply a post-death legal obligation.

In analyzing New Jersey law, the tax court reasoned that while an obligation to pay alimony ends at the recipient's death, an obligation to pay child support survives the death of either spouse.[4]

The tax court then posed the question of whether unallocated support orders are modifiable, and concluded under New Jersey case

law they are.[5] The court accordingly reasoned that in the event Mrs. Gonzales died during the term of the *pendente lite* order, Dr. Gonzales, as the non-custodial parent, could have remained liable to pay some family support after Mrs. Gonzales' hypothetical death, albeit perhaps in some diminished amount.

While not specifically stated in *Gonzales,* the holding was essentially based upon the fact that the payor spouse was a non-custodial parent. Accordingly, since under N.J.S.A. 9:2-5 custody does not automatically revert to the non-custodial parent when the custodial parent dies, the court's jurisdiction might have theoretically continued with respect to modification of the *pendente lite* order and providing continuing family support. Accordingly, the court found New Jersey law would not necessarily have relieved Dr. Gonzalez of his obligation to pay family support had his wife died before the divorce judgment. Accordingly the IRC requirement that payments automatically terminate upon death was not met, and therefore the portion of the unallocated support in dispute was not considered alimony.

Interestingly, in yet another New Jersey case, *Peterson v. Commissioner of Internal Revenue*, the tax court addressed the issue again four years later.[6] In that case a *pendente lite* order was entered, directing the husband to pay unallocated support in the amount of $325 per week for the benefit of his wife and two minor children. In the same order, the court directed that the parties would jointly share legal custody of the children with residential custody of one of the children vesting with the husband and residential custody of the other child vesting with the wife. The husband filed tax returns claiming the unallocated support as alimony and a notice of deficiency followed, disallowing the alimony deduction. The husband contended that the unallocated support payments pursuant to the *pendente lite* order constituted alimony payments. Relying on *Gonzales*, the IRS disagreed.

In *Peterson*, the tax court reached a completely different result from *Gonzales*. Relying on the tax court decision of *Kean v. Commissioner*, discussed *infra,* the court reasoned that absent unusual circumstances, in the event of the wife's death during the pendency of the divorce proceeding, custody would have reverted to the husband without the need for a New Jersey court to order him to continue to make unallocated support payments. Accordingly, court-ordered support payments would have terminated upon the death of the wife, thus the classifying of the unallocated payments as alimony was appropriate.

By the time *Peterson* was decided, the United States Tax Court had already revisited the issue in *Kean v. Commissioner of Internal Revenue Service*.[7] This case also emanated from the New Jersey Family Court. Litigation ensued in 1991, and continued for nearly six years when a final judgment of divorce was entered in 1997. Multiple *pendente lite* orders were entered during the litigation period, and those payments in dispute were made pursuant to orders that did not specifically allocate a portion of the amount as either alimony or child support, but rather required the money to be used to maintain the wife, the children and the household. None of the orders issued indicated whether the disputed payments would terminate at the wife's death.

Once again, the tax court decided the order should be interpreted under New Jersey law, and concluded that generally the obligation to pay alimony ends at the recipient's death, but the obligation to pay child support survives the death of either party.[8] In this case, Mrs. Kean relied on *Gonzales v. Commissioner,* in which the tax court held that New Jersey law would not necessarily have relieved her husband of his obligation to pay family support had she died before the entry of the final judgment. However, in *Kean* the parties shared joint custody of the children, and accordingly the tax court opined that since Mr. Kean was a joint custodial parent N.J.S.A. 9:2-5 would have had no applicability upon the death of his wife, the general rule that divorce proceedings abate with the death of either party would continue to apply and the New Jersey court would no longer have jurisdiction to modify the support order.

More specifically, Mr. Kean would have received sole custody of the children if his wife had died during the pendency of the proceedings, and accordingly the court found the underlying predicates of *Gonzales* to be inapplicable. Since the disputed payments would have terminated at the recipient's death, those payments were considered alimony for federal income tax purposes, deductible by Mr. Kean and includable in the gross income of Mrs. Kean, who was then impacted by a very substantial tax bill, including interest and penalties.

THIRD CIRCUIT CLARIFICATION

Patricia Kean then appealed the tax court decision to the Third Circuit Court of Appeals. Initially the court disposed of her argument that the *pendente lite* payments were not "received by her" because they were technically deposited into a joint checking account shared by Mr. Kean and the court placed certain conditions on the use of the funds in the account. The Third Circuit found both of those arguments unpersuasive.[9]

The court then addressed her second argument, that the payments cannot be considered alimony because a payment can only be considered alimony when there is no liability to make any such payment for any period after the death of the payee spouse. Her argument was that Mr. Kean would have been required to continue making the *pendente lite* payments even if she had died. Consistent with the tax court opinion, the Third Circuit

indicated that the *pendente lite* payments did not state whether the responsibility to make payments would terminate upon the recipient's death, and when an order does not expressly state that payments cease upon the death of the recipient the court is compelled to examine state law. In this regard Mrs. Kean argued that because the payments were unallocated support payments for both herself and her children, her husband would have been obligated to continue making the payments even after her death. Suffice it to say that in support of that position she directed the Third Circuit's attention to *Gonzales*.[10]

The Third Circuit engaged in an analysis of *Gonzales* and other cases involving unallocated support where a child or children made up a component of that support. The court opined that such decisions relied too heavily upon the intricacies of family law and failed to take into account the overall purpose of the tax laws,[11] finding that those cases ignored the interplay between the tax code and their importance in distinguishing between alimony, child support and property settlement payments.

The Third Circuit defined the question as follows: Whether the payor must continue to make payments to or on behalf of the spouse as outlined in the code.[12] While recognizing that Mr. Kean may still have had responsibilities to his children had Ms. Kean died, he would not have been required to make any payments to Ms. Kean or her estate, nor would he have had made any payments on her behalf, since in New Jersey divorce proceedings abate with the death of one of the parties.[13] Consequently, the husband's responsibility to his children, both financial and custodial, properly would have been determined by New Jersey family law and would not have arisen from the *pendente lite* order.

In conclusion, the Third Circuit considered all of the payments to be alimony, indicating:

> Where support payments are *unallocated* as in this case, the entire amount is attributable to the payee spouse's income. Otherwise, we would be left with a situation in which the portion of the unallocated payment intended for the support of the payee spouse would be taxable to the payor spouse.[14]

In affirming the tax court the Third Circuit indicated that while child support payments may be separated out of alimony payments for tax purposes, this is so only if the amount intended for child support is sufficiently identifiable.[15]

RULE 5:7-4(A)

The family law practitioner should be familiar with this rule, which was specifically referenced by the Third Circuit. Unfortunately, it appears to be honored more in the breach than in the implementation. It provides:

> (a) Allocation of Support. In awarding alimony, maintenance or child support, the court shall separate the amounts awarded for alimony or maintenance and the amounts awarded for child support, unless for good cause shown the court determines that the amounts should be unallocated.

Assuredly, through the limited amount of information available to the court on a *pendente lite* basis, it is understandable that the court may be loathe to engage in such allocation. This is specifically so when tax calculations are not presented by an expert at the time the motions are decided. However, the author offers the following suggestions, which will hopefully avoid unanticipated results for one of the litigants, and accordingly avoid resultant malpractice claims.

SUGGESTED APPROACHES

It appears to the author that the court can and should do the following:

1. Allocate alimony and child support pursuant to Rule 5:7-4(a). To accomplish this, the court needs to have sufficient information, including, when necessary, a forensic accountant's submission, so it can be assured the net of tax allocation allows the recipient to meet his or her budget. It is certainly appropriate to ask the court to include in the order the *caveat* that it is entered based upon the assumption the parties will be filing separate returns, and to the extent that joint returns are filed the parties reserve the right to seek reallocation credits.
2. If the court has insufficient information to establish an allocation, it can succinctly indicate for purposes of the order that no portion of the award is to be considered alimony pursuant to IRC Sections 71 and 215, and accordingly is neither taxable to the recipient nor deductible to the payor. Specifically, the court can indicate that the *pendente lite* order is based upon the recipient's net of tax needs as determined by the preliminary submissions. This is language the author believes the court should be urged to include in its order. Always keep in mind that indirect or so-called on behalf of payments are also considered alimony payments if unallocated. Accordingly, if such payments are included in the court's support formula, make sure the tax-neutral language is specifically made applicable to all support payments, whether direct or indirect.
3. If the court, after request, still eschews either allocating the payments or directing that they are tax neutral payments and the reader represents the recipient, ask the court to include in its order a provision that if the recipient is assessed additional taxes as a result of the order, the recipient shall be reimbursed by the payor for those taxes. In this

fashion, the attorney is at least providing some protection for the client if the parties file separate returns and the payor takes a deduction for all or a portion of the payments in an ambiguous order.

JUST WHEN YOU THINK IT'S OVER: ADDRESSING THE PSA

What happens when the case is over and several years later a tax audit ensues? When there has been a *pendente lite* order entered respecting unallocated support, include a provision in the property settlement agreement that if there is a tax assessment of unallocated support emanating from the *pendente lite* order, the payor will be responsible for the tax, including interest, penalties and reasonable legal and accounting fees.

CONCLUSION

Every family law practitioner aspires to leave the courthouse with a full understanding of the consequences of the decision upon his or her client. Obviously, we cannot control future changed circumstances that may compel a court to modify an order, even a *pendente lite* order. We are lawyers, not soothsayers. Yet we are required to educate ourselves as to the law, including tax considerations, so that our clients do not wind up on the wrong end of a decision, which even our adversary didn't necessarily bargain for when the matter was presented. ■

ENDNOTES

1. 407 F. 3d. 186 (3rd Cir. 2005).
2. T.C Memo 1999-332, 78 TCM (CCH) 527 (1999).
3. IRC Sections 61, 71 and 215.
4. *Citing Jacobson v. Jacobson*, 146 N.J. Super. 491 (Ch. Div. 1976) and *Kiaken v. Kiaken*, 149 N.J. 441 (1997).
5. Cf. *Farmilette v. Farmilette*, 237 N.J. Super. 29 (Ch. Div. 1989). *Pendente lite* orders are of course modifiable before and at the time of final judgment. *Capodanno v. Capodanno*, 58 N.J. 113 (1971) and *Jacobitti v. Jacobitti*, 263 N.J. Super. 608 (App. Div. 1993) *aff'd* 135 N.J. 571 (1994).
6. *Peterson v. Commissioner of Internal Revenue T. C. Summary Opinion*, 2003-122.
7. T.C. Memo. 2003-163, 85 TCM (CCH) 1445.
8. *See* endnote 4, *supra*.
9. 407 F.3rd. 186, 191 (3rd. Cir. 2005).
10. *Id.*
11. *Id.* at 192.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*

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Randazzo: *Pendente Lite* Sale/Distribution of Marital Assets

by Patrick Judge Jr.

On June 28, 2005, the Supreme Court of New Jersey, in the matter of *Randazzo v. Randazzo*,[1] expressly disapproved of the Appellate Division decision of *Grange v. Grange*.[2] For more than 25 years, *Grange* has been cited as the authority that a trial court, absent consent, could not sell and/or distribute marital assets prior to the entry of a final judgment of divorce. This article will discuss the *Grange* decision, and the weakening of that decision over the years, which ultimately led to the issuance of *Randazzo* by the Supreme Court.

THE BEGINNING: *GRANGE* (1978)

In *Grange*, while the case was pending, the husband moved to sell real property the parties' owned in Stanhope (a residence in which the parties had formerly resided), as the property was in foreclosure. The husband took the position that the property had negative equity and that he could not afford to maintain it as well as his *pendente lite* obligations. The husband further asserted that an appraisal he obtained indicated the property had negative equity. The husband, in his motion, requested the issue of the net loss be reserved for final hearing.

The motion judge, attempting to minimize losses, granted the husband's motion to sell the property. In so ordering, the judge noted that neither party resided within the home that was to be sold.

Additional proceedings followed in the trial court, which eventually led to an order, whereby the wife was ordered to comply with the sale of the Stanhope property, and if she failed to do so, the court appointed an attorney-in-fact to execute documents that were required to be signed by the wife.

The Appellate Division granted a stay of that order and accelerated the appeal on its own motion.

The issue, as framed by the Appellate Division, was "whether in a matrimonial matter the court may make a *pendente lite* order relating to the equitable distribution of the marital assets and, more specifically, order the sale of a marital dwelling absent the consent of the parties."[3]

The wife argued that the trial judge erred by ordering the sale of the property, contending that an order effecting equitable distribution may be awarded only after a judgment of divorce.

The Appellate Division cited N.J.S.A. 2A:34-23, which states "that in all actions where a judgment of divorce or divorce from bed and board is entered the court may make such award as is necessary to effectuate an equitable distribution of the marital assets." Based thereon, the Appellate Division held that a trial court, absent consent, is without the authority prior to a divorce to distribute a tenancy by the entirety. The Appellate Division held that such a distribution would violate the concept of a tenancy by the entirety, whereby husband and wife hold the property during their joint lives with the remainder passing to the survivor.[4] The case was reversed and remanded.

THE BEGINNING OF THE END: DISTINGUISHING *GRANGE*

Although *Grange* remained good law until the Supreme Court issued the *Randazzo* opinion on June 28, 2005, various trial courts attempted to distinguish *Grange* in the approximately 27 years between the issuance of the *Grange* opinion by the Appellate Division in 1978 and the *Randazzo* opinion by the New Jersey Supreme Court in 2005.

THE CONSENT EXCEPTION: *WITT* (1979)

Witt v. Witt[5] was a trial court opinion issued approximately seven months after *Grange*. In *Witt*, the parties separated in May of 1978. Before physically separating, the husband consented to the sale of the marital home in Woodbridge, and signed the listing agreement. After leaving the home, the husband was not heard from. He did not provide any support for his wife and two children, ages five and three. The first and second mortgages on the marital home fell into default, and a foreclosure action was commenced. The parties were defaulted in the foreclosure action. In addition, there were existing judgments against the husband, and one judgment had already levied upon the marital property.

On July 3, 1978, the wife filed her complaint for divorce. Service was made by publication. The wife filed an order to show cause seeking the sale of the marital property.

The issue in *Witt*, as framed within the opinion, is "whether this court has the authority to order the sale of the marital home *pendente lite*, where the home is owned by the entirety, where both parties have previously consented to such a sale, and where to withhold confirmation of the sale will undoubtedly result in the dissipation of the asset."[6]

The trial court held that it had the power to order the sale of the marital home, "…given the extreme circumstances and peculiar equities of this case…"[7] In explaining its reasoning, the trial court stated that if it denied the request to sell the premises, the result would not bene-

fit the husband, and further would result in irreparable harm to the wife and children. The court further stated that it "is not content to sit idly by while understandably ravenous creditors gobble up the property, leaving nothing in their wake from which to draw support for plaintiff [wife] and the children."[8]

The trial court in *Witt* cited the same statute the Appellate Division cited in *Grange*—N.J.S.A. 2A:34-23—and commented that if a divorce had already been granted, the court in *Witt* would have had the express authority to order the sale of the marital home. But the *Witt* court found that the same statute vests with the trial court, in any pending matrimonial action, "wide discretion in making such orders as are necessary for the maintenance of the parties."[9]

The *Witt* court referenced the then recent *Grange* opinion, which held that in the absence of consent by the parties, the trial court was without authority to order the sale of a marital home owned by the entirety prior to the divorce. The *Witt* court found that, in the facts before it, the husband consented to the sale by executing a listing agreement prior to his departure. Accordingly, based upon the facts before it, the *Witt* court directed that the marital property be sold.

DISTRIBUTION OF INTEREST *PENDENTE LITE*: *SAMUELSON* (1984)

In *Samuelson v. Samuelson*,[10] the issue before the court was whether the court in a *pendente lite* setting could distribute interest monies accruing on the proceeds from the sale of the parties' marital home.

In *Samuelson*, the parties were married in 1950 and separated in September of 1983. The parties listed the marital home for sale, and agreed that any proceeds would be held in an interest-bearing escrow account pending the resolution of various issues. The home was sold in 1984, and the proceeds placed in an interest-bearing trust account. At the time the matter was before the court, the parties lived separately and did not have an executed property settlement agreement. The court noted that since the sale of the marital home, the wife did not receive any support from the husband. The wife was requesting an award of *pendente lite* support. The husband was defending against that application.

The court found that the wife was suffering from a recurring cancerous condition that impacted her ability to earn income. The court found that the wife's gross income for 1983 was approximately $5,000, and that her monthly expenses at the time totaled $1,660, per her case information statement. The husband asserted a yearly gross income of $10,000, but failed to submit financial statements or a case information statement. The court noted that approximately $198,000 was being held in escrow at 10 percent interest, generating approximately $1,633 per month. The issue was whether the trial court could distribute that interest prior to a final judgment.

In analyzing the situation before it, the *Samuelson* court noted and summarized both the *Grange* and *Witt* decisions. The *Samuelson* court further noted that the Supreme Court Committee on Matrimonial Litigation (referred to as Pashman II), addressed the issue of the sale of marital assets during the *pendente lite* stage, and specifically the *Grange* case. The *Samuelson* court pointed out that this committee concluded that "the *Grange* rule is unduly restrictive, contrary to the broad discretionary powers of a court of equity and generally unfair."[11] The *Samuelson* court also noted that the committee recommended that "[t]he trial court should also have the discretionary power to permit a party to utilize a portion of the proceeds when… basic living expenses cannot be paid in any other way."[12]

The *Samuelson* court held that, "[i]n determining what is equitable, the trial judge must consider all the particular circumstances of the individuals before it."[13] The *Samuelson* court also cited N.J.S.A. 2A:34-23 in a similar manner to the *Witt* court, and, in particular, that portion of the statute which states, pending any matrimonial action, the court may make such orders "as to alimony or maintenance of the parties…as the circumstances of the parties and the nature of the case shall render fit, reasonable and just…."[14]

The *Samuelson* court concluded that limitations within *Grange* were inapplicable to the facts of *Samuelson,* and found that it had the power to order *pendente lite* support from the interest accumulating on the funds awaiting equitable distribution when no other source of support is available. The court found that it would be inequitable to permit the interest to accumulate while at the same time requiring the plaintiff to live at "virtually a pauperized level" based upon the limited amount of alimony which could be ordered on the husband's relatively limited income.[15]

THE SALE OF MARITAL ASSETS (NOT REAL PROPERTY) *PENDENTE LITE*: *GRAF* (1985)

In *Graf v. Graf*,[16] the issue before the court was whether the trial court had the authority to order the sale of marital assets prior to the entry of a judgment of divorce. The *Graf* court noted that the *Grange* opinion held that the court does not have the power to order the sale of a marital dwelling prior to the judgment of divorce. The *Graf* court questioned, however, whether *Grange* was so broad as to prohibit the sale of any marital asset prior to a judgment of divorce, regardless of the factual situation present. The *Graf* court stated:

> Many theories have been advanced for the philosophy underpinning the rule. Some say that at the final hearing equity may dictate that marital assets be distributed in kind and, if they are sold earlier, this option is foreclosed. Others say that the statute, N.J.S.A. 2A:34-23, provides for the equitable distribution of marital assets at the time of the entry of a judgment of divorce-and not before. Still others, including *Grange*, say that since a marital dwelling is held as a tenancy by the entirety its distribution while the marriage subsists "would violate the very concept of a tenancy by the entirety." (Citation omitted).[17]

In *Graf*, the husband was an engineer and the wife was a homemaker, with a high school equivalency and no work skills. The parties had one child. In 1983, the parties separated. The husband had lost his job, and a year and a half later was still unemployed. The wife filed her complaint for divorce along with a *pendente lite* motion for support. The case information statements filed revealed no income. The two major marital assets included the marital home with $87,000 in equity and Exxon stock worth $4,000. The court noted that for 20 months the husband, due to his unemployment, failed to pay any support, and that the wife had been forced to live off of savings. Based upon the wife's monthly budget, the court found that those savings would only last another month or two. The wife sought to sell the Exxon stock and use the proceeds to support herself and the child born of the marriage.

The *Graf* court noted the conflicting policy statements within N.J.S.A. 2A:34-23. Specifically, the statute states that the court has discretion to make such orders as are necessary concerning the maintenance of the parties and their children. The statute, however, also states that a court may effectuate an equitable distribution of property where a judgment of divorce is entered. The *Graf* court held that a broad interpretation of the language in the preceding sentence would, in cases where there was an absence of income but sufficient marital assets, prohibit the court from ensuring the continued maintenance of the dependants.

The *Graf* court found that the statute's purpose was to provide broad discretion to the trial court to achieve justice on a case-by-case basis. The *Graf* court recognized that it was bound to follow decisions of the appellate courts, but only when the same issues are presented. The *Graf* court distinguished the facts before it from those in *Grange*, as *Grange* involved the sale of realty, not personalty. Further, the *Graf* court found that *Grange* involved the sale of convenience, whereas *Graf* was addressing a sale of necessity. The *Graf* court held that, "…when the support and maintenance of a dependant custodial parent and children are involved, as is the case here, the broad discretionary powers conferred upon the court by the first sentence of N.J.S.A. 2A:34-23 must apply, and not *Grange*."[18]

The *Graf* court went on to state that it was "…satisfied that *Grange* does not prohibit the *pendente lite* sale of marital assets when such proceeds are necessary to ensure the continued maintenance of a dependent spouse and children and, at most, should be limited under such circumstances to prohibiting the *pendente lite* sale of only the marital dwelling."[19]

The *Graf* court ordered the sale of the Exxon stock, with the proceeds being used to support the wife and child.

REAL PROPERTY TITLED IN ONE SPOUSE'S NAME/IRREPARABLE HARM: *GLATTHORN* (1989)

In *Glatthorn v. Wisniewski*,[20] the wife sought to sell the marital home *pendente lite* over the husband's refusal.

The *Glatthorn* court recognized that the *Grange* holding barred the sale of realty owned by husband and wife in the entirety during the *pendente lite* stage of a divorce. The *Glatthorn* court found further support for this concept in N.J.S.A. 3B:28-3, which was quoted as follows:

> As to real property occupied jointly by a married person with his or her spouse acquired on or after May 28, 1980, as their principal matrimonial residence, every married person shall be entitled to joint possession thereof with his or her spouse during their marriage, which right of possession may not be released, extinguished or alienated without the consent of both spouses except by judgment of a court of competent jurisdiction. All other real property owned by either spouse which is not the principal matrimonial residence may be alienated without the consent of both spouses.[21]

In *Glatthorn*, the parties married in December 1988 and lived together for approximately three months, until March of 1989. During that time, they lived in the first floor apartment of a two-family dwelling located in Irvington. It was asserted that the property was purchased by the wife more than a year prior to the marriage. The deed was in the wife's sole name.

The parties separated, and possession of the property was granted to the wife by an order resulting from a domestic violence complaint. The wife was delinquent in the mortgage payments and other expenses. The wife then entered into a contract to sell the property. The wife had two young children from a prior marriage, and asserted that unless the property was sold, their financial situation would be irreparably harmed. The husband refused to assist in the conveyance of the property.

The husband was ordered to show cause why the property should not be sold. The *Glatthorn* court cited N.J.S.A 2A:34-23 for the proposition that it is afforded broad discretion to make such orders that are deemed necessary for the maintenance of the parties and their children. This court likewise noted, however, the other part of N.J.S.A. 2A:34-23, limiting the trial court's power to effectuate an equitable distribution of property to a situation where a judgment of divorce is entered. The *Glatthorn* court noted that *Grange* was a tenancy by the entirety situation. Unlike *Grange*, the *Glatthorn* court found that the wife had purchased the property with her own funds prior to the marriage. The court found, however, that the *Grange* decision combined with the joint possessory interest of N.J.S.A. 3B:28-3 presented a "difficult hurdle" to order the sale of the marital residence.[22] The *Glatthorn* court found, however, that failure to order the sale of the marital home would result in irreparable harm to the wife.[23]

The court took judicial notice that the real estate market was in a down swing at the time. Further, the court noted the wife's claims that

the expense and upkeep of the property could no longer be maintained without jeopardizing her economic well-being. The *Glatthorn* court found that the husband's possessory interest in the marital property could be protected by sale proceeds being placed in escrow for subsequent equitable distribution. The court held that pursuant to N.J.S.A. 2A:34-23, "a court is not restricted from directing *pendente lite* relief when the law of equity so dictates."[24] The *Glatthorn* court found that its decision "is well in accordance with the *Grange* rule which continues to protect parties from unnecessary sale of marital real property and proceeds distribution during the *pendente lite* period."[25]

TENANCY BY THE ENTIRETY/ HARDSHIP: *PELOW* (1996)

In *Pelow v. Pelow*,[26] the issue presented was whether the court, under the circumstances of that case, could order the *pendente lite* sale of real property held by the parties as tenants by the entirety.

The wife filed for divorce. The husband filed an answer and counterclaim. Each sought the equitable distribution of all property acquired during the marriage. The wife filed a motion seeking, in part, financial relief. The husband responded by seeking an order for the sale of the marital residence.

The wife asserted that the *Grange* holding prohibits the court from directing, during the *pendente lite* phase of the litigation, the sale of the marital home that is held by the parties as tenants by the entirety. The husband argued that N.J.S.A. 2A:34-23, *Grange* itself, and subsequent decisions, permitted an order to sell the marital residence under the facts in the *Pelow* matter.

The *Pelow* court summarized the *Grange* decision. The *Grange* court concluded that N.J.S.A. 2A:34-23 required a judgment of divorce (or divorce from bed and board) prior to effectuating equitable distribution. Further, the *Grange* court found that the trial court is without authority to order pre-divorce distribution of a tenancy by the entirety. The *Grange* court concluded that "such distribution would violate the very concept of a tenancy by the entirety and its attributes of a tenancy in common between husband and wife for the joint lives with the remainder to the survivor in fee."[27]

The *Pelow* court found that the "concept of tenancy by the entirety only survives in the interest of the married parties to achieve the social purposes of protecting marital assets during coverture and as security for one spouse on the death of the other.…The policy, in other words, is to protect the marital residence for the benefit of a spouse and any dependent children.…"[28]

The *Pelow* court then addressed the statutory interpretation of N.J.S.A. 2A:34-23, which contains language that the court has broad authority to make matrimonial orders that are fit, reasonable and just, while at the same time and within the same statute stating that the matrimonial court must await a final judgment of divorce in effectuating equitable distribution.

The *Pelow* court points out that the statute does not make a distinction between real and personal property or real property held by the entirety or as joint tenants or as tenants in common. Accordingly, if the statute was to be construed as prohibiting a sale prior to the entry of a judgment, no property could be sold until a judgment issued.

In *Pelow*, reference is made to the *Witt*, *Samuelson*, and *Glatthorn* cases. The *Pelow* court found that each of these decisions recognize that *Grange* "continues to protect parties from unnecessary sale of marital…property and proceeds distribution during the *pendente lite* period."[29] However, the *Pelow* court references the cases as authority for the sale and distribution of marital property to avoid irreparable harm to a spouse and/or children.[30]

The *Pelow* court concluded that the Legislature intended to invest the courts with broad discretion under N.J.S.A. 2A:34-23 to protect the parties and children during the divorce process. The *Pelow* court went on to hold, "[t]o conclude that the Legislature would permit or intend, for example, children to lack familiar financial support while the marital home, with all its possible liabilities in draining needed resources or advantages in providing necessary resources, should be held until, finally, the entry of a judgment, is not rational."[31] The *Pelow* court also found the statute does not limit the trial court from selling a property held by the entirety when hardship requires the property to be sold.[32]

The *Pelow* court found the financial circumstances of the parties before it to be desperate. The court found that the marital home was a drain on needed resources for the parties and their daughter. The court found that the failure of the court to act would cause irreparable harm to all concerned. Therefore, the court concluded that the purpose of N.J.S.A. 2A:34-23 "is to give a matrimonial judge broad discretion and authority to fashion sagacious remedies on a case by case basis.…"[33] The *Pelow* court opined that *Grange* will continue to protect against the unnecessary sale of marital real property, "while permitting on a case by case basis the proper evaluation of the impact of the maintenance of that property on the parties economic well-being, when such concerns are present, regardless of the nature or form of that property or interest."[34]

Accordingly, the *Pelow* court ordered the marital home to be listed for sale.

SUPREME COURT ACTION: RULE 5:3-5 IS AMENDED (1999)

Rule 5:3-5 (Attorneys Fees and Retainer Agreements in Civil Family Actions; Withdraw), was amended in 1999 to include the following language in subparagraph (c):

> ...The court may also, on good cause shown, direct the parties to sell, mortgage, or otherwise encumber or pledge marital assets to the extent the court deems necessary to permit both parties to fund the litigation.

This rule was amended in response to the recommendation by the Supreme Court of New Jersey, Special Committee on Matrimonial Litigation, the final report of which was issued February 4, 1998. Recommendation 3 reads as follows:

> The Rules should be amended to specifically authorize the Family Part to direct the liquidation, encumbrance or hypothecation of assets so as to provide the litigants, where the equity is warrant, a source of resources to fund the litigation.

The committee's report included the following discussion concerning *Grange* and the cases that followed:

> The Committee has concluded that, in appropriate cases, marital assets can and should be utilized to provide litigants with sufficient resources to reasonably prosecute their cases. To the extent that this conclusion calls for the tempering of the traditional rule first expressed in *Grange v. Grange*, 160 N.J. Super. 153 (App. Div. 1978), that rule should be relaxed. In *Grange, supra*, the Appellate Division had held that the Family Part was without authority to order a pre-divorce distribution of real property held as tenants by the entirety. The Committee notes, with interest and great respect, that nearly twenty years ago, the Supreme Court Committee on Matrimonial Litigation (Pashman II) observed on page 38 of its Report:
>
> The Committee discussed this issue and the leading appellate case in point, *Grange v. Grange*, 160 N.J. Super. 153 (App. Div. 1978). The principal issue there was "whether in a matrimonial matter the court may make a *pendente lite* order relating to the equitable distribution of the marital assets and, more specifically order the sale of the marital dwelling absent the consent of the parties." *Id.* at 157. In a *per curium* opinion, the Appellate Division concluded "that the trial judge did not have the power to order defendant or the court's designated attorney-in-fact to execute the conveyance papers prior to the dissolution of the marriage by a Judgment of Divorce. *Id.* at 158-159.
>
> The Committee concludes that the *Grange* rule is unduly restrictive, contrary to the broad discretionary powers of a court of equity and generally unfair.
>
> Based upon this analysis, although within another context, the Pashman II Committee, almost twenty years ago, made recommendations concerning the continued efficacy of the *Grange* rule, that are strikingly similar to what we now recommend:
>
> - (I)(m)(l) In exceptional cases, a trial court should be permitted to order the sale of any marital asset and impose protective orders to preserve the cash proceeds. The trial court should also have the discretionary power to permit a party to utilize a portion of the proceeds when there are no other assets subject to equitable distribution;
> - a spouse has removed other assets subject to equitable distribution;
> - *bona fide* efforts to locate a spouse are unsuccessful;
> - basic living expenses cannot be paid in any other way; or
> - for other good and emergent cause.
>
> Not insignificantly, in the years that followed the issuance of the Pashman II Report, a series of cases seemed to temper the *Grange* rule. Thus, in *Witt v. Witt*, 165 N.J. Super. 463 (Ch. Div. 1979), the court acknowledged the *Grange* decision, but concluded that the pendente lite sale of the marital home could be ordered against an absent party when it concluded he had previously consented to the sale by executing a listing agreement.
>
> Similarly in *Samuelson v. Samuelson*, 198 N.J. Super. 390 (Ch. Div. 1984), the court authorized use of interest accumulations realized from the sale of a marital residence for support purposes. *See also Glatthorn v. Wisniewski*, 236 N.J. Super. 504 (Ch. Div. 1989).
>
> Most recently in *Pelow v. Pelow*, 300 N.J. Super. 634 (Ch. Div. 1996), Judge Hayser held that, under the facts of that case, the *pendente lite* sale of the marital residence was warranted. In *Pelow*, the court found that the parties did not have financial resources to meet all expenses and to do everything required under the court order. Preservation of the marital residence under the strained financial circumstances present in *Pelow* was found to drain resources needed to provide support.
>
> Significantly, Judge Hayser held as follows:
>
> Therefore, the court has concluded that the overriding "purpose of [N.J.S.A. 2A:34-23] is to give a matrimonial judge broad discretion and authority to fashion sagacious remedies on a case by case basis, which will achieve justice and fulfill the needs of the litigants." *Graf, supra*, 208 N.J. Super. at 243, 505 A.2d 207. Properly understood, *Grange* will "continue[s] to protect parties from unnecessary sale of marital ... real property," *Glatthorn, supra*, 236 *N.J. Super*. at 509, 566 A.2d 242, while permitting on a case by case basis the proper evaluation of the impact of the maintenance of that property on the parties economic well-being, when such concerns are present, regardless of the nature or form of that property or interest. As the Appellate Division stated in *State v. Saavedra*, 276 N.J. Super. 289, 647 A.2d 1348 (App. Div. 1994):
>
> A statute should not be given an arbitrary construction, according to the strict letter, but rather one that will advance the sense and meaning fairly deducible from the context. The reason of the statute prevails over the literal sense of the terms; the obvious policy is an implied limitation on the sense of the general terms, and a touchstone for the expansion of narrower terms.
>
> [*Id.* at 294, 647, A.2d 1348 (quoting *Wene v. Meyner*, 13 N.J. 185, 197, 98 A.2d 573 (1953)); and, *see also State v. Volpini*, 291 N.J. Super. 401, 408, 677 A.2d 780 (App. Div. 1996)]
>
> Thus, the court will order that the marital residence shall be immediately listed for sale, with the sale expenses divided between the plaintiff and defendant, 48 percent and 52 percent respectively.
>
> *Pelow, supra*, at 646-647.
>
> The progression of case law from the Pashman II Report to the present evidences some willingness to permit the *pendente lite* utilization of marital

> assets to meet exigent circumstances. This Committee recommends that, in appropriate cases, in order to assure that there exists a level playing field for all matrimonial litigants, the Family Part should be permitted to direct the use of marital assets to fund the costs of litigation. N.J.S.A. 2A:34-23 accords broad discretion to Family Part judges limiting their awards to what is reasonable and just. This Committee has confidence that the Family Part bench, guided by the principles of equity that have served it so well, will be able to administer what is now being recommended.

On January 21, 1999, the Administrative Determinations by the Supreme Court on the Recommendations of the Special Committee on Matrimonial Litigation were issued. Recommendation 4 read as follows:

> Recommendation 4—Liquidation or Encumbrance of Assets—The Special Committee recommended that the Rules of Court be amended specifically to authorize the Judge in matrimonial matters to direct "the liquidation, encumbrance or hypothecation of assets so as to provide the litigants where the equity is warrant, a source of resources to fund the litigation." This has been a long-standing issue. The intent underlying the special committee's recommendation lists a level of playing field so that an economically disadvantaged spouse would have access to adequate resources to retain counsel and experts to fund litigation against the spouse having a greater amount of liquid assets. The Court agreed with the special committee's intent, but not the specific language of the proposed amendment. Accordingly, the Court has adopted a plain-language rule amendment on the subject (though making the same point). (R.5:5-3(c) [Note. In the committee's report this was designated as Recommendation 3; the Court has redesignated it as Recommendation 4 to clarify the sequence of a related group of three recommendations].
>
> The Court is also directing a conference of Family Presiding Judges to monitor the effects of this amendment, and that of Recommendation 3, closely. After eighteen months, during which a civil amount of experience should have been gained, the conference of Family Presiding Judges is to report back to the Court on whether any further modifications are necessary or desirable.

THE SALE AND DISTRIBUTION OF MARITAL ASSETS *PENDENTE LITE*: *RANDAZZO* (2005)

In *Randazzo v. Randazzo*,[35] the Supreme Court of New Jersey expressly disapproved *Grange*, "to the extent it stands for the proposition that absent consent, the trial court lacks authority to order the sale of a marital asset prior to the judgment of divorce."[36]

In *Randazzo*, the parties owned multiple properties, but lacked liquidity, and because a certain contract was lost, were faced with cash flow problems. After she filed for divorce, the wife obtained the husband's consent to sell the Florida property. Thereafter, the husband resisted the sale. The wife moved to compel the sale, as well as for other relief.

In the husband's answering certification, he acknowledged that the parties accumulated considerable assets, but the loss of a towing contract with the city of Clifton reduced their income and caused them to exhaust their savings. The husband acknowledged the need to liquidate assets to raise cash, and further conceded that he agreed to sign a listing agreement for the sale of the Florida property.

The motion court found the request to sell the Florida property to be "moot," as the husband had agreed to the sale.

Thereafter, the wife filed an order to show cause seeking authorization to sign the agreement of sale and to execute all closing documents for the Florida property; to pay delinquent taxes on all of the real estate holdings with the proceeds; and to evenly divide the balance.

The husband, in his response, acknowledged that he signed the agreement of sale for the Florida property, but he would not release the agreement until the parties reached an understanding regarding the disbursement of the sales proceeds.

The motion court granted the wife's request to sign the agreement of sale and the closing documents concerning the Florida property. The court also required the wife's counsel to pay the outstanding real estate tax liens on the New Jersey real estate, and to place the net proceeds of sale in a trust account. Subsequently, the motion court authorized additional disbursements from the sales proceeds to pay certain obligations.

Trial on the issues of equitable distribution and alimony took place. The procedural history leading to the Appellate Division is intentionally omitted from this article. In an unpublished opinion, the panel of the Appellate Division noted "that the main question on appeal was whether the judge erred in ordering the *pendente lite* sale of the Florida property."[37] The Appellate Division affirmed the trial court. The panel distinguished *Grange v. Grange*, which held that absent consent, marital assets could not be sold and distributed prior to the divorce of the parties. The panel found "overwhelming evidence in the record" that the husband consented to the sale.[38]

The Supreme Court granted the husband's petition for certification, in part, as to the issue of whether the trial court erred in ordering the *pendente lite* sale of real property of the marriage.

The husband argued that N.J.S.A. 2A:34-23 permits the equitable distribution of marital assets only upon the entry of a judgment. Further, he took the position that the sale of the marital asset was not necessary for support.

The wife argued that the Appellate Division correctly affirmed the *pendente lite* sale of the property in Florida. The wife contended that the husband consented to the sale, and that the sale of the Florida property was necessary for the

parties' financial stability.

The Supreme Court analyzed N.J.S.A. 2A:34-23; *Grange*; the Supreme Court Committee on Matrimonial Litigation (1981); other cases including *Witt*, *Graf*, *Glatthorn* and *Pelow*; and the recommendation of the Special Committee on Matrimonial Litigation to amend the rules to permit a trial court to utilize marital assets to fund litigation.

The Supreme Court then went on to hold as follows:

> The Family Part is a court of equity. We read the statutory requirement that directs equitable distribution at the time of the divorce judgment to be limited by the portion of N.J.S.A. 2A:34-23 that authorizes the court in its discretion to "make such order as to the alimony or maintenance of the parties, and also as to the care, custody, education and maintenance of the children." We conclude that, consistent with N.J.S.A. 2A:34-23 and Rule 5:3-5, the trial court may exercise its discretion to order the sale of marital assets and the utilization of the proceeds in a manner as "the case shall render fit, reasonable and just."
>
> We acknowledge that in many cases the proceeds from the sale of marital assets should be placed in escrow pending final distribution. But in other cases, the proceeds may properly be used to pay marital obligations. We leave to the discretion of the trial court the varying circumstances that may justify the sale of the marital assets and the utilization of the proceeds prior to the divorce judgment.
>
> We take this opportunity to express our disagreement with the *Grange* decision. There, despite the apparent equities in favor of the sale of marital property prior to the divorce, the *Grange* panel reversed the trial court's judgment authorizing the sale of the marital condominium. We disapprove of *Grange* to the extent it stands for the proposition that absent consent, the trial court lacks authority to order the sale of a marital asset prior to the judgment of divorce.[39]

The Supreme Court held that the record reflected the parties had valuable real estate, but insufficient money to satisfy their financial obligations. The Supreme Court found that the sale of the Florida property was necessary to maintain the parties financially. Because the Supreme Court was satisfied that the trial court did not abuse its discretion in ordering the sale of the Florida property, it did not address the wife's position that the husband consented to the sale.

In conclusion, the Supreme Court held that a trial court "has the discretion to order the sale of marital assets prior to a final judgment of divorce when the circumstances of the case so justify. Although ordinary distribution of the proceeds from the sale of a marital asset should await the final judgment of divorce, a court has discretion to order an earlier distribution to serve the best interests of the parties."[40]

The impact of *Randazzo* can be seen on just about any motion day in the family part. Judges are no longer constrained during the *pendente lite* phase in administering fairness as the facts of each case require. New Jersey has entrusted our judges with the responsibility to manage not only the progress of a divorce case to a conclusion, but also the lives of the parties before it when the parties are not otherwise able to agree. In furtherance of that responsibility, *Randazzo* has afforded to the trial court discretion in determining whether a marital asset should be sold and, if so, whether the proceeds should be distributed prior to a judgment of divorce. ■

ENDNOTES

1. 184 N.J. 101 (2005).
2. 160 N.J. Super 153 (App. Div. 1978).
3. *Grange* at 157.
4. *Id.* at 158.
5. 165 N.J. Super. 463 (Ch. Div. 1979).
6. *Witt* at 465.
7. *Id.* at 465-66.
8. *Id.* at 466.
9. *Id.*
10. 198 N.J. Super. 390 (Ch. Div. 1984).
11. *Samuelson* at 393.
12. *Id.*
13. *Id.* at 394.
14. *Id.* at 393.
15. *Id.* at 394.
16. 208 N.J. Super. 240 (Ch. Div. 1985).
17. *Graf* at 242.
18. *Id.* at 244-245.
19. *Id.* at 245.
20. 236 N.J. Super. 504 (Ch. Div. 1989).
21. *Glatthorn* at 505.
22. *Id.* at 508.
23. *Id.*
24. *Id.* at 509.
25. *Id.*
26. 300 N.J. Super 634 (Ch. Div. 1996).
27. *Pelow* at 638 (*citing Grange*).
28. *Id.* at 638-639 (citations omitted).
29. *Id.* at 642.
30. *Id.* at 642-643.
31. *Id.* at 644.
32. *Id.*
33. *Id.* at 646.
34. *Id.*
35. 184 N.J. 101 (2005).
36. *Randazzo* at 113.
37. *Id.* at 108.
38. *Id.*
39. *Id.* at 113.
40. *Id.* at 114-115.

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