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CHAIR'S COLUMN

And Now a Word About—and From—Our Young Lawyers

by Madeline Marzano-Lesnevich

Several years ago, under the chairmanship of Lynn Fontaine Newsome, the Young Lawyers Subcommittee of the Family Law Section Executive Committee was formed. The subcommittee was wisely continued and encouraged by each section chair thereafter. It has grown in strength, in membership, and, most importantly, in energy each year since its inception. Several former members of the Young Lawyers Subcommittee now sit as full, voting, valuable members of the Executive Committee: Brian Schwartz, Debra Weisberg, Jeralyn Lawrence, and Amanda Trigg, to mention a few. Their commitment to family law, to service for the good of the section, is to be commended.

This year's Young Lawyers Subcommittee, co-chaired by Robin Bogan and Scott Adam Laterra, has hit the ground running, and already has several events in the works aimed at bringing its members together, and introducing them to the family law community. Through the events that are being planned, the Young Lawyers Subcommittee is providing a venue for all young practitioners to come together outside of the courtroom, in an effort to create a common ground of camaraderie and civility that will carry over *into* the courtroom.

For more on the specific plans of our Young Lawyer Subcommittee, here's what the co-chairs have to say:

When we were growing up, September always signified the beginning of a new year. For every year in grade school, high school, college, and law school, September was the start of a new grade, new teachers and more challenging subjects. Even after graduation from law school, September marked the beginning of a clerkship. The following year, it was the start of a new legal career. It was the next September that posed an even greater challenge. For the very first time, there was absolutely nothing new in September.

Facing a lifetime of Septembers with no change or progress in sight could be very depressing. The key is to realize that the creation of challenges, goals and higher expectations for yourself and your career are now up to you. Maybe you need to spend more time focusing on marketing, gaining trial experience or learning more about retirement assets. No matter what your level of experience in the family law practice, tackling a new obstacle and raising the bar on your own accomplishments will lead to you becoming a more seasoned practitioner.

For the family lawyer who has been practicing seven years and under, joining the Young Lawyers Subcommittee of the Family Law Section of the New Jersey State Bar Association is the first step to advancing your career. As co-chairs of this subcommittee, we are striving to give less experienced family lawyers more opportunities for exposure, growth and advancement, and more choices based upon each lawyer's interest. Whether it is your desire to write an article or to speak at a seminar, this subcommittee will serve as your coach as you make your way to the major leagues.

This past summer, the young family lawyers worked diligently on this year's programs and events. We will be presenting a program during the Family Section's annual trip, which will be held in New Orleans from February 9, 2005, through February 13, 2005. We are also planning "Family Law Jeopardy" and "Hot Topics" seminars, as well

New Jersey Family Lawyer

Table of Contents

as seminars for the outgoing law clerks. These seminars are geared toward providing practical tips to young lawyers, assisting them in avoiding common mistakes, and giving advice on how to handle the challenges facing the new practitioner.

In celebration of the Family Law Section's 40th anniversary, we are planning a mentoring dinner. During a cocktail reception and at dinner, young lawyers will have the opportunity to pose questions to experienced attorneys and judges in a small, relaxed setting. Additionally, a poker tournament will be held to raise money for charity. This tournament will be open to everyone, and will provide young lawyers with contacts in the general community.

Our subcommittee is also devoted to publishing articles written by young lawyers. In future issues of this publication, we will introduce a column, "Young Lawyers' Perspective," which will provide practice tips to assist those lawyers newer to the practice. We are also seeking to pair young lawyers with more experienced attorneys from other law firms to work on collaborative articles. The purpose of these pairings is to further increase young lawyers' contacts within the family law community.

September 2004 has passed; don't wait for September 2005. September is a state of mind. We invite you to join the Young Lawyers Subcommittee of the Family Law Section now. Seize the opportunities we are offering, and create career-related goals for yourself. Whether you are seeking to be a better writer, negotiator, settler, speaker or litigator, or to gain exposure in the family law community, getting involved with our subcommittee is the right path. What is going to be new for you this September?

To get involved, please contact Robin C. Bogan at rcb@cutlaw.com or Scott Adam Laterra at ScottAdamLaterra@aol.com. ■

FROM THE EDITOR-IN-CHIEF

The Unreported Aftermath of Divorce: The Loss of Personal Freedom

by Mark H. Sobel

Divorce litigation, whether culminating in the arduous and emotional upheaval of trial or a less contentious conclusion by way of property settlement agreement, carries with it, literally to each party's grave, an unanticipated and often unrecognized byproduct. That lingering residue is the loss of various significant personal freedoms that most of us take for granted. It may include, but not be limited to: the ability to change careers, retire, leave a job, attend school, move to a different location, or select an appropriate college or other post-high school education or vocational experience for children of the marriage, as well as the myriad of normal parenting decisions that have economic consequences, such as purchasing a car or cell phone for a child, or attending a summer camp.

There are numerous cases and precedents in our state dealing with a variety of these issues. Thus we have *Lynn v. Lynn*[1] for the self-inflicted underemployment, and *Isaacson v. Isaacson*[2] for just how much is too much to bestow upon children (whether it be camp, vacations or three ponies). Similarly, *Loro v. Del Colliano*[3] gives us guidance on the importance of Flyers tickets and cell phones. We have established precedent as it relates to college payments in *Newburgh v. Arrigo*,[4] and the Supreme Court just recently heard further argument in *Caplan v. Caplan*[5] regarding when it is *appropriate* to be retired.

All of these cases seemingly have one thing in common—what we normally would consider personal and private individual choices become contested issues in a post-divorce situation where some third party (the judge) is ultimately empowered and required to make this particularly individual personal decision.

While all of these determinations have financial ramifications—often legitimately—should these ramifications be the engine that drives that train? The myriad of motions the trial courts are presented with related to these post-judgment issues is as vast as the imagination of attorneys, which unfortunately seems to know no bounds in the field of family law. Perhaps that's good. Perhaps it isn't. While I certainly understand the need to provide an avenue for resolving these post-divorce issues, it would seem that dealing with such personal matters (*i.e.*, the importance of education; the cost/benefit analysis associated with early retirement; the plans, voiced or unvoiced by the parties during their marriage, regarding their golden years; as well as the core parental concerns regarding over-indulging teenagers) is perhaps best left to individual control, absent the most aberrational circumstances.

This is not an area where one parent or the other has abdicated parental responsibilities. To the contrary, it is an area where often the ex-spouses legitimately have differing views on these intensely personal decisions regarding their lives.

Does a divorce litigation mean that for all time those types of personal liberties are lost? In many ways, our current jurisprudence would seemingly indicate that is so. But it need not be.

There are practice areas where we have provided greater flexibility in more difficult circumstances, provided there is a showing that the determination was based on good faith rather than to provide less financial benefit to the supported spouse and/or children.

There are practice areas where we have provided greater flexibility in more difficult circumstances, provided there is a showing that the determination was based on good faith rather than to provide less financial benefit to the supported spouse and/or children. Perhaps in these areas we could consider a rule similar to that utilized effectively in the incredibly difficult and complex area of relocation cases.

As we all know, the pendulum has swung back and forth regarding the ease or difficulty for a parent with minor children, post-divorce, to leave the jurisdiction of New Jersey with those children. Ultimately, however, the core focus the court has recognized is the absence of bad faith in such a suggested move. Could the same initial inquiry work in these areas as well, thus providing each parent with a more meaningful and independent ability to make these fundamental personal decisions about their lives and their children's lives? Could the system incorporate a somewhat similar two-step process with the initial inquiry focused upon the absence of a purely economic motive to decrease required payments as the gatekeeper for making such determinations?

Clearly, no one would seriously argue that the children of a marriage are entitled to a chauffeured limousine to and from school, notwithstanding the vast wealth of the paying spouse. Does the issue change when the teenager wants an automobile for high school? Does the issue change when the automobile is not a Saturn, but a Mustang or a Mercedes? Does the issue change when the student may not be devoting (according to that parent's view) enough time and attention to his or her academic requirements? Does the issue change when again, according to that parent's view, the child is not meeting his or her obligations to visit with grandparents, attend religious services, participate with the younger children in family or complete a variety of other tasks parents routinely give their children without a second thought?

It is true this pendulum swings back and forth, depending upon the facts of a particular case and the prevalent attitude within our society regarding a particular issue. Thus, in *Loro*, the court concluded that some "spill over" benefit to the supported spouse does not prevent the court from ordering increased child support payments based upon post-divorce economic improvement by the supporting spouse. However, even there, for some reason, a line was drawn between Flyers tickets, cell phones and renovations to the home. Are those lines ones the court should be required to draw, or are they better left to the individual determination of members of our community who, unfortunately, have faced divorce? There are no right or wrong answers to some of these questions. To some people, Flyers tickets are very important; to others a cell phone is vital. To some people summer camp is a necessity; to others it's a convertible. Are these issues the family court needs to be injected into on a day-to-day basis after the divorce is finalized? Should the citizens of our state who have the unfortunate happenstance of becoming divorced be dependent (absent extreme circumstances) upon some third party's feelings on these issues? These issues are intensely personal. Is it proper that they should remain personal, unless and until it becomes evident to the court that the decision is solely economically based, not merely having economic ramifications?

There, of course, needs to be an initial requirement that the determination is not merely economically driven. While that may be hard to do, I think it is a laudable goal. All of us who have attended any early settlement panel in the state have heard judges lecture the lawyers, and more importantly the litigants, on the importance of the process they are engaged in, and how vital it is that they make a good faith attempt to settle their disputes. In that brief commentary, the court often correctly points out that *the litigants* are the people who know their situation the best, who can fashion a finely tuned settlement that is fair to their individual needs, and who understand the vast interrelationship of different issues within their family. That is why a settlement fashioned by them and achieved by them is the preferable goal. That similar philosophy can, and should, remain in place post-divorce.

All citizens' personal freedoms (including those who become divorced) need to be carefully guarded and protected. Our entire system of laws and jurisprudence is largely based upon that principle. It seems, however, that those personal freedoms are often lost post-divorce. It is an area I believe requires re-examination, much as the area of relocation required re-examination.

These are difficult issues, with competing goals and competing claims. With all of the best intentions in mind, it seems that in most cases resolution of those types of personal decisions should be left to the individuals, and that a threshold showing should be required before court intervention takes those personal and parental determinations away. While I often believe (as I guess everyone who writes an editorial does) that I can both posit a question and supply a convincing answer, in this area I only seek to achieve the former. I think this is an issue that requires compelling study. It is not one for which I have been able to establish a precise and definitive resolution. However, by merely asking the question, I hope experienced minds will focus upon the issue of post-divorce loss of personal freedom. I believe collectively we can find a way to have divorced litigants retain greater personal liberties without sacrificing fair and appropriate resolution where such decisions are merely economically motivated. ■

ENDNOTES

1. *Lynn v. Lynn*, 165 N.J. Super. 328 (App. Div. 1979), *cert. denied* 81 N.J. 52 (1979).
2. *Isaacson v. Isaacson*, 348 N.J. Super. 560 (App. Div. 2002), *cert. denied* 174 N.J. 354 (2002).
3. *Loro v. Del Colliano*, 354 N.J. Super. 212 (App. Div. 2002), *cert. denied* 174 N.J. 544 (2002)
4. *Newburgh v. Arrigo*, 88 N.J. 529 (1982).
5. *Caplan v. Caplan*, 364 N.J. Super. 68 (App. Div. 2003), *cert. granted* 179 N.J. 309 (2004).

FROM THE EDITOR-IN-CHIEF EMERITUS

The 2004 Rule Amendments: Part II

by Lee M. Hymerling

In my last column I focused upon the revised case information statement form incorporated within the rule changes that became effective on September 1. This column will focus upon three additional rule changes, each of which conveys important messages. I will specifically focus upon: 1) the amendment to Rule 5:3-5(a)(10) that requires an additional sentence referring to alternate complimentary dispute resolution (CDR) programs be incorporated within all matrimonial retainer agreements; 2) the amendment to Rule 5:5-4(g) dealing with attachments to certifications; and 3) amendments to Rule 5:3-5(d)(1) and Rule 5:3-5(d) (2) that clarify when an attorney may withdraw from representation. Each change, in its own way, represents important modifications to the rules under which we all practice.

THE RETAINER AGREEMENT MODIFICATION AMENDMENT REQUIRING REFERENCE TO CDR PROGRAMS

The amendment to Rule 5:3-5(a)(10) requires us to advise our clients in our retainer agreement of the availability of complimentary dispute resolution, including, but not limited to, mediation and arbitration. The rule is not complex, nor is the notice that we need to include within our retainer agreements unduly burdensome. It is suggested that the amendment to our retainer agreements need be no more complex than the following:

> By signing this Retainer Agreement you acknowledge that you have been informed that there are available Complimentary Dispute Resolution (CDR) programs including, but not limited to, mediation and arbitration, that might assist you in the resolution of your matrimonial dispute.

Although since the original adoption of Rule 1:40-1, our rules have provided that attorneys have a responsibility "…to become familiar with available CDR programs and inform their clients of them," the amendment to Rule 5:3-5(a)(10) represents a specific mandate that we must incorporate into our retainer agreements a statement that CDR programs are available.

There is already substantial use of CDR within our courts, and has been for more than a decade. In the family part, it ranges from custody mediation to the pilot economic mediation programs that function, or should be functioning, in a third of our counties. The era of CDR has arrived. We must all remember and heed the lesson taught by Rule 1:40. That lesson is simple and direct. CDR programs are available and constitute "an integral part of the judicial process, intended to enhance its quality and efficacy."

WHEN ATTORNEYS MAY WITHDRAW FROM REPRESENTATION WITHOUT LEAVE OF COURT, BUT WITH CLIENT CONSENT

In the not too distant past, our practice was burdened by the Appellate Division's holding in *Kriegsman v. Kriegsman*,[1] long interpreted to preclude withdrawal from representation after an attorney had accepted fees. The final report of the Special Committee on Matrimonial Litigation discussed the issue as follows:[2]

> **The Holding In *Kriegsman v. Kriegsman* Should Both By Rule And Decisional Law Be Relaxed.**
>
> The Committee recognizes that *Kriegsman v. Kriegsman,* 150 N.J. Super. 474 (App. Div. 1977), has long been interpreted as holding that when an attorney or firm accepts a retainer to participate in a matter, that attorney or firm impliedly agrees to litigate the matter to a conclusion regardless of whether the client is able to continue to financially comply with the terms of engagement. As discussed above, this issue is intricately intertwined with the issues of utilization of marital assets to fund matrimonial litigation and the question of whether attorneys should be permitted to take security interests in their client's property to secure fees.
>
> The Committee recognizes that the Family Law Section of the New Jersey State Bar Association (NJSBA) has asked that we recommend that an attorney should be permitted the "opportunity to withdraw from a case where fees have not been paid." Thus, in its brief, on pages 54 and 55, the Family Law Section has argued:
>
> Most states provide an attorney with the opportunity to withdraw from a case when legal fees are not paid. In states such as Alabama, Arkansas and Oregon, legislation provides an attorney with the right to withdraw if good cause is shown. In those states it is well settled that nonpayment of legal fees constitutes good cause.

States such as Maryland (RPC 1.16), Minnesota (RPC 1.16), Oregon, Pennsylvania (RPC 1.16), Rhode Island (RPC 1.17), South Carolina (SC App. Ct. R. 1.16), Texas (RPC 1.5), Utah (CPC 1.16), Virginia (DR 2-102), Washington (RPC 1.15), Wyoming (PCR 1.16), West Virginia (RPC 1.16) and Wisconsin (Supreme Ct. R. 20:1.16) have adopted legislation that specifically allows withdrawal if a client fails to substantially fulfill an obligation and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled or if continued representation will result in an unreasonable financial burden on the attorney. See also, *Commonwealth v. Scheps,* 361 Pa. Super. 566 (1987) (holding that nonpayment of fees is a substantial burden to the attorney).

In Louisiana the courts have allowed an attorney to withdraw upon motion for nonpayment of legal fees. *Jambois v. Jambois,* 598 So. 2d. 1237 (4th Cir. La. 1992). Mississippi has required notice to the client of the attorney intention to withdraw for nonpayment of fees. See *Fairchild v. GMAC,* 179 So.2d. 185 (Miss. 1965) (holding that the notice requirement was satisfied with filing pleadings). In addition, New York allows an attorney to withdraw if it is specified in the retainer and a warning is provided to the client that the attorney will withdraw if fees are not paid. See, *Galvano v. Galvano,* 193 A.D.2d. 779 (1993) (holding withdrawal permissible if client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees).

We believe that a lawyer's application to be relieved must be brought within a reasonable period of time before a *realistically* scheduled trial date. That a date for trial has been set by itself, does not mean that the withdrawal will work any prejudice to the client.

Considering all of these factors, the Committee recommends that the rule emanating from *Kriegsman* relating to the ability of an attorney to withdraw from representation must be relaxed both by court rule and case law. Indeed, the Committee has concluded that the manner in which *Kriegsman* has been applied goes beyond what was the Appellate Division's actual holding. Acceptance of a fee should not constitute a per se bar to obtaining leave to withdraw from a matter.

In order to better explain the rationale behind the Committee's recommendation, a look back at the *Kriegsman* case itself is warranted. The Appellate Division affirmed the trial court's denial of the firm's request to be relieved as counsel. Importantly, the Appellate Division said:

When a firm accepts a retainer to conduct a legal proceeding, it impliedly agrees to prosecute the matter to a conclusion. The firm is not at liberty to abandon the case without justifiable or reasonable cause, or the consent of its client...We are firmly convinced that the Rose firm did not have cause to abandon plaintiff's case, and that the trial judge properly exercised his discretion when he denied the firm's application and scheduled an early trial date...It was to plaintiff's and the firm's advantage that the matter to be heard and disposed of as expeditiously as possible. With trial imminent, it would be extremely difficult for plaintiff to obtain other representation, and therefore she clearly would be prejudiced by the Rose firm's withdrawal. *Kriegsman, supra,* 150 N.J. Super. at 479. (citations omitted).

When considering the continued efficacy of the widely held interpretation of the *Kriegsman* that withdrawal by counsel will not be permitted if fees have been accepted, the Committee suggests a careful review of the facts of the case. The case came before the trial court on counsel's (the Rose firm) application to be relieved as counsel for plaintiff. Plaintiff opposed her firm's application. The Rose firm was not plaintiff's first counsel. It became clear by plaintiff's testimony that the Rose firm knew she had to borrow the initial retainer. Reference is also made to the fact that there was already an extensive file and the defendant was representing himself pro se. Importantly, the Rose firm's request to be relieved came at a time when a trial date was imminent.

The Committee believes that in the more than twenty years since the *Kriegsman* decision was rendered, its holding has been largely misunderstood and misapplied. The time has come for change. As concisely stated in a very recent article by Laurence J. Cutler, Esquire,

[t]he almost universal misinterpretation of this case's holding emanates from two things:

(1) the court did not stress that the holding was fact sensitive and determined in the context of the facts as presented; and
(2) the court seemed to broaden the intended applicability of the decision due to the following subsequent language:
[A]n attorney has certain obligations and duties to a client once representation is undertaken. These obligations do not evaporate because the case becomes more complicated or the work more arduous or the retainer not as profitable as first contemplated or imagined. Attorneys must never lose sight of the fact that "the profession is a branch of the administration of justice and not a mere money-getting trade." Canons of Professional Ethics, No. 12. As Canon 44 of the Canons of Professional Ethics so appropriately states: "The lawyer should not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect." Laurence J. Cutler, "Early Withdrawal: The *Kriegsman* Myth", *New Jersey Family Lawyer,* Volume XVII, No. 5, pp. 152-154.

A copy of the Cutler article has been included as Section A-2 of the Appendix to this report.

As Mr. Cutler's article suggests, it is reasonable to conclude that the Appellate Division's holding in *Kriegsman* was appropriate given the particular facts there present. What this

Committee believes would be unreasonable, however, is for our system to continue to interpret that decision as a virtual bar to an attorney's withdrawal in a matrimonial matter as a result of a client's failure to pay his/her fees. This is not to say that in every case of non-payment of fees, an attorney should automatically be relieved as counsel. The Committee recognizes the public's interest in being able to retain competent legal representation with some security in knowing they will not be abandoned.

Some have asked us to broadly permit counsel to be able to withdraw from matters prior to the passage of a designated date within the procedural history of litigation without seeking leave of court. Others might contend that, were the matrimonial Bar to be able to terminate representations without the necessity of seeking the court's permission, matrimonial litigants might find themselves bereft of counsel at a point in time when, practically speaking, no alternate counsel could be obtained. Some litigants would undoubtedly charge that, inequitably, matrimonial attorneys would abandon them when the source for fees has run dry.

Balancing the equities, the Committee offers the following thoughts as to how its recommendation that the common interpretation of *Kriegsman* must be relaxed should be applied. The Committee has concluded that, absent consent and the substitution of counsel or of the client appearing *pro se,* applications to withdraw should remain subject to the discretion of the individual Family Part judge who would be called upon to make the court's determination within the framework of this Committee's recommendation. In exercising its discretion, the court must be mindful of the three distinct interests that are implicated in the determination of withdrawal applications. The court must be mindful of the rightful concerns of litigants, counsel and the court's own responsibility to manage its docket in the public interest.

As the Committee views it, three possible case scenarios exist. First, in those cases in which a Matrimonial Early Settlement Panel hearing has not as yet taken place and, accordingly, no trial date has been fixed, ordinarily, absent exigent circumstances, the Family Part should grant an application to withdraw. Second, in those cases in which a Matrimonial Settlement Panel hearing has already taken place and a trial date has been fixed, ordinarily, absent exigent circumstances, an application seeking withdrawal should be denied. Into the third or middle ground of cases would fall those matters in which the litigation has proceeded, significant fees have been incurred, but where there is merit both to the attorney's request to be relieved as well as the client's position that the attorney be compelled to remain. In those situations, the Family Part, exercising the broad discretion our tradition and case law permits, should consider all of the equities in arriving at an appropriate determination. In each of these three categories of cases, however, the court should pay due deference to the terms of the original retainer agreement. Prior receipt of a counsel fee should not be regarded as a *per se* bar to an attorney's request that he or she be relieved of the responsibilities of representation.

Recognizing these competing concerns, the Committee believes its recommendations to relax the *Kriegsman* doctrine strike an appropriate balance. The Committee calls for the implementation of its recommendation that *Kriegsman* be relaxed by the adoption of the rule amendment we propose which clearly specifies that the Family Part may consider the terms of the retainer agreement by which counsel was engaged. The Committee recognizes that many retainer agreements explicitly authorize an attorney to seek leave to withdraw should fees not be paid. The intention of the Amendment we recommend is that greater credence be given to such provisions while still acknowledging the supervisory responsibilities of the Family Part over litigation before it.

The Committee has also included within the amended rule that it proposes specific criteria that should be considered by Family Part judges in making rulings upon withdrawal applications.

The Committee is also hopeful that a body of reported case law will develop adopting the reasoning contained herein. It is hoped that the gentle suggestion we make that the shadow of *Kriegsman* has been extended unreasonably beyond its facts will encourage those who sit on the Family Part Bench to make a more considered assessment of all of the circumstances, specifically including the retainer agreement, when withdrawal is sought. *Kriegsman* should neither be viewed as "black letter law" or a "litmus paper test." Instead, *Kriegsman* should be viewed as having been decided on the basis of the particular facts there present. The Committee approvingly cites much of the reasoning contained in the recent Cutler article.

The Supreme Court adopted paragraph Rule 5:3-5(d)(1) on July 5, 2000, to be effective September 5, 2000.The latest amendment clarifies the earlier amendment by indicating that withdrawal from representation "…ninety (90) days or more prior to the scheduled trial date or prior to" the Matrimonial Early Settlement Panel (MESP), whichever is earlier, may happen as of right with the client's consent.The rule as originally adopted following the special committee's report specified that the deadline date would be the "fixing of the trial date" or the MESP hearing. The rule amendments spawned by the work of the special committee predated Best Practices, and the reality that now occurs whereby trial dates are fixed in some matters at the time of the original case management conference.

This year's amendment also modifies Rule 5:3-5(d)(2), which authorizes motions for withdrawal without the client's consent, and states when such motions may be filed. Importantly, Rule 5:3-5(d)(2) sets forth the factors that a court is to consider in such applications.

Those factors, not modified by the new amendment, include:

> the terms of the written Retainer Agreement; whether either the attorney or the client has breached the terms of that Agreement; the age of the action; the imminence of the MESP hearing or trial date, as appropriate; the complexity of the issues; the ability of the client timely to retain substituted counsel; the amount of fees already paid by the client to the attorney; the likelihood that the attorney will receive payment of any balance due under the Retainer Agreement if the matter is tried; the burden on the attorney if the withdrawal application is not granted; and the prejudice to the client or to any other party.

In today's vastly accelerated matrimonial practice, the latest rule change is salutary. It is only hoped that courts will heed the intent/message of the original rule, and now of its amendment. In a system where most family part judges rarely serve more than three years, it is good for us to remind them of the serious negative effect *Kriegsman* had on our practice when it was still viewed as persuasive authority. A past *bad practice* should not be permitted to rear its inequitable head.

RULE 5:5-4(G): THE CERTIFICATION EXHIBIT RULE

The purpose of new paragraph (g) incorporated within Rule 5:5-4 resolves the question some of us might have had with regard to how exhibits are to be considered in the page number requirements imposed by Rule 5:5-4. The answer is as simple as was the original rule. It should not come as any great surprise to anyone that exhibits attached to certifications are not to be counted in determining compliance with the page limits contained in the rule, but that certified statements not previously filed with the court shall be included in the page limit calculation.

Some among of us have attempted to circumvent the page limit rules by attaching supplemental certifications or *certified statements*, presumably believing that doing so did not violate the language of the rule, regardless of whether doing so violated the rule's intent. There is no longer any question about what pages are to be included within the 15-, 25-, and 10-page limits.

I have long felt that there is almost magic in the fact that we are permitted to file motions that should, absent appropriate adjournments, be heard 16 days later. With the upcoming demise of *administrative adjournments*, about which I have frequently written, it is important for us to recognize the burdens imposed upon courts to timely consider all of the materials submitted in support of or in opposition to motions heard each or every other Friday. What the new amendment attempts to do is to clarify and standardize the interpretation of the existing rule.

CONCLUSION

Every other year when the Supreme Court, upon recommendation of the Supreme Court Family Part Practice Committee, acts upon rule amendments, there is by necessity an adjustment period. It is hoped that our trial judges recognize this and, at least in the short run, interpret the rules flexibly. In the longer run—and it should not be very long—we should all be expected not only to familiarize ourselves with the rule changes, but to strictly abide by them. Doing so assures that our courts accord to all litigants a level playing field. ■

ENDNOTES

1. 150 N.J. Super. 474 (App. Div. 1977).
2. The full text of this portion of the special committee's final report is reproduced because of its importance to the current rule change, and to all among us who must argue applications for leave to withdraw from a client's representation. What is quoted should be regarded as the *legislative history* of the rule.

The Supreme Court Reviews Three Family Law Cases

by Bonnie C. Frost and Ivette Alvarez

The New Jersey Supreme Court has granted certification on three cases of interest to family lawyers. All should be decided in this term. They are *Mani v. Mani*,[1] an unreported Appellate Division decision; *Caplan v. Caplan*;[2] and *Steneken v. Steneken*.[3]

MANI V. MANI

Mani was argued on September 13, 2004. This is a case where the parties had been married for 27 years at the time of the filing of the complaint for divorce. They had no children. They ran a seasonal business on the boardwalk until 1993, at which time they stopped working and lived off the wife's investment income from assets gifted to her from her father. When they decided to stop working in 1993, both were in their mid 40s. The wife was the beneficiary of a substantial inheritance of approximately $3.1 million, which was not subject to equitable distribution but generated approximately $200,000 in income per year.

The parties lived an extravagant lifestyle, with a home in New Jersey and an oceanfront condo in Florida valued at $500,000. They also took yearly trips to Mexico. The plaintiff did not cook, so the parties either ate out or ordered take-out dinner from a French restaurant. They invested between $500,000 and $750,000 in improvements to the marital home, such as a heated driveway, electric awnings, a pool with extensive landscaping, and a sprinkler system, which watered the potted plants twice per day. At the time of trial, the husband stated his budget was $7,300 per month, and the wife stated her budget was $13,000 per month.

The trial court found that the wife made "significant and extraordinary financial contributions to the family," and that the defendant's "investment suggestions were of little significance and import." The court imputed a seven percent return to the wife's $2.4 million of assets and, thus, found that the wife had unearned income of $168,000 per year. At the Appellate Division argument, the wife's attorney conceded the wife's income was in excess of $200,000 per year. To the husband, the court imputed $25,000 per year in income. It held that "based on the drastic differences in income, the defendant is substantially unlikely to both eliminate his economic dependency upon the plaintiff and enjoy the standard of living that he had during the latter years of the marriage...therefore, predicated, in substantial part on defendant's economic dependency, an award of permanent alimony in the amount of $610 per week is appropriate."

As to equitable distribution, the court awarded the husband 30 percent of the value of the marital home, or $141,000, because the "financial sources to purchase this property and to improve this property were contributions...by the plaintiff substantially from her investments." The court did not award the husband any contribution to his legal fees.

In conclusion, the trial court granted the wife a divorce based on the "grounds set forth in the complaint." Those grounds were that the husband consumed alcohol to excess, that in March 2000 he refused to speak to her for weeks, and that he had developed a relationship with another woman in March 2000. The husband filed only an answer to the complaint. At the time of trial, the only testimony on the grounds for divorce was that the wife adopted her allegations in the complaint by reference.

The husband appealed the alimony award, arguing that the amount was insufficient to maintain his lifestyle, that the trial court failed to make findings as to how the amount of alimony related to his ability to sustain a lifestyle reasonably comparable to that which the parties enjoyed during the marriage, and that the court erred in computing the wife's income for alimony purposes. He also appealed the court's denial of legal fees as being without any findings under Rule 1:7-4.

The issue now before the Supreme Court arose on appeal. The Appellate Division affirmed the trial court's decision, stating that it did not adopt "the traditional analytical standard which applies to an alimony award because this was an exceptional situation." It found that the defendant was "not at all industrious in working to maintain his concept of an appropriate post-marital lifestyle;" that he had a "sense of entitlement to the largesse of the Wife's family to maintain his lifestyle;" and that "this was not a conventional, long term marriage where the non-supporting spouse had foregone an independent livelihood and career for the care of home, children and family only to end up without economic skills but destitute in middle age or later."

Then, the Appellate Division said the court could consider the proofs in establishing the grounds for divorce when it determined the alimony award. It noted that "though the alimony award may be insufficient for defendant to maintain his relaxed marital lifestyle, the reduction in his living standard was justified, in part by the finding that the Wife established that he was adulterous and committed acts of extreme cruelty." The court further held that the husband's "marital indiscretions warranted consideration in the amount of the alimony award." As to counsel fees, the court found that "...in light of the proved grounds for divorce, the court did not abuse its discretion in ordering each to pay his or her fees."

In the husband's petition to the Supreme Court, he asked, "To what extent, absent egregious circumstances, does marital fault justify an award of insufficient alimony and is fault a factor in determining fees for a dependent spouse?" In this matter, the only testimony the trial court took on the issue of fault was whether "everything in the complaint was true and accurate and would the Wife's testimony be consistent with the complaint." No other testimony was elicited. There was no testimony on the issue of adultery, since the wife did not proceed on that ground.

Case law has held that "alimony is neither a punishment to the payor nor a windfall to the payee."[4] Before the 1971 Divorce Law Study Commission's report, which resulted in a change in divorce law in New Jersey, marital fault by the dependent spouse—usually the wife—was a bar to alimony.[5] However, after 1971, when no fault divorce was introduced into New Jersey, case law evolved to reflect societal changes. In *Lynn v. Lynn*,[6] the court denied the wife alimony based on her post-separation adultery. However, while this decision was on appeal, the Appellate Division authored *Gugliotta v. Gugliotta.*[7]

In *Gugliotta*, the wife had a brief affair. Nonetheless, she was awarded alimony, and the husband appealed. In that case, the Appellate Division held that the wife's adulterous post-complaint affairs did not justify a punitive alimony award. Subsequent to *Gugliotta*, the Appellate Division reversed the trial court in *Lynn*.[8] In *Lynn,* it held that the wife's post-desertion sexual conduct was hardly egregious marital fault that would equitably preclude her from receiving alimony. It held that she did not benefit "economically from her post-desertion, extra marital, sexual liaison, thereby justifying reduction or elimination of alimony."[9]

In 1977, the Supreme Court held that "fault rarely enters in the calculus of an alimony award."[10] Further, the general considerations in awarding alimony are the extent of actual economic dependency that determines the amount and duration of alimony.[11] In *Lepis*, the Supreme Court stated that the alimony law is gender neutral, and judicial decision making should not employ sexist stereotypes.[12]

In opposition to the petition, Mrs. Mani argued that her husband was arguing for a new standard of "egregious circumstances" to be engrafted onto the alimony statute. The alimony statute states "in all actions for divorce other than those where judgment is granted solely on the ground of separation the court may consider also the proofs made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just."[13] The wife argued that if the court were to adopt an egregious circumstances standard, that standard would result in more litigation in trying to establish that the standard was met. The wife argued that the "cure for a non-existent problem that her Husband complained of would be worse than the disease."

As *amicus*, the New Jersey State Bar Association agreed that fault language was in the statute and, therefore, fault could be considered in determining alimony, but, as a practical matter, the *status quo* should be maintained where the courts view alimony as an issue of economic dependency, not related to fault. The association argued that while the statute retains the language of fault being a factor in the determination of alimony, case law has diverged such that fault was rarely a consideration, except in the most outrageous circumstances.

The association argued that if fault were litigated in every case there would be additional institutional burdens placed on the courts as well as financial and emotional burdens imposed on litigants. If the holding of the Appellate Division decision in *Mani* were to be upheld, litigants would ask to be heard on the issue of fault in every divorce—whether it be at trial or during negotiations—in order to minimize the amount of alimony paid. It must be noted that where fault lies with the supporting spouse, the supporting spouse has not conversely been ordered to pay more alimony.

Another argument raised by the association was that if both parties in a divorce action alleged fault, the court would then have to apportion fault between the parties in order to reach the appropriate support number, thereby causing litigants to incur more fees and expenses, and taking more time in the court system.

The final argument advanced by the association was that if the dependent spouse's alimony were reduced as a result of fault, since most of the people receiving alimony are women, such a consideration would have a disproportionate impact on women and children, leaving them with a lesser standard of living than they experienced during the course of the marriage. The Supreme Court has previously stated that "some studies have concluded that the standard of living for a woman decreases 30 percent after a divorce, while men enjoy a 10 percent increase in living standards, on average."[14]

At oral argument, the Supreme Court justices appeared to be struggling with the tension between the clear language of the alimony statute and the logistical, financial and emotional impact on litigants and courts if fault were a factor to be litigated in every divorce case.

CAPLAN V. CAPLAN

The next case, *Caplan*, raises the issue of the proper procedures to be employed in establishing the amount of child support that should be paid when the parties' earnings are above the maximum child support guideline amount, where both parents have income-producing assets, but neither has any earned income, and one parent, the formerly high income earner, is voluntarily unemployed.

In this case, the parties had two children who were 12 and 14 at the time of trial. Both parties were in their 30s, and the husband had been a mortgage securities trader with Salomon Smith Barney. During the marriage, the wife did not work but was a stay-at-home mother.

The husband's earnings ranged from a low of $1,000,000 per year to a high of $4,600,000 per year. At the time of the trial, he had been laid off as a result of downsizing, and advised that he had no plans to seek employment. When the husband was laid off, he received a severance package, which included a lump sum of $115,000, $72,000 in stock options and over $1.6 million in stock. The parties settled all of their differences except the issue of child support and counsel fees, which were then tried.

The wife received $2,075,000 in cash and the marital residence. The lump sum payment was, in part, a payment in lieu of alimony. After the marital home was sold, she had approximately $2.4 million in income-producing assets.

The husband, on the other hand, had gross assets of approximately $6.5 million, of which $5.8 million was in income-producing assets. At the time of trial, the husband contended that he had only $4.5 million in income-producing assets.

The parties' oldest son, Daniel, was a special needs child. Both parties agreed that it was unlikely Daniel would ever be emancipated, and, therefore, they set up a special needs trust for his assistance in the future. Their younger child suffered from asthma but had no learning or social problems.

The primary issue in the case was the allocation of the support obligation for the children. When the husband left the marital home, the children were six and eight; when trial commenced, they were 10 and 12. The difference between the parties' positions at trial was substantial. The wife argued that the needs of the children were changing, and that due to their age they should be able to meaningfully participate in the lifestyle the parties enjoyed during the marriage. The husband, however, believed the needs of the children during the marriage were determinative of their needs.

After trial, the judge concluded that even though each party was able to work, nonetheless, in light of their exceptional economic abilities to meet the support needs of the children, the unemployment of both parties did not impact his decision. He concluded that the husband's income-producing assets were $4.5 million, and that the wife's were $2.4 million. These numbers produced an income ratio between the parties of 65.18 percent being allocated to the husband and 34.82 percent to the wife.

As a result, he ordered the husband to pay $486.54 a month as his 65 percent share of the children's Schedule A expenses (electric, gas, water, sewer, phone and television). Regarding their Schedule B expenses, he found they were all the obligation of the wife, and none were costs attributable to the children. Regarding Schedule C, the defendant was to pay $5,391 of a total of $7,525 expenses that he attributed to the children. The husband's total child support obligation, therefore, was $1,253.80 per week, or $5,391.34 per month.

In addition, the court allocated between the parties, according to those percentages, the children's unreimbursed medical insurance and medical expense costs; the boys' summer camp costs;, dental expenses, including orthodontia for both boys; the bar mitzvah expenses for each child; a $10,000 contribution to each of the boys' UGMA accounts; the older son's college and miscellaneous costs not covered by his UGMA account; and any and all post-secondary education or training for the parties' younger son.

The court denied both cross-motions for reconsideration. On appeal, both parties argued that the court erred in computing the husband's child support obligation.

Judge Robert A. Fall wrote the Appellate Division decision. He noted that while the trial court correctly referenced the applicable procedure, which holds that the trial court must "apply the Guidelines up to (the threshold amount) and supplement the Guidelines base award with a discretionary amount based on the remaining family income...and the factors specified in N.J.S.A. 2A:34-23(a),"[15] the trial judge, nonetheless, failed to apply the very procedure he described. Accordingly, while acknowledging that the steps a trial court must take in establishing a parent's child support obligation may be easily described, the process itself may be difficult to apply when faced with the facts of any one case.

As a result, Judge Fall, in his decision, outlined the required steps to determine child support in such situations as follows:

First, "the reasonable needs of the children must be determined, guided by the principles in *Isaacson*, 348 N.J. Super. 560, (App. Div.), *cert. denied*, 147 N.J. 364 (2002)." The task in this step is to determine the "reasonable lifestyle to which the children are entitled and to the extent possible, differentiate between needs or expenses of plaintiff and those that benefit the children and provide them with that reasonable lifestyle. Overlapping, common expenditures are inevitable and are, indeed, incident to one's status as a custodial parent."[16]

Second, "because there must be a fair and appropriate allocation of the children's needs between the parties, the ability of the parties to generate earned income in addition to unearned income, must be determined."[17] The court rules state, "if the court finds that either parent is without just cause, voluntarily underemployed or unemployed, it shall impute income to that parent according to, *inter alia*," "potential employment and earning capacity using the parent's work history, occupational qualifications, educational background and prevailing job opportunities in the region."[18]

The appellate court found that the trial court incorrectly applied a mechanistic approach to the child support calculus in this case by determining each party's percentage relationship to their combined unearned-income-producing assets. Judge Fall stated that since the court must allocate the reasonable needs of the children between the parents, it would be "inequitable to allocate those needs simply based upon an analysis of unearned income, since one or both parents would thereby have the ability to decrease their respective responsibility to the children's needs by simply not working and avoiding imputation of income principles."[19]

As a result, the Appellate Division directed that, on remand, the trial court determine the ability of each parent to earn income, and factor that ability into the income equation used to determine the allocation of the child support obligation between the parents.

Third, after the trial court has determined the respective percentage of each party's net (imputed earned and unearned income) in proportion to their total combined net, those percentages should be applied to determine each party's share of the maximum child support guideline award for the children.

Fourth, the maximum basic child support amount, in this case $2,834 per month, should then be subtracted from whatever amount the court determines to be the cost of the reasonable needs of the children. This will result in the amount of the children's needs, which remains to be allocated between the parties according to their percentage of total income.

Finally, the court noted that "the sole use of a percentage of income formula to determine child support ignores the other factors set forth in N.J.S.A. 2A:34-23(a) that require analysis." The court reiterated that "children are entitled to share in the good fortune and current income of both parents and enjoy a lifestyle comparable to that of their parents; and that children should not be the economic victims of divorce or separation."[20]

The husband filed a petition for certification, arguing the law did not require a parent to be employed, rather that it only required a parent to meet his or her obligation of support commensurate with the child's needs and/or marital lifestyle. The husband argued that the Appellate Division's decision created a standard where a parent has the absolute duty to work, regardless of the economic circumstances, whenever child support is being determined. The husband argued that the Appellate Division disregarded the thread throughout case law where income is imputed to a parent to assure that an obligor could not remain idle to avoid his or her child support obligation. The husband argued that the cases referred to by the Appellate Division were inapplicable to the facts in this case, since the children's needs were established and could be met regardless of one's ability to pay.

Finally, the husband argued that, "by creating a duty to work in all cases in which support is an issue, the Appellate Division is not only trampling upon the fabric of the American Dream, it is infringing upon the defendant's fundamental right to the pursuit of happiness, as well as to his right to due process and equal protection under law. Clearly, to an intact family, no court could create such a duty."

The wife, on the other hand, argued that the husband sought to "carve out an exception for the extremely wealthy and that such a person should not be entitled to a separate or more favorable treatment simply because he has sufficient wealth to enjoy a privileged lifestyle without working."

Caplan was argued before the Supreme Court on September 27, 2004. Clearly, if the husband were imputed income consistent with his ability to earn, the allocation of whatever the reasonable expenses for the children would cause his obligation to increase (since he was the high-income earner), and the wife's obligation to decrease.

STENEKEN V. STENEKEN

This matter, while very important to those affected, will only apply to a very small number of cases where alimony is an issue and the supporting spouse's income is derived from a closely held business. *Steneken* comes before the New Jersey Supreme Court as a result of the decision by the trial court after an initial remand from the Appellate Division on the issue of alimony.

The parties were married in 1971 and separated in November 1995. They had three children during the marriage. On the first appeal, three issues were raised: the amount of permanent alimony awarded, the value of the husband's business and the wife's percentage share of the husband's business.

The husband's company, ESCO, manufactured optics, optical components and optical filters. The wife's uncle was a founder and owner in the company until the husband began working there during college. Eventually, in 1982, the defendant purchased the company from the remaining owners and became its president.

During the trial, the plaintiff testified to a lavish lifestyle that included a 3,500 square foot, four-bedroom, colonial home; the use of luxury vehicles and a sailboat; numerous out-of-state and out-of-country vacations; and the receipt of expensive jewelry and gifts.

At the time of trial, the wife was a teacher, earning approximately $42,000 a year, and pursuing a master's degree.

The defendant's gross salary, however, ranged between $188,000 per year to $207,000 per year, and, arguably, the husband received perquisites of at least $20,000 per year or more.

The parties had four experts in this matter; a real estate appraiser who valued the real property on which the business sat; a court-appointed business valuation expert; the wife's expert, who testified the defendant had cash flow from his business of $330,000 in 1998, which included the salaries of the children and all perks; and, the husband's business valuation expert.

After a multi-day trial, the judge accepted the husband's expert's value of the business, distributing 35 percent of the value to the wife, or $142,600 payable over six years, and awarded the wife $48,000 in permanent alimony. The trial court found that the husband's salary in 1996 was $221,000, plus perks he received from his company, and in 1995 his income was $188,000 with perks. The court also found that the value of the perks received by the husband averaged $16,000 per year. Despite these findings however, the court determined that the defendant's salary for alimony purposes was $150,000 per year, the same figure, the husband's expert assigned as "reasonable compensation" in valuing ESCO for equitable distribution under the "excess earnings" approach. The husband's expert specifically testified that, "$150,000 was used as reasonable compensation for a CEO of a company of ESCO's size and complexity and is not meant to constitute a determination of defendant's actual income."

The wife appealed the amount of alimony and equitable distribution awarded her. The Appellate Division remanded only on the issue of alimony. The Appellate Division found that it could not reconcile or determine an adequate basis for the conclusion as to the defendant's income, nor determine the basis for the ultimate conclusion of the plaintiff's entitlement to alimony in the amount of $48,000, and accordingly reversed.

On remand, the trial court judge reviewed the financial information in the record, received additional evidence of the defendant's gross income in 2001, that being that he earned $262,555 and that he projected his income in 2002 to be $252,401 (information the husband had provided to the Appellate Division on the issue of fees). This time the trial court reexamined the parties' marital lifestyle as being upper-middle class, determined the wife's unmet needs as being $65,000 per year, and considered the defendant's ability to pay based on his actual income. As a result, the trial court increased the plaintiff's alimony award to $5,500 a month, or $65,000 annually, retroactive to November 1999, the date of the original decision.

On the husband's motion for reconsideration, he argued that the use of his actual income resulted in "double dipping," since his excess earnings beyond his reasonable compensation were considered in valuing the business of which his wife received a 35 percent distributive share. The husband argued that the wife would receive the benefit of his excess income twice—once in equitable distribution and again in alimony. This, the husband claimed, was impermissible double dipping. The husband's application for reconsideration was denied, and he appealed.

On appeal, the wife argued that if alimony were calculated only on the husband's "reasonable compensation" or his fictionalized income, it would not permit her to share in the defendant's income and perks, which he continued to receive from his business and to which she contributed during the marriage. The wife argued that the husband's reliance on the theoretical concepts of reasonable compensation and excess earnings were accounting fictions, and did not reflect the reality of the way the parties lived, which was from cash flow and actual income. Further, to limit the wife to alimony based on an accountant's opinion of one's hypothetical earnings, which did not reflect the marital lifestyle, which could be supported by the husband's actual income, was unfair and contrary to case law and statute.

The husband argued that the number awarded to the wife represented the sum of his alimony obligation attributable to the excess earnings, and that the amount she received as her share of the business—$142,600—was "her share of his capitalized income stream."

In matrimonial cases, businesses are valued by forensic experts utilizing the market approach, the income approach or the cost approach. The wife argued that if reasonable compensation were to become the standard for determining the payor's income for purposes of alimony, then in cases where a business had to be valued and alimony and child support were to be awarded, experts would be forced to do three reports, one for the value of the business, which may or may not address reasonable compensation, a second to determine reasonable compensation for alimony purposes, and a third to determine the payor's actual income to calculate child support.

The husband argued that his double dipping argument in the alimony context was analogous with the double dipping argument with respect to pensions, and urged that the Legislature's bar to double counting in pensions be applied when calculating alimony.

On this second appeal, Judge Anthony J. Parrillo framed the issue as follows: "the novel issue raised in this appeal is whether it is impermissible 'double counting' to value defendant's business based on his reasonable, rather than actual, compensation and then to calculate alimony based on the same excess salary that was added back to business income, thus increasing the value of the corporate asset for which plaintiff already received her share in equitable distribution."[21]

The Appellate Division decided that there was no reason to expand the prohibition against double counting beyond the statutory borders of N.J.S.A. 2A:34-23(b), noting that pension assets are *sui generis* in nature. The Appellate Division stated that: "under the usual pension benefits plan, a retiree has a right to a future stream of income attributable to past employment. The amount of the retiree's benefit is tied to the compensation the retiree received while employed and that portion of the gross amount earned during marriage and assigned to present value is equally divisible."[22]

The Appellate Division held that "excess earnings" on the other hand is a theoretical construct used to value the goodwill component of a closely held corporation at a specific point in time, namely the date of the divorce complaint. It is a hypothetical figure unrelated to the actual value of the underlying assets on a going forward basis, and as a source of the defendant's future income stream.[23]

In conclusion, the Appellate Division stated, "to reiterate, the valuation of the corporate asset was based on defendant's past earnings, not his future earnings. Obviously, the effect of this approach was not to reduce the income actually paid to defendant *in futuro*. In fact, as evidenced by supplemental submissions, defendant's compensation in 2001 and his estimated compensation in 2002 far exceeded the average of his actual earnings over the four year period used in the valuation methodology."[24]

The Appellate Division also held that the husband's double dipping argument failed because to argue otherwise "would be inconsistent with the State's strong legislative and judicial policy of providing support to the dependent spouse in accord with the needs and earning capacity of the parties, and that alimony provides for support usually from current income."[25]

"To allow plaintiff's distributive share of marital property to automatically defeat her needs-based claim would contravene the basic goal of alimony and result in the fundamental unfairness of having defendant alone partake in the benefit of future earnings in excess of reasonable compensation."[26]

The husband's petition for certification stated that the issue was whether it is impermissible double counting to value the defendant's business based on his reasonable, rather than actual compensation, and then to calculate alimony based on the same excess salary that was added back to business income, thus increasing the value of the corporate asset for which the plaintiff already received her share in equitable distribution. The husband argued that the double counting regarding pension was eliminated by the courts and Legislature, and it was now time for the Supreme Court to remedy the same problem regarding income from closely held businesses. The husband argued that to permit double counting to continue was to adopt a rule that was inherently unfair to every closely held business owner, male or female.

No date has been set by the Supreme Court for oral argument at the time this article was completed. ■

ENDNOTES

1. Cert. 178 N.J. 453 (2004).
2. 364 N.J. Super. 68 (App. Div. 2003), cert. 179 N.J. 309 (2004).
3. 367 N.J. Super. 427 (App. Div. 2004), cert. 180 N.J. 357 (2004).
4. *Aronson v. Aronson*, 245 N.J. Super. 354, 363 (App. Div. 1991).
5. *Mahne v. Mahne*, 147 N.J. Super. 326 (App. Div. 1977), *certif. den.* 75 N.J. 22 (1977).
6. 153 N.J. Super. 377 (Ch. Div. 1977).
7. 164 N.J. Super. 139 (App. Div. 1978).
8. 165 N.J. Super. 328 (App. Div.) *certif. den.* 81 N.J. 52 (1979).
9. *Id.* at 338.
10. *Kinsella v. Kinsella*, 150 N.J. 276, 314-15 (1997).
11. *Lepis v. Lepis*, 83 N.J. 139, 155 (1980).
12. *Id.*
13. N.J.S.A. 2A:34-23(g).
14. *Crews v. Crews*, 164 N.J. 11, 32 (2000), *citing* Peterson, A Revolution of the Economic Consequences of Divorce, 61 *Am. Soc. Rev.* 528 (1996).
15. Pressler, Current N.J. Court Rules, Appendix IX-A to Rule 5:6-A at paragraph 20 (2004).
16. *Caplan, supra*, 364 N.J. Super. at 87.
17. *Id.* at 87.
18. Pressler, Current N.J. Court Rules, Appendix IX-A to Rule 5:6-A, paragraph 12 (2004).
19. *Id.* at 88.
20. *Id.* at 90.
21. *Steneken, supra*, 367 N.J. Super. at 430.
22. *Id.* at 439.
23. *Id.* at 439.
24. *Id.* at 441.
25. *Id.* at 441.
26. *Id.* 441.

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Bankruptcy Trustee v. Non-Debtor Spouse

Is the Battleground State Court or Bankruptcy Court?

by Timothy Duggan

Matrimonial lawyers are occasionally confronted with bankruptcy filings by one or both spouses during or after a matrimonial action. The bankruptcy case can dramatically change the landscape of the matrimonial action by adding new parties and issues to an already acrimonious situation.

Among the more notorious characters is the Chapter 7 bankruptcy trustee. Recently, the United States Bankruptcy Court for the District of New Jersey held that a Chapter 7 trustee's rights as a "hypothetical lien judgment creditor" are superior to the rights of a non-debtor divorcing spouse in the equitable distribution of property of the bankruptcy estate.[1] The bankruptcy court found that the debtor's interest in bankruptcy estate property is encumbered by the Chapter 7 trustee's judgment lien, and any transfer of property, including equitable distribution, is subject to the trustee's lien and jurisdiction of the bankruptcy court.

BANKRUPTCY PRIMER

For family lawyers, the following bankruptcy fundamentals are important to understand in evaluating the impact of *Howell* on your practice.

1. **Bankruptcy Estate:** Upon the filing of a bankruptcy petition, a bankruptcy estate is created. The bankruptcy estate consists of all property in which the debtor has an interest, legal or equitable. 11 U.S.C. § 541.
2. **Earnings:** In a Chapter 7 bankruptcy case, post-petition earnings are not property of the bankruptcy estate. 11 U.S.C. § 541(a)(1). In a Chapter 13 bankruptcy case, post-petition earnings are property of the bankruptcy estate. 11 U.S.C. § 1306 (a)(2).
3. **Exempt and Excluded Property:** In both Chapter 7 and Chapter 13 bankruptcy cases, the debtor is entitled to certain exemptions, including $17,425 in the debtor's residence, $9,300 in the debtor's household goods, and $2,775 in a vehicle. 11 U.S.C. § 522 (d). In addition, Employee Retirement Income Security Act (ERISA) qualified plans, IRA accounts and certain other types of retirement plans are not property of the bankruptcy estate. 11 U.S.C. § 541(c); *In re Yuhas*, 104 F.3d 612 (3d Cir. 1997).
4. **Control and Sale of Assets:** In a Chapter 7 bankruptcy case, the Chapter 7 trustee stands in the shoes of the debtor and takes control of the debtor's property. 11 U.S.C. § 704. The trustee may sell jointly owned property, including property jointly owned by spouses. 11 U.S.C. § 363 (h). The non-debtor spouse is entitled to notice of the sale, and may object to the sale if the detriment to the non-debtor spouse outweighs the benefit to the bankruptcy estate. 11 U.S.C. § 363 (h)(1)-(4). The non-debtor spouse also has a right of first refusal. 11 U.S.C. § 363 (i).
5. **Bankruptcy Stay:** The bankruptcy stay does not prohibit a non-debtor spouse from either seeking to establish the amount of alimony, support, or maintenance, or deciding issues of custody. 11 U.S.C. § 362 (b)(2). These actions are exempt from the automatic stay. However, any action to seek distribution of bankruptcy estate property (*i.e.* equitable distribution) is subject to the bankruptcy stay, and the non-debtor spouse must have the bankruptcy stay lifted, modified or annulled before proceeding in state court. 11 U.S.C. § 362 (a)(3).
6. **Priority Claims:** The Bankruptcy Code provides priority treatment to certain creditors who must be paid before general unsecured creditors. Relevant to this article is Bankruptcy Code §§ 507(a)(7) and 726(a)(1), which require pre-petition alimony, maintenance and support to be paid before the claims of general unsecured creditors (assuming money exists).

THE *HOWELL* DECISION

Mrs. Howell filed a complaint for divorce in May 2003, and immediately obtained a *pendente lite* order requiring Mr. Howell to pay $500 per week, plus roof expenses and healthcare expenses. After Mr. Howell refused to pay spousal support, the state court judge entered two arrest warrants and revoked Mr.

Howell's driver's license. Seeking to stay further enforcement procedures, Mr. Howell filed a Chapter 7 bankruptcy petition. Mr. Howell listed his home on his bankruptcy schedules with a value of $400,000, encumbered by a mortgage in the amount of $240,000. He also claimed an exemption of $17,425 in the equity in the home. Mrs. Howell immediately filed a motion for relief from the bankruptcy stay in order to return to state court to complete her divorce action and seek equitable distribution of their joint property, including the home.

In reviewing the motion, the bankruptcy court noted that relief from the bankruptcy stay is not required to proceed against exempt assets.[2] However, since the debtor's sole remaining asset was his equity in his residence, which he owned with his wife, Mrs. Howell's only chance for relief was to recoup what she could from the debtor's equity in the form of equitable distribution.

Mrs. Howell argued that the bankruptcy court should abstain from deciding this issue, and permit her to return to state court. The Chapter 7 bankruptcy trustee opposed the motion, arguing that since a judgment of divorce had not been entered, Mrs. Howell did not have a right to equitable distribution. The trustee further argued that since the determination of the respective interests of the bankruptcy estate and Mrs. Howell required careful consideration of both bankruptcy and equitable distribution law, the bankruptcy court should retain jurisdiction. The bankruptcy judge agreed with the Chapter 7 trustee, and denied Mrs. Howell's motion.

The bankruptcy court performed a thorough review of the two leading bankruptcy court decisions that had exhaustively reviewed various case law analyzing the interaction of bankruptcy law and New Jersey equitable distribution law. First, the bankruptcy court reviewed *In re Berlingeri*,[3] which held that a right to equitable distribution arises upon the entry of a judgment of divorce.[4]

If the judgment of divorce awarding equitable distribution is entered before a bankruptcy petition is filed, it is a pre-bankruptcy claim. However, if the judgment of divorce and award of equitable distribution is entered post-bankruptcy, the equitable distribution claim is a non-dischargeable post-petition obligation of the debtor.

The bankruptcy court next proceeded to analyze *In re Becker*,[5] which involved a Chapter 7 debtor who filed for bankruptcy protection before an award of equitable distribution was entered in his state court action. The *Becker* court reaffirmed that a Chapter 7 trustee has the rights of a hypothetical judgment creditor who has levied on a debtor's property as of the date the bankruptcy petition is filed, whether or not a creditor exists.[6] Citing *Freda v. Commercial Trusts Co.*,[7] the court also noted that under state law, transfers of property under equitable distribution are subject to existing liens.

The *Becker* court held that the filing of a bankruptcy petition:

> is therefore the legal equivalent of a levy by the trustee upon all the debtor's property as of the petition date. It follows equitable distribution and cannot alter a bankruptcy estate's rights in property in which the debtor had an interest on a petition date, allegedly owned or otherwise.[8]

The bankruptcy judge in *Howell* found that a post-petition award of equitable distribution cannot alter the rights of the Chapter 7 trustee as a levying judgment creditor on the debtor's interest in property. The court concluded that Mrs. Howell may seek a monetary award of the "equivalent" value of her rights of equitable distribution, but she may not seek to have the bankruptcy estate property actually distributed to her in kind. The bankruptcy court denied Mrs. Howell's motion, and retained jurisdiction over the marital residence.

PRACTICAL IMPLICATIONS

What does this decision mean to matrimonial lawyers, and are there any protective measures that can be taken to avoid the harsh results of a Chapter 7 filing?

- Courts following *Howell* will retain jurisdiction over assets subject to the trustee's lien, and deny motions to lift the stay to the extent of the property encumbered by the trustee's lien. If there is sufficient equity in the property, the trustee will seek to sell the property, pay the non-debtor spouse his or her portion of the equity (generally half), and use the balance to pay claims against the bankruptcy estate.
- As the court noted in *Howell*, pre-bankruptcy claims for unpaid alimony, support and maintenance are provided a priority in a Chapter 7 bankruptcy liquidation, and can be collected from exempt assets. Try to obtain a *pendente lite* order as soon as possible.
- Immediately review the debtor's bankruptcy schedules, identify which assets are exempt and not property of the bankruptcy estate, and seek recourse against those assets in your family law action.
- Consider obtaining relief that, under state law, would trump the rights of a levying judgment creditor. For example, bankruptcy courts recognize constructive trusts and certain types of equitable liens. If the debtor-spouse has engaged in fraudulent or unlawful conduct, you may want to seek the imposition of a constructive trust over certain marital assets. Although this remedy is very limited, and does not apply to most matrimonial cases, keep it in mind.
- The filing of a bankruptcy petition and subsequent discharge may be a sufficient *change of cir-*

cumstances permitting a non-debtor spouse to return to state court and adjust the amount of alimony and support to be paid from post-petition earnings. In addition, it is important to note that exempt assets, including pension, IRA and 401(k) accounts, are generally not part of the bankruptcy estate, and will be subject to the control of the state court.

- It is prudent to compare the state court case information statements to the debtor's bankruptcy schedules. Any discrepancy (*i.e*. missing assets) may provide support for dismissal of the bankruptcy case, or denial of the discharge under Bankruptcy Code Section 727.

Before spending time and money filing motions, analyze the debtor's bankruptcy schedules and determine what is encumbered by the trustee's lien. Deduct the debtor's exemptions and costs of sale (most trustees use 10 percent as the standard cost of sale), and you will have an idea of what the trustee will recover from the sale of the asset. Of course, it is very important to know the true value of the property in question, and it may be prudent to retain an appraiser.

Often it is more cost effective to negotiate a deal with the trustee to buy out his or her interest in the property and pursue the exempt assets in state court. However, before making an offer, fully evaluate your client's claim, including his or her right to a priority claim for pre-bankruptcy arrears in alimony and support, which may be used as a bargaining chip with the trustee. ■

ENDNOTES

1. *In re Howell,* 311 B.R. 173 (Bankr. N.J. 2004).
2. Under 11 U.S.C. § 522 (c)(1), exempt assets are available to satisfy unpaid alimony, support and maintenance.
3. 246 B.R. 196 (Bankr. D.N.J. 2000).
4. Relying upon N.J.S.A. 2A: 34-23 and *Carr v. Carr*, 120 N.J. 336 (1990).
5. 136 B.R. 113 (Bankr. D.N.J. 1992).
6. 11 U.S.C. §544 provides in pertinent part:
   (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by
   (1) a creditor that extends credit to a debtor at the time of the commencement of the case, and that obtains, at such time with respect to such credit, a judicial lien on all property in which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;
   (2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists;...
7. 118 N.J. 36 (1990).
8. *Becker*, 136 B.R. at 115-118.

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The Grudge Match

The Family Part vs. the Probate Part

by Steven K. Mignogna

In the past two years, both the New Jersey Supreme Court and the Appellate Division needed to address, in independent cases, whether a family dispute involving a decedent must be handled in the family part or the probate part of the New Jersey Superior Court, Chancery Division. With increases in family disputes, the issue arises more frequently. In turn, the resolution of the issue bears on the venue of the litigation, the judge who hears the case, and an assortment of procedural points. At the same time, the precedent is not yet crystallized. These factors converge to create a significant, but debatable, concern that must be addressed early in the case.

This article considers the issue on three levels: a) the general rules; b) common contexts in which the problem arises; and c) the most recent precedent.

GENERAL RULES

New Jersey Court Rule 4:3-1 sets the general parameters. Rule 4:3-1(a)(2) states simply, "All actions brought pursuant to R. 4:83 *et seq*." are to be brought in the probate part.

Rule 4:83-2 then requires that "all matters relating to estates of decedents, trusts, guardianships and custodianships…shall be filed with the Surrogate of the county of venue as the deputy clerk of the Superior Court, Chancery Division, Probate Part, pursuant to R. 1:5-6." At the same time, Rule 4:3-2 provides, in Subsection (3), that venue shall be laid subject to Rule 4:83-4 for "probate actions." Consequently, these New Jersey Court Rules suggest "a preference and procedure for determining the appropriate forum for a specific claim."[1]

Rule 4:3-1(a)(3) frames the jurisdiction of the family part. Under that rule:

> All civil actions in which the principal claim is unique to and arises out of a family or family-type relationship shall be brought in the Chancery Division, Family Part. Civil family actions cognizable in the Family Part shall include all actions and proceedings provided for in of Part V of these rules; all civil actions and proceedings formerly cognizable in the juvenile and domestic relations court; and all other actions and proceedings unique to and arising out of a family or family-type relationship.

Likewise, under Rule 5:1-2, "all civil actions in which the principal claim is unique to and arises out of a family or family-type relationship shall be brought in Family Part."

COMMON CONTEXTS

These rules of court are extremely general. The nature of the problem is more readily evident in the common contexts in which the issue arises. For example, one frequent question is whether the probate part or the family part is the proper venue to bring claims to enforce judgments or orders of divorce decrees, which were not satisfied before or at the time of one of the spouse's death. As a general rule, these claims belong in the family part. When the plaintiff is seeking merely to enforce the rights granted by the family part at the time of divorce, and is not seeking any additional rights, the family part retains jurisdiction. Similarly, the family part has the authority to enforce its own decrees and orders, and, therefore, is vested with jurisdiction to hear such cases.[2] To hold otherwise would frustrate the power of the court to enforce its own decrees.[3] Therefore, when the family part is asked to enforce its own orders, jurisdiction remains with the family part.[4]

As explained in *D'Angelo*:

> While the Law Division/Probate Part has full authority to hear and determine controversies over wills, trusts, and estates, it was not the intent of the Legislature to permit that court to encroach upon the general jurisdiction of the Superior Court, Chancery Division/Family Part…The distribution of assets of a marital estate and performance of judgments/agreement obligations are logical extension of the rule that allow a court to enforce its own orders.[5]

Again, as a general rule, all matters that involve a family or family-type relationship shall be brought in the family part.[6] The courts acknowledge that, when one of the two parties to a divorce is deceased a matrimonial dispute no longer exists technically; nonetheless, the family part has continuing jurisdiction over an action commenced between live spouses, despite the fact that one for the spouses died after the start of the action.[7] Furthermore, the mere fact that an executrix stands in the place of the deceased spouse does not require the action to be moved to the probate part.[8] As long as matrimonial law is being enforced, and not probate law, the family part is the appropriate venue.[9]

On the other hand, one of the cases in which the probate part was held to be the proper venue was *Lopatkin v. Lopatkin*.[10] In that case, Mrs. Lopatkin sought to enforce rights stemming from her ownership of money held in escrow for her and her spouse as tenants by the entirety.[11] The proceeds from a real estate sale were still being held in escrow because of the pending matrimonial action.[12] However, the court ruled that the holding of this property was not substantially related to a family relationship, especially since the funds were not placed in escrow by the court and the reasons for placing the funds in escrow had nothing to do with the matrimonial action.[13] The court ruled that this action belonged in the probate part.[14]

The trend is thus for such cases to stay in the family part rather than be transferred to the probate part.[15]

The more complex, yet still common, dilemma exists when the claim arises from a less traditional *family* context, and is not brought until after the death of one of the parties. That very context precipitated the New Jersey Supreme Court's recent venture into this arena.

RECENT PRECEDENT

The evaluation of recent precedent begins with *Kingsdorf v. Kingsdorf*.[16] The executor of an estate brought a post-judgment motion to enforce a divorce settlement between his parents to transfer property from the wife/mother to the husband/father's estate upon the husband/father's death. In reviewing the intersection of family law and estate litigation in this case, the Appellate Division held that the trial court lacked the power to equitably divide and distribute the marital estate after the husband's death, because such a power exists only in the context of a divorce.[17] The court also had to assess whether the executor, who was also the guardian of his incapacitated father while still alive, committed a fraud on the court by deliberately failing to notify the parties that the husband had died before formal entry of the divorce. The Appellate Division directed the complaint to be dismissed.[18]

The Appellate Division went on to discuss where jurisdiction would lie if the complainant were to re-file in either the probate or family part. The court declared that it was "beyond dispute" that when the action was first filed, it was properly filed in the family part.[19] However, the divorce proceeding abated upon the husband's death, and the plaintiff's authority to act as his father's guardian, while his father was in a nursing home, ceased upon his death.[20] Thus, upon the husband/father's death, the defendant held legal title to the properties, and any claim on behalf of the husband/father would be made by his estate.[21] The court presumed the claim would be based upon the contention that an agreement had been reached prior to his death.[22] Such a claim, the Appellate Division opined, would not be unique to or arise out of a familial relationship, or require the expertise of a family part judge, and so would not be within the family part's jurisdiction. Accordingly, the court instructed that if the estate were to file a new complaint, it be filed in the Chancery Division, general equity part.[23]

Only a few months after *Kingsdorf*, the New Jersey Supreme Court ruled on similar issues in *In re Estate of Roccamonte*.[24] *Roccamonte* involved a decedent who, although married with two children, also maintained a relationship with the plaintiff during the last 40 years of his life. In particular, the plaintiff and the decedent met in the 1950s, and lived together intermittently until the mid 1960s. The plaintiff testified that she had moved to California in the mid 1960s, but had received calls from the decedent, promising her that if she came back to New Jersey he would leave his wife and provide for the plaintiff financially for the rest of her life. In response, the plaintiff returned to New Jersey and divorced her husband. The plaintiff and the decedent, and the plaintiff's daughter, then co-habitated from 1970 until his death in 1995. They lived together as husband and wife, although, in fact, they were not married. The decedent never divorced his wife, and continued throughout his life to support his wife and children.

The decedent was wealthy. In 1973, when the apartment the decedent shared with the plaintiff was converted to a co-op, he purchased the apartment and placed title in the plaintiff's name. The decedent paid for improvements to the apartment. He also provided the plaintiff with cash as a weekly allowance, clothes, jewelry, and vacations. He paid the college tuition and medical expenses of the plaintiff's daughter.

The decedent died intestate. The plaintiff did receive the proceeds of an insurance policy ($18,000) and a certificate of deposit in her name ($10,000). She also retained title to the apartment. The plaintiff claimed that while she was living with the decedent he repeatedly told her that he would "take care of" her, and that she would be "taken care of" for the rest of her life.

After the decedent's death, the plaintiff filed a complaint setting forth two claims: a contract to make a will and unjust enrichment. She also sought a lump-sum support award. She filed the action in the family part. During the following two years, a substantial amount of time was expended on whether the action belonged in the family or probate part.[25] Over the plaintiff's objection, the case was moved to the probate part. The trial court then granted summary judgment against the plaintiff and in favor of the decedent's estate.[26] The Appellate Division then held that the matter was not ripe for summary judgment, in view of various questions of fact, such as the decedent's intent.[27] The matter was remanded to the probate part.

As reported in the subsequent decision, the trial court conducted a hearing, at the conclusion of which the trial court ruled against the plaintiff and dismissed the complaint. The plaintiff appealed. In its second decision, the Appellate Division concurred with the trial judge's determination that the evidence did not support a contract to make a will, and further found no basis to question the trial judge's discretionary evaluation that the plaintiff had not met the standards for unjust enrichment or *quantum merit.*[28]

However, the Appellate Division did differ with the trial judge's analysis regarding the palimony claim. After discussing the main precedent to date,[29] the Appellate Division found that the plaintiff could enforce a promise to provide support to her for life.[30] The Appellate Division further found that the claim remained viable against the decedent's estate. The matter was remanded again, to the probate part, with direction for the entry of judgment in favor of the plaintiff, with the damages to be determined by the trial court based on the record that had already been made.[31]

The Appellate Division noted that, as in *Kozlowski* and *Crowe*, the relationship between the plaintiff and the decedent in *Roccamonte* was in the nature of a quasi-marriage.[32] In turn, the appellate judges focused on whether the plaintiff had a viable palimony claim.

The New Jersey Supreme Court affirmed, holding that: 1) a palimony contract was entered into by the decedent and the plaintiff, in which the plaintiff was promised support for her life, and 2) the contract is enforceable against the decedent's estate.[33] However, the Supreme Court modified the Appellate Division's ruling that the matter be remanded to the probate part, and directed that the case be remanded to the family part. The Supreme Court reasoned that the trial court would need to fix a lump-sum payment to the plaintiff, and that "Family Part judges have developed a special expertise in dealing with family and family-type matters… and, surely, fixing levels of support is an adjudicatory task well within that special expertise."[34]

The Supreme Court also explained:

> Because palimony claims typically are unique to a family-type relationship, the Family Part is where they should be brought….Moreover, probate actions involving or arising out of a family or family-type action have been held to be within the cognizability of the Family Part as well.[35]

Roccamonte is a major decision on several levels. Although the Supreme Court remanded the case to the family part, and thus extended the line of precedent favoring the family part over the probate part in such contexts, the opinion is arguably distinguishable from other situations, especially in light of the Supreme Court's focus on the need for the fixing of a lump-sum award to the plaintiff. In the end, while these decisions refine the applicable rules, a wide gap still exists for debate; the tug-of-war between the family and probate parts is likely to persist, and pose ongoing challenges for practitioners. ■

ENDNOTES

1. *Boardwalk Properties v. BPHC*, 253 N.J. Super. 515, 526 (App. Div. 1991).
2. *See, e.g., D'Angelo v. D'Angelo*, 208 N.J. Super. 729, 731 (Ch. Div.1986) (holding that a court has power to enforce its own judgments)(*citing Joseph Harris and Sons, Inc. v. Van Loan*, 23 N.J. 466, 469 (1957)).
3. *Id.*
4. *Id.* at 731-2.
5. *Id.* at 732.
6. *Maquiling v. Maquiling Estate*, 211 N.J. Super. 69, 72 (Law Div. 1986); *Berlin v. Berlin*, 200 N.J. Super. 275, 277-8 (Ch. Div. 1984).
7. *Maquiling*, 211 N.J. Super. at 72; *Berlin*, 200 N.J. Super. at 278-9.
8. *Berlin*, 200 N.J. Super. at 279.
9. *Id.*; *D'Angelo v. D'Angelo*, 208 N.J. Super. 729, 732 (Ch. Div. 1986).
10. 236 N.J. Super. 555 (Ch. Div. 1989).
11. *Id.* at 557.
12. *Id.*
13. *Id.* at 558.
14. *Id.*
15. *Maquiling*, 211 N.J. Super. at 72 (Family part and not Law Division was proper venue for wife to seek recovery of assets comparable to proceeds of a life insurance policy that deceased husband promised to maintain for his former spouse); *D'Angleo*, 208 N.J. Super. at 732 (Family part had jurisdiction over a former wife's post-judgment proceeding against her deceased ex-husband); *Berlin*, 200 N.J. Super. at 278 (Family part was proper forum to enforce an order for marital property to be sold by wife's executor); *Kiken v. Kiken*, 149 N.J. 441 (1997)(dispute over whether a deceased father's estate had to pay for his child's college education as father had agreed in divorce decree, remanded to family part).
16. 351 N.J. Super. 144 (App. Div. 2002).
17. *Id.* at 155.
18. *Id.*
19. *Id.* at 159.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. 174 N.J. 381, 808 A.2d 838 (2002).
25. *Id.* at 360-61.
26. *Id.* at 357.
27. *Id.* at 364.
28. *In re Estate of Roccamonte*, 346 N.J. Super. 107, 117 (App. Div. 2001).
29. *Kozlowski v. Kozlowski*, 80 N.J. 378 (1979) and *Crowe v. De Gioia*, 90 N.J. 126 (1982).
30. *Id.* at 119-21.
31. *Id.* at 122.
32. *Id.* at 119, 121.
33. *See In re Estate of Roccamonte*, 174 N.J. 381, 808 A.2d 838 (2002).
34. *Id.* at 848 (citations omitted).
35. *Id.* at 848 (citations omitted).

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The Ultimate Judgment Call

As a Matrimonial Attorney, Do You Retain a Joint Valuation Expert? And, Will They Accept?

by Michael A. Saccomanno

As you gather notes during your initial interview with a new client, you learn that part of the marital estate includes a closely held business. As you explain to your client that he or she will need to retain a business valuation expert to determine the business's fair value,[1] your client informs you that there is no need to value the business because it is worthless, and the business-owning spouse is on the verge of bankruptcy. Or, perhaps the client claims to know the business is worth $100 million, and will be going public as soon as the divorce is over. After the smoke clears, your next step naturally is to contact your favorite business valuation expert before your adversary contacts and retains them first.

This article asks the questions: Have you considered retaining a joint valuation expert? And if you and your adversary agree to engage a joint appraiser, will the selected expert accept?

We all know that having an independent third party prepare a business valuation report does not guarantee success and/or an amicable settlement. It is my opinion and experience that, if each party handles the process properly, a joint valuation expert may increase the odds of a satisfactory settlement, which might save the clients the expense of a costly trial and allow attorneys and experts to close cases in a more timely fashion.

Following are some key elements needed for successful joint retention.

WHO TO RETAIN

Since the selection of the right business valuator can significantly impact the settlement of a case, evaluating the character and integrity of the potential valuator is a must. Most business appraisers currently practicing in this arena are degreed, experienced, and often accredited by one of the major credential designators. But all this may not help your case if the valuator is not objective and unbiased. A joint valuator must be willing *and* able to objectively listen to each party to establish an unbiased, defendable position, irrespective of what the individual clients and attorneys believe. This requires the valuator to see the forest for the trees, a quality every appraiser generally possesses when they represent one side or the other, but a quality not as evident when a valuator is jointly retained.

Joint valuation experts should be cautioned not to merely try to make both attorneys happy by rendering a business value in the middle of what the clients originally believed was reasonable, regardless of the facts and circumstances of the individual case. Joint valuators incorrectly view the middle outcome as a success, which will lead to future jobs and, more importantly, keep them out of courtroom and avoid a competitor's rebuttal. In reality, such a valuator did not perform the service of a business valuation expert; rather, he or she merely engineered a value. This approach directly contradicts what the valuation profession was founded on: educated, informed, defendable conclusions. Furthermore this middle outcome came at the expense of one or both of the clients. Fortunately, such an approach is much more the exception than the rule.

Remember, the job of a business valuator, whether jointly or independently retained, is to determine the market value of an asset, not to be a psychologist, or worse, a hired gun.

One of the main differences between an attorney's role and a business valuator's role in a particular case is the following: The attorney must be an advocate for the client, whereas business valuators are prohibited by the Uniform Standards of Professional Appraisal Practice (USPAP) from being advocates for a particular side in a dispute. As independent business valuation experts, business valuators are advocates of their educated defendable opinions.

Unfortunately, everyone knows certain business valuators who are notoriously perceived as *husband friendly* or *wife friendly*, and who manufacture artificially high or low values depending on who they represent. These particular so-called experts usually do not succeed in the jointly retained expert arena because, at the end of the day, the attorneys and their respective clients are left with unsupportable or unrealistic valuation conclusions, which may be worse than having no valuation at all.

KEY ELEMENTS TO SUCCESSFUL JOINT RETENTION

At the start of any joint engagement, each attorney needs to provide the valuator with a timeline of report deadlines and dates of scheduled court appearances. This is preferably done by conference call with both attorneys, and followed up in writing to avoid any confusion. This will allow everyone to be duly notified.

Along with being independent, joint valuators must be *perceived* as being independent. One may ask, is there a difference? The answer is yes. One way to resolve any potential independence questions is to copy each attorney on any and all correspondence, memos, and/or draft schedules and reports. Joint valuators must remember that they have been retained by both attorneys (clients), and must treat the engagement accordingly.

Another key element to achieving a successful joint retention is the interview process. In the course of a more traditional business valuation, the valuator will interview the business owner (and/or management) to gain insight into their particular business. In a joint retention engagement, the valuator should independently interview both spouses (business owning and non-business owning) regarding their respective perception and knowledge of the business. Why interview the non-business owning spouse about the business? The answer is simple: Let the non-business owning spouse be part of the valuation process. The answers provided (if any) during the interview are not as important as the comfort level that can be obtained by including them in the process. You would be surprised at how much can be learned from the non-business owning spouse!

After concluding a preliminary value, the joint valuator should be advised to contact each attorney for a three-way conference call or meeting to discuss the preliminary findings and address any questions and/or comments that may arise. This step could assist the parties in assessing an early settlement.

While the elements listed above are not all-inclusive, they provide the basic framework for achieving a successful outcome in a joint retention engagement.

WILL YOUR VALUATOR ACCEPT A JOINT VALUATION ENGAGEMENT?

Now that you and your adversary have decided to engage a joint valuation expert, and agreed on who that expert should be, you place the call to his or her office to discuss the case. Unfortunately, your chosen expert declines the joint engagement. Why?

One of the primary reasons a valuation expert may decline a joint engagement centers on the notion that one or both attorneys will not embrace the outcome. In a joint engagement, you have two separate attorneys—each an advocate for their client—and you have one valuation expert, who is not an advocate for either attorney or client, but an advocate for their *own* opinion. In a more traditional engagement, with two separate valuation experts, although still advocating for their own opinion, valuators experience a greater comfort level in preparing individual valuations and then discussing the differences.

If a decision is made to engage a joint valuator, attorneys should possess confidence in their chosen expert; embrace their informed, educated opinion; and discuss any questions and/or concerns that may arise.

SUMMARY

This article is not intended to suggest that in every matrimonial case attorneys should attempt to retain a joint expert. There are certain cases where joint retention probably will not work; for example, where the clients are being unruly (out for blood) or there are too many complex issues, leading the attorney believe his or her client would be best served by their own expert. But in cases where joint retention may be a possibility, remember the following:

- First and foremost, choose an expert who is capable of listening to each client objectively, and is able to provide an unbiased, defendable position, irrespective of any preconceived opinions.
- At the start, conduct a joint conference call with the joint expert, outlining all deadlines and scheduled court appearances.
- Everyone—attorneys, clients, and the joint expert—needs to be informed with copies of all correspondence, and kept updated regarding progress or lack of progress as the case moves forward.
- Interview each client independently.
- Be advised that there is a certain level of analysis that needs to be completed in every valuation; allow the valuation expert to provide independent opinions and conclusions.

Always remember, never hire a valuation expert if you know what their conclusion will be ahead of time. The best valuation expert (jointly retained or not) is the expert who cannot, and will not, give you a value without preparing the level of analysis required to determine it. ■

ENDNOTE

1. Consistent with New Jersey Superior Court decision in *Brown v. Brown*, 348 N.J. Super. 466 (App. Div. 2002).

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