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Chairman's Report

by Lee M. Hymerling

The bulk of this column will be devoted to a status report of Section activities, as well as a discussion of the Section's unfinished agenda.

Certainly, the past five months have been marked by the introduction of a vastly expanded Section program. In no small part, this is directly attributable to the yeoman services rendered by my two fellow officers, Section Vice-Chairman Charles De Fuccio and Section Secretary Jeff Weinstein. It was thus with regret that I received and accepted Charles De Fuccio's recent resignation. That resignation was tendered by virtue of the press of Charles' practice. Let me here publicly thank Charles for his service to the Section, which has spanned not only the last five months as vice-chairman, but also his term as Section secretary. It is my hope that he will remain active as a member of the Section's Executive Committee. An election will be held at the Acapulco convention to fill the vacancy created by Charles' resignation. Albeit the by-laws would have permitted me to appoint Charles' successor, I felt it more appropriate to convene a broad-based Nominating Committee. The report of that committee appears elsewhere in this issue of the Family Lawyer.

Regional Dinners

Also appearing elsewhere in this issue is a report on the enormous success of the four regional dinners conducted statewide to familiarize

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REGIONAL DINNERS: Section Chairman Lee M. Hymerling presided at the four regional meetings held throughout the state to acquaint members with the recommendations made by the Pashman Committee. Speakers at the Cherry Hill session included Thomas P. Zampino, Edward S. Snyder and The Honorable Eugene D. Serpentelli.

Pashman and Glickman to Address Section in Acapulco

The Family Law Section is pleased to announce that The Honorable Morris Pashman, Associate Justice of the New Jersey Supreme Court, and The Honorable Herbert S. Glickman, Judge of the Superior Court, Chancery Division, Essex County, have consented to participate in the Section's program at the State Bar Mid-Year Meeting in Acapulco to be held on Saturday, November 21.

The program will be devoted to an open dialogue concerning the Pashman Report, as well as the recently adopted rule amendments. Participating on the panel in addition to Justice Pashman and Judge Glickman will be Section Chairman Lee Hymerling, who will preside over the session and moderate the panel; Jeffrey Weinstein, our Section's secretary; and Gary

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Members Invited to Comment on Pashman Report and Rule Changes

Section members are encouraged to forward to Section Chairman Hymerling any written comments, complaints or suggestions concerning what position, if any, the Section should take with regard to the amendment to R. R:4-79 which became effective September 14, 1981. Comments should be forwarded to the chairman at his office address: c/o Archer, Greiner & Read, One Centennial Square, Haddonfield, New Jersey 08033. It is Hymerling's intention to collate all letters for discussion at the December meeting of the Executive Committee of the Section. At that meeting, decisions will be made as to what, if any, recommendations should be made to the Supreme Court.

Section members are also encouraged, if they so desire, to forward their comments concerning the rule changes to Frances K. Boronski, Assistant Director, Administrative Office of the Courts, State House Annex, CN 037, Trenton, New Jersey 08625.

Officers of the Section have heard from many sources that many members of the Section desire to be heard with regard to the rule amendments. This invitation offers that opportunity.

Chairman's Report

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Section members with the recently issued Pashman Report, as well as the rule changes which became effective on September 14. Traveling throughout the state, it became obvious that matrimonial lawyers statewide found the programs to be an important bridge between the Pashman Report and its implementation. The dinners also served a vital function to permit Section members, as well as judges, to voice concerns and to pose questions about the important initiatives that have recently affected our practice. Finally, the dinners served as one manifestation of what our Section can and will be doing for its membership.

Mid-Year Program

Following up upon the dinners will be the important program sponsored by the Section at the State Bar Mid-Year Meeting in Acapulco. That session is intended not so much to inform participants about the Pashman Report, but instead to generate a dialogue concerning the reforms already enacted and any further reforms that may still be required.

At each dinner site, I tried to make the point that New Jersey attorneys and, indeed, the public are blessed with excellent Bench-Bar relations. We practice in a state in which dialogue between the Bench and Bar not only exists, but is encouraged to the nth degree. It is significant that Justice Pashman and Judge Glickman will be participating in our Acapulco program. The program should give all who attend an opportunity to air their gripes, express their comments, and make their suggestions for the future.

I am mindful, however, that only a fraction of our Section's membership will attend the Acapulco convention and that many Section members wish to have their opinions heard with regard to the Pashman Report. Your comments are welcome. They will be discussed at the December meeting of our Section's Executive Committee, at which time decisions will be made as to what, if any, formal position should be taken by the Section.

Newsletter Well Received

On an entirely different topic, the response to the Family Lawyer has been overwhelming. The editors and I have received innumerable letters complimenting the Section on the first two issues and encouraging the continued development of this publication. Even more gratifying has been the enormous interest generated by matrimonial practitioners who have quality articles published. Let there be no question that this might be a closed publication; broad-based participation is encouraged. The publication is also willing to foster debate. Appearing in the next publication will be two articles which adopt conflicting positions on a topic which has attracted considerable attention—the requirement, as a portion of the Preliminary Disclosure Statement required by R. 4:79-2, to publicly file income tax returns. Further "point-counterpoint" type articles are encouraged. Anyone interested in submitting an article for publication should contact one of the two editors.

Membership Increasing

Perhaps because of the regional dinners, or our newsletter, or perhaps because of the focus which has now been placed upon family law, our Section's membership has increased dramatically. From May through September alone, our membership has increased from approximately 620 to 770 individuals, making the Family Law Section the second largest Section within the New Jersey State Bar Association. Parenthetically, the largest section, having a membership of somewhat over 900 practitioners, is the Real Property and Probate Section which spans two separate substantive areas of the law. No doubt the Family Law Section's membership will continue to increase and may, at a point in the not too distant future, become number one.

Family Court

Our agenda of unfinished business is even more lengthy and, indeed, more exciting than what has gone before. Our Section intends to be at the forefront of the development of the Family Part of our Superior Court in the event the enabling legislation now pending in the Legislature is adopted. Our Family Court Committee, headed by David Ansell, is continuing in its effort to establish a blueprint for the implementation of a Family Court in New Jersey.

Early Settlement Programs

Extremely important are the efforts that Larry Cutler, George Whitmore and Alan Domers will expend in attempting to encourage County Bar Associations, in those counties in which Early Settlement Programs do not now exist, to establish such programs and to coordinate both the new and existing programs in the public interest. A major effort is now under way in Camden County to resurrect a dormant Early Settlement Program. Similar efforts throughout the state must be fostered.

Committees Active

Yeoman tasks have been assigned to the various committees of our Section. The Alimony Committee, headed by Jim Yudes, is actively considering the general topic of rehabilitative alimony, the effect of possible legislation upon this remedy and its implications for the future. The Taxation Committee, headed by Bill Schreiber, is actively pursuing alternatives to the *Davis* case. The Equitable Distribution Committee, headed by Dick Singer, is exploring the morass of pension law as it impacts upon equitable distribution. These and other committees will continue their efforts in the months ahead and would welcome your comments and suggestions.

The precise scope of what our Section does need not have specific bounds. The Section's programs should be as broad as are the needs of the membership. Let us hear from you. Let us receive your comments, so that we may mold our Section to fit your needs.

Alimony and Equitable Distribution in Pennsylvania

by Leonard Dubin

On July 1, 1980, Pennsylvania joined the growing number of jurisdictions which have recognized the need for divorce reform.[1]

Prior to that date, Pennsylvania was a "fault" state for divorce purposes which provided for neither alimony nor equitable distribution. The new code remedies these deficiencies and now provides for the awarding of alimony and equitable distribution.

Alimony

With respect to alimony, the statute contains fourteen criteria with provide guidance to the court in fixing an appropriate amount of alimony.[2] It is important to emphasize that one of the criteria permits the court to take into consideration marital misconduct of either party during the marriage when determining how much, if any, alimony should be awarded.

The alimony provision, however, cannot be read alone but must be considered together with the equitable distribution provision, since the court may allow alimony only if it finds that the party seeking alimony lacks sufficient property, including but not limited to, any property distributed pursuant to Chapter 4 (Equitable Distribution Chapter) to provide for his or her reasonable needs. Obviously, if the spouse who is seeking alimony receives a substantial amount by reason of equitable distribution which, when invested, would yield to that spouse sufficient income to provide for that spouse's needs, then the court could properly make no award of alimony.

By an examination of the statute, it is apparent that the legislature intended that alimony not be a sinecure for the spouse receiving it. Rather, the intent of the legislature was to provide for "rehabilitative alimony." This philosophy is apparent by an examination of Section 501(c).[3]

Equitable Distribution

The equitable distribution provision of the new Divorce Code represents the most dramatic change in Pennsylvania. Unlike the New Jersey statutory provision dealing with equitable distribution which authorizes the trial court in divorce actions without any guidance to "make such award or awards to the parties, in addition to alimony or maintenance, to effectuate an equitable distribution of property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage,"[4] the Pennsylvania Legislature included within the statute the criteria to be employed by the court in determining equitable distribution. Therefore, the Pennsylvania Act has done by statute what has been accomplished in New Jersey by case law, i.e., the inclusion of objective criteria to determine equitable distribution.[5]

With certain exceptions,[6] equitable distribution in Pennsylvania is made of "marital property," which, essentially, is all property acquired during the marriage irrespective of how title is held.[7]

It should be noted that the concept of equitable distribution of property acquired by either spouse prior to the effective date of the statute (i.e. July 1, 1980) is under constitutional attack. In *Bachetta v. Bachetta,* the Court of Common Pleas of Chester County, Pennsylvania found the statute unconstitutional as it related to equitable distribution of property acquired prior to July 1, 1980. On the other hand, the Court of Common Pleas of Philadelphia County in the case of *Banks v. Banks* came to the opposite conclusion. Both cases have been appealed, and the Supreme Court of Pennsylvania will in the near future hear argument on the issue.

Because the new Divorce Code has only been in effect for a little more than a year, as of this date there are no reported Pennsylvania appellate court decisions to assist counsel in advising clients how the courts will utilize the statutory criteria in making equitable distribution awards.

Footnotes

[1] On that date a new "Divorce Code" became effective, Act of April 2, 1980, P.L. 63 No. 26, 23 P.S. ¶¶101 et seq.

[2] See Section 501 of the Divorce Code which sets forth the fourteen criteria.

[3] Section 501 (c) Duration. Unless the ability of the party seeking alimony to provide for his or her reasonable needs through employment is substantially diminished by reason of age, physical, mental or emotional condition, custody of minor children, or other compelling impediment to gainful employment, the court in ordering alimony shall limit the duration of the order to a period of time which is reasonable for the purpose of allowing the party seeking alimony to meet his or her reasonable needs by:

1 obtaining appropriate employment; or

2 developing an appropriate employment skill.

[4] NJSA 2A: 34-23

Leonard Dubin

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Alimony in PA (cont'd)

[5] Section 401(d). In a proceeding for divorce or annulment, the court shall, upon request of either party, equitably divide, distribute or assign the marital property between the parties without regard to marital misconduct in such proportions as the court deems just after considering all relevant factors including:

1. The length of the marriage.
2. Any prior marriage of either party.
3. The age, health, station, amount and sources of income, vocational skills, and employability, estate, liabilities and needs of each of the parties.
4. The contribution by one party to the education, training, or increased earning power of the other party.
5. The opportunity of each party for future acquisitions of capital assets and income.
6. The sources of income of both parties, including but not limited to medical, retirement, insurance or other benefits.
7. The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker.
8. The value of the property set apart to each party.
9. The standard of living of the parties established during the marriage.
10. The economic circumstances of each party at the time the division of property is to become effective.

[6] Section 401(e). For purposes of this chapter only "marital property" means all property acquired by either party during the marriage except:

1. Property acquired in exchange for property acquired prior to the marriage except for the increase in value during the marriage.
2. Property excluded by valid agreement of the parties entered into before, during or after the marriage.
3. Property acquired by gift, bequest, devise or descent except for the increase in value during the marriage.
4. Property acquired after separation until the date of divorce, provided, however, if the parties separate and reconcile, all property acquired subsequent to the final separation until their divorce.
5. Property which a party has sold, granted, conveyed or otherwise disposed of in good faith and for value prior to the time proceedings for the divorce are commenced.
6. Veterans' benefits exempt from attachment, levy or seizure pursuant to the Act of September 2, 1958, public law 85-857, 72 Statute 1229, as amended, except for those benefits received by a veteran where such veteran has waived a portion of his military retirement pay in order to receive veteran's compensation.
7. Property to the extent to which such property has been mortgaged, or otherwise encumbered in good faith for value, prior to the time proceedings for the divorce are commenced.

[7] Section 401 (f). All property, whether real or personal, acquired by either party during the marriage is presumed to be marital property regardless of whether title is held individually or by the parties in some form of co-ownership such as joint tenancy, tenancy in common or tenancy by the entirety. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (e).

Pashman-Glickman to Address Section in Acapulco

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Skoloff, past Section chairman. Following an explanation of the rule changes by Messrs. Hymerling, Weinstein and Skoloff and following comments by Justice Pashman and Judge Glickman, questions and comments from the floor will be welcomed.

The program is intended to accord members of the Section, as well as members of the Bar at large, an opportunity to voice their concerns and to express suggestions concerning both the original report of the Supreme Court Committee on Matrimonial Litigation and R. 4:4:79 which became effective September 14.

Many Section members will recall that a similar program was presented by the Section at the NJSBA Mid-Year Meeting in New Orleans in 1979. That program followed the issuance of the Preliminary Report of the original Supreme Court Committee on Matrimonial Litigation consisting of Justices Pashman, Mountain and Schreiber. Comments received from the Bar at the New Orleans convention led to many of the initiatives incorporated within the Pashman Report. The Acapulco session promises to be as lively and as meaningful.

Also addressing the Section will be David Wildstein, co-chairman of the Section's Legislative Committee, who will report on numerous bills now in the Legislature of concern to Section members.

Additionally, during the meeting the Section will conduct an election to fill a vacancy that exists in the Section's vice-chairmanship. A separate article containing the report of Chairman Hymerling concerning the appointment of a Nominating Committee appears elsewhere in this month's *Family Lawyer.*

Rule Amendments in Matrimonial Practice

by Frank D. Allen

The amendments and changes of the Rules of Civil Procedure effective September 4, 1981 have significant impact on matrimonial practice. While these changes certainly have lofty objectives, the matrimonial practitioner in particular must take immediate heed to avoid the pitfalls—and even potential malpractice claims—occasioned by failure to abruptly alter entrenched practices.

This brief article endeavors merely to highlight the changes made by these rule amendments.

R. 4:79-1, the former **4:79-3,** simply permits the defendant in a matrimonial action; by entering a written Appearance, to be heard on all issues other than the divorce cause of action.

R. 4:79-2 Preliminary Disclosure Statement. The enactment of this rule, following the recommendations of the Pashman Report, implements perhaps the single most dramatic initiative in matrimonial practice in the past decade. The rule requires a Preliminary Disclosure Statement to be filed with the Court within 45 days after the filing of an Answer or an Appearance. As the rule is presently styled, it must be filed in *all* cases. The form to be followed is prescribed in Appendix 5 to the rule amendment. Allstate Publishers has already made available pre-printed forms and other legal form suppliers may follow suit. The Preliminary Disclosure Statement contains the answers to a number of crucial questions such as whether alimony, child support or equitable distribution are in dispute, the date of the marriage, whether an agreement exists, the names and ages of children, and the names and addresses of employers. The disclosure statement then contains a summary of crucial financial information set forth within the body of the statement. The statement also requires the attachment of numerous forms, including federal and state income tax returns for the prior year or, if none filed, the applicable W-2 and 1099 forms; a statement of year-to-date income; a statement of all prerequisites of employment; a statement of medical and dental insurance available; a statement of all unearned income; a budget in a prescribed form; copies of any agreements which might exist dealing with support, and a comprehensive balance sheet.

There is no question that the form will require a substantial time commitment on the part of practitioners. The amount of time will of course depend upon the complexities of the particular case. In matters involving relatively simple fact patterns, little time will be required; in the more complex case, substantial work will be involved. The use of this form will not preclude attorneys from filing detailed Affidavits, but does attempt to assure that essential data is furnished on a uniform basis.

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The rule provides in R. 79-2(b) that the disclosure statement must be filed even in a default situation. Query: whether this should be mandatory when no collateral relief is sought. The parties are under a continuing duty to inform the Court of any changes in the information supplied and all amendments must be filed at least 20 days prior to final hearing.

R. 4:79-3 Application for Pendente Lite Relief. This rule now deals with applications for support, restraints and contempt pendente lite. *Subpart (b)* of the rule requires that on applications for support, counsel fees and costs, the application must be accompanied by the complete Preliminary Disclosure Statement. It must be filed with the Court no later than eight (8) days prior to the motion hearing date. A completed Preliminary Disclosure Statement shall also accompany the response to the application. Obviously, the burden on counsel is even greater in this situation and you must now start to think at the initial interview about gathering the information necessary to complete the statement. One would hope the Courts will be understanding, particularly in those situations in which it may frequently be necessary to answer parts of the statement with a "to be supplied" type of response, either in whole or in part. I think that care must be taken, particularly at such an early stage of the proceedings, in submitting information which might later be binding. Thus a tightrope is presented to supply sufficient information without precipitously filing inaccurate information.

R. 4:79-4 Participation in Early Settlement Programs. This is an entirely new rule which provides that in counties where an Early Settlement Program has been instituted by the County Bar Association, the judge shall refer appropriate cases to the program based upon a review of the pleadings and the Preliminary Disclosure Statement. Participation by litigants and counsel in cases selected is mandatory.

The State Bar has assured the Supreme Court that there will be an Early Settlement Program in every county in the next six months. The panels as proposed will have two lawyers and will seek, pursuant to the recommendations of the Pashman Report, to obtain final stipulations. If an entire case cannot be settled, partial stipulations are to be encouraged. The panels are also authorized to frame discovery orders. The stipulations and order prepared by the panel will then be submitted to the matrimonial judge in the vicinage.

R. 4:79-4 Discovery. The rule remains that interrogatories as to all issues may be served as a matter of course. A change which is noteworthy is that an interrogatory requesting financial information may be answered by reference to the Preliminary Disclosure Statement. In this regard,

Rule Amendments (cont'd)

counsel must be alert to incomplete disclosure statements and consider moving for more specific disclosure statements expeditiously.

Another basic change made in the rule on discovery is that depositions of parties, as a matter of course, may be taken pursuant to *R. 4:11* as to all matters except those relating to the cause of action. Leave of Court is still required for other discovery.

R. 4:79-8 Custody of Children. The mandatory language has been removed from the rule and custody investigation will be ordered only in those situations in which a genuine and substantial issue exists. Thus, there is now judicial discretion in ordering an investigation. The rule requires that when an investigation is ordered, the Probation Department of the county of venue shall conduct it, notwithstanding that one of the parties might live in another county. The Probation Offices are under the gun by mandate of the rule to file their reports with the Court no later than *45 days* after receipt of the judgment or order requiring the investigation.

The rule also contains a new *subsection (f)* which requires that a hearing date be set no later than three (3) months after issue is joined in a custody matter and specifically countenances bifurcation of matrimonial actions to expedite resolution of custody issues.

R. 4:79-9 Alimony and Support Payments; Enforcement. This rule now provides that judgments or orders shall require alimony and support payments to be made through the Probation Office and that such payments shall now be subject to a late interest charge at the rate prescribed by *R. 4:42-11(a).* As part of the recent rule enactments, the rule referred to has raised the interest on awards from eight to twelve percent per annum. Such provision should be incorporated into every proposed order for alimony and support in the future. It will also be good practice to stress this provision to clients, so that they realize late payments may result in a substantial, automatic penalty.

Subsection (b) of 4:79-9 deals with failure to pay and enforcement by Probation or a party. The rule requires that if within a one-year period any three weeks' support is not paid, the Probation Office shall institute enforcement proceedings. The rule has been amended, deleting the prior discretionary language which referred to a "continued" failure to pay. It now prescribes a *mandatory* criterion that failure to pay a total of *three weeks'* support, either consecutively or cumulatively, shall result in the filing by the Probation Office of a verified statement setting forth the disobedience to the order or judgment. The rule has similarly been amended to provide that in such proceedings the Court *shall,* on its own motion or on motion by the party bringing the enforcement action, assess a late interest charge against the adverse party at the rate prescribed (12% per annum). These changes remove discretion in the filing of a contempt proceeding and furthermore require the assessment of what may be a substantial late penalty without discretion.

R. 4:79-11 Listing for Trial; Claims for Equitable Distribution of Property. This rule has been deleted in its entirety and replaced functionally by the Preliminary Disclosure Statement.

Motion Practice

In addition to the specific amendments limited to matrimonial practice, matrimonial practice in turn is affected by the general amendments to the motion rules.

R. 1:6-2 Form of Motions and Hearings. This rule now provides that every motion shall state the time and place for presentation to the Court, the grounds upon which it is made and the nature of the relief sought, and shall be *accompanied by a proposed form of order in accordance with R. 3:1-4 (a) or R. 4:42-1 (c) as applicable.* The form of order shall have appended at the end thereof a check list, to be completed by the Court, indicating whether and by what party answering and reply papers have been filed. If the motion or response relies on facts not of record, it shall be supported by Affidavit. The motion shall be *deemed uncontested* unless responsive papers are timely filed and served stating the basis of opposition.

This is a substantial evolution in prior practice and requires that all motions be filed with a form of proposed order and the check list, which seems to be just a listing of the parties and their counsel to the action. Query: whether the request that a proposed form of order be submitted is realistic within the context of matrimonial litigation where multi-part motions are commonplace.

A new subsection of *R. 1:6-2* requires that when an action has been specially assigned to an individual judge, all motions shall be made directly to that judge, who shall determine the mode and scheduling of their disposition. This subsection also provides that, except as provided in *R. 4:79-11,* motions filed in causes pending in the Superior Court, Chancery Division, Matrimonial Part shall be governed by this paragraph.

The new **R. 4:79-11** provides that *R. 1:6-2 (b)* shall control matrimonial actions except that, in exercising its discretion as to the mode and scheduling of disposition of motions, the Court shall ordinarily grant requests for oral argument on substantive and non-routine discovery motions and ordinarily not grant requests for oral argument on calendar and routine discovery motions. It will thus be for trial judges to generally determine what is a substantive motion and what constitutes a routine, as opposed to a non-routine, discovery motion. Substantive motions would presumably be most applications for custody or pendente lite support.

R. 1:6-2 (c) requires that a discovery motion not governed by paragraph (b), discussed above, involving any aspect of pretrial discovery or the calendar shall be listed for disposition only if

Rule Amendments (cont'd)

accompanied by a Certification, which must state that the moving party has conferred unsuccessfully with opposing counsel in order to resolve the issues raised by the motion. Calendar motions are to be disposed of on the papers, unless on at least two (2) days' notice the Court specifically directs oral argument on its own motion or in its discretion at the request of a party.

It would seem that, although this subsection is not literally applicable to marimonial motions, it will be good practice on discovery motions to make such efforts and include a Certification. Further, as a matter of practice, all motions should contain an indication of whether oral argument is requested.

Subsection (d) of the rule as amended further specifically provides that in all motions to which *subsections (b) and (c)* do not apply, the moving party may waive oral argument and consent to disposition on the papers. The motion will then be disposed of, unless respondent requests oral argument or the Court otherwise directs.

One further amendment of general application which does impact on all types of matters is a minor change in the requirements of *R. 4:4-2* as amended. Every summons issued to an individual in this state must advise him that if he is unable to obtain an attorney, he may communicate with the New Jersey State Bar Association or Lawyer Referral Service of the county of his residence, or the county in which the action is pending; and if he cannot afford an attorney, he may communicate with the Legal Services office of the county of his residence or the county in which the action is pending. If the defendant is a non-resident of the state, the summons shall similarly advise him directing him, however, to the appropriate agency of the county in which the action is pending. The summons must explicitly state the telephone number of such agency or service.

Conclusion

It might be well to keep a check list with your office support personnel to assure compliance with the new motion practice until this becomes ingrained. You should also plan to review all matrimonial files to prepare Preliminary Disclosure Statements prior to trial or by year end 1981. The counties will vary somewhat in implementation, but any grace period allowed is slipping by now.

Weinstein and Wildstein Nominated

Section Chairman Lee M. Hymerling recently announced the resignation of Charles De Fuccio as vice-chairman of the Section. Although the Section's by-laws would have permitted Hymerling to appoint a successor, recognizing the unusual nature of the vacancy and that De Fuccio's term would not have expired until May, 1983, the chairman opted in favor of the appointment of a Nominating Committee, usual Section practice under the by-laws, to nominate a successor to De Fuccio.

Appointed to chair the Nominating Committee was immediate Past Chairman Thomas P. Zampino of Belleville. Also on the committee were four past chairpersons of the Section: Laurence J. Cutler, Edward S. Snyder, Gary N. Skoloff and Anne W. Elwell. Also serving on the committee were State Bar Trustee Donald P. Gaydos and Section Rules Committee Chairman David K. Ansell.

The Nominating Committee has nominated current Section Secretary Jeffrey P. Weinstein of West Orange to fill the position of vice-chairman, and has suggested that the vacancy left open by Weinstein's nomination be filled by David Wildstein of Woodbridge. A formal election will be held at the NJSBA Mid-Year Meeting in Acapulco, at which time the Nominating Committee's report will be presented to the floor by Anne W. Elwell.

Weinstein, a partner of the firm of Gern, Stieber, Dunetz, Davidson & Weinstein in West Orange, has long been active in Section affairs. In addition to serving as the Section's current secretary, he has served as the Section's legislative co-chairman. Weinstein is a Fellow of the American Academy of Matrimonial Lawyers.

Similarly, Wildstein has long been active in Section activities. Like Weinstein, Wildstein serves as co-chairman of the Section's Legislative Committee. He is also a member of the Section's committee to study the Family Court. He is a member of the firm of Wilentz, Goldman & Spitzer of Woodbridge. He was a member of the Supreme Court Committee on Matrimonial Litigation (the Pashman Committee) and is a frequent lecturer for the Institute for Continuing Legal Education. He is also a Fellow of the American Academy of Matrimonial Lawyers.

Recent Cases

by Myra T. Peterson

CONTRACTS—CONSTITUTIONAL LAW—Court may require Jewish husband to cooperate in former spouse's obtaining Jewish ecclesiastical divorce despite his unwillingness to obtain such religious divorce.

The parties were married in a Jewish ceremony at which time a traditional Jewish contract, a Ketuba, was entered into. Such contract requires the husband to give to his wife a Jewish divorce, a "Get," should he allege adultery against the wife. The husband here did counterclaim for divorce on the ground of adultery. The wife wanted a Get; without such religious divorce, the wife could not remarry in a Jewish ceremony. The husband did not wish to provide such a Get and claimed violation of the First Amendment were he to be forced to obtain a religious divorce. [A Jewish wife must be given the Get by the husband; the wife cannot readily obtain such a divorce without the husband's consent.]

The Court, *sua sponte,* called several prominent rabbis to testify and, on the basis of their testimony, determined that the obtaining of a Get was contractual on the basis of the Ketuba and that it was not a religious act. Based on such finding, the court ordered that the marriage contract whereby the husband provide the wife with a Get be enforced, that such enforcement was in furtherance of public policy and was not violative of the husband's right to religious freedom.

[Comment: If there had not been an adultery claim against the wife, or if the adultery counterclaim had been amended to 18 months no fault at the time of trial as is often the case, would the husband not have been required to obtain a Get? If not, does such a result interfere with the right of a Jewish wife, who may wish to remarry in the Jewish faith, to have a no fault divorce?]

Minkin v. Minkin, M-11721-78, Decided July 22, 1971 (Bergen; Minuskin, J.S.C.)

COUNSEL FEES—Detailed affidavit of services needed; Wife should not unilaterally hire experts; Husband entitled to plenary hearing to challenge fee award; Attorney cannot always expect full remuneration for services from non-client spouse.

The trial court had entered judgment against the husband for $25,832 for counsel fees, accounting fees, and appraisal fees for services rendered to the wife. The husband appealed. The Appellate Division reversed and remanded, holding that an explicit affidavit of services comporting with R. 4:42-9(b) was mandated, the subject matter of various office and telephone conferences must be indicated, if time sheets are included they must be explicit (the court implying that such time sheets should be certified to be true copies), and that the husband was entitled to a plenary hearing to challenge the fee applications.

The Court also, in *obiter dictum,* noted that rather than have a party hire experts "ex parte . . . the better practice [is] for the plaintiff to first make application to the trial court . . . upon a showing of the necessity for such expert services, [and] for the court then to designate the experts to be retained. . . ."

Also in *dictum,* the Court stated that the 30% of counsel's time had been consumed by telephone and office conferences and that the necessity for such "should be scrutinized most carefully . . . ." " 'Some [divorce] litigants will virtually take over counsel's office and absorb most of his time if permitted by counsel to do so.' 'There comes a time when counsel is obligated to limit such conferences or accept the fact that he cannot always expect full remuneration for the time so consumed.' "

[Comment: The Court addressed itself to a spouse's (usually the husband) payment of the dependent spouse's counsel fees. The suggestion, whether it be dictum or holding, that an attorney should not expect remuneration for numerous conferences with his or her client—many of which may be for hand-holding purposes—flies in the face of encouragement of settlement of matrimonial cases as contained in the Supreme Court Committee on Matrimonial Litigation Phase Two Final Report; *There, the Committee stated: "It requires greater courage, more patience, and many times a higher level of professional skill to negotiate a fair settlement than it does to litigate family law issues." As any practitioner knows, settlement involves not only negotiation with opposing counsel but often strenuous and lengthy effort to demonstrate to or convince a client of the workability and fairness of a settlement. Often this effort takes place at a time when the client is hurt, bitter, suspicious and inflexible because of the emotions involved and the hand-holding—for which the* Mayer *Court would disallow fees from the financially supporting spouse—is absolutely necessary so as to diffuse the client's emotions which, if not overcome, prevent settlement. The* Mayer *Court's suggestion that counsel's effort should perhaps be unremunerated does a disservice to the attorney who makes a good faith effort to diffuse emotions and encourage settlement.*

Additionally, it should be noted that the Mayer *Court's preference for court-appointed experts is at variance with the* Supreme Court Committee Report *as to court-appointed experts wherein it is stated: "However, there is a separate and distinct value to the retention of an expert by each party, especially in cases in which income and assets may be hidden and the discovery of truth requires great time and effort. Independent experts should therefore continue to be used by each party at the discretion of counsel."]*

Mayer v. Mayer, A-4626-78, Decided July 14, 1981 (Allcorn, Botter, Pressler, JJ.A.D.)

EQUITABLE DISTRIBUTION—Chose in action—Inchoate personal injury claim for pain and suffering not property right subject to equitable distribution; Recovery for lost earnings and medical expenses subject to equitable distribu-

Recent Cases (cont'd)

tion; Court must determine credits to be given each spouse in a future distribution of marital home.

During the marriage, the appellant wife had undergone surgery and had a potential malpractice claim as a result of surgical complications. The trial court had awarded to the husband "25% of [the wife's] inchoate right to sue for medical malpractice," relying upon *DiTolvo v. DiTolvo,* 131 N.J. Super. 72 (App. Div. 1974).

The Appellate Division, disapproving *DiTolvo,* reversed, holding that "monies realized . . . as compensation for pain, suffering, disfigurement, disability or other debilitation of the mind or body, represent personal property of the injured spouse not distributable under N.J.S.A. 2A:34-23." The other spouse's *per quod* claims will be considered the personal property of that spouse. However, "losses, such as post wage and medical expenses, which have diminished the marital estate, are distributable [between the parties] when recovered."

The *Amato* court reached its conclusion by recognizing that "[n]othing is more personal than the entirely subjective sensations of agonizing pain, mental anguish, embarrassment because of scarring or disfigurement and outrage attending severe bodily injury . . . . None of these, including the frustrations of diminution or loss of normal bodily functions or movements can be sensed, or need they be borne, by anyone but the injured spouse."

[Comment: Amato *is absolutely* contra *to* DiTolvo. *There is no Supreme Court ruling on the subject. The* DiTolvo *Court, following the expansive reasoning of* Painter v. Painter, *65 N.J. 196 (1974), and its progeny, in using the word "acquired" in N.J.S.A. 2A:34-23 in a "comprehensive sense" over-expansively included a chose in action for a personal injury claim and the other spouse's* per quod *claim as property subject to equitable distribution.*

Where the DiTolvo *Court found its treatment of a personal injury claim as part of the marital estate subject to equitable distribution as "comport[ing] with our present practice in negligence actions in permitting a lump sum award to the injured spouse," without a separate determination as to allocation of the award as to loss of past earnings, earning capacity, etc., the* Amato *court found "no immutable rule" requiring such a lump sum award. Under* Amato, *the personal injury award will have to be allocated by the jury as to pain and suffering, medical expenses, lost wages, etc. and then there must be further allocation by the parties or the matrimonial court, of "the distributable items recovered", i.e. actual losses to the marital estate—lost wages, medical expenses, etc.]*

The *Amato* Court also determined that where a marital home is subject to future sale and distribution, the trial court must determine credits to be given each spouse at that time.

The trial court had held that the wife and minor children were to occupy the marital home until the youngest child no longer attended high school. At that time the house was to be sold, the wife was to receive 47% of the proceeds and the husband, 53% of the proceeds. The court did not state reasons for the disproportionate allocation nor did the court determine credits to be given to either spouse when the house was sold for mortgage payments and taxes, house repairs and maintenance, and support payments. According to the Appellate Division, the trial court erred.

First, the Court found the 47%-53% "disproportionate allocation of the future value seem[ingly] facially inequitable," barring special reasons. The Court then stated that the trial court in determining a future distribution of the marital home, must consider "respective net incomes of the parties, including support payments, . . . maintenance . . . mortgage, [and] taxes."

[Comment: Does the Court's statement that a disproportionate allocation of the proceeds of a house "barring special reasons" is facially inequitable suggest that absent "special reasons" there is an unstated presumption that a marital house should be divided 50%-50%. No value was given to the Amato *house. However, if there is such a presumption, does it apply to the $1,000,000 home as well as the $50,000 home?]*

Amato v. Amato, A-2375-79, Decided Sept. 2, 1981, (Botter, King, McElroy, JJ.A.D.)

Child Custody Litigation Seminar Scheduled for November

The American Bar Association Family Law Section will sponsor a two-day child custody litigation seminar on Friday and Saturday, November 13-14 in New York City.

Honorable Conrad Krafte of Hackensack and Gary N. Skoloff of Newark are New Jersey participants in the program.

Topics include: preparation and trial strategy; use of depositions, interrogatories and production of evidence prior to trial; representing children's interests; views from the bench on how to strengthen the presentation of a child custody case; examination of expert witnesses; cross-examination of a privately retained psychiatrist; and future trends in child custody procedures, including alternatives to the adversary model.

Other seminar participants include: Professor Sanford N. Katz of Boston College Law School, seminar chairman; Stanford E. Lerch of Arizona, ABA Family Law Section chairman; Hon. Maxine Duberstein, Dr. Doris Jonas Freed and Richard H. Wels, all of New York; Monroe L. Inker and Joan R. Katz, both of Massachusetts; Beverly Anne Groner of Maryland; and Sonja Goldstein of Connecticut.

The program will be held at Halloran House, 525 Lexington Avenue, New York City. For further information contact Professor Sanford N. Katz, Boston College Law School, 885 Centre Street, Newton Centre, MA 02159, phone 617/969-0100, extension 4372.

What Tax Consequences (Real or Potential) Should Be Considered in Equitable Distribution Awards? by Barry I. Croland

The New Jersey decisional law, even after the passage of ten years, is strangely silent and somewhat cryptic in its treatment of the tax consequences of judicially mandated equitable distribution of marital assets.[1] We do know, with regard to marital assets which may be received by the transferring spouse after the entry of the Final Judgment of Divorce, that the future tax consequences to that spouse "*may* be a relevant consideration when considering whether a distribution is equitable and it is clearly relevant with respect to the determination of alimony, but it does not affect the value of [that asset]."[2] Also, trial courts must "receive any relevant evidence with respect to the amount of the federal and state income taxes and the effect of the tax upon the parties."[3] These general rules are helpful but they do not embody guidelines to assist the trial courts or counsel in dealing with the basic questions of how, when and to what extent tax consequences should be considered.[4]

Other states have dealt thoughtfully and intelligently with the "tax consequence" issue. The California Supreme Court in *In re Fonstein,*[5] affirmed a trial court's refusal to consider tax consequences which *might* result to the transferring spouse if he decided, in the future, to convert his interest in his law practice into cash because no evidence was produced that the husband was withdrawing from the partnership, was required to withdraw, or intended to withdraw. The court stated:

> "Of course, once the property is divided pursuant to the trial court's order, the future tax consequences may vary on further sale or liquidation from what they would have been had the property been divided differently. The trial court need not speculate on such possibilities, however, or consider tax consequences that may or may not arise after the division of the community property.
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> * * *
>
> "We recognize that when community assets are divided in kind, the risk of future tax liabilities from the disposition of realization of the assets is apportioned equally, while such risks are not necessarily distributed evenly when the community property is divided according to its value. There will be some compensating distribution of the potential liabilities, however. For example, the award of the family residence to [the wife] imposed upon her a burden of a capital gains tax should she choose to sell the house at some future time. [The husband], on the other hand, will assume the risk of a tax liability upon his receipt of withdrawal payments. We do not believe that any hypothetical inequity in the distribution of these tax burdens or in disregarding tax consequences in valuing the community assets is adequate justification for introducing an unnecessarily complicated and speculative factor into the process of dividing the community property. The amount of taxes which Harold will incur if he ever withdraws from his firm will depend upon a number of variables, the variety of which makes impossible anything more than a speculative approximation of the potential tax liability. Since these variables are largely subject to [the husband's] control, it is appropriate to allocate to him the potential liability." (552 P.2d at 1175-77)

Fonstein is significant for one other reason; namely, the Court's rejection of the husband's argument that the presentation of expert testimony as to future tax consequences requires a trial court to take into account those consequences in *valuing* marital assets. The Court, in a footnote, stated:

> "Regardless of the certainty that tax liability will be incurred if in the future an asset is sold, liquidated or otherwise reduced to cash, the trial court is not required to speculate on or consider such tax consequences in the absence of proof that a taxable event has occurred during the marriage or will occur in connection with the division of the community property." (552 P.2d at 1176 fn. 5)

California has also dealt with the tax consequences which arise from the sale or division of the one asset which is most commonly involved in equitable distribution cases: the marital home. While New Jersey, unlike California, is not required to equalize the division of marital property, the following language from the case of *In re Marriage of Epstein,* 592 P.2d 1165 (Calif. 1979) merits serious consideration by our courts:

> "In cases such as the instant matter involving the sale of a family residence, the uncertainty concerning the amount of capital gains tax liability stems from provisions in state and federal tax law which defer liability to the extent that the proceeds from the sale are reinvested in a new residence within one year of the sale. . . . That uncertainty, however, will be resolved within a year or two of the court's decree. In the present case, the amount of the tax liability may have been fixed by events pending the decision of this appeal, so the trial court, upon the remand of this case made necessary by our holding on the husband's right of reimbursement, can recognize that liability in dividing the proceeds of the sale. If not, and in similar cases arising in the future, the court can take account of tax liability by providing that the liability incurred, if any, is owed equally by both spouses. In unusual cases, it could retain jurisdiction to

Tax Consequences (cont'd)

supervise the payment of taxes and adjust the division of the community property. (592 P.2d at 1172)[6]

California has also considered the practical considerations which mandate that speculative and contingent tax liabilities should not affect either the valuation of marital assets or the manner in which those assets are distributed. The wife in *In re Marriage of Clark,* 145 Cal. Rptr. 602 (Ct. App. 1978) argued successfully that it was error for the trial court to award her husband all of the stock in a closely held corporation without taking into consideration the actual tax consequences to the wife who was ordered to transfer her shares to the husband.[7] Significantly, the court stated in rejecting the husband's argument that the "court should ignore the tax because an installment sale renders it speculative . . ."[8]:

> "Perry agrees Marie will have a capital gains tax from the transaction and the exact amount (give or take a few dollars) could be determined at date of trial if it did not qualify as an installment sale; therefore, the inequity in forcing Maria to shoulder all of the tax because of the form of payment is obvious. Also, patent are the problems such a concept would create. For example, settlement negotiations, already complicated and often emotionally distasteful, would become more so as the parties seek the advantage—or to escape the disadvantage—of this argument should we accept it. Courts should not hesitate to suggest guidelines for balancing the equities in a given situation where the judicial action is reasonable under the circumstances. Such a situation exists here. In most cases, the capital gain tax does not exceed 30% (25% federal and 5% state) of the gain, and total tax paid is often the same whether in one sum or in annual payments; however, as previously stated, it is true that under the present law there are exceptions. Although computation of the tax is sometimes beyond precise solution, equity between the parties can be substantially accomplished. In most cases, a fair determination can be made if the court bases the capital gain tax on the transaction in question without considering the *other* income of the selling spouse (seller). This would eliminate continued litigation on computation and free the court from future time consuming problems. In order to equalize the division of the community property, the buying spouse (buyer) should pay one-half of the capital gain tax caused by the transaction. . . ." (145 Cal. Rptr. at 606-07)

Equitable distribution states which have fashioned rules and guidelines similar to our *Painter*[9] decision have dealt directly and more thoroughly than our courts with the tax consequence issue. In *Wallahan v. Wallahan,* 284 N.W.2d 21 (S.D. 1979) the Supreme Court of South Dakota rejected the husband's argument that a trial court "should reduce the present market value of his retirement funds to their 'ascertainable present value' to determine his net worth." 284 N.W.2d at 26. The Court held that:

> "Defendant deposited $25,000 into three separate Keogh retirement funds between 1972 and 1976. Plaintiff and defendant stipulated at the trial that the total present market value of the stocks in the three funds was $32,245.65 according to the most recent stock brokerage quotation available. The trial court used this stipulated value in determining defendant's net worth. . . . The evidence indicates that the defendant is in the 50% tax bracket for income tax purposes, and the $32,245.65 value of the stocks would be reduced by income tax and penalty if they were removed from the tax sheltered Keogh account and made available in cash for this property division. There is no proof that defendant will be required to liquidate his Keogh fund to meet the requirements of the property division. Therefore, we decline, as did the trial court, to indulge in such speculation to determine net worth. (Citing cases)"[10]

The husband in *Crooker v. Crooker*[11] unsuccessfully challenged the lower court's failure to consider the potential tax liability associated with the estimation of the fair market value of a restaurant, the value of which was equitably divided. The Supreme Court of Maine, citing New Jersey's *Stern* case, among others, held:

> "The division of marital property is committed to the sound discretion of the trial court. . . . Although the presiding Justice had the power to order that the restaurant be sold, he was under no obligation to exercise that power. This Court has recognized that liquidation of the marital assets may be in some cases disadvantageous to the parties.. . . In the present case, the presiding Justice could have reasonably concluded that a forced sale of a viable restaurant business would tend to jeopardize rather than enhance Mr. Crooker's ability to satisfy Mrs. Crooker's monetary award.
>
> "Having decided not to order a sale of the restaurant, the presiding Justice further determined that the estimated fair market value of the property should not be diminished by the amount of expenses and tax liability that Mr. Crooker might incur if he personally elected to sell the restaurant. We find no error in that determination. Mr. Crooker never represented to the Superior Court that he actually intended to sell the property in order to pay Mrs. Crooker her share of the marital property. Thus, he sought a reduction in the fair market value of the restaurant for liabilities that might never arise. For the presiding Justice to have considered such potential but unrealized liability would have been to indulge in speculation. The value of marital

Tax Consequences (cont'd)

assets should be determined as of the time they are distributed without reference to possible future events. (Citing cases, including *Stern v. Stern*) Of course, the Court must consider the tax consequences of distributions it actually orders in its decree.... But the Court should not adjust its valuation of marital assets to account for the parties' possible dealings with those assets after they are finally distributed."

New Jersey is firmly committed to the fundamental policy that an award of support or a division of assets cannot be equitable unless it is fair.[12] Also, we have seen that tax liabilities "may be a relevant consideration when considering whether a distribution is equitable."[13] What we need is an analytical and comprehensive expression by our highest court dealing with the inter-relationship between the value of assets and the actual and potential liabilities which are related to an equitable distribution of assets. When an appropriate case arises, we suggest that the following general rules might be helpful:

1. A trial court must consider the actual tax consequences of every equitable distribution award.
2. The burden is upon trial counsel to provide the trial court with competent evidence as to not only the value of assets[14] but the actual and potential tax liabilities which will or might occur from the distribution of assets.
3. If counsel does not meet his burden, the trial court should have the right to order an independent expert to provide the value/tax liability evidence referred to above and the cost of such expert should be assessed in a manner which is fair to both parties.
4. Trial courts must make specific findings regarding the tax consequences of its award.[15]
5. Remote and speculative tax consequences should not be considered.
6. In the exceptional case only, if the transferring spouse is compelled to liquidate an asset which results in an unanticipated tax consequence after the entry of a Final Judgment, that spouse should have the right, in a manner consistent with our Rules of Court [16] and principles of estoppel,[17] to apply to the trial court for a reconsideration of the original equitable distribution award.[18]

Tax consequences are as much a part of an equitable distribution case as asset identification and valuation. We hope that our judiciary, which has been so dynamic and innovative in other areas of law, will address itself to this area of family law.

FOOTNOTES

[1]This article will not consider the *United States v. Davis* tax issues (370 U.S. 65 (1962)) or other similarly complex issues such as recapture of depreciation, ordinary versus capital gains tax liability, the deductibility of support payments and the like. For a discussion of and conflicting views about the *Davis* rule in New Jersey, compare Dieffenbach, *The Case of Non-Taxable Division of Marital Property* 93 *New Jersey Lawyer* 8 (Nov. 1981 with Skoloff, *New Jersey Family Law Practice,* 372-74 (3d Ed. 1976).

[2]Emphasis added. *Stern v. Stern,* 66 *N.J.* 340, 348 (1975). The Court in *Stern* rejected the husband's argument that the present value of his interest in his law firm's accounts receivable "should be diminished by the estimated amount of federal income tax that defendant will be required to pay in respect of these accounts, or some part thereof, as they reach him in the form of later partnership distributions." 66 *N.J.* at 347.

[3]*Kruger v. Kruger,* 73 *N.J.* 464, 472 (1977). In *Kruger,* the Supreme Court agreed with the Appellate Division that the trial court erred when it failed to "consider the income tax impact of Mr. Kruger's retirement pay."

[4]See footnote 1, *supra.*

[5]131 Cal. Rptr. 873, 552 P.2d 1169 (1969).

[6]The Economic Recovery Tax Act of 1981 extends, from 18 months to 24 months, the period within which the seller of a home has the right to defer a capital gain by reinvesting in a home of equal or greater value. See IRC § 1034. The act also provides that the seller of a home who is over the age of 55 has the right to exclude $125,000 of capital gains from his tax liability if the house sold was the seller's principal residence for 3 of the last 5 years. See IRC § 121. *Cf.* 1978 AFLTR 1065 and 1980 AFLTR 1254.

[7]The wife in the *Clark* case received consideration for her share of the stock which was transferred to her husband. She was required, because this stock had appreciated in value, to pay a capital gains tax on that appreciation. If a New Jersey Court ordered such a transfer, the tax liability to the transferring spouse would be the same as that caused by the California decision.

[8]145 Cal. Rptr. at 606

[9]65 N.J. 196, 211 (1974)

[10]The terms "contingent" and "speculative" were recently considered by South Dakota's highest court which held in *Hanson v. Hanson,* 302 N.W. 2d 801 (S.D.1981):

> "[C]ontingent liabilities that may never be paid or that may be paid only in part need not be deducted in determining net worth." ... Speculative contingent liabilities should not be considered in apportioning the parties' assets for purposes of a property division."
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> * * *
>
> "Generally, something is a contingent liability when it depends upon some future event, which may or may not happen, thereby making it uncertain whether it will ever become a liability. (Citing cases) Similarly, the word 'speculative' has been found to have varying meanings. It is "[s]ometimes ... used as ... a conclusion reached by the faculty or process of intellectual examination, search, and reasoning; sometimes as meaning conjecture, guesswork, and surmise." (302 N.W. 2d at 802-3)

[11]—Me.—, —N.E.2d— (1981), 7 FLR 2687 (1981)

[12]See, *e.g., Peterson v. Peterson,* 85 *N.J.* 638, 645-46 (1981); *Lepis v. Lepis,* 83 *N.J.* 139, 146 (1980); *Smith v. Smith,* 72 *N.J.* 350, 358 (1977); and *Carlsen v. Carlsen,* 72 *N.J.* 363, 370 (1977).

(continued on page 41)

Legislative Report

by Jeffrey Weinstein

The State Legislature has not been active over the last month. Accordingly, we have had time to reflect upon the three most recent laws and the bills which are presently pending in both the Assembly and in the Senate.

Firstly, as to the recent laws, Assembly Bill A-1668 which allows for an execution Order against wages if support payments are 30 days overdue should, hopefully, be of no force and effect if Senate Bill S-1508 becomes a law. As to S-1508, this column devoted much time and attention to the aforesaid Bill. I earnestly hope it becomes law in the very near future. It protects spouses who are not receiving support and yet it provides for judicial discretion. As to Assembly Bill A-1330 which Bill sets forth a procedure wherein a spouse may be restrained from the marital premises upon a complaint being filed in the Municipal Court, the Family Law Section did not support said Bill. There are some obvious problems with this new law. I draw your attention to the Pashman Report and most particularly that section of the Pashman Report which sets forth the criteria for judges to consider in excluding a spouse from the marital residence. The recommendation of the Pashman Report was that a spouse should not be excluded from a marital residence without an opportunity for a hearing unless exceptional circumstances are present. The Report goes on to say that judges should consider certain criteria including the existence of imminent danger to person or property, financial circumstances of the parties, the best interest of the children, corroboration, the degree of fear suffered by the moving party, the availability of alternative housing and the time frame. There is no criteria set forth in Assembly A-1330 for the Municipal Courts to follow. I recognize that one of the purposes of the Bill was to lessen the cost for litigants. I am afraid that the Bill might increase the cost to litigants. It may be necessary for there to be two hearings, one in a Municipal Court and a second in a matrimonial proceeding.

In my last column I sought your comments concerning Senate Bill 1020 and Assembly Bill 1948. Senate Bill 1020 establishes the criteria for our courts to consider in granting rehabilitative alimony. Assembly Bill 1948 excludes, from equitable distribution, an individual's interest in a pension fund but allows pension fund payments to be considered for purposes of alimony. There was some urgency to both Bills as they were moving quite quickly through both Houses of our Legislature. We were able to at least stall the rapid progress of both Bills.

With respect to Senate Bill 1020, I, personally, agree with the intent of the Bill but I do not believe that the Bill should enumerate, in any manner, criteria for the courts to consider in granting the rehabilitative alimony. I believe there is a need for rehabilitative alimony but I do not believe that the criteria should be set forth in a statute common law should govern. I would appreciate your comments concerning said Bill.

With respect to Assembly Bill 1948, our Executive Committee supports the intent of the Bill with respect to pensions but not the bills as proposed. Many of the members of the Executive Committee feel that though pensions should be excluded from equitable distribution, generally, there should be some discretion given to the court, to include certain pensions. Richard Singer's committee on equitable distribution is preparing a report on the Bill.

I have not received any response concerning the Family Court in Assembly Bill 3428. As reported in the Chairman's report (Volume I, No. 2), the Executive Committee of the Family Law Section endorsed the Family Court Bill.

It is important that the Family Law Section no longer is forced to react to Bills but rather the Family Law Section should partake in formulating new laws where appropriate. I do not mean to imply that we should create law without need. There is a need, however, by those of us involved in the practice of matrimonial law, to recognize changing social considerations and then to meet the new demands created by the change. We must recognize that our Legislature will be an active participant in the shaping and reshaping of matrimonial law. I do not believe that we can afford to sit idly by and not partake in change where appropriate. Rather, I believe that we should be in the forefront and, under the right circumstances, not only promote change through common law but also promote change which would be in the best interest of the public by working with the Legislature.

Tax Consequences *(continued from page 40)*

[13]*Stern v. Stern, supra,* 66, *N.J.* at 348.

[14]See *Rothman v. Rothman,* 65 *N.J.* 219, 232-33 (1974) and Report of the Supreme Court Committee on Matrimonial Litigation (Phase II), 108 *N.J.L.J.* 41 (Supplement July 16, 1981).

[15]See *Esposito v. Esposito,* 158 *N.J. Super.* 285, 291 (App. Div. 1978) and *Nochenson v. Nochenson, N.J. Super.* 148, 450 (App. Div. 1977)

[16]See R. 4:50-1.

[17]See *Tassie v. Tassie,* 140 *N.J. Super.* 517, 524-28 (App. Div. 1976). *Cf. Esposito v. Esposito, supra.* 158 *N.J. Super.*at 301.

[18]It is recognized that this suggestion may create controversy and disagreement. However, a significant number of practitioners have experienced trial judges who, in large asset cases, ignore tax consequence issues by ordering the payment of cash, based upon a "finding" that the paying spouse has the ability to borrow and therefore he or she need not liquidate his or her assets. Such a conclusion begs the ultimate question. Borrowed funds must be repaid and with today's extraordinarily high interest rates, it is probable that assets may have to be liquidated in the future. If the paying spouse is required, in good faith, to liquidate part of his assets, within a year from the date a Court's Judgment is filed, why should he be precluded from showing the actual inequity of a Court ordered distribution of marital assets? But see *In re Marriage of Goldstein,* 383 P. 2d 1343, 1345 (Ariz. 1978).

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____ Patent, Trademark, Copyright Law and Unfair Competition
____ Public Utility Law
____ Real Property
____ Probate and Trust Law
____ Taxation
____ Women's Rights
____ Workers' Compensation
____ Federal Practice and Procedure
____ Public Contract Law

I am willing, at my convenience, to answer brief telephone inquiries from new lawyers about the areas of law which I have designated. I certify that I am a member in good standing of the New Jersey State Bar Association, and that I carry professional liability insurance of at least $100,000/300,000. My participation is intended to provide informal assistance to new lawyers, and I will not solicit referrals from inquirers for the cases which are the basis for the inquiries.

Date: _____ Signature: _____

Regional Dinners Huge Success

More than 400 members of the Family Law Section attended the regional dinners conducted by the Section to discuss the Pashman Report and the rule amendments.

Approximately 100 members attended the first session held at the Saddle Brook Marriott on September 14. Participating in the Saddle Brook program were Past Section Chairman Gary Skoloff, *New Jersey Family Lawyer* Co-Editor Barry Croland, and the Honorable Harvey Sorkow.

Close to 90 members attended the session held at the Sheraton Gardens in Freehold on September 22. Participating on that panel were David Ansell, president of the Monmouth County Bar Association; David Wildstein, Section legislative co-chairman; and the Honorable Julia Ashbey.

Close to 100 members attended the session at The Manor in West Orange on September 24. Participating on that panel were Section Past Chairpersons Anne Elwell and Edward Snyder, together with the Honorable Robert Mooney.

The final session held at the Sheraton Poste in Cherry Hill on October 1 was attended by more than 120 Section members. Participating on that panel were Past Section Chairmen Thomas Zampino and Edward Snyder, joined by the Honorable Eugene Serpentelli.

Chairman Hymerling presided over all four sessions and also discussed pretrial reforms proposed by the Pashman Committee.

The Section is particularly pleased that Justice Pashman attended both the Saddle Brook and West Orange sessions, and shared his comments with Section members. The Section is also gratified that more than 25 members of the Matrimonial Bench attended the sessions.

In the light of the enormous response to the programs, the Section Executive Committee will consider holding additional regional sessions when warranted, to discuss with the membership topics of concern to matrimonial practitioners in New Jersey.