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CHAIR'S COLUMN

Help Wanted: Family Part Judges

by Lizanne Ceconi

For the past several years, we have been told that the goal in the family part is to have our cases completed within one year of the filing of the complaint for divorce. In order to attain this goal, cases are streamlined through the system, often without any sensitivity to the needs of the particular matter. We are told to be trial-ready because the one-year deadline is approaching. We get ready for trial; prepare our legal briefs and trial notebooks; and rush to court for the case—for what always seems to be the oldest case on the docket.

After negotiating walkways with multiple litigation bags and boxes tethered to wheels, we arrive in the courtroom already feeling that we've accomplished something for the day, including our morning workout. Upon arrival, we learn that there are two other *oldest* cases, a dozen case management conferences, four uncontested hearings, one default hearing, three intensive settlement conferences and one judge. We also learn that our judge is assigned emergent duty, so we can expect interruptions for temporary restraining orders during the day. Welcome to the world of the family part judge!

The dearth of family part judges is twofold. First, there just are not enough judges assigned to the family part. We have read plenty about the need for more judicial appointments. (Hopefully, by the time you read this, many of those vacancies will be filled.) Yet, it seems that no matter how many judges are sitting in the family part, there is still more caseload than judges can handle. One of my favorite judges likes to point out that each case can get about nine seconds of court time in order for the system to move. He also made known that if each of us tried one more case a year, we would cause the system to collapse. Unfortunately, in many northern counties, the system has already collapsed.

In the last two months, I have spent over 20 days in court trying to get two cases resolved. In one case, I was in court for 12 days and had about four hours of total trial time. Days and hours were spent trying to resolve the case with very little judicial face-time. In the second case, a handsomely paid expert witness was scheduled to testify for the day; the appearance date had been pre-scheduled to accommodate her schedule and that of the court. Because of the judge's calendar, the expert was on the witness stand for less than an hour, requiring her to re-appear on another date. These unpleasant experiences have allowed me to witness how hard our family part judges are working, and the relentless caseload they encounter. It gave me a new perspective on just how difficult, and sometimes heart wrenching, it must be for a conscientious judge to get through the day—and want to come back the next day for more.

The second issue, which dovetails into the first, is a more difficult one: How do we get judges to *want* to sit in the family part? Just as importantly, once they have sat in the family part, and become at least comfortable with the law, the lawyers and the process, how do we make them want to *stay* in the family part? A well-respected appellate judge, in paraphrasing W.C. Fields, commented that he once spent a year in family part, and it was last week. Too often, a family court assignment is perceived as punishment or paying one's dues. Everyone knows that family part judges work the hardest and longest hours, grapple with some of the most critical issues in people's lives, contend with some of the more absurd dispute resolutions and get no extra compensation for doing it. Let's face it, arguing over $10 a week in child support, or dueling about where the parenting time pickup should be, is not why we went to law school or why judges aspired to sit on the bench.

It is discouraging to realize that the challenges facing the family court system have not changed in nearly three decades. In July 1979, the Interim Report of the Supreme Court Committee on Matrimonial Litigation provided the following:

> We submit this interim report in the hopes of renewing the Supreme Court's commitment to assuring that the anguish of

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> litigants involved in matrimonial cases not be exacerbated by a legal process of questionable effectiveness and efficiency.[1]

The report recommended that matrimonial cases should have high priority in the overall court calendar.[2] For nearly 30 years we have wrestled with these issues, hoping to decipher the Rosetta stone of the family part. Certainly a defeatist attitude will not help us achieve a better court system. It is time we look for a positive spin to these age-old issues.

Several months ago, I attended the retirement dinner of the Honorable Alexander Lehrer. For those of you who know Judge Lehrer, he is a bright man, and passionate about everything he encounters in life. During his closing remarks, he spoke about how he loved his time in the family part and felt it was the most important contribution he made during his long tenure on the bench. He touted family lawyers as the best lawyers in the system, the most concerned, and the ones who know more about every area of the law. He admired the ability of a good family lawyer to balance legal knowledge with psychological insight of the client's needs. It was such a welcomed change to hear the family part being extolled rather than excoriated.

The positive spin put forth by Judge Lehrer made me think that we need to pitch the family part differently. The system needs to come up with creative ways to lure and cultivate family part judges. The family part is one of the few areas of litigation where cases are specifically assigned to a particular judge for the entirety of the case. This requires a tremendous amount of administrative time, and frankly, there are about as many judges who want to administer caseloads as attorneys who want to run law practices. It just was not part of our legal training. If we cannot get more judges appointed to the family part, then maybe we need to have more support staff assigned to handle the purely administrative matters. Judges should not be spending any significant time handling adjournment requests when they have plenty of substantive issues to address. Judges outside the family part should be utilized to hear uncontested divorces. Since the majority of cases in the system are default cases or *simple divorces*, assigning a few of these matters to judges outside the family part would free up much-needed time. Time should be built into the judge's calendar to review motion papers, rather than causing these judges to schlep home the papers after a full day's calendar.

It is unrealistic to suggest higher pay, but it is not unreasonable to provide more time off for outside training or education. Priority should be given to family part judges for continuing judicial/legal training. Family part judges should be allowed to attend the NJSBA Annual Meeting & Convention, the Mid-Year Meeting and the Family Law Retreat without having to use personal vacation time. A certain number of days should be figured into the judge's schedule to allow for these events. Given the nature of the practice, I believe that family part judges and lawyers need more down time than others. It is simply unfair to expect a judge to administer an overburdened caseload rife with grueling emotional issues and not provide some outlet to prevent burnout.

I've been told that the late Chief Justice Robert Wilentz would call his family part judges from time to time just to see how they were faring. He would remind them that they were doing the most important work of the court. I am sure the atta-boy helped morale. After all, it is important for all of us to feel important and relevant, and we need to remind our judges how significant their contribution is to families and children throughout the state.

This slap on the back approach made me think that maybe we should hire Rutgers' Football Coach Greg Schiano for the job of recruiting family part judges. If Schiano was capable of getting quality football players to sign on to Rutgers after a 2–10 season, he could probably convince some superior court judges that they really want to sit in the family part. I thought the pitch might sound like this:

"More than any other assignment, in the family part, you can make a difference in people's lives. While you may prefer for the parties to decide these issues on their own, you can impact the direction they take. You can help them move on with their lives after the toughest emotional turmoil they've ever endured. You can ensure that they will receive the proper support to do so. You can determine a child's future by deciding where they live, the relationships they develop and the schools they attend. While these tasks are daunting, you will have the support of the best and most compassionate lawyers in the system. They will share your concerns and give you a much-needed laugh from time to time. The fundamentals are that you must care about people and want to do the right thing. The legacy you create in the family part is not just about your own personal goals and achievements, but about the legacy you create for the families you have positively affected."

It took the Rutgers football team almost 30 years to make it to a bowl game. Perhaps it was the changing positive attitude that got them there. Maybe if we all focus more on why we are family lawyers, and the positive impact we have on children and families, we will get closer to our goals. As family law practitioners, we should be grateful that there are judges willing to accept the toughest judicial assignments. We need to maintain an open dialogue and a team approach to reach our goal of an effective and efficient family part. ■

ENDNOTES

1. Foreword, *Interim Report of the Supreme Court Committee on Matrimonial Litigation*, July 20, 1979, Justice Pashman, chair.
2. *Id.*, at 4.

SENIOR EDITOR'S COLUMN

Trial Certification and Fee Arbitration: There is No *Per Se* Nexus

by John E. Finnerty Jr.

Since the Supreme Court did not adopt a recommendation by the Professional Responsibility Rules Committee to allow litigants to make public statements regarding the fee arbitration process, these proceedings and filings will remain confidential. However, the mere filing of a fee arbitration petition may jeopardize a lawyer's ability to become certified, or, once certified, to retain that designation bestowed for demonstrated competence in matrimonial practice based upon "education, experience, knowledge and skill."[1]

The original matrimonial attorney trial certification application had a section titled "V: Other Matters." Under Section A, the following inquiry was made:

> Have any claims been made against you, arising out of the professional relationship or fiduciary relationship with a client, either criminal, civil, administrative, or ethical? (This question includes, but is not limited to, malpractice and ethics claims and/or complaints).

That inquiry did not contain any requirement that the number or details of fee arbitration petitions be disclosed. In effect, there was no such obligation, because a fee arbitration petition, which was about a fee dispute, was not seen to be a claim *against* an attorney, or relevant to his competence as a matrimonial lawyer.

Not until September 2000, did the rules impose an obligation on applicants to disclose to the Trial Certification Board fee arbitrations that had been filed by clients. Effective Sept. 5, 2000, Rule 1:39-2, was amended to add the following subparagraph:

> Ongoing Obligation. Each applicant has an ongoing responsibility to report to the Board any malpractice actions brought, disciplinary complaints filed, *fee arbitrations filed*, or any discipline imposed on him or her during the pendancy of the application. In addition, each applicant has an ongoing obligation to notify the Board during the pendancy of the application process of any additional information that relates to the requirements for certification.[2]

Following the rule amendment, the certification application was not changed. It made the exact same inquiry under the same heading "V: Other Matters." However, those who applied for re-certification after the rule amendment learned that the certification board now required an applicant to list and "provide full details" for all fee arbitrations that had been filed for the applicable pre-certification period. It was also learned, when applications were acted upon, that the mere filing of a fee arbitration petition, regardless of its outcome, might directly impact the board's actions on future re-certification applications. Those that are seeking certification for the first time are subject to the same potential consequences.

Fee disputes are endemic to matrimonial matters because of the emotional nature of these cases, and the high demand for the investment of substantial time by attorneys to fulfill their various obligations to their clients. These obligations involve not only being in court, conducting discovery, and devising appropriate litigation strategies in accordance with the client's objectives, but also counseling and management of client objectives during an emotional time, when each client feels that the fabric of his or her life has been torn asunder. The course to follow in a case is not easily determined, and the law is amorphous and fact-sensitive subject to vast discretion lodged in judges with varied and diverse personalities, values, and perspectives.

Filing of a fee arbitration petition because a litigant disputes a fee they promised to pay, pursuant to a dually executed retainer agreement, *per se*, does not evidentially support even an inference that a lawyer is not competent. That a lawyer seeks to collect a fee that has been charged and earned pursuant to a contractual retainer agreement with his or her client, which the client either honestly disputes or just seeks to avoid paying, cannot logically be considered a reason to question the competence and demonstrated expertise of the lawyer; but, it clearly is being so considered for that purpose by the certification board.

It is not a secret that fee arbitrations occur frequently in family part

matters. The author's counsel to clients is to save their money for themselves, and try to resolve their matrimonial disputes through negotiation and sound business decisions. However, litigants have a right to reject such counsel, and to insist that positions they want advanced be presented. Lawyers that represent such clients have an obligation to present these positions, even though they may personally disagree, if they are unable to persuade the client on a more tempered course. Outstanding fees in such cases increase when a lawyer cannot be relieved because of the stage of the case, or when the client does not have the resources to pay for the services required as they are being rendered. Nevertheless, the lawyer must continue to work. He or she is ethically bound to do so.

If the filing of fee arbitration petitions will preclude certification, then lawyers either will be chilled in seeking to collect their fees, or even in bothering to apply for certification. Lawyers also may be chilled in offering to continue representation if a client falls behind in any significant fashion, regardless of the righteousness of the issue and position the client seeks to advance, *or of the client's need for counsel*.

If lawyers are going to lose (or not get) certification because they seek to collect fees earned pursuant to contractual retainer agreements, which clients refuse to pay, then we go down a very slippery slope. We will discourage lawyers from ever allowing clients to get behind or in hanging in for the person who does not, in the moment, have the deep pockets to pay bills as they are rendered. Additionally, we will trash hard-working lawyers who make sacrifices for clients who turn out to be faithless and who will do or say anything to avoid paying the fees they committed to pay.

There is something intrinsically wrong with this, and the Supreme Court Family Part Practice Committee or such other appropriate committee of the Supreme Court should consider this issue in the next rule cycle.

Moreover, if the filing of fee arbitrations is going to impact certification as they now do, then we need to be apprised of how many fee arbitrations are too many and what "a substantial pattern" of fee arbitrations is that might prevent future certification. Neither the Court Rules nor the trial certification regulations reference this issue or provide guidelines or definitions of what a substantial pattern of fee arbitration is such that certification may be denied.

How many fee arbitrations during what period of time is too many? Is the result of the fee arbitration relevant? How much of a discount in the fee following hearing justifies a negative mark against a lawyer? Suppose the lawyer resolves the fee arbitration with the client before hearing? Does the mere filing still count as a black mark? Should it matter if the reduction in fee ordered by the panel is *less* than the lawyer was willing to reduce the bill for prior to arbitration? Those seeking certification are entitled to know the answers to these questions, if fee arbitration filings are going to continue to be a relevant factor in processing certification applications.

The certification rules always have provided for termination of certification if the board finds that a certified attorney "no longer demonstrates continuing competence or is engaged in conduct or omissions to discharge responsibilities that are not acceptable on the part of a certified attorney."[3] No one could dispute that decline or loss of competence or inappropriate conduct should be relevant to continuation of certification. However, the mere invocation of a right informally and confidentially to resolve a fee dispute, absent anything more, is not relevant to the issue of one's competence, and should not be a factor in the certification process. ■

ENDNOTES

1. *See* R. 1:39.
2. *See* R. 1:39-2(e) (emphasis supplied).
3. R. 1:39-8.

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SENIOR EDITOR'S COLUMN

Binding Arbitration: The Answer to Calendar Chaos

by Michael J. Stanton

Despite statistical data that the average life of a divorce case, from filing to adjudication, has been reduced somewhat in recent years, it cannot be denied that the inconveniences (and resulting expenses) imposed upon matrimonial litigants and their attorneys continue to abound. We lawyers often exchange horror stories of examples of this. Worse yet, it must be recognized that numerous cases have been settled at the courthouse and placed orally upon the record because one or both of the litigants simply can no longer bear the cost (financially, emotionally, or both) of continued court appearances that are weeks apart. One can only speculate about how some of those settlements might have differed from the ultimate decision of the judge, had the case been fully tried.

Committees of the bench and bar have spent thousands of hours attempting to alleviate this problem, but their success has been limited. Yet a solution has been available by statute for many years, and the matrimonial bar continues generally to ignore it or regard it with suspicion, thereby depriving themselves and their clients of its benefits. That solution is binding arbitration.

There are many reasons to submit appropriate cases to arbitration. Arbitration is not only an attractive alternative for cases that have potentially *Sheridan v. Sheridan*[1] issues. Considering the calendar congestion that presently exists in most counties resulting from the volume of cases and the shortage of judges, a several-day trial before an arbitrator may be completed in a few weeks, whereas the same trial may take several months to complete in the courts. Additionally, once written summations or proposed findings of fact and conclusions of law are submitted, the written decision by the arbitrator is likely to be received within a few weeks, whereas the written decision by the trial court judge may not be received for several months due to the many pressures and obligations judges face.

The arbitrator is more likely to be able to devote his or her attention to one case at a time, whereas many judges are trying as many as five or six (or more) cases concurrently, in addition to handling motion calendars, domestic violence cases and other responsibilities. Judges are human, and these conflicting responsibilities must have an effect on their ability to maintain focus on a particular case. The arbitrator is more likely to be able to focus his or her attention on the case at hand.

Most of our courts are uncertain regarding the scheduling of trial dates, which, together with conflicting trial schedules of the attorneys and expert witnesses, creates enormous delays in completing the matrimonial trial. In contrast, arbitration affords the opportunity to pre-schedule consecutive trial dates and complete the entire presentation of testimony within a short period of time. Most courts will honor such prescheduled arbitration dates, and consider the attorneys to be on their feet, thereby enabling the expeditious completion of the arbitration hearing.

The attorneys and clients should be made aware of the likelihood that the arbitration process will be less costly than the trial process in the courts. This is true notwithstanding that the arbitrator must be paid his or her hourly rate. Substantial savings are likely to result from the elimination of the necessity of fragmented preparation and presentation over a lengthy period of time in the courts, which includes preparing the case over and over again and substantial amounts of down time at the courthouse.

A key ingredient to the successful arbitration of a matrimonial matter is the selection of a competent arbitrator. The chair of the New Jersey State Bar Association's Family Law Section, Lizanne J. Ceconi, has appointed a task force to study the potential unauthorized practice of law in the arbitration and mediation arenas. While problems in this field are more likely to arise in the area of mediation, attorneys must be vigilant in selecting an arbitrator. A competent arbitrator is likely to be just as knowledgeable and experienced as most trial court judges, and will have the advantage of dealing with only the arbitrated matter during the period of its presentation.

Procedurally, the arbitration prehearing process may provide for the same, or similar, discovery as that which is available in the pre-

trial court process. Furthermore, the arbitrator, in conjunction with the attorneys, can establish a streamlined motion procedure, which may be more expedient than that which is available in the courts. Minor procedural matters, such as scheduling and discovery, might be resolved by informal telephone conferences, letters, faxes and emails, methodologies that may be inappropriate in the courts.

In conjunction with the arbitrator, the court may enter an order setting forth the arbitration hearing dates, thereby enabling the attorney to inform other courts that he or she is under court order to appear at the arbitration; that is, the attorney is on his or her feet. This prevents interruption of the arbitration hearing, thereby permitting consecutive days that are rarely ever available in the trial courts.

Arbitration has another, perhaps less important advantage over litigation in the courts. A relaxed dress code for the arbitration sessions may be agreed upon. The arbitration is normally conducted in an office conference room, which allows the attorneys and litigants to spread out their materials on a conference room table, as opposed to the more formal setting of a courtroom. Hence although the proceeding remains professional and dignified with appropriate decorum, the surroundings may be more comfortable and less stressful.

The arbitration process in the state of New Jersey is controlled by N.J.S.A. 2A:23-B-1 to 32. It is important to keep in mind some of the salient characteristics of the arbitration statute. The arbitrator may issue subpoenas for attendance of witnesses and production of documents, and in most respects function in the same manner as a judge. The arbitrator also may award counsel fees. On application to the arbitrator by a party to the arbitration, the arbitrator may modify or correct his or her award.

Section 22 of the arbitration statute grants a party the right to file a summary action with the court for an order confirming the arbitrator's award after the arbitration proceeding. Section 23 of the statute provides the circumstances under which a party may ask the court to vacate an arbitrator's award. Section 24 of the arbitration statute provides the grounds for a court to modify an arbitration award.

Recently the Appellate Division decided the case of *Hogoboom v. Hogoboom*.[2] In *Hogoboom* the Appellate Division held that the arbitration statute specifically provides that parties may "expand the scope of judicial review of an award by expressly providing for such expansion." The court went on to hold, however, that the parties are not entitled to create the right to direct appeal to the Appellate Division, because the Appellate Division's jurisdiction is defined by court Rule 2:2-3, and the parties are not permitted to enlarge that jurisdiction. The court cited the decision in *Hudson v. Hudson*,[3] for the rule that "Consent of the parties does not create appellate jurisdiction."

The rule established by the Appellate Division in *Hogoboom* is that the parties to an arbitration proceeding must initially take an "appeal" to the trial court for review of the arbitration award. The trial court will then apply the standard of review set forth in N.J.S.A. 2A:23-B – 22 or 23, or the standard of review to which the parties have contractually agreed in their arbitration agreement. The court will then determine whether or not the arbitration award should be vacated or modified. Only then do the parties have the right to appeal the trial court's decision to the Appellate Division.

We believe matrimonial lawyers are doing their clients, themselves and the court system a disservice if they do not consider and offer their clients the option of binding arbitration. Most of us recognize the case that appears headed for litigation early in the process; that's the time we should propose arbitration. The court can enter the appropriate order, thereby removing the case from its calendar. The parties can fashion an arbitration agreement that suits their needs. The arbitrator can manage pretrial discovery. When the case is ready, the scheduled arbitration hearing dates can be communicated to the judge, who can enter an order setting forth those dates as court ordered, thereby enabling the attorneys to avoid scheduling conflicts from other courts.

We are all familiar with the truism that a settlement allows the parties to take control of their divorce case and replace the uncertainty of a judge's decision with the certainty of an agreed upon compromise. We also are aware that some cases cannot be settled, and some parties (and some attorneys) are not capable of compromise. There is an alternative truism for these cases. The parties and attorneys can take control of their divorce litigation, and avoid the court system chaos by entering into binding arbitration. ■

ENDNOTES

1. 247 N.J. Super. 552 (1990).
2. 2007 WL 1702820 (App. Div. 2007).
3. 36 N.J. 549, 553 (1962).

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FROM THE EDITOR-IN-CHIEF *EMERITUS*

Hail to Judge Serpentelli, the First Recipient of a New Award Named in His Honor

by Lee M. Hymerling

The *New Jersey Family Lawyer* congratulates the Honorable Eugene Serpentelli upon his receipt of the Family Law Section's plaudits at the section's gala holiday party, which was held at The Heldrich in New Brunswick, on Dec. 10, 2007. Not only did Judge Serpentelli receive a token of the section's esteem in the form of a plaque, but even more significant, Section Chair Lizanne J. Ceconi announced the creation of an award that will bear his name, and that will be periodically bestowed upon an individual who has made a lifelong contribution to the development of family law in our state.

While our section's Saul Tischler Family Law Section Award was designed to recognize members of the practicing bar and of the bench, it is acknowledged that, in recent years our Supreme Court has precluded sitting judges from receiving such awards.The newly created Serpentelli Award is designed to recognize the contributions of members of the bench (presumably after they have retired), as well as the contributions of others who have significantly impacted upon the family justice system.

There is no finer candidate whose name should be attached to such an award than Judge Serpentelli. Through his long judicial tenure, Judge Serpentelli, both as an assignment judge and as chair of innumerable Supreme Court committees, has advanced the cause of providing the citizens of New Jersey, in the form of the family part, a court that has efficiently and compassionately decided the hundreds of thousands of cases that come before it on an annual basis. He did so not only throught his leadership of the committees he chaired, but also as a role model for other judges to emulate.

In an earlier issue, the *New Jersey Family Lawyer* published my reminiscences of Judge Serpentelli's service as chair of the Supreme Court Family Practice Committee over the past 23 years. In his wisdom, Chief Justice Stuart Rabner recently appointed Judge Serpentelli to continue chairing that committee, which has, over the years of his tenure, not only been a rules committee in the classic sense of the term, but has also grappled with some of the most difficult substantive law challenges that have confronted our courts for almost a quarter century.

This column, rather than focusing on Judge Serpentelli's accomplishments as chair of the practice committee, will focus on some of his other accomplishments, which say so much about his qualities as a jurist, a legal scholar, and a caring and committed human being.

One way to measure the qualities of a judge is how that individual is regarded by those who appear before him or her. On this measure, few could match the recognitions that have come to Judge Serpentelli. It is well known that, on four separate occasions, the *New Jersey Law Journal* conducted surveys of New Jersey's trial court bench. Although questions persist regarding the surveys' methodology, and the judiciary has had qualms about whether the surveys truly reflect the performance of sitting judges, Judge Serpentelli's elevated rank among most of his peers cannot be challenged.

In the last survey, which was published as a supplement to the *New Jersey Law Journal* in January 2005, Judge Serpentelli was listed as "Top Gavel," having achieved the highest score in the first six of the dozen categories, "on his way to compiling a 9.42 out of 10 in overall competency." Judge Serpentelli's rating positioned him at the highest ranking of the 366 judges that were rated.

In fact, Judge Serpentelli, then in his 27th year on the bench, placed second to Atlantic County's Anthony Gibson, now retired, with Judges Gibson and Serpentelli also having run first and second in both the 1999 and 1993 surveys previously conducted by the *New Jersey Law Journal.* The *Law Journal* made the following comment about Judge Serpentelli:

> The Supreme Court has long turned to Serpentelli for difficult assignments. In particular, he is the long-time chairman of the court's family practice committee and the state's domestic

violence working group, which one family practitioner calls "a thankless job."

Serpentelli led in no fewer than six of the twelve categories in which the Judges were rated. In fact, he led in the first six questions, dealing primarily with the judicial brainpower, such as knowing the law, procedure, and records and documents in the case, as well as fairly weighing the evidence, handling complex matters and fostering settlements.

And he's consistent. He's been first in Ocean in all four surveys dating back to 1989.

Evidence of Judge Serpentelli's influence can be seen not only throughout his beloved Ocean County, but throughout the state of New Jersey. Few judges sit on the bench for so many years. No trial judge in the post-1947 era has had so far-reaching and diverse an impact upon our judicial system.

For starters, it is doubtful that one record set by Judge Serpentelli will ever be equaled—that of having served as assignment judge longer than any other jurist. His 22 years as assignment judge speaks volumes about his wisdom as a judge and the quality of his leadership. Indeed, prior to his retirement, he served under four chief justices (Robert Wilentz, Deborah Poritz, James Zazzali, and Stuart Rabner) and with four administrative directors (Robert D. Lipscher, James J. Ciancia, Richard J. Williams, and Phillip Carchman).

Some of our younger colleagues may have not be aware that early in his tenure as Ocean County's assignment judge, he was one of three assigned the task of serving as our judiciary's *Mount Laurel II* judges. His colleagues were Judge Stephen Skillman, who has for years served as a presiding judge in the Appellate Division, and Judge L. Anthony Gibson, who shared with Judge Serpentelli the top spots in the *Law Journal's* judicial surveys of 1993 and 1999. That Judge Serpentelli served with colleagues of such longstanding judicial luster, speaks volumes.

Judge Serpentelli's judicial work has long been recognized, not only within New Jersey case law but also in scholarly works from around the country. Indeed, in one book note that appeared in the October 1996 issue of the *University of Richmond Law Review*, it is noted that not only had Chief Justice Wilentz chosen Judges Skillman, Gibson, and Serpentelli to serve as *Mount Laurel II* judges, but that Judge Serpentelli, in the early stages of his career, had clerked for former New Jersey Chief Justice Joseph Weintraub, and had practiced in the small firm that had primarily represented zoning and planning boards.

Among Judge Serpentelli's greatest contributions to the development of New Jersey law was his monumental opinion in *AMG Realty Co. v. Warren Tp.,*[1] an opinion that spanned 70 pages of text and an additional 79 pages of appendices. Simply put, Judge Serpentelli set forth a method by which to achieve a fair allocation of moderate income housing in a particular township. In effect, Judge Serpentelli breathed judicial life into the meaning of our Supreme Court's opinion in *Southern Burlington Cty., N.A.A.C.P. v. Mt. Laurel Township,*[2] popularly known as *Mount Laurel II*.

As Judge Serpentelli introduced his lengthy opinion, he wrote that the case

> …presents the court with the opportunity to start the process of developing a method of fair share allocation and eliminating the confusion surrounding the issue. The process is critical to implementation of the *Mount Laurel* principle because as long as uncertainty regarding the fair share obligation prevails, "The weakness of the constitutional doctrine will continue." *Id.* at 253. The development of a fair share methodology constitutes a primary step in achieving the ultimate goal of *Mount. Laurel II: the actual construction of low and moderate income housing. Id.* at 352. Only after the Court quantifies the fair share obligation can it determine whether the municipal ordinance fully complies with *Mount Laurel* and thereafter, whether the plaintiff is entitled to a builder's remedy.[3]

In constructing his formula, Judge Serpentelli recognized the three issues that had to be addressed:

I. *Fair Share*–What number of low- and moderate-income units of the regional need must Warren provide for through its land use regulations?
II. *Compliance*–Has Warren, through its present land use regulations, provided a realistic opportunity for the construction of its fair share and thereby satisfied its *Mount Laurel* obligation?
III. Builder's Remedy–Have plaintiffs demonstrated noncompliance, proposed a substantial lower-income component for the project, and can their plans be implemented without significant negative environmental or planning impact?[4]

The *New Jersey Family Lawyer* is admittedly not a land use journal, but its editors do recognize the Herculean task Judges Serpentelli, Skillman, and Gibson confronted in the early 1980s as they applied the lessons of *Mount Laurel II* to the individual facts presented to them. Judge Serpentelli, with typical modesty, wrote:

> The authoring of this opinion has strained my literary capacity to make the subject matter easily intelligible while at the same time not sacrificing accuracy and thoroughness. No doubt the opinion has also strained the reader's patience. However, the tedium is now over, for this conclusion will address the broader issues underlying the technical concepts discussed above.
>
> While all of plaintiffs' and defendant's arguments concerning the numbers game have varying degrees of merit, it is not necessary to address them individually. Depending on one's

philosophical bent, degree of concurrence with *Mount Laurel*'s objectives and propensity for subjective analysis, one could easily join plaintiffs' or defendants' bar. However, while others may be entitled to such perspectives, I am not. The Supreme Court has charged the three *Mount Laurel* judges with the responsibility of formulating a methodology which identifies the housing needs of lower income people and thereafter fairly distributes the needs. Once the need is identified, it cannot be ignored to satisfy defendants or inflated to satisfy plaintiffs. The answer to the numbers game is squarely addressed by the Supreme Court:

> The provision of decent housing for the poor is not a function of this Court. Our only role is to see to it that zoning does not prevent it, but rather provides a realistic opportunity for its construction as required by New Jersey's Constitution. The actual construction of that housing will continue to depend, in a much larger degree, on the economy, on private enterprise, and on the actions of the other branches of government at the national, state and local level. We intend here only to make sure that if the poor remain locked into urban slums, it will not be because we failed to enforce the Constitution. [*Id.* at 352]

In designing a fair share methodology, subjective preconceptions should not control. Rather, the methodology should seek to determine objectively the precise extent to which a municipality must open its doors to the poor. Once that need is identified and the obligation imposed, the economy, private enterprise and other branches of government will decide whether the need will be satisfied.

The pivotal question is not whether the numbers are too high or low, but whether the methodology that produces the numbers is reasonable. Any reasonable methodology must have as its keystone three ingredients: reliable data, as few assumptions as possible, and an internal system of checks and balances. Reliable data refers to the best source available for the information needed and the rejection of data which is suspect. The need to make as few assumptions as possible refers to the desirability of avoiding subjectivity and avoiding any data which requires excessive mathematical extrapolation. An internal system of checks and balances refers to the effort to include all important concepts while not allowing any concept to have a disproportionate impact.

A final paragraph of the opinion was as follows:

> As to the equity between those who live in Warren and those who do not, candor requires a recognition that when Warren fulfills its *Mount Laurel* obligation there will be significant change. However, this decision represents only the first step in an ongoing process. The real challenge lies ahead in sensibly and sensitively planning the change which must occur. Our Supreme Court emphasized that the change caused by the satisfaction of the fair share need not be destructive. All who are involved in the process-the governing body, the planning board, plaintiffs, the master and the court must strive to devise a solution which will maximize the housing opportunity for the poor and minimize the impact on Warren. In the final analysis, in striking the appropriate balance between the rights of the residents of Warren and the rights of those who have been excluded, Warren must make the changes necessary to receive our lower income citizens if their constitutional rights are to be enforced.[5]

Your attention also is directed to Judge Serpentelli's early opinion in *Weir v. Weir*.[6] This opinion was written while Judge Serpentelli sat as a matrimonial judge, before the creation of the family part several years later. In *Weir*, Judge Serpentelli held that where a husband had met threshold requirements for eligibility for a pension but uncertainty remained since he might die before being permitted to receive any benefits or before his rights had matured by virtue of disability or exercise of pre-retirement options, the husband's pension interest was still subject to equitable distribution, with the method of allocation to be determined after holding a plenary hearing. Judge Serpentelli's opinion was well-reasoned, and its holding has withstood the test of time.

So too have his opinions in a plethora of prerogative writ matters.[7] In that case, Judge Serpentelli addressed what he characterized as "the interesting Question" of "whether a board of adjustment may condition a variance approval on the agreement of the owner not to subdivide the property involved and, if such a condition is invalid, whether the owner may subsequently disregard the condition and still retain the benefits of the variance."[8]

What followed in his opinion not only reflected his legal scholarship, but his sense of practicality, as well as his finely tuned sense of fairness. Judge Serpentelli's reasoning follows:

> New Jersey case law has not always been consistent in the treatment of such conditions. However, the court believes that the prevailing law is well summarized in 3 *Rathkopf The Law of Zoning and Planning*, § 40.02 (4th ed. 1987):
>
> …The general requirements relating to conditions which may be imposed are: The conditions imposed must be directly related to and incidental to the proposed use of the land, and must be without regard to the person who owns or occupies it.
>
> …To be valid, conditions must (1) not offend against any provision of the zoning ordinance; (2) not require illegal conduct on the part of the permittee; (3) be in the public interest; (4) be reasonably calculated to achieve some legitimate objective of the zoning ordinance; and (5) not be unnecessarily burdensome to the landowner.
>
> While no single New Jersey decision comprehensively enunciates these

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A Devoted Family Friend: Hon. Eugene D. Serpentelli

by Hon. Robert A. Fall

Although the July 4, 2007, retirement-by-age of Judge Serpentelli marked a sad occasion for many of us, we are heartened by the wise decision of the Supreme Court to continue our "devoted family friend" as the chair of its Family Practice Committee. In fact, Judge Serpentelli has been the only chair of the Supreme Court Family Practice Committee since its formation in 1983, following the passage that year of the constitutional amendment creating the family part of the superior court.

It is hard to fully comprehend Judge Serpentelli's contribution to the bench, and to bench-bar relations, since his appointment to the bench in November 1978. For more than a quarter of a century, he has been a leader, friend, buffer and advocate for all family law practitioners and family part judges, and has made the Supreme Court Family Practice Committee a nationwide model for the enhancement and systemic benefits of bench-bar relations.

Every single issue or rule change that has been addressed during the evolution of the family part since its inception in 1983 has been the product of the tireless work of those family law practitioners, judges, and the court staff who have constituted the membership of the Family Practice Committee. This partnership is unique to the family part and works well, all facilitated through the leadership of Judge Serpentelli.

Following adoption by our Legislature of the Prevention of Domestic Violence Act, at N.J.S.A. 2C:25-17 to -35, it became evident there was a need for the adoption of uniform practices and procedures in the trial court, and the cooperation of law enforcement authorities to serve and enforce restraining orders in order to afford victims and children the maximum protection provided by that act. Again, Chief Justice Robert Wilentz turned to his trusted friend, Judge Serpentelli, for leadership, and appointed him as chair of the Statewide Domestic Violence Working Group.

That committee brought together superior court judges, court staff, law enforcement personnel, municipal court judges, public defenders, prosecutors, victim service providers, and family law practitioners to address, *inter alia*, the issue of uniform procedures in the processing and hearing of domestic violence cases and enforcement of restraining orders. Under Judge Serpentelli's leadership, a Domestic Violence Procedures Manual was created and ultimately jointly approved by both the attorney general and the Supreme Court. Today, that manual serves as a procedural guideline for law enforcement personnel, court staff and all judges.

It also must be noted that the contributions of Judge Serpentelli to our legal system are by no means limited to the area of family law. He was one of three specially selected *Mount Laurel* judges appointed by Chief Justice Wilentz to hear and decide issues concerning compliance with the landmark affordable housing mandates issued by our Supreme Court. He also is recognized as one the foremost expert judges in the area of zoning and land use. The judge has authored more than 50 published decisions on a variety of topics, including family law, zoning and planning, land use, and freedom of the press.

Judge Serpentelli served as the assignment judge of Ocean County for more than 22 years, the longest tenure of any assignment judge in the history of New Jersey. In almost daily discussions with Judge Serpentelli over my 21 years on the bench, I can tell you that he derived his greatest pleasure and source of pride from his day-to-day dealings with the judges and staff with whom he worked. His management and leadership style were second to none. He encouraged innovation and facilitated judges and judicial employees to become leaders in their respective fields. Simply stated, he did everything within his power to allow all of us to become the best we could possibly be, and he was our biggest advocate. He advanced many of our careers, mine included. Most importantly, he treated everyone—lawyers, judges, and members of the public—with the utmost respect.

There are a few other things that most of you would probably not know. Judge Serpentelli was an innovator in the use of volunteers in the court system. During each of his weekly jury orientation speeches, he would pitch volunteerism, and invariably, many jurors would come forward and volunteer their time as juvenile conference committee members, child placement review board members, court mediators, counselors, clerical workers,

and yes, even court greeters, who would meet everyone who entered the courthouse with a smile and an offer of assistance if needed. He forged a volunteer staff that exceeded by double that in any other county.

Many years ago, he undertook the task of conducting the weekly hearings on adoptions. He created a special room for that task, which was quickly filled with stuffed animals that were donated by various service organizations. At the end of each adoption, the child was permitted to select and keep a stuffed animal, and he posed for countless photographs with the children and their adoptive parents, in order to make the adoption experience pleasant and memorable—that's Judge Serpentelli.

Using his interpersonal skills, Judge Serpentelli also forged a partnership between county government and the courts in Ocean County. That partnership provided our county with among the best facilities in the state, as well as the restoration of historic courtroom number one to its 19th century splendor. He took great pride in that accomplishment, as we all did.

Lastly, he is someone who clearly should have been recognized by an appointment to our Supreme Court. Unfortunately, without political backing of some substance, the appointive process simply does not work that way. I would include Judge Serpentelli among such legal giants as Judge Sylvia B. Pressler, Judge Michael Patrick King, and Judge Milton Conford, all of whom fully deserved to sit on our Supreme Court. On the other hand, as to Judge Serpentelli, had his focus been the Supreme Court, the public would probably not have benefited as much as it has during his tenure on the bench. And, of course, with the benefit of his continued leadership on the Supreme Court Family Practice Committee, how can we complain?

Hats off and best of luck to a true friend of the family part. May we be fortunate enough to have the benefit of his guidance for many years to come. ■

Robert A. Fall, J.A.D., *distinguished judge of the Appellate Division, retired from the bench in 2006, and authored more than 50 opinions, primarily in the area of family law, during his tenure. He serves as an adjunct professor at Seton Hall School of Law, and is a partner in Benchmark Resolution Services, LLC, specializing in mediation, arbitration and complex case management.*

From the Editor-in-Chief Emeritus

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principles, a composite of the holdings of many of our cases dealing with the issue of the validity of such conditions conforms to the analysis contained in *Rathkopf. North Plainfield v. Perone,* 54 N.J. Super. 1 (App. Div.), *certif. den.*, 29 N.J. 507 (1959); *V.F. Zahodiakin v. Board of Adjustment, Summit,* 8 N.J. 386 (1952); *Houdaille Con. Mats., Inc. v. Bd. of Ad. Tewksbury Tp.,* 92 N.J. Super. 293 (App. Div. 1966); *State v. Farmland-Fair Lawn Dairies, Inc.,* 70 N.J. Super, 19 (App. Div. 1961), *certif. den.* 38 N.J. 301 (1962); *Alperin v. Mayor and Tp. Com. of Middletown Tp.,* 91 N.J. Super. 190 (Ch. Div. 1966).[9]

Judge Serpentelli then, with his preeminent ability to synthesize the law, applied the unique facts of this case to the legal principles he had enunciated. Ultimately, he concluded that the condition was valid, and affirmed the planning board's decision below.

Without question, Judge Serpentelli was, over his almost 30-year tenure, a judge for all seasons, whose jurisprudence was not confined to a single discipline; it crossed substantive lines. All who have appeared before him can attest to the fairness of his approach and his unbridled commitment to justice.

We congratulate Judge Serpentelli for his many achievements over a stellar career—a career that will be recalled each time the Serpentelli Award is presented to an individual who most emulates the award's namesake.

We also congratulate Judge Serpentelli on the occasion of his retirement and venturing into a new enterprise with Judges James Clyne and Robert Fall. No doubt each of these distinguished retired jurists will bring to mediation and arbitration the excellence they brought to the state of New Jersey Judiciary. Indeed, they collectively represent a benchmark. ■

ENDNOTES

1. 207 N.J. Super. 388 (Law Div. 1984).
2. 92 N.J. 158 (1983).
3. 207 N.J. Super. at 393.
4. *Id*.
5. *Id*. at 459.
6. 173 N.J. Super. (Ch. Div. 1980).
7. *See, e.g., Orloski v. Borough of Ship Bottom*, 226 N.J. Super. 666 (Law Div. 1988).
8. *Id*. at 668.
9. *Id.* at 672.

Crews/Hughes and the Marital Lifestyle: Eliminating the Confusion

by Frank A. Louis

It has only been within the last few years that reference to the marital lifestyle has been elevated to the center of every case. Defining the marital lifestyle has been the subject of much debate and argument; it has resulted in litigation and created a cottage industry where marital lifestyle reports have purportedly become essential elements in the preparation of a case, with the inevitable consequent effect of increased cost and delay. Whether they are truly necessary is a topic for further discussion.

While there continues to be much debate about what constitutes the marital lifestyle, the Appellate Division in *Hughes v. Hughes*[1] injected uncertainty in our law—where certainty is necessary—by linking debt and the marital lifestyle. According to many, *Hughes* seemingly established a 10-year bright-line rule for permanent alimony. Some argue acquiring new debt to meet the marital lifestyle is justified by the decision. This article will attempt to place *Hughes* in some correct historical and legal perspective, while simultaneously explaining the impact of the marital lifestyle on a limited duration award. Viewed in proper context, *Hughes* has an appropriate place in the alimony analysis, and it does not stand for what it is most cited for; it neither says support should be based on debt nor that a 10-year marriage automatically is a permanent alimony case.

Hughes is perhaps best known for its statement that a 10-year marriage is not "short term;" that language has impermissibly been interpreted as elevating duration to a status the author believes is neither statutorily warranted nor justified by policy, and establishing a bright-line 10-year rule for permanency. While duration obviously is critical to the alimony analysis and a 10-year marriage *may* be a permanent case, it also may be appropriate for limited duration alimony (LDA).

Duration does not end the analysis; it is only part of the analytical process undertaken by the fact finder. As the Supreme Court emphasized in *Lynn v. Lynn*:[2]

> [H]owever, the *length of the marriage and the proper amount or duration of alimony do not correlate in any mathematical formulation. Where the circumstances of the parties diverge greatly at the end of a relatively short marriage, the more fortunate spouse may be fairly called upon to accept the responsibility for the other's misfortune – the fate of their shared enterprise."* (Emphasis added)[3]

Use of the term "misfortune" in *Lynn* had particular relevance, since that case involved reimbursement alimony and the impact of one spouse helping the other to obtain a professional degree and the related consequences. *Lynn*'s place in the alimony analysis is better understood if the term "misfortune" is replaced with the economic consequence created by the marriage, which is more consistent with general alimony law and also consistent with Justice Morris Pashman's point in *Lepis*, emphasizing that duration, in and of itself, is not determinative.[4] No one factor in the alimony analysis can and should be.

As the Appellate Division noted in *Devane v. Devane*,[5] a trial court must apply *all* the factors set forth in N.J.S.A. 2A:34-23.1. *Devane* involved equitable distribution, but, nonetheless, the principle is the same. All statutory factors must be considered.

Neither *Lynn* nor any other Supreme Court decisions mandate permanent alimony after a certain number of years. In fact, Justice Pashman emphasized in *Lepis v. Lepis*[6] that duration is *not* determinative.

> "[T]he extent of actual economic dependency, not one's status of a wife must determine the duration of support as well as its amount."[7]

In marriages of the length in *Hughes*, the analysis should be conducted under the principles and policies reflected by the limited duration alimony statute, which is a separate topic but nonetheless important to note. The limited duration alimony statute requires an analysis of the *impact of the marriage* on the parties. It is the impact of the marriage that creates the "economic dependency" justifying alimony. The impact of the marriage and issues of economic dependency are critical in the analysis of any alimony case.

THE *HUGHES* DECISION

While *Hughes* is cited for the proposition that a 10-year marriage automatically requires permanent alimony, in reality the result was more the product of the adverse

impact of the marriage on Mrs. Hughes. Prior to the marriage, Mrs. Hughes was working toward a degree that would have enabled her to be a music teacher. She relinquished what would have been a financially stable career as a direct consequence of the marriage. She entered into a business with her husband, which ultimately left her adrift economically. Thus, as a consequence of the *marriage*, Mrs. Hughes suffered an economic detriment that properly was addressed by alimony.

Rehabilitative alimony played a crucial role in *Hughes,* but it did not eliminate the need—or the right—for permanent alimony. The ultimate result in *Hughes* was fact sensitive, it was *not* keyed solely to the length of the marriage, a point ignored by many observers. The Appellate Division correctly rejected the trial court's finding that Mrs. Hughes was only entitled to four years of rehabilitative alimony. Citing *Hughes* for the proposition that a marriage of 10 years mandates permanent alimony is not only impermissible, but a gross oversimplification of a complex topic. There is no bright-line rule that if the marriage is over 10 years then it automatically is a permanent case. Neither *Hughes*, the statute, nor, in fact, any case so holds. In the family law context, justice is served by analysis, not a rigid categorical process dominated by only *one* factor.

In *Hughes*, the parties were married on June 11, 1983, and had one child; three months after the parties' 10th anniversary, a complaint for divorce was filed. Prior to the marriage, Mrs. Hughes worked as a waitress while pursuing a music education degree at the Boston Conservatory of Music. Mr. Hughes was a successful commercial real estate agent at Coldwell Banker earning $230,000 a year. The opinion suggests Mr. Hughes induced his wife to leave her job and abandon her career plans to work with him; together they formed a corporation that was actively engaged in commercial real estate.

The parties enjoyed an upper-middle-class lifestyle, which included an 11-room house, an in-ground pool and occasional domestic help. They enjoyed vacations to the Caribbean and Florida and sailing trips to Maine, Nantucket and Newport. Mrs. Hughes drove an Audi and Mr. Hughes a Mercedes. Unfortunately, as a consequence of alcohol abuse issues and the real estate recession in the late 1980s, the parties could only maintain their lifestyle by borrowing money, first from their corporation and then using credit cards, to the extent that, as of the parties' separation, credit card debt was approximately $73,000. By March 1996, it had increased to $116,260.

The trial court, after noting the length of the marriage, only awarded Mrs. Hughes four years of rehabilitative alimony. This award was reversed. She received permanent alimony, but it was unique; she received what the author characterizes as "permanent alimony lite."[8] The Appellate Division found Mrs. Hughes was entitled to permanent alimony, coupled with the rehabilitative alimony, but with the *caveat* the support should only enable her to live "perhaps not at the *full level* of Plaintiff's [lifestyle], but *somewhat reflective* of how the parties lived during the marriage."[9]

"Somewhat reflective" is far from a ringing endorsement of Mrs. Hughes' entitlement to continue to enjoy the marital lifestyle; but, as the analysis demonstrates, the result was dictated not by rigid legal principles or bright-line tests. *Hughes* emphasized a central and fundamental point in the alimony analysis; it is fact sensitive and policy driven. The ultimate result turns on the *impact of the marriage on the parties*, how the marital partnership functioned, and how the parties' earning capacities were affected by the marriage, as well as all the other statutory factors. These factors help determine whether any "economic dependency" is entitled to legal recognition. The alimony analysis is not designed to be easy; it is designed to be fair.

The court then discussed the standard of living, and criticized the court by basing alimony on what the trial court characterized as the "real standard of living without resort to excessive borrowing."[10] The Appellate Division observed the trial court confused two concepts, emphasizing that the marital standard of living "is the way the couple *actually lived*, whether they resorted to *borrowing and parental support* or if they limited themselves to their earned income."[11] It is this language that has created confusion, since this quote has been repeatedly relied upon by other courts. It has created difficulties in resolving cases, and even worse, led to unfair results. Yet, the comment that the standard of living is the way the people *actually lived*, is correct.

STANDARD OF LIVING: IS THE RIGHT TO ENJOY IT EARNED?

The problem is that the *Hughes* opinion failed to place that comment in a context courts and lawyers can easily understand and, importantly, utilize in the future. That process requires an analysis of the term "marital lifestyle" or the "standard of living." Is a standard of living maintained by debt and not income one entitled to legal protection? Are all marital standards of living entitled to protection? The answer to these questions places *Hughes* in the appropriate context; both legally, and from a policy standpoint.

Any discussion about the marital lifestyle inevitably begins with *Crews v. Crews*.[12] *Crews*, initially created a methodology that highlighted the marital lifestyle to the degree it overshadowed any of the other statutory factors. The uncertainty caused by *Crews* was corrected by *Weishaus v. Weishaus*.[13] Yet, now we are not discussing *procedure* but *substance*. The *Crews* discussion of the marital lifestyle is

important, and can be harmonized with the *Hughes* comments in the correct public policy context. In language critical to the analysis, *Crews* emphasized the "goal" of any alimony award is to allow the dependent spouse to maintain a standard of living reasonably comparable to the standard established during the marriage.[14] The decision also required the court to consider the ability of the dependent spouse to be self-sufficient, citing *Hughes* at 33-34.

There are effectively two issues in the alimony analysis relating to the marital standard of living. The first is whether a dependent spouse is *entitled* to enjoy the "marital" standard of living; the second is whether support should be awarded to enable that spouse to meet that "goal," even if it means requiring the supporting spouse to utilize debt (as the parties themselves did in *Hughes* during the marriage) to maintain that lifestyle.

The first issue can be eliminated by recognizing, as we instinctively know, that the mere fact that you are married does not automatically *entitle* the dependent spouse to enjoy the marital lifestyle. The marital lifestyle is not an entitlement; rather, it is a *right* the dependent spouse *earns* by virtue of how the marital partnership functions. We intuitively understand that if the parties were married for one, two or three years, and enjoyed an extraordinary lifestyle during that brief marriage, that does not automatically mean the dependent spouse has a *vested* right, *i.e.*, an *entitlement* to enjoy that lifestyle. Phrased otherwise, the dependent spouse has not *earned* the right to compel the supporting spouse to pay alimony at a level to enable the marital lifestyle to be maintained.

THE LEGALLY PROTECTABLE LIFESTYLE

Even if the case is one appropriate for limited duration alimony, *i.e.*, alimony awarded for a fixed period of years, that does not mean the marital standard of living is a right to be enjoyed automatically. It may be, but it may not be. If, as a consequence of the marriage, there was minimal impact on the dependent spouse's earning capacity, or if the cash flow that maintained the marital lifestyle was the product of the supporting spouse's pre-marital skill and expertise unaffected by the marriage, alimony might be applicable but not necessarily at a level to sustain the marital lifestyle. Simply put, the marital lifestyle in a short marriage is not necessarily entitled to *legal protection*. It *is* nonetheless the marital lifestyle, just not one entitled to protection. In the more traditional longer term marriage the economic sacrifices the dependent spouses made, coupled with the contributions made to the marital partnership, provide the policy justification for maintaining the marital lifestyle. If the marital lifestyle is viewed as something that is *earned*, then the right vests. There is some reluctance to use the term because the law makes it clear that vesting as a concept has no place in matrimonial law.[15] Thus, using "vesting" may lead to confusion. Yet, in this context, it seemingly fits. The better term, which properly focuses the analysis and hopefully is not confusing, is whether the marital lifestyle is entitled to *legal protection*. Such a term would require *evidence* to be presented to differentiate between lifestyles. It is a policy analysis that compels a supporting spouse to maintain a lifestyle.

Legal protection is more consistent with the governing legal principles. It focuses the analysis more precisely than the *Lepis* "economic dependency" test. Justice Pashman indicated it was the "actual economic dependency, not one's status as a Wife, that must determine the duration of support as well as the amount."[16] Thus, in two instances the Supreme Court suggested there is more to the alimony analysis than merely duration. When Justice Pashman used the term "actual economic dependency," he did not mean *all* economic dependencies, but only those dependencies entitled to legal protection. Thus, utilizing the term "legal protection" makes the point more accurately and precisely.

The analysis concerning which marital lifestyles might be entitled to legal protection is not limited solely to economic factors, although certainly the analysis commences with economic contributions or economic sacrifices by the dependent spouse. In the traditional marriage, the justification for alimony, and hence the fairness of requiring the supporting spouse to maintain the marital lifestyle, is that the dependent spouse *earned* the right to have the lifestyle protected. This right was earned by making both economic and non-economic contributions to the marital partnership, and in doing so, in all probability, depreciated his or her earning capacity, all as a consequence of the marriage. "Earned" used in this context is not an economic term; rather, it is a reflection of the *policy* that provides justification for an alimony award. It may be comprised of contributions or sacrifices that importantly may have much or little to do with economics. Marriage, and the obligations created as a consequence, is based on far more than mere economics.

If the lifestyle *is* entitled to protection, but based on all the factors it still is a limited duration alimony case, then the *amount* of alimony should be calculated to enable the dependent spouse to enjoy the marital lifestyle but only during the limited duration alimony term. If the lifestyle is *not* entitled to protection, then the amount of alimony during the term should not be keyed to the lifestyle. Thus, the right to enjoy the marital lifestyle does not automatically exist in *every* limited duration alimony case; the right is dependent on the facts.

THE MARITAL LIFESTYLE: A MEASURING STICK

If you accept the proposition that once the marital lifestyle is

entitled to *legal protection*, then it is proper, as *Crews* says, for it to be the *goal*. Alimony as a statutory creation is gender blind.[17] Neither party has an automatic *right* to the marital lifestyle without a factual analysis. It is not something, particularly when children are not involved, that *belongs* to a spouse simply because there is a marriage certificate. Viewed in this context, the marital lifestyle, when entitled to legal protection, becomes the *measuring stick* for the future alimony calculations. Viewing lifestyle as a measuring stick, both *Crews* and *Hughes* can be harmonized.

We have learned that in the vast majority of cases when parties divorce it is virtually impossible for the marital lifestyle to be maintained by one or both parties. Yet, that does not mean the *right* to enjoy the marital lifestyle was not *earned* as a consequence of marital effort, or that the dependent spouse is not entitled to that amount. It just means there was not sufficient money to pay for the marital lifestyle. The lifestyle may well be entitled to protection, but the protection simply cannot, and should not, be granted in the absence of a financial ability of the supporting spouse to do so. That lifestyle, because it cannot be supported due to inadequate finances, becomes a measuring stick—a theoretical legal *right* to be certain, but one only imposed by a court when sufficient funds exist for it to be met. This generally only occurs when there is a future change in circumstances.

It is and should be the goal, in *Crews* terminology, to enable the dependent spouse to enjoy the marital lifestyle; and once the circumstances do *change,* and there *is* the financial ability to meet that lifestyle, then this legally protected right should be implemented through an appropriate alimony award. In that circumstance, the law is only implementing a pre-existing right that was earned during the marriage, which previously could not be implemented. That does not mean that at the initial award, if the marital lifestyle (*i.e.* the measuring stick) was maintained by incurring ever-increasing amounts of debt, that it is good policy to direct the parties to continue to incur debt to maintain the lifestyle. Rather, *Hughes*, fairly read, should be interpreted to mean *how* Mr. and Mrs. Hughes actually lived was a reflection of what they felt was appropriate lifestyle, *i.e.*, it *measured* what they felt was an appropriate lifestyle. That lifestyle may well be one entitled to legal protection. The personal and economic decisions that were made establish the measuring stick for *future* alimony awards when there *are* sufficient funds to later meet that goal, which are generated by *income*, not *debt*. This occurs when there is a change in circumstances.

Thus, in a changed circumstance analysis, *Crews*' original reasoning and concerns becomes clear. This measuring stick must fairly be established or memorialized in some fashion at the time of the divorce, since the *goal* or the right to enjoy a certain lifestyle, could not be met because of the parties' limited financial ability. Yet, once the parties' ability changes, *i.e.*, the change in circumstance envisioned by *Lepis* and *Crews*, and assuming the right to the marital lifestyle has *vested*, then alimony should be increased to enable the dependent spouse to enjoy the marital lifestyle. The change in circumstances is that the increased income replaces the cash flow previously provided by debt. The goal, which is a policy-driven objective, is then achieved, and the *earned* right then can be implemented.

Under *Crews*, the dependent spouse is not entitled to *exceed* that measuring stick. If the supporting spouse does not have the ability at the time of the divorce to meet that goal, then alimony should not be awarded at a level to achieve an economically impossible goal, since the end result is then obviously unfair. If the lifestyle can only be maintained by debt, or liquidation of assets, then it is economically unrealistic to suggest it be maintained. Yet, as the circumstances change, that legal entitlement, which has been earned by the spouse, can be satisfied. ■

ENDNOTES

1. 311 N.J. Super. 15 (App. Div. 1998).
2. 91 N.J. 510, 518 (1982).
3. 91 N.J. at 518.
4. *Lepis* at 155.
5. 280 N.J. Super. 488, 493 (App. Div. 1995).
6. 83 N.J. 139 (1980).
7. 83 N.J. at 155.
8. *Hughes* at 34.
9. 311 N.J. Super. at 33-34. (Emphasis added)
10. 311 N.J. Super. at 34.
11. 311 N.J. Super. at 34. (Emphasis added)
12. 164 N.J. 11 (2000).
13. 180 N.J. 136 (2004).
14. *See* N.J.S.A. 2A:34-23.
15. *Stern v. Stern*, 66 N.J. 340, 348 (1975).
16. *Lepis* at 155; *Lynn* at 517. While *Lepis* refers to a wife, it is clear that since the 1988 statutory amendments, alimony is gender neutral.
17. N.J.S.A. 2A:24-23.

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Strategies to Avoid, and if Necessary, to Survive Fee Arbitration

by Christopher Rade Musulin

Having practiced family law for 20 years, and served as the District III B fee arbitration secretary since 1996, I am no stranger to attorney client fee disputes. I hope to offer some insightful perspectives into the avoidance of fee arbitration, and if necessary, a useful description of survival techniques if fee arbitration becomes necessary in your practice.

AVOIDING FEE ARBITRATION

Explain How the Attorney Gets Paid

During the initial interview, most of us spend time answering client questions about support, custody, equitable distribution or other issues raised by the client. Because they are most often in an acute emotional state, clients tend to be selective about the information they choose to retain. Additionally, some clients view fee discussions as insensitive to their urgent matters. As a result, any discussion about fees at the initial consultation may largely be ignored.

In reality, whether included as part of the initial consultation or disclosed during a second interview, a discussion of how attorneys are paid is just as critical as the substantive issues raised in the case. Do not be bashful. Explain the process of the retainer, your billing cycle and your entitlement under Supreme Court Rules for payment of your fee for the services provided to your client. Generally speaking, if the client has a very clear understanding as to the attorneys fees and method of billing, fee arbitration will likely never take place.

Easy to Understand Fee Agreements

Attorneys tend to overcomplicate everything. The matrimonial fee agreement is no exception. As fee arbitration secretary, I have reviewed hundreds of different fee agreements, many of which are completely incomprehensible. They are essentially contracts of adhesion.

Closely follow the Supreme Court Rules for requirements in the fee agreement. Attach the Client Bill of Rights. Beyond this, nothing else is necessary. The more complicated the agreement, the greater the opportunity for misunderstandings or adverse interpretations by third parties (fee committees, ethics committees, etc) to be construed against the attorney who drafted the contract.

Never send out a fee agreement requesting the client to sign and return it to your office in a self-addressed stamped envelope without having first met with and discussed the retainer agreement with the client. The agreement should be carefully reviewed with the client as you would review a settlement agreement, and the time to do so should be offered as a non-billable courtesy. Besides building good will, a client will be hard pressed to claim a lack of understanding if the matter ever proceeds to fee arbitration. It is 30 minutes well spent.

Explaining the Costs of Each Major Service

There should be no surprises. Your client is a legal consumer. Explain that the order to show cause will cost an anticipated $2,500 in legal fees. If they are informed ahead of time, especially in writing, they will not succeed with a claim of lack of understanding during fee arbitration. Hopefully, this also will cause the litigant to temper his or her emotions and more conservatively utilize attorney resources.

Bimonthly Billing Cycle

For years, I have utilized a bimonthly billing cycle. Generally speaking, attorney's fees broken into smaller amounts are less painful and more easily paid from retainer or invoices addressed to the attention of the client. This also can greatly improve cash flow for the firm.

Proactive Staff Contact Upon the Issuance of the Bill

It is appropriate and sound practice to have your comptroller or secretary contact your client and ask whether they received the bill, and further ask them whether they have any questions or concerns. Again, it is time well spent.

Appropriate Retainer; Reservation Retainer

This is the oldest advice in the book. When the complicated custody case walks into your office, $5,000 is simply not enough.

Additionally, it is appropriate to maintain a reserve of funds for a client in retainer. For example, if you receive a $5,000 retainer, your fee agreement can provide for replenishment or for payment as

invoices are issued while still maintaining $1,500 or a similar amount in the client account. This strategy will greatly enhance the probability of payment. Of course, this must be disclosed in the fee agreement.

SURVIVING FEE ARBITRATION

Always attach a copy of the rule with your pre-action notice. Attorneys too often selectively paraphrase portions of the rule, and invariably forget to include some critical piece of information, rendering the pre-action notice defective. Also, check with the Office of Attorney Ethics for the correct name, address, phone number and email address of the fee secretary for the district. These often change, even mid cycle.

Once you receive notification that a client has invoked the process of fee arbitration, treat this situation seriously. Approach all deadlines the way you do when managing a file for a client. The attorney fee response and filing fee are due within 20 days from the date of initial notification. Pursuant to Rule 1:20-7(k), extensions can be provided for good cause.

Although the fee secretary will send you a form for the attorney fee response, you are not limited to the format. You should summarize your position and submit any document you intend to rely upon during the arbitration process. It should be noted that you can submit additional documents at a later time, as long as you have complied with the initial time filing deadlines. There is no court rule preventing this practice.

If you do not file a response or pay the fee, you will receive a deficiency letter. If the issues are not cured within 20 days, you will be barred from participating and the matter will proceed in an uncontested fashion. Consistent with Rule 1:20A-3(b)(2), the committee can refuse to consider any evidence from the attorney.

Third-party practice exists. If you previously worked at a different law firm, or if other attorneys were involved in the case, you can join them as necessary parties. The last thing you want is a fee arbitration determination against you personally if your prior law firm or if other attorneys should share responsibility.[1]

There is no provision for discovery in fee arbitration. However, the secretary can issue subpoenas for the production of necessary documents or witnesses.

Since 1983, stipulations of settlement are required once the process is invoked and a settlement has been achieved. It is critical to detail default procedures in the form of stipulation in the event of noncompliance. This typically works as a deterrent, and will encourage your former client to pay your fee.

Upon notification of a settlement, the secretary closes the file. It is generally unnecessary to file the stipulation with the secretary, but it is good practice. The stipulation is then forwarded to the Office of Attorney Ethics.

With regard to scheduling, pursuant to Rule 1: 20A-3(b), the hearing can be scheduled upon 10 days written notification to the parties. In many jurisdictions, the backlog is substantial. Cases are fully disposed of within 90 days of filing or less, with few exceptions.

Each county maintains a different practice for conducting fee arbitrations. In some counties, fee arbitrations take place at the office of the hearing panel chair or another member of the panel. In other counties, the hearings can occur at the courthouse or bar association office.

The panel consists of two attorneys and one layperson. By court rule, a quorum is three, but this can be waived by the parties.[2] If the amount in controversy is less than $3,000, the matter can be heard by

one attorney. This $3,000 threshold has not been subject to review in over a decade, and should certainly be increased, perhaps to $5,000.

No record is created of the fee arbitration proceeding. The formal rules of evidence are relaxed. Witnesses are sworn by the panel chair, who enters rulings upon evidentiary objections. Witnesses also can be sequestered. Traditional trial procedure is followed.

In the event one of the parties does not appear, the matter proceeds by default in the same way you present a notice of equitable distribution at a default hearing.

If for any reason you need an adjournment, you should attempt to receive the consent of your adversary, the same procedure utilized when adjourning a motion or other court proceeding. Adjournments are generally not granted in cases involving incarcerated litigants, as these fee arbitrations must take place at the institution and are quite complicated to schedule.

A client can unilaterally withdraw the fee arbitration request within 30 days after the secretary dockets the case. Thereafter, there is no right to withdraw. Rather, a stipulation must be entered into. If the case is withdrawn within the 30-day period, the client is barred from reinitiating the fee arbitration process.

The standard of proof in fee arbitration matters is a preponderance of the evidence.[3] The burden of proof is upon the attorney to prove the reasonableness of the fee in accordance with R.P.C. 1.5.

It is completely appropriate for the attorney to request a panel including lawyers familiar with their substantive area of practice. Panel members that limit their practice to bankruptcy or personal injury matters may not be particularly well-suited to address family law issues.

Although not required, it is often helpful to have an attorney represent you in the fee arbitration process. If you have reached the point of conflict with your former client over a fee, it is likely that you have a dysfunctional interpersonal relationship, and any efforts made toward settlement will likely prove fruitless. An attorney representing you will present a fresh dynamic, and can often facilitate a stipulation of settlement.

You should prepare for the fee arbitration as seriously as you prepare for a trial or plenary hearing. Have a clear idea regarding presentation of appropriate proofs, and be prepared to carry your burden. You should begin by briefly outlining the nature of the matter, then identify and introduce into evidence your fee agreement. In addition, you should offer proofs in a chronological fashion, introducing the monthly billing statements, describing all services rendered, and further introducing letters, pleadings or other documents corroborating services provided. Attorney-client privilege is waived at the proceeding, and the attorney is free to discuss all aspects of representation.

If services were previously provided to the client, it is important to detail the existence of such a prior relationship, as it will likely suggest a greater level of knowledge with regard to the nature of services and billing practices with the client.

Occasionally, an attorney will not have a fee agreement. This is not fatal; however, this will likely result in a resolution of any doubts or controversies regarding the fee agreement in the favor of the client.

Assuming the attorney presents adequate proofs, the fee should be upheld. Once entered, either party should comply with the determination within 30 days from the date of issuance. The letter enclosing the determination from the committee details the process of appeal. Unfortunately, angry clients tend to appeal. If the procedures detailed in this article are closely complied with, it is unlikely an appeal will be successful.

Preventative legal practice is the best strategy to avoid problems. Accounts receivable plague all law firms. It is more important than ever to avoid fee conflicts with your clients. ■

ENDNOTES

1. *See* R. 1:20A-3(b)(3).
2. *See* R. 1: 20A- 3(b).
3. R. 1: 20A-3(b).

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Facts

- Alcohol is the most widely used and destructive drug in America.
- Cocaine use causes marked personality changes; users become impatient, suspicious and have difficulty concentrating.
- Marijuana affects memory, concentration and ambition.
- Early intervention with alcohol and drug problems most often leads to complete recovery.
- Attorneys can and do suffer from alcohol and other drug abuse problems.

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