New Jersey Family Lawyer

Volume 29 • Number 3
January 2009

SENIOR EDITOR'S COLUMN

Post-Judgment Discovery: Proceed With Caution

by John E. Finnerty

A recently published case demonstrates the tightrope that lawyers must walk when seeking to advocate effectively for their clients within the 'rules of the game.'

In *Welch v. Welch*,[1] decided Jan. 7, 2008, and approved for publication on June 9, 2008, Judge Michael Guadagno refused to consider on a post-judgment application for modification of custody, documents that had been obtained by the moving party from the Marlboro Township Police Department through service of a subpoena. The subpoena was issued two days prior to the filing of the former husband's motion seeking modification of the residential custody of the parties' 15-year-old child, on the grounds of the wife's alleged instability.

There is no indication whether the subpoena, made returnable the return date of the motion, was copied to the adversary, but from the opinion it appears that it was not. The subpoena was forwarded with a transmittal, which encouraged the production of the subpoenaed records prior to the hearing date. Four days prior to the return date of the motion, the police department forwarded copies of subpoenaed documents to the husband's counsel, who in turn forwarded them the following day to the wife's counsel. The husband sought to rely on the subpoenaed documents to demonstrate his wife's alleged mental instability.

Since the court concluded that the lynchpin of the movant's case was the subpoenaed police reports, and ruled that they had been obtained in violation of court rules, it refused to consider the evidence, and denied the motion. There was no discussion of what these records demonstrated or whether they gave rise to a concern about the mother that would be pertinent from a custodial perspective in terms of the best interests of the child. In the author's opinion, it is of concern that a judge may have honored form over substance, and failed to exercise his *parens patriae* responsibility to children by refusing to consider available evidence that may have been relevant to their welfare.

In refusing to consider the records, the trial judge summarized the history of discovery in family actions. He noted that historically such discovery has been far more limited than in other areas of litigation. He failed to reference that Rule 5:5-1(c) discovery by way of deposition had been liberalized by a rule amendment adopted by the Supreme Court in November 1985, following a rule amendment recommendation by the Supreme Court Family Part Practice Committee. That recommendation came following extensive study of third-party deposition practice in matrimonial actions in other states. The research concluded that New Jersey was one of a small minority of states that did not allow depositions as of course of third-party witnesses in matrimonial cases. Consequently, the Supreme Court Family Part Practice Committee voted to propose a rule amendment to the Supreme Court, which was adopted and became effective January 1986.

In not considering the subpoenaed material, the trial court asserted that a post-judgment matrimonial motion was "summary" in nature. In support of that conclusion, the trial court cited Rule 5:5-4 provisions for "page limitations," "short return dates," and "entry of a written Order at conclusion of the motion hearing." The trial judge concluded:

> These limitations are stringent and clearly intended to resolve issues in a summary fashion. A return date of twenty (24) day is not nearly enough time to conduct meaningful discovery and allow an adversary to file a timely response.

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The trial judge further cited Rule 5:5-1(d), which, besides the permitted discovery enumerated in that rule, provides that all other discovery in family actions shall be permitted by leave of court for good cause shown, with exceptions for production of documents, requests for admissions and copies of documents referenced in the pleadings. The trial judge correctly noted that this rule applied to discovery in pending actions, and that there is no rule that authorizes discovery in a post-judgment action, even assuming the subpoena was served following the filing of the motion, rather than two days before the motion. However, there is no reference in the rules that supports the conclusion that any post-judgment proceeding is "summary" or "short." The author notes that post-judgment applications can be extensive and require substantial discovery over a lengthy period of time, and post-judgment hearings can sometimes last as long as divorce trials.

The power to issue subpoenas is significant, and certainly must be exercised in good faith.[2] Nevertheless, there is no specific rule that *precludes* service of subpoenas in pending post-judgment cases absent a court order or the scheduling of a plenary hearing. However, it is also true that there is no rule that authorizes such discovery.

The subpoena in this case sought documents, and in the transmittal letter the attorney clearly sought to obtain the documents before the hearing, presumably so they could be used at the time of the return of date or in reply papers. Clearly, that subpoena should have been served contemporaneously on the adversary, since the adversary apparently was known. The adversary then could have filed a motion to quash, and the documents would never have been released. The failure to serve the subpoena came perilously close to violating the policy of Rule 4:14-7(c). The better practice would have been to serve the subpoena contemporaneously on adverse counsel.

The author views the case as troubling, and the practice of subpoena power in pending post-judgment proceedings also is troubling. It does not appear that there is a sufficiently clear policy in the rules precluding a post-judgment subpoena, but an alternative argument could be made, because of the silence of the rules on this issue.

However, the exclusion and refusal to consider evidence that may be relevant to the substantive issue involved certainly is extreme. The better course for the attorney in this case might have been to set forth in a motion the basis for the belief that if a subpoena was served probative evidence would be uncovered relevant to the issue of the custody and the best interests of the child. Certainly, the person who served the subpoena had sufficient knowledge about some circumstances that caused it to be issued to a specific police department. Faced with knowledge that there were events that resulted in police files being created, a trial court would be hard-pressed not to allow the facts believed to exist to be explored and developed, since the exploration of those facts might demonstrate cause for concern regarding the best interests of the child. Reviewing the evidence would allow the court to make a determination on substantive grounds rather than because of perceived procedural violations.

Another example of a situation that might justify the service of a subpoena, is a post-judgment application to modify alimony and/or child support based on changed circumstances. If the respondent knew that the movant had, within some period of time prior to the filing, refinanced a home, which presumably would have required the filing of a loan application, then obviously the information disclosed in that loan application would be relevant to evaluation of the alleged changed circumstances presented by the movant. It would certainly be germane relevant evidence that should be considered by a trial court in connection with evaluating the application. If the movant did not provide that information, then certainly the respondent should be able to obtain the information and provide it to the court before a determination is made on the application to modify. There may very well be a wealth of information that, if not voluntarily produced, could only be obtained by way of subpoena.

Perhaps, in certain cases where the movant seeks relief and the respondent needs access to information that he or she knows exists in the hands of third parties, the respondent should cross move for permission to serve a subpoena to obtain the material before a substantive determination is made by the court on the initial application.

There may be other circumstances that justify issuance of post-judgment subpoenas. However, the alleged facts in the *Welch* case and the hypothetical just referenced are clear examples where independent evidence may exist in control of third parties that should be produced for the court before the post-judgment motion is determined or a hearing is held. This author believes that the entire issue should be considered and addressed by the Supreme Court Family Part Practice Committee in its next cycle. ■

ENDNOTES

1. FM-13-1006-94C.
2. *Cavallaro v. Jamco Property Management*, 334 N.J. Super. 557, 569 (App. Div. 2000).

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CO-MANAGING EDITOR'S COLUMN

Realistic Trial Dates, Not an Unrealistic Expectation

by Charles F. Vuotto Jr.

How many times has the following scenario played itself out: On the day scheduled for trial, you appear on time, lugging heavy and cumbersome trial binders and trial boxes ready to proceed. The clients have taken off from work and are paying someone to watch the children—first to prepare for trial and then to appear in court. You have already submitted a trial brief along with numerous premarked exhibits to the court and your adversary. The cost to prepare these documents, as well as the copying and delivery charges alone are staggering. You have spent substantial time meeting with your client and your witnesses to prepare them for trial. You have contacted the judge's secretary and/or law clerk to get an idea of how crowded the docket is and to confirm that you are actually going to proceed. You were told that your trial will proceed as scheduled.

When you arrive at court, however, you find that you are number 35 on the list comprised mostly of domestic violence matters (initial temporary restraining orders, dismissals, and final hearings) along with a smattering of family matter pre- and post-judgment hearings and conferences. Unless the judge is a miracle worker or operates on a different timeline than the rest of reality, there is absolutely no way the judge will have time to speak to counsel, let alone to start a trial in your matter.

Why does this happen, and what can be done to improve the process? Would we tolerate this in any other setting? Imagine scheduling a doctor's appointment and being told to engage in hours and hours of preparation in advance and arrive at 8:30 a.m. for an examination, which *may* occur anytime between then and 4:30 p.m. Would we tolerate spending a few thousand dollars each year on season tickets to a sporting event, only to be told each week that the game might have to be rescheduled? What if every week you tuned in to watch your favorite dramatic series on television to learn that the writers were too busy to complete this week's show? What if you went to get burgers and fries at the local fast food chain, placed your order and waited in line, only to be told when you arrived at the window that they were closed, come back tomorrow? I doubt we would tolerate any of these situations.

I believe that there are various explanations for this occurrence; some are intended and some are not. Certainly, the court has little control over how many priority matters (*e.g.,* domestic violence complaints) are filed, and only slightly more control over when these matters must be heard. Obviously, domestic violence, children in court, juvenile matters, Division of Youth and Family Services matters, and orders to show cause take priority because of statutory or Rule requirements. (See for example N.J.S.A. 9:6-8.22.) This fact is emphasized in smaller counties where the family part judges must handle more than one of these case-types.

Further, it is an unfortunate fact of life that some attorneys do not make earnest efforts to resolve their cases until they are required to appear for trial. I submit, however, that these attorneys are in the minority. The vast majority of our colleagues make every effort to resolve their cases, both directly with their adversary and through the assistance of the Early Settlement Program and mediation. Yet, all too often, upon appearing in court prepared for trial to commence, having exhausted the various alternate dispute programs, counsel and the parties are still asked to "go outside and talk," or otherwise 'encouraged' by the court to settle, continue talking, without any real hope of testimony commencing. Although it certainly puts great pressure on litigants to settle their case while they are paying their attorneys to cool their heels in court, we must ask ourselves whether this is an appropriate method to move matrimonial matters through the docket to completion. Perhaps we can turn up the heat and force everyone to stand on one foot as well. This will pressure litigants into settling too, but is it appropriate?

Simply put, realistic trial dates should be set; and perhaps equally importantly, cases should be tried on *consecutive days*, consistent with Rule 5:3-6, as opposed to cases being tried on 'partial' days, over months—a fate that is unfair not only to the parties, their witnesses, and counsel, but also to the family part judges themselves. A litigant should not need to be a professional football player or other public figure to obtain consecutive trial dates.

Further, if a realistic later date becomes untenable, counsel should

be advised immediately, and an alternate course required. Attorneys and litigants should not be required to appear in court when there is no hope of being reached for trial or at the very least a *meaningful* judicial settlement conference (*i.e.,* with a judge familiar with the issues who has read and considered position statements by the parties). Causing litigants to incur such unnecessary expense undermines the great institution of our judicial system. Clients ask: "Why did the court schedule this matter for trial if there was no hope of it being reached?" This is part of the reason why lawyers and the court system receive such negative press. One of the goals of best practices was to address the negative views by the public of the matrimonial court. A recognition of the judiciary as a service industry runs through the recommendations. The proliferation of unrealistic trial dates undermines this laudable goal.

The solution to this situation is to schedule meaningful pre-trial judicial and other mandatory settlement conferences. If those conferences are not successful, then set realistic trial dates. Further, in order to encourage settlement, the court could consider the reasonableness of the settlement positions when counsel fees are sought. If a realistic trial date is not possible due to the court's significant other commitments (*i.e.*, domestic violence matters, children in court, juvenile matters, Division of Youth and Family Services matters, and orders to show cause), it is understandable.

As the complexity of cases increases and the number of filings continues to rise, a greater demand has been placed on the judiciary to provide quality and expedited service to New Jersey families seeking relief through the courts.[1] The court system is overburdened due to the growing population, decreased budget,[2] and increased litigation in all areas, but especially with regard to domestic violence. Statistics regarding domestic violence filings, which, according to the judiciary's website include abuse/neglect, adoption, child placement review, juvenile/family crisis, kinship, termination of parental rights, criminal/quasi-criminal/other matters (formerly family matters received from other courts) average 58,981 per year over the four years between 2004 and 2007.[3] In 2008, there are 126 family part judges.[4] Therefore, if spread evenly, each judge must handle 468 of these emergent matters in a year, in addition to dissolution and FD non-dissolution matters, which average 223,152 filings per year over the same four-year period.[5] If spread evenly, this means that each judge must handle 2,239 filings per year for dissolution, non-dissolution, and domestic violence. This is a daunting task.

The solution, however, is not a massive cattle call in the hope that cases will settle and the end of the year numbers will look better. Rather, the response should be the scheduling of other alternative dispute resolution mechanisms that litigants and their attorneys should be required to attend and that are calculated to result in the productive utilization of counsel's time working toward a reasonable settlement until the matter can be reached for trial. For example, if a realistic trial date cannot be fixed or is far into the future, the court can provide one or more of the following alternatives: 1) meaningful pre-trial judicial settlement conferences; 2) mediation; 3) mandatory settlement conferences in one attorney's office; and/or, if the parties agree, 4) arbitration.

If, while reviewing the judge's schedule for the week, the calendar coordinator recognizes that the judge will be unable to address all of the scheduled cases, a more reasoned approach is to form an alternative plan and re-schedule cases for another date. Judges will argue that attorneys can productively use the waiting time to try to settle their cases. If the court has no time at all to even conference the case, however, is it reasonable to expect that a case that is ready for trial can actually be settled, particularly if one party is *pro se*? If the court cannot provide even the minimum attention to a case needed to conference it with the attorneys, it is more reasonable to require counsel, the parties (and experts when they are involved) to employ one of the options stated above? The trial should be re-scheduled to a later date, when the court can give it and the parties the attention that is deserved. ■

ENDNOTES

1. Excerpt from the Supreme Court Family Practice Committee Judicial Education *Final Subcommittee Report* co-chaired by Hon. Linda R. Feinberg, A.J.S.C. and Frank Louis, Esq. Submitted on Oct. 30, 2001: "*Comprehensive Judicial Orientation Program for Newly Assigned Family Part Judges.*"
2. "The proposed budget requires the judiciary to absorb a reduction of $27 million for FY [fiscal year] 2009." (Testimony by Judge Philip S. Carchman, acting administrative director of the courts Senate Budget and Appropriations Committee, Fiscal Year 2009, Wednesday, April 30, 2008, www.judiciary.state.nj.us/ pressrel/budget_speech.pdf).
3. New Jersey Judiciary Superior Court Caseload Reference Guide 2004–2008, Family Division, Domestic Violence, www.judiciary.state.nj.us/quant/5yrdom.pdf.
4. www.judiciary.state.nj.us/pressrel/GAO2009.pdf.
5. New Jersey Judiciary Superior Court Caseload Reference Guide 2004–2008, Family Division, http://www.judiciary.state.nj.us/quant/5yrmenu3.pdf.

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ASSOCIATE MANAGING EDITOR'S COLUMN

Where is Pima County, New Jersey?

(Who Knew We Had Parenting Guidelines in New Jersey?)

by Amy Sara Cores

Although I am known for my inability to navigate most of New Jersey without the assistance of a GPS, I was pretty sure that there was no Pima County in New Jersey, when my client handed me the Pima County parenting time guidelines. He had just attended custody/parenting time mediation at the courthouse. I was a bit perplexed. I looked at it and noted the title: Pima County, Arizona Parent/Child Access Guidelines. It was Pima County, Arizona! So why are the mediators in some county in New Jersey using the Pima County, Arizona guidelines?

My client was advised that these were the guidelines that were followed by the courts and judges of our state. He was also told that the current shared physical and legal custody arrangement was not in his children's best interest, based on these guidelines. The best he could hope for was every other weekend and a three-hour dinner during the week. After calming down my client, I realized that I may have been more upset about the situation than he was.

The Pima County guidelines provide a breakdown of how parenting time should be structured based on the age of the child(ren). For children up to nine months old, the guidelines provide the nonresidential parent three visits per week for two hours each visit. Up to four months of age, these two-hour visits should occur in the custodial parent's home. From four to nine months of age, the visits may occur outside the custodial home or in an established child care setting. There is no vacation time for the noncustodial parent and no overnights are recommended.[1] The problems inherent in such a plan should be patently clear.

Rule 5:8-1 provides that if the court finds "that either the custody of children or parenting time issues, or both, are a genuine and substantial issue, the court shall refer the case to mediation." As family law practitioners, we recognize the flaws in this system. First, if the parties were going to be able to amicably resolve a custody or parenting time dispute, they usually would have already done so through counsel. Second, fathers traditionally are relegated to being the noncustodial or weekend parent. The mediators seem to reinforce the false assumption that this is a universal result. Yet we send our clients with the advice not to sign anything and to make sure they clearly indicate that an attorney must review any agreement.

The rule does not provide that the mediation is to occur through any particular person or agency. Many counties, however, use probation officers or other court staff to handle this process in both FM and FD cases. It is unclear what qualifications are necessary to become a court mediator for custody/parenting time. What training do they have? What experience do they have? Moreover, each county seems to have different methods of complying with the rule. In North Jersey, one county has a program similar to that suggested herein below already in place, while other counties use court staff to mediate.

New Jersey is not a 'guidelines' state when it comes to parental time-sharing. While we may use the child support guidelines, they are not applicable in all matters. We do not have alimony guidelines, and we do not have custody guidelines. From a lawyer's perspective, we prefer the absence of guidelines, since we are able to be true advocates for our clients. With respect to custody/parenting time guidelines, the circumstances of the individual family must always be considered. Therefore, any guidelines would be instructive rather than mandatory under any circumstance. Indeed, even the Pima County guidelines are just that—a guide and not mandatory.

The Pima County guidelines assume the following: One parent has sole custody or primary physical custody; time needs to be identified for the non-custody parent and the child; both parents are fit and proper; both parents are willing and able to parent the child. Interestingly, the Pima County guidelines have not been adopted by the courts in Arizona and are meant to be suggestive. The Arizona courts further require that a parenting plan must include the following[2]:

- Provisions for how the parents will be involved in caring for the child and how the big deci-

sions—such as education, religion, and healthcare—will be made (usually jointly).
- A residential plan (schedule of physical custody).
- A method of mediating or resolving disputes.
- A provision for periodic review of the parenting plan. (Every one or two years is common.) The law does not require any particular type of review, and the review required by the parenting plan could range from a single discussion between the parents to a series of formal sessions with a mediator.
- A statement that the parties realize joint custody does not necessarily mean equal parenting time.

N.J.S.A. 9:2-4 provides guidance with respect to custody determinations:

> In any proceeding involving the custody of a minor child, the rights of both parents shall be equal and the court shall enter an order which may include:
>
> a. Joint custody of a minor child to both parents, which is comprised of legal custody or physical custody which shall include: (1) provisions for residential arrangements so that a child shall reside either solely with one parent or alternatively with each parent in accordance with the needs of the parents and the child; and (2) provisions for consultation between the parents in making major decisions regarding the child's health, education and general welfare;
>
> b. Sole custody to one parent with appropriate parenting time for the noncustodial parent; or
>
> c. Any other custody arrangement as the court may determine to be in the best interests of the child.

There are no statutory standards or guidelines for a 'parenting time' schedule. The clear statutory purpose is that we consider each family individually when assisting our clients to fix a parenting time arrangement. Indeed, the statute is gender neutral, and the rights of mothers and fathers are *equal*.

As advocates, we often turn to experts to assist us in the more complicated custody/parenting time cases. In my professional experience, I have seen cases in which the mother was the 'primary caretaker' during the marriage, but the expert recommended that the father have physical custody after the divorce/physical separation of the parties. The recommendation was in the best interest of the child. Thus, nothing can be assumed.

The Legislature and courts of this state have not set forth custody/parenting time guidelines by which we must be bound in family law cases. This author believes that many family lawyers would fight against the imposition of any mandatory guidelines for parenting plans. So why are our clients being handed guidelines and told that guidelines must be followed, when the guidelines are not even binding in Pima County? Even one occurrence of this is too many. Although I was aware that there were 'guidelines' being used by some of the same mediators, I was not aware that they were guidelines from another state. Certainly, I was not aware that mediators told our clients that the judges apply these guidelines in all matters. Aside from undermining our advocacy skills, the use of these guidelines violates our statutory scheme and is contrary to the best interests of the children, who become the charges of our judges in contested matters.

N.J.S.A. 9:2-4(c) provides:

> In making an award of custody, the court shall consider but not be limited to the following factors: the parents' ability to agree, communicate and cooperate in matters relating to the child; the parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; the interaction and relationship of the child with its parents and siblings; the history of domestic violence, if any; the safety of the child and the safety of either parent from physical abuse by the other parent; the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of the child's education; the fitness of the parents; the geographical proximity of the parents' homes; the extent and quality of the time spent with the child prior to or subsequent to the separation; the parents' employment responsibilities; and the age and number of the children. A parent shall not be deemed unfit unless the parents' conduct has a substantial adverse effect on the child.

Our courts have further addressed these factors over the years in a litany of custody cases. In a case involving the custody of a minor child, the paramount consideration is the safety, happiness, physical, mental and moral welfare of the child, and neither parent has a superior right to custody.[3] Custody issues are resolved by using a best interests analysis that gives weight to the child custody statutory factors.[4] The focus on the child's best interest is paramount, and a child's interest can come before a parent's.[5] The best interest of child standard is more than a statement of primary criterion for custody decision or factors to be considered; it is an expression of the court's special responsibility to safeguard the interests of a child at the center of a custody dispute because the child cannot be presumed to be protected by adversarial process.[6]

The information given to our clients by these mediators is incorrect, and action should be taken to put an end to this practice. The first and most important action that must be taken is that these guidelines should be immediately removed from the arsenal available to the mediators. Indeed, the New

Jersey judiciary website provides access to an informational pamphlet, which in general terms provides information about the laws of the state of New Jersey, as well as suggestions for parenting plans.[7] These suggestions are also broken down by the age of the child. For example, parents are informed that for infants, regularity is key. Both parents need to be able to attend to the daily needs of the infant child. As opposed to the Pima County guidelines, there are no suggestions made for the number of days or amount of time to which the nonresidential parent is entitled. Thus, the Pima County guidelines are antithetical to the guidance provided by our Supreme Court. The pamphlet available on the Court website is in accord with our statutory scheme and case law.

This author believes that there is an opportunity for the courts and family law practitioners to turn a program, which has mixed results in the real world, into a more productive program. Attorneys volunteer to be early settlement panel panelists, and now economic mediators. So why not use the family law practitioners of this state as custody/parenting time mediators, along the same model as economic mediation? Attorneys would take a mandatory course in custody/parenting time mediation. They could sign up for the program in the county in which they primarily practice. The first two hours with the mediator would be at no charge to the litigants. Thereafter, the attorney would fix his or her hourly rate.

Certainly, this suggestion is merely that—a suggestion. In this author's opinion, the current mediation program used in several counties is not effective. Fathers are discouraged from asserting their equal rights to their children. Mothers become entrenched in positions when they attend mediation with a sympathetic mediator. Parties spend thousands of dollars on attorneys and experts as a result of a single mediation session resulting in an order that does not fully express the rights and obligations of the parties relative to their child(ren). Most attorneys have seen a non-dissolution order initially entered after mediation, which results in years of litigation to ensure the access rights of the noncustodial parent.

It may seem like a radical idea to use educated professionals in this capacity who have taken a course to assist litigants in resolving custody disputes and who devote their professional life to the field of family law. Or, it may be that we better serve the litigants who avail themselves of our courts and provide to them the most qualified people to assist them, rather than an eight-page booklet from Pima County, Arizona. ■

ENDNOTES

1. www.sc.pima.gov/?tabid=203.
2. www.sc.pima.gov/SC_Web/Portals/0/Library/Child_Custody_&_Parenting_(PimaSC09).pdf. The pamphlet is titled "Child Custody and Parenting Time Packet #9." It was revised in August 2004, with sample forms revised in January 2008.
3. *Fantony v. Fantony*, 21 N.J. 525 (1956).
4. *Hand v. Hand*, 391 N.J. Super. 102 (App. Div. 2007).
5. *In re Parentage of Robinson*, 383 N.J. Super. 165 (Ch. Div. 2005).
6. *Kinsella v. Kinsella*, 150 N.J. 276 (1997).
7. https://njcourts.judiciary.state.nj.us/web0/family/paretime.pdf.

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How Should Pre-Marital Cohabitation be Considered in the Alimony Analysis?

by Frank Louis

A difficult alimony issue that frequently arises is where parties live together and thereafter marry. In these instances, what is the impact of that pre-marital cohabitation on alimony? There is law concerning the impact of pre-marital cohabitation on equitable distribution, but the law is uncertain in addressing alimony. For example, a marital home acquired during cohabitation, but in contemplation of marriage, was addressed in *Weiss v. Weiss*.[1] Additionally, the cut-off date for asset distribution was changed on the unique facts of *Berrie v. Berrie*[2] because of pre-marital cohabitation.

Berrie, while certainly involving cohabitation, turned not so much on that fact but on how Mr. Berrie, in the midst of his first divorce, characterized his cohabitation as being equivalent to a marriage. As he said, "he was married 'morally and spiritually' to his cohabitant."[3] Not surprisingly, the Appellate Division held him to his word, and deemed his cohabitation to be marital. *Berrie* has the potential to create uncertainty where the Supreme Court ultimately wanted certainty relating to valuation dates and equitable distribution; thus, it is perhaps best to limit *Berrie* to its unique facts. The same result could have been reached by using the remedial device of a constructive trust without doing damage to statutory integrity.

Yet, there is no case specifically dealing with the impact of pre-marital cohabitation on alimony. Assume the following: the parties lived together for eight years, then married and lived together for another eight years. Thus, the total time they resided together was 16 years. The wife argues this was a committed relationship for 16 years, with all the attributes of marriage but for the ceremony. She then reasons, based on the length of this marital-type relationship (16 years), she is entitled to permanent alimony. She claims this should be viewed as a 16-year marriage, and argues *duration* is determinative on the issue of permanency.

In response, the husband argues alimony is a creature of statute, and the Legislature never contemplated, and certainly never authorized, cohabitation without the sanctity of marriage to be a statutory factor in N.J.S.A. 2A:34-23. Marriage, he further notes, is a bedrock societal principle, and a reflection of our values. Societal judgments reflected by our law are made legislatively; they should not be engrafted on a statute in an exercise of social engineering by courts when the Legislature could have but chose not to add cohabitation as a factor. He further contends it is not the province of courts to rewrite statutes to reflect a court's perception of fairness; rather, courts should *interpret* the law the Legislature makes. He concludes by asserting courts should not make law the Legislature never intended or wanted.

The wife, in response, points out that the overriding public policy in family law is to assure, as the Supreme Court said in *Miller*, that at the end of a marriage parties treat each other fairly.[4] She further points out the same principle applies, once again according to the Supreme Court, to people who never marry; yet, they are required by our law to treat each other fairly at the end of a relationship.[5] Besides, she finally argues, the alimony statute provides courts with *discretion*, since Factor 10 allows "*any other factor* which the court may deem relevant" to be considered.

Most of the cases addressing the issue in New Jersey deal with property, not alimony. In *Mangone v. Mangone*,[6] the parties resided together prior to the marriage. The Court deemed the marriage to form a new contract, which superseded any pre-marital contract, noting "when the parties married each other, whatever contractual rights existed before the wedding merged into the greater contract of marriage."[7] The trial court relied on general legal principles that a second contract covering the same parties and subject matter extinguished the prior contract.[8]

Judge Robert Fall, in *Rolle v. Rolle*,[9] criticized *Mangone* as creating a harsh result, but also concluded N.J.S.A. 2A:34-23 does not permit equitable distribution of property legally or beneficially acquired by a party prior to the marriage. He noted this was a "simple and definitive rule."[10] Of course, the only simple and definitive rule in matrimonial cases, viewed from the perspective of over a quarter of a century since the 1971 amendments, is that there is no simple and definitive rule.

Judge Fall believed Mrs. Rolle could be treated fairly by pursuing equitable claims, such as constructive or resulting trusts, which were

not extinguished by the marital contract. Such equitable claims, he pointed out, were not contractual in nature; rather, they were created by the parties *conduct*.[11] Judge Fall was correct not only in that observation but in his approach to statutory construction, since the equitable distribution statute is specific that assets to be distributed are only those *acquired during* the marriage.[12] He used the existing law to require the parties to be fair; he did not engage in judicial legislating creating future problems.

The alimony statute does not contain language that is, in Judge Fall's terms, so simple and definitive. N.J.S.A. 2A:34-23 provides a court with power in a divorce action to award different types of alimony but only after considering various factors; one is the generalized Factor X (any other factor). Additionally, cohabitation that occurs before marriage may directly affect other alimony statutory factors, such as impacting the parties' earning capacities and the non-economic contributions people make to an economic partnership. Thus, there is a blurring of the cohabitation into the statutory factors.

A case that potentially sheds some light is *McGee v. McGee*.[13] In New Jersey's historical jurisprudence, Dr. McGee was one of the more reprehensible characters. A review of the opinion makes it clear his conduct clearly effected the decision. Dr. and Mrs. McGee commenced their relationship in 1981, but did not marry until 1989. The opinion relates a series of instances where Dr. McGee took economic advantage of his wife to the extent that at trial she was a 57-year-old woman with limited employment prospects, health problems and had been severely disadvantaged by the relationship and the marriage. Justice (then Judge) Virginia Long focused on the Supreme Court's policy statement in *Lynn* regarding the nature of alimony that "it was *not* duration of the marriage, but the *actual extent of the economic dependency* that determines *both* the duration of alimony as well as the amounts."[14]

Mrs. McGee, as early as 1981, (eight years before they married) was financially dependent on her husband, and was clearly dependent upon him at the divorce. As Justice Long noted, she relinquished her job "if not because Dr. McGee asked her to do so, at least because he was willing to support her."[15] Thus, the cohabitation directly implicated the statutory factor of Mrs. McGee's earning capacity.

Justice Long was clearly affected by what happened to Mrs. McGee during the course of the relationship. She concluded, without necessarily specifying it was both unfair and inequitable to base alimony solely on the length of the marriage, that given what happened to Mrs. McGee during the course of the relationship, permanent alimony was appropriate. The opinion cites the alimony factors, and while not expressly relying on the additional generalized factor, ("any other factor"), *McGee* confirms a trial court's right to consider the impact of premarital cohabitation on alimony when warranted by the facts.

In reviewing the issue with Judge Fall, he agreed not only with that generalized principle, but suggested when people reside together before the marriage in a marital-type relationship, creating an economic dependency and then marry, what the parties have done is effectively *ratify* their circumstances by the marital contract. Ratification is in and of itself a legal term, but Judge Fall's instincts are correct; while people may not consider the legal ramifications, when they do marry after residing together, they seemingly are acknowledging what happened between them during their cohabitation; thus by marrying, they are ratifying the facts and circumstances in existence as of the marriage.

Dr. McGee accepted or ratified the economic depreciation suffered by Mrs. McGee before they married by marrying her. Had their relationship ended then without a marriage under *Kozlowski*, he still would have had to treat her fairly based upon what had transpired during their relationship.[16]

Ratification is inherently contractual; it is not a concept frequently utilized in the family part. In *Thermo Contractor, Corp. v. Bank of New Jersey*,[17] the Supreme Court discussed the term.The Court relied on Section 82 of the Restatement of Agency (2d) (1957), noting "ratification is the affirmance by a person of a prior act."While noting ratification may either be express or implied, it does require *intent*, citing *Passaic-Bergen Lumber Co. v. United States Trust Co.*[18] relying on *Thermo*, the court noted the essence of ratification is the affirmance by a person of a prior act.

Thus, ratification logically suggests by marrying, people are intentionally affirming, accepting or acquiescing to the impact of their pre-existing relationship on each other as of their marriage.While not referring to Dr. McGee's conduct, Mrs. McGee did not pursue development of her earning capacity as a consequence of either the direct or indirect actions of her husband. Phrased another way, as a consequence of their relationship, her earning capacity was adversely affected, and the consequences were accepted or affirmed by Dr. McGee when he and Mrs. McGee married. When they married, he knew she had relinquished, as a result of their relationship, development of her own earning capacity. When their relationship ended, it was only fair and appropriate he should bear the consequences of the conduct he not only created, but accepted.

Whether viewed as ratification, acceptance, or affirmance, it is neither unreasonable, unfair, nor violative of any fundamental public policy, to recognize the economic reality their relationship created. In fact, public policy demands that society require people to be responsible for

the consequences of their voluntary conduct. When people, without the benefit of marriage, who live together must treat each other fairly as *Kozlowski* holds, but people who live together and then marry, should not be held to the *same* legal standard is neither logically consistent nor fair. A ceremonial marriage cannot be an abrogation of a relationship; rather, it more logically—and fairly—should be confirmation of the pre-existing relationship.

The statute suggests alimony is subject to modification.[19] What the statute does not expressly state is the legal standard that alimony awards are enforceable *only* to the extent they are fair and equitable.[20] That is a judicial construct engrafted upon the alimony statute done for reasons of policy and not statutory construction; assuring that alimony is paid only when it is fair and equitable, is not only appropriate but consistent with the responsibility of a court in monitoring the consequences of a marriage that has been legally terminated. Thus, it is appropriate in determining alimony for courts to consider what happened during a period of cohabitation followed by a marriage. It logically follows, if Justice Pashman's admonition that it was the fundamental public policy of this state to assure that parties, even those who do not marry, treat each other fairly, then certainly if they marry that standard cannot be diminished. The Supreme Court in *Miller* was correct in emphasizing that same point; Justice Pashman captured the essence of this practice as he frequently did arid his policy-driven view must be part of our law.

What ultimately dooms the husband's argument is not simply that the court is exercising discretion under the generalized Factor 10; rather, it is that the court is conducting its analysis under the literal language of the statute. Lawyers focus far too much on duration, which is only one factor. They analyze the issue whether the period of cohabitation can somehow be pigeon-holed within the statutory factor concerning duration that specifically relates to duration of the *marriage*.

Yet, other factors are not necessarily limited to the 'marital' period. Factor 5 addresses the earning capacity, educational level, vocational skills, and employability of the parties; Factor 6 addresses the length of absence from the job market and the custodial responsibilities of the parties seeking maintenance, as well as the actual need and ability of the parties to pay. Factor 1 addresses the age, physical, and emotional health of the parties.

Unlike duration, or the standard of living that are both statutorily linked to marriage, these factors bear on the *fairness* of any alimony award. These statutory factors effectively require a court consider premarital cohabitation; none are linked by the actual language of the statute to the *marital* relationship.

A court may consider pre-marital cohabitation under N.J.S.A., 2A:84-23(b) without doing violence to the actual language of the statute. Both "duration of the marriage" and the "standard of living established in the marriage" refer to marriage.[21] Yet, the other eight statutory factors never mention marriage. In reality, the issue is not whether eight years of pre-marital cohabitation is added to the eight years of marriage to create a marriage of 16 years; instead, it is determining the impact of the pre-marital cohabitation on the other eight factors not statutorily linked to the marital period. In utilizing this approach, a court would be following the dictates of the legislature without doing violence to the clear language of the statute.

Certainly, a court would consider in the alimony analysis a person's disability creating an inability to work, even if that disability occurred *before* the marriage, or even after filing of the complaint. Thus, logically, disability would be considered even if there had not been premarital cohabitation under N.J.S.A. 34-23 (b) (3) under "health" or "earning capacity" (b) (5). Each of the remaining eight statutory factors should be considered, even if a factor occurred *after* filing. While a court should not consider a standard of living (a marital statutory component) established post-filing to justify a higher alimony award, it should consider post-filing events that implicate to the remaining eight factors.

These non-marital statutory factors directly bear on the status of the parties at the end of their marriage and at trial; they legitimately bear on the issue of alimony. Just as a court would consider the fact a supporting spouse knew at marriage a spouse was disabled and that the disability impacted earning capacity, a court should also consider the marriage ratified, affirmed, or minimally represented an acknowledgment by the parties of the circumstances in existence as of the marriage. We accept the person we marry with all the advantages and disadvantages they have. Just as the person who marries someone with a disability, people who marry understand the economic circumstances of the person they marry, and accept them for who they are. This analysis is firmly rooted in the case law as Dr. McGee appropriately bore the consequences of Mrs. McGee's economic dependence upon him created during cohabitation and *before* marriage.[22] To the extent such circumstances are the product of their joint decisions, there is nothing inappropriate considering the impact of the circumstances they, themselves, created.

Thus, considering premarital cohabitation as a *factor* bearing on the fairness of any alimony award is not, as the husband argued, a judicial usurpation of a legislative prerogative; rather, it is a recognition of the fundamental nature of marriage, personal relationships coupled with an application of specific statutory provisions. Spouses have

responsibilities; the statutory factors help a court implement those obligations. The extent of a spouse's responsibility in the alimony context is inherently fact-sensitive.

In the hypothetical, viewing a 16-year relationship solely as an eight-year marriage ignores what the parties themselves recognized when they married. Such a restrictive view would eliminate, if not rewrite, substantial portions of the alimony statute, and do the very violence to the statute the husband claimed he sought to prevent. Even more fundamentally, it ignores the economic reality created by the personal decisions the parties made; it potentially undermines the central most important element in the alimony analysis recognized by the Supreme Court in *Miller*. The ultimate responsibility emanating from a marriage is that when it ends, spouses must treat each other fairly and that fairness must recognize the decisions the parties, themselves, made.[23] As Justice Long emphasized in reversing the trial court, "it is the complete factual scenario surrounding the parties' lengthy relationship which should have been considered here and was not."[24]

There is precedent outside of New Jersey holding it is perfectly appropriate for courts to consider the impact of premarital cohabitation on alimony. In the matter of *Lind v. Lind*,[25] the Oregon Court of Appeals rejected a husband's argument that premarital cohabitation could not be considered because the statute "plainly" referred to duration of the marriage. The appellate court noted that trial courts had "broad discretion" to consider other factors by virtue of the expansive provision, comparable to Factor 10[26] in New Jersey, that permitted an Oregon trial court to consider "any other factors the court deems just and equitable."

In considering premarital cohabitation, the court considered its length and that during cohabitation the wife contributed all her earnings to household expenses. The court also considered that the parties did not view their financial relationship as merely sharing expenses; rather, they "recognized that they were a family and eventually that they would marry." The court also considered the fact they "conducted themselves as a married couple."[27] Importantly for the New Jersey analysis, the court emphasized what is similar law in New Jersey: "that no one factor is dispositive," emphasizing the importance of a factual analysis as opposed to a bright line rule relating to cohabitation. *Lind* also noted the parties during the marriage had a much higher standard of living than they did during the period of cohabitation; this diminished in their view the importance of the cohabitation.

On somewhat unique facts, the Supreme Court of New Hampshire, in *Hoffman v. Hoffman*,[28] considered the parties cohabitation in determining that the wife was entitled to alimony for a period of seven years. The parties had been married for 12 years, and lived together for five years before that. It is clear the Court considered the length of the relationship and the fact that the wife's total monthly income would only be approximately $3,895 per month. Apparently, however, since she was "younger" and had the "potential to increase her earnings over time," they felt that seven years was appropriate. The results in New Jersey might well have been different but, nonetheless, the importance is the Court *considered* pre-marital cohabitation in determining both the *amount* and *length* of alimony.

In *Harrelson v. Harrelson*,[29] the Alaska Supreme Court, while recognizing the state did not acknowledge common law marriages, reaffirmed the view under Alaskan law a trial court is free to consider the parties' entire relationship including periods of premarital cohabitation. While *Harrelson* had more to do with division of property, the Court noted the parties filed joint income tax returns for six of the 12 years they lived together, raised and supported each other's children and before marrying, bought and sold a home together. Thus, in Alaska, holding one's self out as being married may be significant. Yet, interestingly, *Harrelson* reversed the trial court because it made inconsistent findings about the length of the marital as opposed to the non-marital relationship. The appellate court wanted clarification of that point; however, it emphasized the trial court on remand was free to consider the parties' entire relationship, including premarital cohabitation *and* whether there was a "joint economic enterprise."[30]

A similar case was *Moriarity v. Stone*[31] (relying on *Liebson v. Liebson*[32]), holding a Massachusetts court may consider in determining alimony the parties' circumstances *prior* to the marriage and specifically, "the parties' contributions during the period of cohabitation." While *Liebson* appears to have involved assets, this quote is found in the portion of the opinion concerning alimony. Since the parties lived and built a business together during the substantial premarital cohabitation, it had to be considered in the alimony analysis.

Conversely, there are several cases holding precisely the opposite. In *Hebbring v. Hebbring*,[33] a California appellate court found in a 19-month marriage that it was improper to "tack on" the premarital cohabitation period, relying on a 1986 California case *In Re. Marriage of Bukatay*.[34]

A Connecticut appellate court, in *Loughlin v. Louqhlin*,[35] also indicated it was improper to consider the parties' six years of cohabitation prior to the marriage. The husband argued that the court's award of 12 years of alimony, "effectively recognized cohabitation as a marital status" and the court found that it cannot reasonably argue cohabitation is within the plain meaning of "marriage." The court went through an analysis of

Connecticut cases, and concluded it was Connecticut's policy "to draw a clear distinction between marriage and cohabitation even when that cohabitation was preceded by or ultimately led to a marital relationship," citing *Murray* from California and *Murray v. Murray*,[36] and *In re Marriage of Goldstein*.[37] Yet, the court that recognized *In re Matter of Long,*[38] an Oregon Appellate Division Court decision, found courts may consider the "entire length of the relationship," including cohabitation prior to the marriage using language quite similar to that found in *McGee*.

These out-of-state cases are not dispositive since under my construct consideration, pre-marital cohabitation would *not* be in the statutory sections relating to "duration of the marriage" or the "standard of living established during the marriage." Rather, the consideration would be justified by the remainder of the statute. The out-of-state cases took a simplistic approach that if one considered pre-marital cohabitation, it had to be in "duration." Thus, they rejected expansion of the statutory term to include the pre-marital period these courts felt violated the "unambiguous" statute.[39]

The issue is not whether you add the eight years of cohabitation to the eight years of marriage; rather, it is the *impact* of the eight on the non-marital statutory factors. Differentiating between the marital and non-marital parts of the statute balances the need in this sensitive area of personal relationships and enables decisions to be made on the actual facts and circumstances of the parties while simultaneously respecting the legislative role in setting policy through statutory enactment. Courts are then interpreting, not making, law.

CONCLUSION

Considering the impact of pre-marital cohabitation is light of the non-marital statutory factors in N.J.S.A. 2A:34-23(b) is not a judicial usurpation of legislative authority, it is an implementation of our fundamental societal values through the legislative expression of policy contained in the statute, thus assuring at the end of a relationship the parties actually *do* treat each other fairly. ■

ENDNOTES

1. 226 N.J. Super. 281, 287-288 (App. Div. 1988) *cert. den'd*. 114 N.J. 287 (1989).
2. 252 N.J. Super. 635, 645-647 (App. Div. 1991).
3. *Berrie*, at 639.
4. *Miller v. Miller*, 160 N.J. 408, 418 (1999).
5. *See Kozlowski v. Kozlowski*, 80 N.J. 378, 390 (1979) (Justice Pashman's concurring opinion).
6. 202 N.J. Super. 505 (Ch. Div. 1985).
7. *Manqone*, at 50. (emphasis added)
8. *Mangone*, at 509.
9. 219 N.J. Super. 528 (Ch. Div. 1987).
10. *Rolle*, at 535.
11. *Rolle*, at 536.
12. The more appropriate result in *Berrie*, a case where the valuation date was changed, would have been to disregard the statute but provide Mrs. Berrie with the same equitable remedy Judge Fall advised Mrs. Rolle she had. In that way, fairness would have been achieved but the intellectual and jurisprudential integrity of the statute preserved. *Berrie v. Berrie*, 252 N.J. Super. 635 (App. Div. 1991).
13. 277 N.J. Super. 1 (App. Div. 1994).
14. *Lynn v. Lynn*, 91 N.J. 510, 517-518 (1982) (emphasis added).
15. *McGee,* at 14.
16. *Kozlowski,* at 390 (Justice Pashman's concurring opinion).
17. 69 N.J. 352 (1976).
18. 110 N.J.L. 315 (E&A 1933). The Appellate Division in *Martin Glen & Ing. v. First Fidelity Bank, N.A.*, 279 N.J. Super. 48 (App. Div. 1995).
19. *See* N.J.S.A. 2A:34-23.
20. *See generally Lepis v. Lepis*, 80 N.J. 139 (1980).
21. *See* N.J.S.A. 2A:34-23(b) (2) + (4).
22. *McGee*, at 14.
23. *Miller*, at 418.
24. *McGee*, at 12.
25. 139 P.3d, 1032; 207 Or.App. 56 (2006).
26. N.J.S.A. 2A:34-23(b) (10).
27. *Lind*, at 1040.
28. 143 N.H. 514, 727 A.2d 1003 (1999).
29. 932 P.2d 247 (1997).
30. *Harrelson*, at 255.
31. 668 N.E. 2d 1338, 41 Mass. App. Ct. 151 (1996).
32. 412 Mass. 431, 432-433 (1992).
33. 207 Cal. App. 3d 1260, 255 Cal. Rptr. 488 (1989).
34. 180 Cal.App. 3d, 143, 255 Cal. Rptr. 492 (1986).
35. 93 Conn. App. 618, 889 A. 2d 902 (2006).
36. 374 So.2d 213 622, 623, (Fl. App. 1979).
37. 97 Ill.App.3d 1023, 1028, 423 N.E.2d, 1201 (1981).
38. 159 Or. App. 471, 475, 978 P.2d, 410 (1999), rev. den'd 994 P.2d 130 (2000).
39. *See*, for example, *Loughlin*, at 627.

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How to 'Get' on With Your Life

by Cary B. Cheifetz and Brian Roffman

With the addition of the irreconcilable differences to the causes of action for divorce, there has never been an easier time for men and women seeking a divorce in New Jersey to get on with their lives.[1] However, for some women of the Jewish faith there is an additional obstacle to getting on with their lives after a civil divorce. This obstacle is known as obtaining a get.

In order for a Jewish woman to remarry according to halakha (Jewish law) she must receive a bill of divorce from her husband called a get. The foundation for this rule is found in the book of Deuteronomy:

> When a man takes a wife and marries her, if it then comes to pass that she finds no favor in his eyes for he has found something unseemly in her, he shall write her a document of divorce and give it to her hand, and send her out of his house.[2]

If a Jewish man and woman obtain a secular divorce in New Jersey or anywhere else in the world, there will be no change in their marital status according to halakha because "[i]n order for a divorce to be considered complete, thus severing all marital ties of a couple, a Jewish husband must issue his wife a get."[3] If a Jewish husband refuses to give his wife a get for any reason, they will continue to be married according to halakha, even if they are no longer living together as husband and wife. A Jewish woman left in this state of limbo is called an 'agunah,' which means a chained woman.

Agunah status is very undesirable for a Jewish woman because halakhically she cannot remarry, and any children she has with any man besides the man she is still halakhically married to will be considered the offspring of an adulterous affair. Most Conservative and Orthodox rabbis will not agree to perform a wedding for a woman with agunah status. This means that unless an agunah obtains a get from her husband, she may not be able to remarry and cannot move on with her life. Furthermore, even if a Reform rabbi or a judge is willing to perform a wedding ceremony for an agunah to marry another man, her children and their offspring would still be considered mamzers (bastards) according to halakha.

Being a mamzer can be a very difficult situation for a Jewish person. Even though he or she is considered to be Jewish, a mamzer may only marry other mamzers or someone who converts to the Jewish faith.[4] This is a major problem, even if an agunah does not believe in halakha. If the agunah bears a child with mamzer status, few Orthodox or Conservative rabbis will perform a marriage between the agunah's child and another Jew unless the child's partner is also a mamzer or a convert. Even the agunah's grandchildren and great grandchildren will be marred by mamzer status, and will not be able to marry most Jews according to halakha.

While this is a major problem for a Jewish woman, her husband is not in the same predicament, because he can refuse to give the get more or less consequence-free. Thus, many men demand a more favorable divorce settlement in exchange for giving a get. Many women agree to their husband's demands because, according to their beliefs, they cannot remarry without the get. The get can only be obtained voluntarily by the husband.

However, a man can also become 'chained' if his wife refuses to accept his get. The chief rabbinate of Israel recently released a study claiming that more men have been chained to marriages than women during the last two years in Israel.[5]

However, being a chained man does not entail the same level of hardship as being a chained woman. For example, if a man has children with another woman while he is still halakhically married to his wife, his children will not be mamzers. Polygamy is not outlawed in the Torah, and thus if a chained man has children with another woman, those children will not be considered mamzers.

While it is true that a ruling by Rabbi Gershom 1,000 years ago created a ban on polygamy that would prevent a man from remarrying until he is divorced from his first wife, there is a loophole men can use to get around this ruling.[6] A man can remarry even if his wife refuses to accept a get if he is able to obtain the signatures of 100 rabbis from three different countries.[7] It may be difficult to get 100 rabbis to agree to allow a chained man to remarry, but with the ease of travel and communication today, it is not impossible that a man could become unchained from his marriage in this manner. Women do not have a similar loophole.

Hundreds of years ago, an agunah had a halakhic solution to her situation. Usually a man must give a get of his free will, otherwise the get is invalid. However, there was a time when Jewish people lived in communities where their own courts had the power to enforce judgments. In some instances, if a man refused to give a get the local Jewish religious court, called a Beth Din, would issue a kofin "we force" order. According to Jewish law, "the [kofin] order may be enforced by sanctions including fines, incarceration, and corporal punishment."[8]

This is no longer a solution today in the United States, because Beth Dins in America do not have the power to make legally binding decisions. The Beth Din of America cannot throw a man in jail or order people to beat the man up if he does not give his wife a get. "In a sense, the agunah crisis does not stem from any limitations internal to the hala[k]hic system itself, but from the interaction of that system with the non-hala[k]hic societal structure."[9] Without the authority to pressure a man into giving a get through halakhic authority, the get must be given of the man's free will, otherwise the get is called a 'get meusah,' and is considered invalid.

WHAT SOLUTIONS HAVE THE CONSERVATIVE AND ORTHODOX MOVEMENTS TRIED?

The general rule of thumb when attempting to come up with solutions for agunot is that no solution will work unless every stream of Judaism accepts the solution.[10] If Reform Jews accept a potential solution, but Conservative and Orthodox Jews do not, it is not a complete solution.

If Conservative and Orthodox Jews do not accept the potential solution the woman will still be considered an agunah, and will not be able to marry into the streams of Judaism that do not accept the potential solution. Additionally, if the agunah has any children with another man without receiving a get that is acceptable to a branch of Judaism that follows halakha, her children, grandchildren, etc. will be forever barred from marrying any normal-status Jews that strictly follow halakha.

The Orthodox branch of Judaism looks to halakha in its attempts to find solutions for agunot. The only solutions Orthodox Jews will accept are those that are consistent with halakha and cited in Jewish texts. It is important to realize that Orthodox Jews will always side on being overly careful not to violate halakha. Any solutions Orthodox Jews would accept must be carefully tailored to conform to halakha because of the high stakes involved in this issue.

Annulment

One potential solution is to issue a woman an annulment. The Orthodox and Conservative movements both will annul a marriage if there are certain circumstances mentioned in the Talmud. If an Orthodox or Conservative Beth Din annuls a marriage there is no need for the woman to receive a get because she would have never been considered to be married at all.

However, the Conservative movement created other instances not mentioned in the Talmud where they will annul marriages. The Conservative movement justifies the creation of new instances of issuing annulments on the ground that "all who marry within the Jewish community do so with the implied consent of, and under the conditions, laid down by the rabbis [and] [h]ence, the marriage exists as long as the rabbis agree it does."[11]

A scenario where the Conservative movement issued an annulment, but the Orthodox movement would not, was a scenario where an agunah received "seventeen decisions from Orthodox [Beth] Din ordering her husband to give her a get…[however,] [h]e refused to abide by these decisions."[12] A Conservative Beth Din annulled the agunah's marriage because it was clear that her husband was never going to issue a get, no matter what.

Only in extreme scenarios such as a husband refusing to give a get after 17 orders from a Beth Din would the Conservative movement grant an annulment not mentioned directly in the Talmud. However, the Orthodox movement would not allow an annulment in this scenario because the Talmud does not cite a scenario where a marriage was annulled because a husband absolutely refused to give a get.

Refusal to Recognize Non-Halakhic Marriages

An attempt by Orthodox Jews to eliminate the problem of agunot and mamzerim for many non-observant Jews was suggested by Rabbi Moshe Feinstein.[13] Since, the Reform movement of Judaism abolished the requirement of a woman to obtain a get to remarry, many Jewish people

in America divorce civilly, but not halakhically. Therefore, potentially hundreds, if not thousands of American Jews could be mamzers according to halakha. Additionally, if a less observant woman becomes more observant after her civil divorce and wants to marry an Orthodox Jew, she will be unable to marry him unless she receives a get from her first husband.

To attempt to avoid these scenarios, Rabbi Feinstein argued that because weddings conducted by more liberal streams of Judaism are not halakhically sound, either because the two witnesses to the marriage do not meet the halakhic requirements to be witnesses at a Jewish wedding or because the more liberal rabbi does not meet the standards of the Orthodox rabbinate, the couple is not actually married. If the couple is not actually married according to halakha, then the woman does not require a get to marry another man and her children will not be mamzers.

Unfortunately, while Rabbi Feinstein's opinion is accepted by many Modern Orthodox Jews, many of the other streams of Orthodox Judaism would still require the woman to obtain a get. Many Orthodox rabbis argue that even if two Jewish people do not have a kosher wedding, there is a "hala[k]hic presumption that people do not desire their intercourse to be promiscuous," and when the couple has marital relations the marriage becomes valid despite any halakhic defects in the wedding ceremony.[14] Furthermore, most Orthodox rabbis, including Modern Orthodox rabbis, would probably still require the woman to obtain a get from her first husband before they would be willing to perform a wedding for her because they would not want there to be any chance that the woman's children would be mamzers.

Conditional Gets and Marriages

In biblical times if a woman's husband went off to war and was captured or missing, his wife would become an agunah because there was no way to know if her husband was dead. The Talmud explains that King David ordered his soldiers to give their wives conditional gets before leaving for war.[15] These conditional gets would activate if the woman's husband did not return after X number of years.

The idea of having every Orthodox man give his wife a conditional get after they are married, making their marriage a conditional marriage, has been considered as a potential solution. The conditional get could declare that if the husband lives separately from his wife for more than 18 months, the get is activated, and the marriage is ended. This would be a halakhically acceptable solution to the agunah problem, because it has precedent in the Talmud and does not bend halakha or come up with new rules that deviate from halakha.

Unfortunately, conditional gets cannot solve an agunah's dilemma. This solution is flawed because a married couple having marital relations "subsequent to a conditional marriage constitute[s] a waiver of condition thereby making the marriage absolute and in need of a get" to terminate the marriage.[16]

The wife could ask the husband to issue another conditional get, but the next time they have marital relations he will have to issue another conditional get. This process would be tedious and ultimately worthless, because even if a man gave his wife a new conditional get after the last time they had martial relations before they separated, there is no way for her to prove that they did not have relations after the last conditional get was given. Furthermore, few Orthodox rabbis would perform a wedding for a woman in this scenario unless her husband gives her an actual get, because of the chance that she is still an agunah.

Beth Din of America Binding Arbitration Agreement

Recently, the Beth Din of America created a prenuptial agreement that many Orthodox rabbis require a couple to sign before the rabbis will agree to marry that couple. This prenuptial agreement is a binding arbitrational agreement carefully worded to not violate halakha, and at the same time not violate the Constitution.

A halakhically valid prenuptial agreement cannot specifically demand money from the husband if he fails to give the get to his wife. If the contract is worded in that manner, and the husband gives the get under the duress of monetary penalties without a kofin order from the Beth Din, the get will be get meusah. To avoid this problem, the prenuptial agreement requires the "husband to pay his wife $150 in spousal support per day as long as their domestic residence together shall cease for whatever reasons."[17] It also requires the husband to waive his halakhic right to his wife's earnings while they are separated. That provision is very important, because under Jewish law a husband is entitled to all of his wife's earnings while they are married unless he waives that right.

The contract also requires that the parties agree to appear in person before the Beth Din of America at the demand of the other party. This requirement is potentially very important because it is imperative that an agunah seeking a get, first goes to a Beth Din *before* she tries to obtain the get through a secular court. If the agunah tries to bypass the Beth Din, any penalties a secular court might impose on her husband will be completely ineffective in acquiring a get for her. If the husband gives the get under pressure from a secular court, and the wife never went through the proper channels at the Beth Din, the get will be get meusah.

CAN NEW JERSEY COURTS HELP AN AGUNAH?

The halakhic requirement for a couple to appear before the Beth Din prior to asking a secular court to intervene is important because

the New Jersey case, *Aflalo v. Aflalo,* "determined that the Free Exercise clause (U.S. Const. amend. I) did not allow the court authority to compel either husband or wife to appear before the religious tribunal, whether to obtain a *get* or to discuss reconciliation."[18] The court in *Aflalo* also noted an establishment clause concern when it quoted the dissent in a New York case, *Avitzur v. Avitzur,* as saying:

> [E]ven the limited relief which the majority of four approved required inquiry into and resolution of questions of Jewish religious law and tradition and thus inappropriately entangled the civil court in the wife's attempts to obtain a religious divorce.[19]

If an agunah seeking a get in New Jersey did not sign the Beth Din prenuptial agreement or a similar contract, and her husband will not go to the Beth Din, the secular courts in New Jersey cannot order him to go to the Beth Din because of free exercise and establishment clause concerns. In this situation, where the husband will not go to the Beth Din, the only thing the Beth Din can do is issue a 'seruv' after the husband ignores three of its summons.[20]

A seruv might persuade a court in New York (where the courts have determined it is constitutional to require the parties appear before the Beth Din) to use their power to order the husband to go to the Beth Din.[21] In New York, the courts also have the power to fine the husband until he goes to the Beth Din if he ignores their order.[22] However, in New Jersey, if an agunah obtains a seruv without having signed the Beth Din prenuptial contract, the court will not have the authority to force the husband to appear before the Beth Din.

CAN A NEW JERSEY SECULAR COURT ENFORCE THE BETH DIN PRENUPTIAL AGREEMENT AND REQUIRE A HUSBAND TO ABIDE BY A SERUV ORDER

DEMANDING APPEARANCE?

There are no reported cases yet, where a New Jersey court has ordered a husband to go before the Beth Din against his will if he has signed the Beth Din prenuptial agreement and the Beth Din orders him to appear for arbitration. The argument can be made that he signed the contract, it is binding, and he must appear before the Beth Din to arbitrate. On the other hand, the contract may violate the free exercise clause, the establishment clause, and New Jersey public policy, thus rendering the contact unenforceable.

Professor Irving A. Breitowitz, who has written a law review article on the plight of agunot, as well as a book, believes there is no violation of the establishment clause if a secular court orders a husband to appear before the Beth Din. Professor Breitowitz believes "a secular court would and should enforce an arbitration agreement."[23] However, in New Jersey, where the courts believe it is unconstitutional to force a man to appear before the Beth Din, he believes "the [New Jersey] court might rule the same way even with a prenup."[24]

However, the director of the Beth Din of America, Rabbi Yona Reiss, "would not interpret *Aflalo* as barring a New Jersey court from enforcing the Beth Din prenup."[25] Rabbi Reiss believes that "the prenup is a legally binding arbitration agreement and the secular courts in New Jersey should uphold the provision of the contract requiring the husband to appear before the Beth Din."[26]

There is precedent for New Jersey courts upholding decisions by the Beth Din when the litigants signed an arbitration agreement. For example, in *Elmora Hebrew Center, Inc v. Fishman*, the New Jersey Supreme Court found that "it is appropriate that the [Elmora Hebrew Center], like a party to a civil arbitration, should be bound to observe the Beth Din's determination of any issues that the [Elmora Hebrew Center], agreed to submit to that tribunal."[27] The ruling in *Elmora Hebrew Center* seems to strongly suggest that New Jersey courts would uphold the ruling of a Beth Din for a husband to appear before it if he and his wife had signed the Beth Din prenuptial agreement.

However, there are still reasons to believe the New Jersey courts would not uphold the Beth Din prenuptial agreement. The New Jersey Supreme Court in *Elmora Hebrew Center* also stated:

> Our conclusion is not an endorsement of the mesne procedural determinations by which the lower courts surrendered jurisdiction over the civil aspects of this case…It is not proper for a trial court to refer civil issues to a religious tribunal in the first instance.[28]

If it is not proper for a civil court to surrender jurisdiction over civil issues in a case, it may be improper to give the Beth Din of America jurisdiction to decide whether or not the parties can be divorced. However, the New Jersey case law in *Aflalo* suggests that determining whether or not to give a get is a religious issue, not a secular one, and, therefore, the Beth Din could have jurisdiction to arbitrate.

On the other hand, the court in *Aflalo* said:

> This court should not, and will not, compel a course of conduct in the Beth Din no matter how unfair the consequences. The spectre of Henry being imprisoned or surrendering his religious freedoms because of action by a civil court is the very image which gave rise to the First Amendment.[29]

This suggests the prenuptial contract may be unenforceable because it is against New Jersey public policy. The New Jersey courts may also be reluctant to allow a religious court to determine a civil issue such as whether it has jurisdiction to hear a case and or force someone to appear before it.

COULD THE NEW JERSEY LEGISLATURE CREATE A TORT SOLUTION?

Some people have suggested that a tort remedy might be a solution for agunot. A woman could sue her husband for intentional infliction of emotional harm based on the horrible trauma of not being able to remarry or have more children. "While the failure to give a *get* is an omission rather than a commission, there is authority that even a failure to act may give rise to tortious liability."[30]

The New York case of *Perl v. Perl* explored the possibility of a tort remedy existing for agunot in civil court.[31] However, the court ruled that the husband was seeking "specific economic objectives [and] the component of mental distress became a regrettable by-product"[32] Basically, what the court ruled is that "[d]riving a hard bargain, or even an unconscionable one, is not clearly conduct that go[es] beyond all possible bounds of decency, and should not be regarded as tortious."[33]

It is very difficult to prove the intent part of the intentional infliction of emotional harm if a court takes the view that a husband's motivations for not giving the get are "not malicious but are economic."[34] However, evidence could be brought in to the court to show the husband's intent to emotionally harm his wife maliciously and not just economically. Perhaps, if the husband demanded full custody of the parties' children rather than a larger cut of equitable distribution the court would be more inclined to rule in favor of the wife.

However, a major problem with this type of tort claim is that it could cost an agunah a lot of money to pay for an attorney and bring the case to court. Additionally, there is a good chance she will not win based on the ruling in *Perl*, which currently is the only published case in the United States on the issue of suing for intentional infliction of emotional harm for failure to give a get. Another problem is collection of damages, which also is a byproduct and not the goal of the party seeking the get.

Another tort solution could be to "create a law that specifically provid[es] that the maintenance of a barrier to remarriage subsequent to the grant of a civil divorce constitutes the intentional infliction of emotional distress."[35] A statute like this has the advantage that it would not be difficult to prove and would allow an agunah to successfully sue her husband for damages if he refuses to give her a get.

The problem with this tort law is that if a woman successfully sues her husband for intentional infliction of emotional distress for not giving a get, and then the husband gives the get because he does not want to get sued again, the get will be get meusah. This problem can be minimized if the agunah goes to the Beth Din before she sues in secular court. However, even assuming this statute would be halakhically acceptable, it would have an even harder time passing constitutional scrutiny. "A specially drafted law whose exclusive purpose is the protection of uniquely religious sensibilities carries with it at least the appearance of the state placing its imprimatur on religion."[36] The purpose of this law is not wholly secular like the get law, because "it makes sense to remove barriers to marriage in the context of a divorce proceeding." However, "there is no unique secular interest in singling out in tort law" this particular issue.[37]

CONCLUSION

It seems unlikely that there are short cuts to ending the problem of agunot in cases that are tried. Often, people think there is a solution for everything in our court system, but this might be a time when there is not. Most states, including New Jersey, do not want to get involved in this issue because it is a religious issue that the government is not equipped to address or constitutionally allowed to entangle itself in.

It is a good idea for Jewish communities in New Jersey to require every couple getting married to sign some form of halakhic prenuptial agreement to help facilitate the divorce process and hopefully prevent the agunah problem. Even if the agreement is not actually enforceable in New Jersey, it will act as a pledge of honor that in the event of a divorce both parties will act civilly and maturely. Likewise, these issues should be addressed in property settlement agreements.

Ultimately, the solution to this problem is not in the hands of the New Jersey courts. The solution is in building strong Jewish communities that know right from wrong and raise sons who are 'mensches,' who are willing to help themselves and their former spouses get on with their lives. ■

ENDNOTES

1. N.J.S.A. 2A:34-2(i).
2. Deuteronomy 24:1
3. Marc S. Cwik, "The Agunah Divorce Problem in Jewish Society: Exploring the Possibility of an International Law SION," 17 *Wis. Int'l L.J.* 109, 113-4 (1993).
4. Deuteronomy 23:3 "A mamzer shall not enter the congregation of HASHEM." This means that a mamzer may not marry normal status Jews.
5. www.israelnationalnews.com /News/News.aspx/123472.
6. This ban was accepted universally by European Jewish communities about 1,000 years ago, but was not accepted by Jews living in the Middle East or Africa until much more recently.
7. This process of getting an exemption from Rabbi Gershom's ban on polygamy is called 'heter meah rabbanim,' and can be obtained by a man without too much difficulty.
8. Irving Breitowitz, *Between Civil and Religious Law: The Plight of the Agunah in American Society*, at 34 West-

port: Greenwood Press. 1993.
9. Irving Breitowitz, "The Plight of the Agunah: A Study in Halacha, Contract,and the First Amendment," 51 *Md. L. Rev.* 312, 341 (1992).
10. Agunot is the plural of agunah.
11. Felicia Moskowitz, "The Plight of the Agunah," 4 *Touro J. Transnat'l L.* 301, 306 (1993).
12. www.jewishvirtuallibrary.org /jsource/Judaism/agunot.html.
13. Mamzerim is the plural of mamzer.
14. Breitowitz, *supra*, note 8 at 72-3.
15. Breitowitz, *supra*, 51 *Md. L. Rev.* at 317-18.
16. Breitowitz, *supra*, note 8 at 61.
17. Beth Din of America, *Binding Arbitration agreement*, §VII.
18. *Mayer-Kolker v. Kolker,* 359 N.J. Super. 98, 102 (App. Div. 2003); *Aflalo v.Aflalo,* 295 N.J. Super. 527, 542 (Ch. Div. 1996).
19. *Aflalo*, *supra*, 295 N.J. Super. at 541; *Avitzur v.Avitzur*, 459 N.Y.S.2d 572, 577-78 (1983).
20. A seruv is an order from the Beth Din stating that a party refused to appear before the Beth Din. It must be acquired by a woman prior to attempting to obtain any relief involving a get in a secular court.
21. *Avitzur*, *supra*, 459 N.Y.S.2d 572.
22. *Marguiles v. Marguiles*, 344 N.Y.S.2d 482 (1973).The court ruled that they could fine the husband, but not incarcerate him, despite his being in contempt of court for failure to appear before the Beth Din.
23. Email from Irving A Breitowitz, Professor of Law, University of Maryland School of Law (Aug. 27, 2007, 22:35 EST).
24. *Id*.
25. Telephone interview with Rabbi Yona Reiss, Director, Beth Din of America (Sept. 12, 2007).
26. *Id*.
27. *Elmora Hebrew Center, Inc v. Fishman*, 125 N.J. 404, 418 (1991).
28. *Id*. at 419.
29. *Aflalo*, *supra*, 295 N.J. Super. at 542.
30. Breitowitz, *supra*, note 8 at 401.
31. *Perl v. Perl*, 512 N.Y.S.2d 372 (N.Y.A.D. 1 Dept 1987).
32. *Id*. at 96.
33. Breitowitz, *supra*, note 8 at 398.
34. *Id*. at 241.
35. Breitowitz, *supra*, 51 *Md. L. Rev.* at 402.
36. *Id*. at 405.
37. Breitowitz, *supra*, note 8 at 247.

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Equitable Distribution of Personal Injury Judgment Awards and Disability Pensions

by Richard Sevrin

The issue presented is how and in what manner settlements and recoveries in personal injury litigation are intended to be distributed for the purposes of equitable distribution during or at the time of divorce.

In *Landwehr vs. Landwehr*,[1] the Court dealt with whether or not all or part of the settlement proceeds a spouse receives during a marriage for claims arising out of his or her personal injuries constitute marital assets subject to equitable distribution pursuant to N.J.S.A. 2A:34-23. The Supreme Court held that:

> …the portion of the settlement that is intended to compensate for lost earnings and the medical expenses of the injured spouse is subject to distribution, but the remainder of the settlement, which is intended to compensate for personal pain, suffering, and the mental and physical disabilities of the injured spouse or for the loss of consortium or services suffered by the uninjured spouse, are not distributable.[2]

The Landwehrs were married in 1959 and had three children. On July 31, 1978, Mr. Landwehr was injured in an automobile accident. As a result, he sustained numerous personal injuries, was hospitalized for over a week and was out of work for three months. During most of his recuperation, the husband collected weekly disability payments of $138 per week. (His weekly salary was $200 per week.) All of his hospital and medical bills were paid by insurance.

Throughout his recuperation, Ms. Landwehr attended to the defendant-husband, took care of their three children, and ran their household. The wife worked outside the home. Shortly after the defendant-husband's accident, while he was in the hospital, the plaintiff-wife brought an attorney to him to discuss their legal rights with regard to the accident. During the attorney's initial interview, the wife indicated that she desired to pursue a *per quod claim* (loss of consortium or services) derivative action in connection with any lawsuit brought on behalf of the defendant. A settlement took place with the insurance carrier in May 1980 for $26,000, prior to any complaint being filed.

The parties separated in June of 1981. The plaintiff-wife filed a complaint for divorce in October 1981, and a final judgment of divorce was entered. At the time, the court reserved judgment on whether or not the personal injury settlement was subject to equitable distribution pursuant to N.J.S.A. 2A:34-23.

The trial court determined that the plaintiff-wife was entitled to a portion of the personal injury settlement proceeds intended to cover the *per quod claim*, and to half of the settlement intended to cover the husband's lost wages. The defendant-husband was, thereafter, entitled to keep the remainder of the settlement.

The court further held that any funds intended to compensate the defendant-husband for his personal injuries were not subject to equitable distribution. The Appellate Division reversed the judgment, holding that the entire personal injury settlement was marital property subject to equitable distribution.

The Supreme Court held that it was clear a spouse receives compensation for pain, personal pain, suffering, and mental and physical disabilities for excruciatingly personal reasons, apart from the labors or efforts of economic transactions of the marital partners. The Court found that nothing was more personal then the entirely subjective sensation of pain, mental anguish, embarrassment caused by scarring or disfigurement, and outrage attending severe bodily injury. Mental injury, as well, has many of the characteristics. Equally personal are the effects of even mild or moderately severe injury. None of those, including frustrations of diminution or loss of normal body functions or movements, can be sensed, or need be borne, by anyone but the injured spouse.

In agreeing with the Appellate Division in *Amato v. Amato*,[3] global distribution under N.J.S.A. 2A:34-23 was not intended to force a victim of personal injuries to share the proceeds he or she received for the pain and suffering and disability arising out of the injuries.

The Court also held that the injured spouse has his or her separate and equally separate personal right to an action for loss of consortium. Just as there is no equitable reason for that spouse to profit from his or her ex-spouses' compensation for personal suffering and injury, there is no justification for allocation of a share in the right to a loss of consortium.

The Court went on to say that the

portion of the personal injury award, or settlement, that simply reimburses marital assets that were lost because of a spouse's injury should be subject to equitable distribution. Marital income and marital assets, by definition, belong to both marriage partners. Based upon that, the Court held that any personal injury that causes income to be lost and assets to be expended for medical expenses made from the assets of the parties are to be reimbursed. Portions of the settlement that were intended to compensate for lost wages are subject to equitable distribution, along with the reimbursement for medical expenses paid on behalf of the injured spouse.

The method of allocating the components of an award for settlement that was received prior to the distribution of marital assets, pursuant to divorce, would be different from the allocation made after divorce. After a divorce, special jury interrogatories may be utilized to delineate the separate factors of recovery. Thereafter, if the divorced spouses cannot agree to a reasonable allocation, a matrimonial judge will resolve the dispute, including a determination of a *pro rata* responsibility for attorneys' fees and suit expenses. The same procedures should be employed should the matter be settled.

Accordingly, the injured spouse will have the burden of showing what portion of his or her award represents compensation for his or her pain, suffering, and disabilities, and the uninjured spouse will have the burden of showing what portion of the award represents compensation for his or her loss of services and consortium. To the extent that a party fails to prove that a portion of the award represents his or her separate property, it shall be classified as a marital asset subject to equitable distribution.

In *Larrison v. Larrison,*[4] the court was met with the issue of whether a party's benefits under the police disability pension is subject to equitable distribution without any exemption for that portion of the pension benefit intended as compensation for the disability. The court held that in addressing an equitable distribution claim against a disability pension, the reviewing court must determine which portion of the pension represents a retirement component in which the plaintiff would be entitled to share, and which portion represents compensation for the defendant's personal disability and personal economic loss.

Mr. Larrison began working as a police officer for the Neptune Township Police Department on Feb. 1, 1996. The parties were married on Nov. 19, 1997. There were two children born of the marriage. On May 1, 2004, Mr. Larrison retired after becoming eligible for a monthly ordinary disability pension benefit from the New Jersey Police & Firemen's Retirement System. At the time of his retirement, his base annual salary was $81,997.83. On Oct. 8, 2004, Mr. Larrison received a net retroactive pension check of $8,905.55 and, thereafter, began receiving a regular monthly disability retirement benefit of $2,733.26, which represented 40 percent of his final year's salary.

On Jan. 4, 2005, Mrs. Larrison filed for divorce. After hearing from expert testimony at trial the court found that:

> The marital coverture portion of the Defendant's pension is subject to equitable distribution. A pension is an asset that may only be contributed to by one party, but is a result of the marital units efforts to provide financial security in the future. The Plaintiff is entitled to share in the pension benefits that accumulated during the marriage, as they are subject to equitable distribution. The distribution should commence from the date the

> Defendant became eligible to receive the benefits.

The Appellate Division found that in the case of a disability pension, such as the one at issue, *i.e.*, the Police & Firemen's Retirement System, the portion that serves to compensate the pensioner-spouse for his or her disability and economic loss should not be subject to equitable distribution.[5]

In *Amato v. Amato*, the Supreme Court dealt with a pending personal injury claim when the proceeds were received prior to the marriage terminating. The trial court, in *Avallone v. Avallone,* initially ordered that the plaintiff receive half of the defendant's monthly pension benefit, but then lowered her share of the benefit slightly.

In *Larrison v. Larrison*, the appellate court held that in the case of disability pensions, such as the Police & Firemen's Retirement System Pension, the portion that serves to compensate the pensioner-spouse for his or her disability and economic loss should not be subject to equitable distributions. Finally, the court held that based upon the testimony of Peter J. Gorman, the executive assistant of the New Jersey Department of Treasury, Division of Benefits and Pensions, the court was satisfied that the husband's benefits were intended to, in part, substitute for lost wages, and his inability to continue working as a police officer. The fact that the defendant's retirement benefit is paid in the same fashion as other retirement plans was of no moment, because his ability to receive payment is expressly conditioned upon his being disabled. Since the husband will only receive his pension as long as he continues to earn a lower salary than he earned as a police officer, it seems that the pension serves, at least in part, to replace the salary unable to be earned as a police officer. The court then held:

> We recognize that the statute governing the pension plan does not set forth a procedure for determining what portion of a pensioner's benefit is intended to compensate exclusively for his disability. This omission, however, cannot result in unjustly and improperly subjecting the full amount of disability pension to equitable distribution upon divorce. Confronted with this situation, the trial Court should explore, with the assistance of expert analysis, other options, including limiting the amount subject to equitable distribution to Defendant's contributions to his pension, which is what he would have received had he left the Police Department at the time.

In *Larrison*,[6] the intent was to balance the non-pensioner-spouse's legitimate claims to marital assets, without attaching funds intended to compensate the pensioner-spouse for his disabilities.

The court encouraged the Police & Firemen's Retirement System Board of Trustees to consider expressly identifying which portion of a disability pension is intended to be exclusively compensatory. Absent such a clear statement, the board should consider promulgating guidelines to assist the pensioners, their spouses, and the courts as they grapple with the complexities of these issues in the context of marital dissolution.

Neither the legislator, nor the Police and Firemen's Retirement System Board of Trustees has established an appropriate methodology and formula for distribution of Retirement System Disability Benefits; therefore, the Appellate Division was forced to set forth one. In *Sternesky v. Salcie-Sternesky,*[7] the court was met with the issue of how, and in what matter, to determine the distribution of the Police & Firemen's Retirement System Disability Pension recognizing the portion of a retirement benefit is subject to equitable distribution.

The parties were married in 1998, and both had college degrees. The plaintiff was employed in a job he had held since 1996, as a dispatcher for the Englewood Fire Department, and enrolled in the Police & Firemen's Retirement System since 1996. The wife was employed in her field. In April 2000, Englewood appointed the husband to the position of a firefighter, and in December 2003 he was hospitalized as a consequence of injuries he sustained while fighting a fire. The husband sought counseling to address post-traumatic stress from the injury, which also caused him to become disabled. Mr. Sternesky was subsequently awarded an accidental disability retirement allowance, effective Dec. 1, 2005. The plaintiff was 38 years of age, and the defendant was 35 when the divorce was filed in July 2005.

In an analysis of the benefits of the Police & Firemen's Retirement System the court acknowledged that the principal governing the identification of retirement assets that are part of the marital estate subject to equitable distribution must be separated from that which would be benefits subject to the disability of the pensioner. It is clear that the portion of the pension that is not related to disability is subject to equitable distribution in view of the fact that both spouses contribute to the earnings of the pension rights by participating in the marriage, both expecting to share the future enjoyment of the pension benefits. Pension benefits attributable to work during the marriage are not immune from equitable distribution because they are in the pay status.

There is a portion of the pension benefit that should not be subject to equitable distribution, that being a disability retirement allowance that compensates the pensioner-spouse for disability and economic loss.[8] Recognizing the pension statute and regulations, the court in *Sternesky* acknowledged that an employee qualifies for an accidental disability retirement allowance only if there is a direct result of a traumatic event occurring during and resulting from the performance of duties. The allowance granted by the pension is two-thirds of the final compensation, regardless of

the employee's age, years of service or contribution to the pension fund. The allowance is not dependent upon an annuity that is the actuarial equivalent of the aggregate contributions.

An employee who is disabled as a consequence of a qualifying accident early in his or her career would receive the same percentage of the final salary as one who has worked for many years prior to the qualifying disability. An ordinary retirement allowance is based solely on the member's age, years of service and contributions to the fund that is available from 50 percent to 65 percent of the final salary, depending upon the years of service and the age of the pensioner.

The court recognized that the enhanced benefit for accidental disability retirement (two-thirds of final salary as opposed to one-half of final salary for ordinary retirement at the earliest time) is intended to ensure income for a member disabled due to traumatic injury in the performance of duties that pose an inherent risk of injury. The enhanced benefit for injury of this sort is reasonably viewed as part of the incentive for accepting employment offered to the members of the Police & Firemen's Retirement System.

The court noted that the accidental disability retirement allowance is awarded in place of the ordinary retirement benefit. It serves as a more generous substitute for the ordinary retirement allowance toward which the employee earned credits during his or her career. The disability retirement allowance guarantees a return on retirement credit earned during the marriage regardless of length of service when the early retirement is caused by a disabling injury due to a traumatic event during performance of duties. The receipt of the ordinary retirement allowance is included in the two-thirds benefit under the retirement disability.

In resolving the Police & Firemen's Retirement System Disability Allowance, the court held that the trial court should apply the formula, which is inferable from the statutory scheme and decisions of the courts considering equitable distribution of retirement assets, to segregate the components of the allowance of the retirement disability from that which would be the ordinary retirement benefits due the pensioner. The court concluded that the trial court must identify the ordinary retirement allowance, preserving for the retiree the excess allowance based upon accidental disability, *i.e.*, the percentage of final salary above the percentage payable on ordinary retirement.

The trial court must further identify the portion of that allowance that is attributable to service during the marriage. The goal being to identify that component of the disability pension that recognizes the non-pensioner spouse's legitimate claim for a marital asset. The court identified the marital portion by using the coverture fraction, *i.e.*, the amount that will be distributed to the non-pensioner spouse when payments are received, the coverture fraction being the numerator equivalent to service during the marriage and the denominator equivalent to total years of service. The fraction reflects the relationship between the credits earned during the marriage and total credits earned after or before the marriage.

The court concluded that after determining the ordinary retirement allowance and subtracting the excess benefit based on accidental disability, the trial court should identify the marital component by multiplying the ordinary retirement allowance by a fraction, with a numerator equivalent to service during the marriage with the denominator equivalent to service required for an ordinary retirement allowance. The formula segregates the spouse's legitimate claims to the marital portion, without attaching funds intended to compensate the pensioner-spouse for his or her disability.

The formula was described by an example with the assumption that a traumatic disabling injury, after 10 years of service, all of which were during the marriage. The final salary of $60,000 was earned by the pensioner. In accordance with the formula, the accidental disability allowance would be $40,000, (*i.e.*, two-thirds of the final salary). The ordinary retirement allowance would be $30,000. The difference, $10,000, is preserved for the retiree. The $10,000 preserved for the retiree is subtracted from $40,000, leaving $30,000. The $30,000 difference is then multiplied by the coverture fraction (10 years of service over 20 years of service required for an ordinary retirement). The product of $15,000 is the portion attributable to service during the marriage, which is subject to equitable distribution.

In conclusion, there is no question that the courts have interpreted the equitable distribution statute to insure that a disabled spouse maintains those portions of civil damages and retirement funds geared to his or her disability. The portion of equitable distribution provided to the parties during the course of the marriage through loss of wages, and through pension benefits derived as a result of the marital partnership, shall be equitably distributed between the parties. ■

ENDNOTES

1. 111 N.J. 491 (1988).
2. *Id.* at 493.
3. 180 N.J. Super. 210, (App. Div. 1981).
4. 392 N.J. Super. 1 (App. Div. 2007).
5. *See Avallone v. Avallone,* 275 N.J. Super. 575, 583 (App. Div. 1994).
6. *Larrison, supra.*, at 862.
7. 396 N.J. Super. 290 (App. Div. 2007).
8. *See Avallone*, *supra.*

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