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FAMILY LAWYER

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Chairman's Report

by Jeffrey P. Weinstein

The Family Law Section can be exceptionally proud of the relationship that exists between the Matrimonial Bar and the Matrimonial Bench and the relationship that exists between the Matrimonial Bar and the Legislature.

The Executive Committee of the Family Law Section invited all of the Presiding Judges of the Family Part to attend an Executive Committee meeting of our Section. The meeting is scheduled for February 28, 1984. Obviously, as of the date I am writing this report, the meeting has not yet taken place. I am absolutely confident the meeting will prove to be productive and beneficial to the Bench, the Bar and the public. Almost every Presiding Judge throughout the state indicated that they would attend the meeting. This overwhelming response indicates, convincingly, the dedication of the Bench to the Family Part of the Superior Court. This overwhelming response clearly indicates the dedication of the Presiding Judges to their position. Their responsibility is enormous and the Judges know it. We have a responsibility, as attorneys who practice in the Family Part, to insure its success. Even looking at it in the most selfish light, if the public suffers, we suffer. It is more important that a meeting will take place between our Executive Committee and the Presiding Judges than what takes place in the meeting.

The Family Part Practice Committee is also scheduled to meet during the last week of February, 1984. The Family Part Practice Committee has much work to do. Hopefully, it will explore many different areas involved in the Family Part. The Committee will, undoubtedly, focus some of its attention on Rules, motion practice, juvenile matters, support guidelines, alternative means of dispute resolution and substantive issues as well, such as custody proceedings.

Legislative Program

The Legislature began its new session in the second week of January, 1984. Our Legislative Coordinator, James P. Yudes, and David K. Ansell, Section officer involved in legislation, have been kept abreast of what to expect this session by Philip Kirschner of the New Jersey State Bar

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Use of Depositions in Family Law Litigation

by Michael J. Albano and John W. Dennis, Jr.

Introduction

Proper pre-trial discovery should alert the litigants to the facts and allegations relied upon by the opposition. For the practitioner in family law matters, oral depositions may be the most important discovery tool available for this purpose. This article examines the role oral depositions should play in family law litigation. Although my law practice is primarily limited, geographically, to the State of Missouri, the function of pre-trial discovery, including the use of depositions, is generally uniform throughout the country. That is, to provide the parties with an opportunity to apprise themselves of the issues at hand by eliciting sworn testimony from a witness by examination before a court reporter who transcribes that testimony. In doing so, the parties can narrow the controverted issues for trial, and more easily present the important uncontroverted facts to the trier of fact.

Reasons for Depositions

It is impossible to generalize the type of family law case in which depositions should always be taken. Because depositions can significantly increase the cost of litigation, it is not recommended that they be used in every case. In some instances depositions are not as effective as "requests for production of documents," requests for admissions, or other discovery devices. For example, if the issue in the case will turn on the relative incomes of the parties, and the relevant information can be gleaned from employee pay records, bank statements, charge account records, and the like, there is little to be gained by interrogation of a party which does nothing more than verify the accuracy and completeness of the information produced. Clearly, the ultimate issues

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The Family Lawyer *takes special pride in presenting Mr. Albano's article. He is the current chairman-elect of the American Bar Association Family Law Section. More information concerning Mr. Albano and Mr. Dennis appears on page 120.*

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Editor's View

Counsel Fees—The Time Is Now—Not Only To Fulfill the Promise of the Pashman Report But To Go Beyond

by Lee M. Hymerling, *Editor-in-Chief*

Almost three years have passed since the issuance of the Phase Two, Final Report of the Supreme Court Committee on Matrimonial Litigation (the Pashman Committee).

> "To assure effective representation in matrimonial cases, it is important to provide adequate funds for counsel fees to a financially dependent spouse. This subject has evoked a great deal of controversy. On the one hand, the moving party often requires reimbursement or payment of counsel fees; on the other hand, there is the burden of additional expense on the responding party. The resulting practice has been to award, at best, nominal fees and frequently no interim fees at all, without an examination of the facts underlying an individual application . . .
>
> "The present system of financing counsel fees often denies the dependent spouse the funds necessary to retain competent counsel and expert witnesses . . . The Committee submits that the present practices of postponing the award of pendente lite fees until final hearing, or of awarding nominal fees or no fees pendente lite, are unfair and unjust to a financially dependent moving party."

Based upon these findings, the Pashman Committee recommended that "[m]atrimonial judges should take a more realistic approach toward counsel fees for prospective services. Only a flexible approach will guarantee effective legal representation for the financially dependent spouse . . . ." Essentially, what the Committee recommended was that matrimonial judges should make interim awards of counsel fees more frequently. In large measure, in many of our counties, that recommendation fell on deaf ears.

It is therefore recommended that the new Family Part Practice Committee give priority attention to reviewing current practices in order to assure a uniform approach to guarantee dependent spouses the funds necessary to retain competent counsel.

As in 1981, today in many counties only minimal or no interim fees are allowed. Undoubtedly, such an approach limits the number of attorneys who will accept representation of dependent spouses. Additionally, such an approach forces attorneys who do accept representation of dependent spouses to finance their own services. As calendars in many vicinages exceed one year, an attorney for a dependent spouse can be forced into the position of rendering services spanning tens of hours, with only the promise of maybe getting paid at some point in the future. Such a practice leads to the construction of an extremely high statement for services rendered at the conclusion of the case, which may cause later problems and, indeed, even fee disputes. Clearly, some relief is necessary.

The recently adopted rules for our Family Part created an even greater need for interim fees. The revision of R. 5:5-2, which will become effective on April 1, 1984, requires the filing of a Case Information Statement (the successor to our current Preliminary Disclosure Statement) with the filing of the initial pleading by each party. This means the C.I.S. will have to be filed when a Complaint is filed. Obviously, this will force substantial legal work to be done at the very inception of litigation. Several hours will now have to be devoted in many actions to completing a budget, income analysis and a balance sheet before a Complaint or Counterclaim may be filed. The advisability of this amendment will be the subject of an editorial to appear in a later issue. Regardless of the advisability of the amendment, its impact upon when services will have to be rendered cannot be doubted.

This editorial does not suggest that all requests for pendente lite counsel fees should be honored; instead, all that is sought is a return to the recommendations of the Pashman Report, which suggested that a more realistic approach toward counsel fees for prospective services should be taken. This means that judges should not limit themselves in their awards to affidavits setting forth past services rendered. Judges should recognize that so limiting the application of a dependent spouse is inherently unfair, not only to that litigant but also to his or her attorney. To so limit those applications would be to almost guarantee that that litigant would never "catch up." Judges should instead be willing, from their experience and based upon the new C.I.S., to make an informed estimate as to what services

are likely to be rendered during the discovery period and award fees accordingly.

Again, drawing upon the recommendations of the Pashman Report, the criteria for awarding pendente lite fees might include, but not necessarily be limited to, the following:

- the financial circumstances of the parties;
- the amount of discovery and trial preparation anticipated;
- the complexity and difficulty of the legal, factual and practical issues;
- that actual fee arrangement between the moving party and his or her attorney, including any amount already paid to counsel;
- the merits of the moving party's application; and
- the moving party's good faith in seeking relief.

A similar approach should be taken with regard to expert fees. Just as it is essential that dependent spouses have competent counsel, it is also essential that they be accorded the opportunity to retain appropriate experts. It is hoped that in considering the topic of pendente lite counsel and expert fees, the new Family Part Practice Committee will adopt statewide standards. The result in Morris County should not significantly differ from the result in Salem County. Attorneys appearing in Somerset County should not expect different treatment in Hudson County. Whatever standards are adopted should be widely promulgated so that all involved—judges, attorneys and litigants alike—are informed.

It would be all too simple for judges to continue their present practice of merely reserving counsel fee decisions to the time of final hearing. Such a practice, however, is patently unfair and requires immediate remedy.

Just as the time has come to heed the recommendations of the 1981 Pashman Committee Report with regard to pendente lite counsel fees, the time is also ripe to generally reconsider the entire structure of matrimonial counsel fees. Thus, the new Family Part Practice Committee is encouraged to discuss whether the general standards set forth in *Williams v. Williams,* 59 N.J. 229 (1971), which have guided all counsel fee award cases ever since, should now be updated. This dialogue should include whether it is appropriate to award substantial counsel fees to a dependent spouse who receives a significant equitable distribution award. Is it fair to require the financially advantaged spouse not only to bear the full brunt of his or her own attorney's fees, but also to pay those of the dependent spouse who is adjudged entitled to both alimony and equitable distribution? Does such a result equitably distribute the costs of the litigation?

Additional consideration should be given to whether a dependent spouse should be required to pay interim fees if his or her conduct is found to have wrongfully protracted the litigation. In such situations, would it be appropriate for a court to award counsel fees against the dependent spouse, to be paid from an eventual equitable distribution award?

The Family Part Practice Committee should also consider the growing practice in a number of our counties requiring the filing in a sealed envelope of Early Settlement Panel recommendations as to counsel fees so that these recommendations might later be considered, following trial, in connection with counsel fee applications. Additional consideration should be given to the possibility of adopting an Offer of Judgment rule applicable to matrimonial cases.

In sum, the dialogue this editorial hopes to promote should go beyond the black letter recommendations made by the Pashman Committee three years ago. Indeed, those recommendations seem almost self-evident. They deserve immediate implementation. Going beyond those recommendations, however, a comprehensive analysis of the entire counsel fee issue should now be undertaken. Such an analysis not only will be in the interests of the practicing matrimonial bar, but more importantly will serve the public interest of assuring that just counsel fee awards are made in all cases coming before our new Family Part.

The policy of the ***Family Lawyer*** *is that the subject matter, although not the text, of all editorials is discussed among the editor-in-chief and the three editors. All editorials represent at least a majority view of this group. This editorial does not, however, necessarily represent the position of the New Jersey State Bar Association or its Family Law Section.*

Use of Depositions in Family Law Litigation

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to be determined by the trial court may be obtained from the documentation rather than testimony.

It is likely that the nature of the disputed issues in the case will dictate the advisability of the choice of discovery tools to be utilized. Issues such as child custody, marital misconduct, value of closely-held corporations or complicated financial backgrounds of the parties warrant discovery by oral depositions. It is advantageous to depose the opposing party in those types of instances in which spontaneous, unrehearsed responses are necessary to get an accurate assessment of the opposition's position. Of the various discovery devices, depositions are unique in providing the interrogating attorney with the freedom to probe on a wide variety of points, and in any manner which is likely to elicit the most information about the adversary's case. Since the rules of discovery are construed to favor disclosure of relevant information, the inquiry is not usually limited by the rules of evidence.

The opportunity to depose the opposing party has some pragmatic side-benefits as well. One object is to give the deponent the chance to state all of the facts he believes support his position. In turn, the party taking the deposition has a right to rely upon the completeness of the testimony. At time of trial, when the deponent seeks to rely on different allegations in the context of matters that were inquired about during the deposition, his credibility on those matters should be adversely affected, if he is permitted to testify to those "new" allegations at all. Thus, the deposition will help freeze the testimony of the deponent. Additionally, the thorough deposition will reduce the chance of surprise testimony. In theory the facts of the case should be fresher in the mind of the deponent at deposition because of the timing involved. Aside from eliciting the testimony of the witness, the attorney should also take the opportunity to evaluate the demeanor of the witness. If one's client is being deposed, every effort should be made to educate the client about what to expect, and to have the client present a good image as a witness. In almost every case, the discovery process is a totally foreign experience to the client. Rather than commiserate about an unfortunate experience after the fact, it is worthwhile to make certain that the client understands the process before the deposition. Another beneficial by-product of depositions is that it presents an opportunity for a dialogue regarding settlement. Or, the results of the deposition may encourage the litigants to see the issues in a different light, and initiate settlement negotiations. Sometimes the evidence upon which a party is relying does not seem as devastating when viewed on the transcript of the deposition. In other circumstances, the parties have the chance to assess the devastating effect of the evidence of the opposition. This pre-trial taste of the adversary process may promote settlement merely because of the unpleasant prospect of an encore performance at trial.

Sugar and Vinegar Approach

The evidence to be obtained in deposition depends upon the issues in controversy. The manner in which the discovery is obtained in deposition is a matter of strategy and personal style. However, one of the most consistently effective approaches may be a sort of sugar and vinegar approach. Generally, the interrogating attorney will want to discover all of the facts upon which the opponent's allegations are based. Secondly, there will be matters that the attorney will want to see if the deponent will confirm or deny that are

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favorable to his client's case. An effective method is to try to disarm the deponent and get as much information as possible with sugar. After having exhausted this approach, the attorney may try to extract the balance of the evidence with a more vigorous adversary approach. It is virtually certain that the deponent will be wary in the beginning. The interrogating attorney need not play into that feeling since it will only make the deponent more defensive. The emotionalism inherent in family law litigation will often manifest itself despite the attorney's best efforts to reduce its impact. It seems more logical to try to avoid it. If the deponent is caught up in his emotions, it will quite possibly result in a situation in which his testimony will change at trial when he realizes that the trial judge is evaluating his testimony. By first playing the kind Dr. Jekyll, the attorney has at least attempted to obtain discovery in the easiest way possible for all concerned. Having made that effort, the introduction of Hyde into the inquiry may be necessary to get the deponent to divulge information which the attorney has the right to discover. One disadvantage in this process is that the witness has now been given a primer on cross-examination at trial. However, if the deponent has behaved poorly in deposition, the judicious use of his deposition testimony for impeachment purposes will undermine his attempts to rehabilitate himself as a trial witness.

Expert's Testimony

Depositions of an expert witness may also be necessary. If the attorney believes the expert is absolutely necessary, and may be unavailable for trial, a deposition is needed to preserve the testimony for trial. However, it is advisable to determine in advance whether the potential expert witness will be unavailable for testimony at trial. If so, the better practice would be to engage another expert who can testify at trial. The reading of a deposition transcript into the record at trial ranks very high on the scale of most mind-numbingly boring acts. It is certainly not as persuasive as live testimony.

Prior to the selection of the expert witness on a domestic case, consideration must be given to the local rules of evidence and local case law. Obviously, whether a witness is qualified to testify as an expert is normally within the discretion of the trial court. However, if the witness, based upon his background and skill, possesses extraordinary training to aid the court in determining its conclusions, and if he bases his answers upon what he believes to be reasonable scientific certainty, generally the evidence should be admissible, subject, of course, to the cross-examination of the adversary. Consider, in advance of trial, the weaknesses in the qualifications of potential experts, or the weakness of the scientific opinion, because those weaknesses will be vigorously exploited by the opponent on cross-examination and will hinder the expert's persuasiveness.

The process of selecting an expert should involve obtaining a complete résumé, a list of scholarly articles written by the potential witness, a list of the cases in which he has previously testified, either by deposition or at trial, and other similar information. It is essential to examine with a critical eye the credentials that have been submitted. The focus of the consideration should be two-fold, i.e. (a) whether the potential witness has expertise in the particular area to be considered, and (b) whether his credentials will be sufficient to qualify him as an expert on the subject. Finally, before producing one's own expert witness for deposition, he should be exposed to a cross-examination which anticipates the scope of examination at his deposition. Ultimately, this should help the expert prepare for trial as well.

It goes without saying that the attorney should never be caught off guard about the existence of the opposition's expert witness. This information should be obtained through the use of interrogatories. If it is the opponent's expert witness whose deposition is at hand, it is advisable to get one's own expert to develop a series of questions on the issue in controversy. Information on the deponent's qualifications and the expert's familiarity with the background of the case, should also be determined. The attorney should discover whether the expert has testified in other cases since it may provide him with information that can be used in the present case. Investigation may disclose that the expert took an inconsistent position in a previous case. It is essential to thoroughly cover the work that has been done by the expert, whether the information is a test, audit, appraisal, psychiatric evaluation, home study or the like. Be certain that you have subpoenaed the expert witness' complete file, including any underlying data relied on for further evaluation by the client's expert witness. Explore hypothetical fact situations which will beneficially differentiate the client's position from the opposing party's position. It is important to keep in mind that the opponent's expert may be working from the set of facts that the opponent has presented to him, or has permitted the expert to see. If so, the addition of key facts in a hypothetical, which the attorney will be able to prove at trial, may change the effect of the opposition's expert witness. However, even if this is not achieved in deposition, the discovery of the expert witness' position is bound to help in anticipating the adversary's theory in the case. It also provides an opportunity to develop more detailed cross-examination for trial.

Use of Depositions

Depositions may be used for purposes of impeaching the credibility of a witness at trial, or, as evidence in lieu of a witness who is otherwise "unavailable" for trial, according to the rules of court. With any deposition that has been obtained on behalf of a client, the attorney should be familiar with its contents. Those portions of a deposition, which are anticipated to involve crucial tes-

timony at trial, should be earmarked to facilitate their location during cross-examination. Various issues and facts should be first outlined by topic, then by page and line numbers for easy reference during cross-examination. On the one hand, a deposition should serve to deter a witness from changing his story at trial since he is aware of the statements made during deposition. On the other hand, if the witness does change his story, the deposition can be used to assault the credibility of the witness, or obtain a retraction of testimony as a misstatement or forgetfulness. The deponent who is not prepared at deposition, or who has misspoken in the heat of the moment at deposition, can be hamstrung by its proper use as impeachment at trial.

Conclusion

In light of the expense of depositions, the use of this discovery device must be carefully analyzed. When the decision has been made to take a deposition, every effort to obtain as much information as possible should be made. This translates into more expense for preparation. However, it would be unwise to assume that the only persons who will read the deposition are the attorneys and the litigant. If properly utilized, a deposition can educate the attorney on the opposition's theory of the case, and simultaneously assist the attorney in limiting the effectiveness of the opponent's evidence.

Chairman's Report

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Association. Phil is the legislative counsel for the New Jersey State Bar Association and does an extraordinary job, not only for our Section, but also for other Sections and Committees of the State Bar. Philip not only knows what bills are important to family law practitioners, but also knows the status of each and every bill. Phil is able to feel the pulse of the legislators. He is aware of what bill has sufficient momentum to become a law. Philip Kirschner is a dedicated, hard-working member of the staff of the State Bar. He has proven, in the past, to be invaluable to our Section in reviewing legislation and helping our Section develop a position to bring before the Board of Trustees. Phil actually mails all bills involved in family law to me and to our legislative coordinators. The legislative coordinators then research the bill and recommend a position to be taken by the Executive Committee. The Executive Committee then takes a position and this position is transmitted to the Board of Trustees. Of course, many bills are not important enough for our Section to take a position. At times, the Board of Trustees wants Section representatives to appear before the body to discuss the Section's position on a particular bill. Similarly, at times, after the Section has taken a position and the Board of Trustees has taken a position, it is necessary for a member of our Section to testify on the bill before a committee of the Legislature.

At the present time, our Section has supported, and the Board of Trustees has approved our position on, many pending bills. The Family Law Section supports S-552, which bill modernizes the law concerning marriage and married persons. Our Section also supports S-553, which amends and repeals portions of the law governing child custody and the supervision of children. The Family Law Section is in favor of S-558, which removes sex-based references in the law governing public assistance. We also support Assembly Bill A-284, which is designated as a bill involving the uniform disposition of community property rights at death.

The Family Law Section opposes Assembly Bill A-292, which provides grandparents with notice of their right to intervene in an action concerning custody, visitation or guardianship of their minor grandchildren.

There are many other pending bills which require our input. Among these bills are S-554, which amends the statutory law concerning divorce and alimony. In essence, the bill sets forth certain criteria to be used by the courts in a determination of alimony. Also pending is Assembly Bill A-152, which provides that there should be a presumption that joint custody is in the best interest of a minor child in all custody proceedings. Also dealing with custody is Assembly Bill A-42, which extends visitation rights of children to brothers and sisters of whole or half blood. Senate Bill S-26 is pending, which would establish the responsibility and liability of a parent, guardian or other person having legal custody for the illegal acts of juveniles. Senate Bill S-257 is pending, which would provide for a mandatory conversion privilege from a group to individual or family coverage under health insurance policies. The aforesaid are but a few of the bills pending now in the Legislature. I am sure more bills will be introduced during this legislative session. It is important that our input be received by the legislators.

As I indicated in my prior columns, not only should we, as the Family Law Section, react to pending bills, we should promulgate bills where necessary and if appropriate. I would urge all of you to contact either myself, David K. Ansell, or James P. Yudes concerning your position on these pending bills. I would also urge you to contact any of us if you want a particular law changed or modified through legislation. I can promise you that we will react to your proposal.

Plans for our Annual Family Law Section Dinner have now been finalized. Our affair will be at L'Affaire Restaurant in Mountainside, New Jersey on April 3, 1984. I promise to keep the speeches short, your glasses raised, and your plates full.

How Domestic Violence Cases Are Handled in Essex County

by The Hon. R. Benjamin Cohen

On April 9, 1982 New Jersey's "Prevention of Domestic Violence Act"[1] [the Act] became effective. In enacting this statute the Legislature recognized that domestic violence is a serious problem in our society. The Act is designed to protect victims of domestic violence from abuse[2] at the hands of cohabitants[3] by providing additional civil remedies for criminal acts. The plaintiff has the burden of proving that an act of domestic violence has occurred by a preponderance of the evidence. The same conduct may give rise to both a criminal complaint and a domestic violence complaint.

Domestic violence complaints are now filed in the Superior Court, Chancery Division, Family Part. Since many of these complaints request emergent relief, an *ex parte* hearing before a Family Part Judge[4] is frequently held on the same day that the complaint is filed.[5]

Within 10 days of the filing of the complaint a hearing is held in the Family Part, on notice to the defendant. If the complaint is sustained, the Court may enter a final order: prohibiting the defendant from having contact with the plaintiff or from entering the plaintiff's residence or place of employment; prohibiting the defendant from harassing the plaintiff or plaintiff's relatives; granting the plaintiff exclusive possession of a jointly owned or leased residence; determining child support, child custody and establishing visitation rights; requiring the defendant to pay to the plaintiff monetary compensation for losses[6] suffered as a direct result of the act of domestic violence; requiring the defendant to receive professional counseling.[7]

Violation of a temporary restraining order or a final order issued pursuant to the Act constitutes contempt.[8] In Essex County the summary contempt provisions of *R.*1:10 have been successfully utilized to enforce domestic violence orders. Based on a sworn affidavit or on testimony under oath alleging violation of an order which had been served on a defendant, a Judge of the Family Part issues an order to show cause why the defendant should not be cited for contempt. The order to show cause directs the County Prosecutor to prosecute the contempt proceeding and advises the defendant of his right to counsel. If the defendant is indigent, the court assigns *pro bono* counsel.

According to figures released by the Administrative Office of the Courts[9], during the first 12 months following the effective date of the Act (April, 1982 through March, 1983), domestic violence complaints filed in Essex County accounted for nearly one-fifth of all such complaints filed in the entire State. Moreover, in the 10 subsequent months (April, 1983 through January, 1984) domestic violence complaints were filed in Essex County at more than double the rate of the first 12 months.[10]

In response to the burgeoning domestic violence caseload in Essex County, the Assignment Judge requested that I study the problems involved and recommend procedures to insure the just and efficient disposition of these cases. A review of the statute indicated that several different departments within local and county government have responsibilities with regard to domestic violence cases. Accordingly I conducted a series of meetings with the Family Part Judges, and with representatives of the Municipal Court Judges, the Family Part (domestic relations) clerk's office, the municipal clerks' offices, the county sheriff's department, the county department of corrections, and the municipal police departments. After listening to the concerns and soliciting the suggestions of each department, I drafted procedures for processing domestic violence complaints and promulgated them to all departments.[11]

A copy of the procedures currently employed in Essex County for processing domestic violence complaints and ancillary enforcement (contempt) proceedings is set forth below. These are provided to familiarize the bar with these procedures and in the hope that other counties may benefit from our experience.

The Honorable R. Benjamin Cohen is a Judge of the Superior Court, Chancery Division, Family Part in Essex County. He was appointed to the bench in July, 1981.

Footnotes

1. P.L.1981, c.426, *N.J.S.* 2C:25-1, *et seq.* This statute has since been amended by P.L. 1982, c.82, effective July 23, 1982.
2. "Domestic violence" includes acts of assault, kidnapping, criminal restraint, false imprisonment, sexual assault, criminal sexual contact, lewdness, criminal mischief, burglary and harassment. *N.J.S.* 2C:25-3(b).
3. " 'Cohabitants' means emancipated minors or persons 18 years of age or older of the opposite sex who have resided together or who currently are residing in the same living quarters, persons who together are the parents of one or more children, regardless of their marital status or whether they have lived together at any time, or currently are residing in the same living quarters." *N.J.S.* 2C:25-3(a).
4. On weekends, holidays, and other times when the Family Part is not in session, a Municipal Court Judge or a Family Part Judge is assigned to issue temporary restraining orders. *N.J.S.* 2C:25-14(a).
5. In Essex County such an *ex parte* hearing is held in virtually every case on the day the complaint is filed.
6. *N.J.S.* 2C:25-13(b)(6) provides: "Compensatory losses shall include, but not be limited to, loss of

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Procedures for the Filing of Domestic Violence Complaints

—Superior Court, Chancery Division—
Family Part
(herein Family Part)

I. When the Family Part *is* in session, the Complaint and Temporary Restraining Order will be handled therein.

If a plaintiff appears in a Municipal Court or in the police station seeking to file a Domestic Violence Complaint during the hours of 8:30 a.m.-3:30 p.m. Monday thru Friday, they are referred immediately to:

Superior Court, Chancery Division-
Family Part
Clerk's Office, Room B-10
470 Martin Luther King, Jr. Boulevard
Old Court House
Newark, New Jersey 07102

If a Criminal Complaint arising out of the same incident is filed by the plaintiff, prior to the filing of the Domestic Violence Complaint, the Clerk of the Municipal Court has been instructed to give a copy of that Complaint to the plaintiff in an envelope marked:

Superior Court, Chancery Division-
Family Part
Clerk's Office, Room B-10
470 Martin Luther King, Jr. Boulevard
Old Court House
Newark, New Jersey 07102

for the plaintiff to bring with her/him to the Domestic Relations Court.

Note: A victim may file both a Criminal Complaint and a Domestic Violence Complaint if the victim desires to do so.

If a plaintiff files a Domestic Violence Complaint in the Family Part and subsequently files a criminal complaint in the Municipal Court, and the Municipal Court Clerk is aware of the existence of the Domestic Violence Complaint, the Municipal Court Clerk has been instructed to call the Family Part (Domestic) Clerk's Office (961-7265, 66) and inform them of the criminal complaint and then forward a copy of that complaint to the Family Part (Domestic) Clerk.

A. Filing of Complaint

1. When the *Plaintiff* appears in the Family Part (Domestic) Clerk's Office, the interviewer will seek to determine the following:
   a. If the issue is not one of Domestic Violence, referral will be made to appropriate court or agency.
   b. If the issue is one of Domestic Violence—an inquiry will first be made to determine if parties are amenable to diversion, i.e., remediation thru social service and *if so,* referred to the Family Crisis Unit (Room 410, OCH) for appropriate services. *If not,* formal court action will be taken and a Domestic Violence Complaint will be filed.

   Upon the filing of a complaint, the interviewer will complete a Pre-Court Interview Form detailing the following:
   - nature of the complaint
   - whether or not a criminal complaint was or will be filed
   - whether or not any other action has or will be filed and typed
   - whether or not child abuse is involved or if there has been a history of child abuse
   - whether or not Welfare is involved
   - any related issues.

   The Pre-Court Interview Form is then given to the Clerk to be used as the basis for the Domestic Violence Complaint Form.

2. The Clerk then completes the Domestic Violence Complaint Form — LR-44, Rev. 8/82.

3. The Clerk will then:
   a. index the complaint in the Russell Index
   b. give the complaint a unique docket number — FV-07-000-YY (calendar year) (or applicable court term)
   c. open a case file
   d. search the Russell Index for any other open Domestic Relations Complaints (and if any are found, cross-reference all cases involved)
   e. complete the description area of the Pre-Court Interview Form detailing the defendant's physical appearance, place of employment, work hours, and work phone number, as well as the plaintiff's phone number.

4. The file with:
   - TRO — LR-45, Rev. 8/82 (with top portion already completed).
   - Complaint
   - Pre-Court Interview Form

   and *Plaintiff* are brought before a judge hearing Domestic Relations matters (excepting those on D-CAN cases on that particular day) on a rotating basis—for the possible issuance of a Temporary Restraining Order.

B. Issuance of Temporary Restraining Order

1. If the Judge issues a TRO, the remainder of the form is completed and a date for the Final Hearing is set by the Judge as follows:
   - If the TRO is issued on a Monday or Tuesday, the Final Hearing ordinarily will be scheduled on the Wednesday of the following week.

- if the TRO is issued on a Wednesday or Thursday, the Final Hearing ordinarily will be scheduled on the Friday of the following week.
- if the TRO is issued on a Friday, the Final Hearing ordinarily will be scheduled one week from the following Monday.

2. After the hearing on the application a court attendant assigned to that particular court transports the plaintiff and file to the Clerk's Office.

3. The Clerk's Office then:
   a. dockets the result (TRO)
   b. schedules the time for the Final Hearing and indicates same on the TRO
   c. distributes the TRO as follows:
      Plaintiff—appropriate copy of the TRO
      Police (of appropriate town)—appropriate copy of the TRO
      Sheriff
      - appropriate copy of the Complaint for personal service on the defendent
      - appropriate copy of the TRO AND one copy of the TRO for Sheriff's records
      - one copy of the Pre-Court Interview Form
   d. types calendar and sends a copy to court assigned.

4. The Sheriff's Detective Bureau then attempts to personally serve the defendant—and subsequently indicates on the TRO, in the Return of Service area, whether such service was made or not, and signs and dates same (with an explanation as to why, if unable to serve).
   - the TRO, with the Return of Service area completed by the Sheriff's Office, is then returned to the Clerk's Office and filed in the corresponding jacket. If this information is not in the jacket by the hearing date, the Clerk will call the Detective Bureau for that information and indicate the results in the jacket.

C. Final Hearing

1. If:
   a. prior to the Final Hearing the plaintiff petitions the Court to withdraw the complaint, the Court may administratively dismiss the complaint and vacate the Temporary Restraining Order.
   b. at the time of the Final Hearing, the Plaintiff does not appear, the Court may dismiss the complaint and vacate the Temporary Restraining Order.
   c. at the time of the Final Hearing, the defendant does not appear, the Court may continue the restraints imposed on the Temporary Restraining Order until further order of the Court; enter a default judgment; issue a bench warrant for the defendant if appropriate; or take other necessary action.

   As a result, all parties (defendant, plaintiff, Sheriff and appropriate police) are so notified by the Clerk. If a default judgment is entered, the Clerk's Office will then proceed as indicated in Section B, 3 and 4.

2. At the *Final Hearing:* if a *Final Order* is issued by the Judge:
   a. the court attendant from the appropriate court, with the court jacket, will escort the Plaintiff and Defendant to the Family Part Clerk's Office.
   b. the Clerk will distribute the Final Order as follows:
      - appropriate copy to the defendant (with Return of Service area completed)
      - appropriate copy to the Plaintiff
      - appropriate copy to the Sheriff (BCI Unit)
      - appropriate copy to the applicable Police Department
   c. If a support or restitution issue is involved, the defendant and plaintiff will be escorted to the Probation Department, (Room 412A, OCH) with copies of the Final Order, for resolution of those issues.
   d. If Social Services are ordered, parties will be referred to the Family Crisis Unit (Room 410, OCH) for appropriate services.
   e. the Clerk will then docket the results of the Final Hearing.

3. Any *Interim Orders* entered by the Judge are processed in the same manner as a Final Order (see #2).

D. Enforcement Proceedings: Contempt

1. If a temporary or Final Order has been violated, and:
   a. the plaintiff appears in the Clerk's Office OR
   b. the plaintiff notifies the police and the police take the defendant into custody
      - the police will bring the defendant immediately to the Prison Floor (Sheriff's Office) during working hours or to the Jail after working hours, with a copy of the *Arrest Report* and a copy of the *Restraining Order*
      - The Clerk's Office will be notified, by the Sheriff or the Jail, and the defendant and necessary paperwork will be brought to the Clerk's Office.

The Clerk then completes an *Application for the Rescheduling of a Domestic Relations Matter.*

2. This application (with a summary statement concerning the alleged violation), and a notation that personal service of the order has been effected, will be sent, with the entire jacket, to the Judge who originally entered the order (regardless of whether that particular Judge is on Domestic Relations or Juvenile Delinquency at that time).

3. If the defendant is in custody, the Sheriff will at this time transport the defendant to Court.

4. Based on the application before him/her, the Judge may then issue an *Order to Show Cause* why the defendant should not be held in contempt and set the matter down for a hearing before a Judge other than him/herself (preferably on a Domestic Violence Calendar date).

5. The Judge will inform the defendant of his/her right to an attorney. If unable to afford one, the defendant will be advised to contact Legal Services. Where appropriate the Judge may set bail, issue a bench warrant or take other necessary action.

6. Upon issuance of an Order to Show Cause, the Clerk's Office reproduces and distributes all necessary documents as follows:
   Prosecutor—
   (one copy:)
   - Order to Show Cause
   - Final Order
   - Temporary Restraining Order
   - Complaint
   - (any interim orders)

   Sheriff—
   (who will then *serve* plaintiff and defendant)
   (one copy:)
   - Order to Show Cause
   - Final Order
   - Temporary Restraining Order
   - Description Sheet

   Defendant—(one copy:)
   - Order to Show Cause
   - Final Order
   - Temporary Restraining Order
   - Complaint
   - (any interim orders)

   Plaintiff—
   (one copy:)
   - Order to Show Cause

   The Clerk's Office then: indicates in the file that service of the Order was made
   - types a calendar
   - sends a copy to the Court assigned.

7. The Hearing on the Order to Show Cause is then held and the outcome docketed, accordingly.

II. When the Family Part *is not* in session, specifically: on weekends, holidays and other times when the court is closed (after 4:00 p.m.) a Municipal Court Judge shall be available to issue a Temporary Restraining Order.

When the *Municipal Court is* in session and the *Family Part is not,* the *Municipal Court Clerks* have been instructed to:

1. Take the Domestic Violence Complaint (LR-44, Rev. 8/82).

2. Prepare a Temporary Restraining Order (LR-45, Rev. 8/82).

Once the Municipal Court Judge has affixed his signature to the Temporary Restraining Order it is *imperative* that you indicate on the order the following:

Hearing Place:
Superior Court, Chancery Division—
Family Part
Room B-10
470 Martin Luther King Jr. Boulevard
Newark, New Jersey 07102
Time: 9:00 a.m.
Date: *Fridays only*—(within ten (10) days of filing of complaint) any complaint not deliverable to the Clerk of the Family Part before Wednesday morning should be scheduled for the Friday of the following week.

3. Immediately forward a copy of the Domestic Violence Complaint and Temporary Restraining Order to the local police department for immediate personal service upon the defendant. (Both the complaint and the order must be served).

The Return of Service Section on the Order must be completed by the police and returned to your court. (This area *must* be completed, even if service was not made).

4. Upon receipt of Temporary Restraining Order with Return of Service completed by the police, complete the Transmittal Form.
   Please be sure to include the following on the Transmittal Form:
   - plaintiff's address and phone number
   - description of defendant
   - defendant's place of employment and work phone number.

NOTE: A victim may file both a Domestic Violence Complaint and a Criminal Complaint if the victim desires to do so.

5. Upon completion of all of the above, forward:
   - 1 copy of the Domestic Violence Complaint
   - 1 copy of the Temporary Restraining Order
   - 2 copies of the Transmittal Form (with return self-addressed envelope; one copy will then be returned to the Municipal Court as proof of receipt by the Family Part)
   - 1 copy of any Criminal Complaint filed, if applicable.

TO:

Superior Court, Chancery Division—
Family Part
Clerk's Office, Room B-10
470 Martin Luther King, Jr. Boulevard
Old Court House
Newark, New Jersey 07102

OR

When the *Municipal Court is not* in session and the *Family Part is* also *not* in session, the *Municipal Court* has been instructed as follows:

1. A Municipal Court Judge shall be available to the police (authorized desk personnel only) on an emergent duty basis via phone.
2. A supply of Domestic Violence Complaints and Temporary Restraining Orders shall be given to the police for use on an emergent basis.
3. Police shall contact the Municipal Court Judge on emergent duty and at the Judge's direction, complete the complaint and Temporary Restraining Order accordingly. In the absence of a Judge's signature on the order, the police shall note: "By oral order of the Judge____ _____" and serve both the complaint and Temporary Restraining Order on the defendant and indicate said service in the Return of Service Section of the order.

The following day, the complaint and order shall be delivered to the court, whereupon the Clerk shall secure the signature of the Judge.

From this point on, the Municipal Court Clerk shall follow the procedure detailed in Section II A. (4) and (5).

A. The Family Part (Domestic) Clerk's Office: upon receipt from the Municipal Court of the
   - Complaint AND
   - Temporary Restraining Order (with a hearing date already set by the Municipal Court)

shall immediately

1. index the complaint in the Russell Index
2. give the complaint a unique docket number—FV-07-000-YY (calendar year) (or applicable court term)
3. open a case file
4. search the Russell Index for any other open Domestic Relations Complaints (and if any are found, cross-reference all cases involved).
5. check the court hearing date which should be Friday at 9:00 a.m. and
6. add said case to the Court's calendar for that day for the *Final* Hearing.

From this point on, the procedures are the same as those detailed in Section I, C through D.

Footnotes

(continued from page 123)

earnings or support, out-of-pocket losses for injuries sustained, moving expenses, reasonable attorney's fees and compensation for pain and suffering. Where appropriate, punitive damages may be awarded in addition to compensatory damages."

7. *N.J.S.* 2C:25-13(b).
8. *N.J.S.* 2C:25-15(b).
9. See, "1983 Report on the Prevention of Domestic Violence Act," submitted June 29, 1983 by the Administrative Director of the Courts.
10. This statistic was provided by the Family Part (domestic relations) Clerk's Office, Essex County.
11. I wish to acknowledge the able assistance of Suzanne Karkut, Assistant Court Administrator who put a great deal of time and effort into the drafting and dissemination of these procedures.

Recent Cases

by Myra T. Peterson

AGREEMENTS—Oral contract made by attorney with full knowledge and consent of client held binding despite client's later repudiation of such.

A trial for divorce was held in December, 1980 resulting in a February, 1981 Final Judgment of Divorce. Because the parties' only child was living with her grandparents while the plaintiff-wife attended school, the Final Judgment of Divorce provided that when the child was to resume living with her mother a motion for child support would be brought.

That motion was brought in January 1982 and the defendant-husband cross moved for elimination of alimony of $26,000 per year based upon the plaintiff's completion of her Master's degree and her subsequent employment. The trial court ordered that the husband pay $125 per week child support and granted the defendant's motion to eliminate alimony.

The plaintiff appealed claiming that because of child care and housekeeping expenses, transportation expenses, etc., her net employment income was insufficient to replace the alimony that she had been receiving and that the trial court erred in eliminating such.

In March 1983, the Appellate Division reversed the trial court's order eliminating alimony and remanded the case for the purpose of setting an appropriate alimony amount such that the plaintiff's income would not be lessened by reason of the expenses attendant upon her employment.

The remand was set down for trial on November 7, 1983. On that date there were intensive settlement negotiations between the plaintiff who was

present in court, her attorney, the defendant's attorney, the defendant who chose not to be in court but was in telephonic communication with his attorney, the court-appointed accountant and the court. The settlement negotiations resulted in a settlement of the case which was reported to the court in chambers by both attorneys, the defendant's attorney representing to the court that his client had agreed with the terms of the settlement during telephone conversations.

On November 11, 1983, plaintiff's attorney sent to the defendant's attorney a consent order which embodied the settlement. Some few days later, the plaintiff's attorney's office was called by the defendant's attorney who stated that the defendant did not wish to abide by the terms of the settlement and that the defendant's attorney and his firm would necessarily withdraw as counsel. The defendant retained other counsel. The consent order was not signed by the defendant, his first attorney or his new attorney, and the plaintiff brought an order to show cause to specifically enforce the oral settlement entered into.

On the return date of the Order to Show Cause, the court ruled that the oral settlement agreement, entered into by the parties' respective attorneys with the specific knowledge, consent and authorization of their clients, as reported to the court in chambers would be formalized by Order despite the fact that the defendant thereafter attempted to repudiate the agreement. The court noted that the defendant did not deny that he had agreed to the settlement on November 7, but instead was merely unhappy with it *after* he had agreed to such.

In its opinion, as yet, unreported, the court noted that matrimonial settlement agreements, whether oral or written, entered into with the consent of both parties are initially binding and that stipulations "fall into the same favored position." The court also noted that traditionally in the law courts a settlement made by an attorney which was authorized by his client has been found to be binding despite the fact of a later repudiation. See *Philips v. Pullen,* 50 N.J.L. 439 (E. & A. 1888), *Honeywell v. Bulb,* 130 N.J. Super. 130 (App. Div. 1974) and *Pascarella v. Bruck,* 190 N.J. Super. 118 (App. Div. 1983).

The court specifically stated that whether or not an agreement will be binding does not rest upon whether that agreement is spread on the record and that the spreading of an agreement on the record is not "a procedural requisite to validity and/or enforcement." "Under the circumstances of this case, both attorneys have the authority to and did bind their clients . . . . [T]he property settlement and support agreement is a binding contract and would be upheld."

[COMMENT: The decision of the trial court is in accord with the recent Appellate Division decision in Pascarella v. Bruck, *190 N.J. Super. 118 (App. Div. 1983). In* Pascarella, *a medical malpractice case was settled, the terms of which were* not *put on the record. Three days after the agreement was reached, the plaintiff telephoned her attorney to inform him that she did not wish to go through with the settlement. She moved to upset the settlement based upon the facts that at the time of settlement she was emotionally pressed, vulnerable to suggestions, had not properly reflected upon the situation, did not know why she had indicated that the settlement was acceptable and that when she arrived home from court she had been "quite confused" and had determined that she could not "in good conscience" accept "the proposals."*

On motion, the trial court vacated the settlement, the court indicating that it did not consider the oral settlement binding because "(1) the judge had had 'no hand in any of [the] negotiations'; (2) the settlement was 'in an oral form' and had to be put in written form, and (3) the settlement had not been placed upon the court's record."

The Appellate Division ruled that the trial judge had erred in vacating the settlement. The appellate court noted that "there is no legal requirement that there be court approval" of a settlement, that spreading the terms of an agreement upon the record "although a familiar practice, is not a procedure requisite to enforcement," that the fact that the agreement was oral "is of no consequence" and "the failure to do no more than, as here, inform the court of settlement and have the clerk mark the case settled has no effect on the validity of a compromise disposition."

Unfortunately, matrimonial law is often viewed as a species of law unto itself. Certainly, while procedures may differ from court to court, absent special factors attendant in matrimonial cases, substantive law should not. The matrimonial trial court's decision upholding an oral matrimonial agreement demonstrates that contract law is contract law whether it be between spouses or former spouses or unrelated civil litigants.]

Davidson v. Davidson, Docket No. M-10121-77 (Chan. Div.-Family Part, Decided February 7, 1984) (Bergen County, Krafte, J.S.C.) (opinion not yet approved for publication)

Ed. Note

While the New Jersey Family Lawyer *receives all decisions approved for publication, given the length of time between issuance of a decision and its publication and the fact that so many opinions remain unreported, New Jersey practitioners should be aware of significant, even unreported, decisions. If you are involved in a case in which a novel opinion is issued, so that the opinion may be shared with our readers, kindly send the opinion to:*

Myra T. Peterson, Esq.
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One Mack Centre Drive
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Military Pensions Plus: A Practical Primer of the Uniformed Services Former Spouses' Protection Act

by William J. Thompson

Introduction

As most matrimonial practitioners are aware, Public Law 97-252 substantively amended the then-applicable federal law concerning the distribution of military pensions.[1] Through this statute titled the Uniformed Services Former Spouses Protection Act (USFSPA), Congress effectively reversed the decision of the United States Supreme Court in *McCarty v. McCarty,*[2] which had prohibited a state court from distributing a military pension upon divorce or dissolution of marriage. The USFSPA, effective February 1, 1983, now permits a state court, subject to the provisions of the Act, to treat retirement pay of a present or retired member of the armed services "as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."[3]

Since the passage of this federal legislation, most commentators have focused upon the substantive legal effect of this legislation in returning to state courts, such as those of this state, the authority to distribute a military pension as marital property within the context of divorce litigation.[4] Clearly, the USFSPA creates an enormous advantage to the matrimonial practitioner by facilitating a direct "in-kind" distribution of a military pension. Yet, the statute by its terms is not applicable to all military pensions. It is clear that Congress did not intend to provide governmental assistance in effecting an in-kind distribution nor insurance of continuation of military-related benefits in all cases. Thus, the statute as amended contains rather specific conditions which limit the applicability of its terms. Those conditions create numerous practical problems which require careful scrutiny. This article will focus upon those practical concerns in an effort to facilitate the use of the USFSPA by New Jersey practitioners.

Pension Distributions

One of the principal reforms of the USFSPA is contained within 10 U.S.C. 1408. That section expressly permits direct payments to certain former spouses of members or retired members of the armed forces directly from the appropriate branch of the armed services. Obviously, such a remedy has significant enforcement advantages. An eligible former spouse can receive direct payments from the armed services without those payments passing through the former member spouse. However, the USFSPA is not applicable in all circumstances. Some of these conditions which must be met are as follows:

1. The parties must have been married for a period of at least 10 years during which the member spouse performed at least 10 years of creditable service.[5]

2. The decree and/or court order directing direct payments must be a *final* decree.[6] Interestingly, the statute does include in addition to divorce and dissolution decrees, final decrees of annulment or legal separation. Additionally, the decree must not be subject to appeal in order to create a present entitlement under the act.[7] The act thus does not, by its terms, permit direct payments for awards of pendente lite relief.

3. The order must provide for payment for child support, alimony or division of property.[8] The USFSPA would not appear to be applicable to orders directing payments for other purposes, such as attorneys' fees.

In incorporating the above conditions within the statute, Congress rather explicitly limited the applicability of the direct payment provisions of the USFSPA. While these limitations are important, they are not substantive in nature. The payments through the USFSPA were not intended to be an exclusive remedy. Nor was the USFSPA intended to implicitly limit a state court's authority to distribute a member's retirement or pension benefits. Thus, the USFSPA expressly states that:

> "Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum permitted . . . Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section . . . "[9]

It is clear from this section that Congress did not legislatively limit a state court's authority to distribute a member's pension, nor did Congress intend to provide an exclusive method of enforcement of a state court order pertaining to child support, alimony or property division. The USFSPA, therefore, must be read as providing an enforcement mechanism which supplements all existing state court remedies. Unquestionably, a member or retired member can be required to make direct payments either in addition to or in lieu of direct payments through the armed services to a former spouse.

William J. Thompson is an associate of the Haddonfield firm of Archer & Greiner. Mr. Thompson has previously contributed to this publication and was the co-author with Lee M. Hymerling of "Equitable Distribution: A Coherent Approach," which was presented by Mr. Hymerling at the Second Annual Family Law Symposium.

The USFSPA contains numerous sections which limit its scope. Congress did not intend to make the federal government's administrative services available to all former spouses free of charge. The limitations contained within the USFSPA create pitfalls which can serve as traps for the unwary. Some of these pitfalls are as follows:

1. **Jurisdiction.** The USFSPA contains certain jurisdictional limitations. Thus, the act precludes a state court from ordering a direct distribution from the armed services unless that court has jurisdiction over the member "by reason of (a) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (b) his domicile in the territorial jurisdiction of the court, or (c) his consent to the jurisdiction of the court."[10] Obviously, since the long arm jurisdiction of the state court may extend beyond these statutory jurisdictional limitations, it may be advisable to include within any order or decree a statement of the member spouse's residence, domicile or consent to jurisdiction to avoid any dispute in obtaining the direct payment benefits of the USFSPA. Additionally, the court order should, if the member spouse is an active member of the armed services, contain the required certification that the rights of the member under the Soldiers and Sailors Civil Relief Act of 1940 have been observed.[11]

2. **Calculation of Payments.** The USFSPA permits direct payments calculated solely upon a member's *net* pay. Section 1408 specifically permits only a distribution of "disposable retired or retainer pay."[12] As defined within the USFSPA, "disposable retired or retainer pay" is calculated following appropriate deductions for monies owed by the member to the United States government; withholdings for federal, state or local income taxes; and various other deductions. Obviously, net pay calculations differ dramatically from gross monthly receipts. A 30 percent award of a member's "disposable retirement pay" may differ dramatically from 30 percent of that member's gross monthly entitlement. In order to prevent ambiguity or miscalculation, it may be advisable to incorporate within any court decree an appropriate provision expressly setting forth the calculations upon which the member's "disposable retirement pay" has been based. Inclusion of this calculation within the body of the order may prevent difficulty in obtaining enforcement through the armed services, and may further provide the recipient spouse with an independent avenue of relief through the state court should those calculations prove inaccurate at some point thereafter.

3. **Exclusion for "Retired for Disability" Pay.** Although permitting direct payment of either a percentage or dollar amount of a member's "disposable retirement pay," the USFSPA apparently precludes direct distribution of the retirement pay of a member retired for disability under chapter 61 of the United States Code.[13] In calculating a member's "disposable retirement pay" for distribution purposes, one must, therefore, investigate whether the member spouse is receiving as a component of his monthly check such disability payments from the federal government. If so, these disability payments if received under chapter 61 of the United States Code may *not* be included within the armed services calculation of the member's "disposable retirement pay" as defined within this Act. The existence of such a disability component could dramatically alter the amount of the monthly payments to be received by the former spouse. Again, this concern emphasizes the advantage of including within any applicable order or decree a specific calculation defining the anticipated "disposable retirement pay" of the member spouse. Should it be determined that that calculation is erroneous, the recipient spouse should have an available remedy through the issuing state court.

4. **Maximum Payments Permitted.** Under the USFSPA, the armed services will only honor orders of payments which do not exceed 50 percent of the member's "disposable retirement pay" as defined above.[14] Again, this limitation appears to be procedural, limiting only the amount of the direct payment which the recipient former spouse may receive from the appropriate branch of the armed services. Should for any reason the recipient spouse's entitlement exceed 50 percent of the member's "disposable retirement pay," the former spouse's remedy lies with the state courts, not with the USFSPA. In such circumstances, the court order should contain specific language imposing a direct obligation upon the member spouse to, in effect, "make up" any difference between the recipient's former spouse's entitlement and the amount tendered directly from the armed services.

5. **Amount to be Paid.** The USFSPA specifically requires that the court order calculate the payments to be tendered "expressed in dollars or as a percentage of disposable retired or retainer pay."[15] Clearly, the method of calculating the payment can have a dramatic effect. By expressing the payment in a specific dollar amount, the recipient spouse will have absolute certainty as to the amount which he or she can anticipate receiving on a monthly basis. However, utilization of a specific dollar figure will have the detrimental effect of barring the recipient spouse's entitlement to automatically share in any increases or adjustments in the member spouse's retirement. Under 10 U.S.C. 1401(a), a member's retirement or retainer pay is adjusted annually. Utilization of a specific dollar figure may bar a spouse's entitlement to share in these annual adjustments. One alternative, of course, would be to utilize a stated percentage of the member's "disposable retirement pay," with a further stated dollar amount minimum. This method would have the advantage of providing the recipient spouse with the certainty of a minimum payment while, at the same time,

allowing that spouse to share in any annual adjustments which may occur thereafter.

6. **90-Day Hiatus.** Under the terms of the USFSPA the armed services are required to commence direct payments to an eligible former spouse not later than 90 days following the date of service. Clearly, this can create a hiatus of 90 days or longer between the entry of a court decree entitling a spouse to receive payments, and that spouse's actual receipt of the first check. In order to prevent any ambiguity as to whether the recipient spouse is entitled to receive payments during this period, it is suggested that the applicable court order specifically provide for direct payments from the member spouse until the recipient spouse begins to receive the checks from the appropriate branch of the armed forces. Inclusion of such a provision within the court order or decree should prevent the accumulation of any arrearages between the entry of the decree and the actual receipt of payments from the armed services. Additionally, such a provision would avoid any ambiguity as to whether or not the final decree was intended to provide to the recipient spouse payments during this hiatus.

7. **Tax Obligations of Payor/Payee.** As indicated above, the "disposable retirement pay" under the terms of the USFSPA is calculated on a *net* basis. The statute on its face is silent as to any income tax ramifications of direct payments from the armed services to a recipient former spouse. Obviously, these tax ramifications may differ depending upon whether the payments are intended for property distribution, child support or allmony.

It appears that, in the first instance, the entire retirement pay of the member spouse is treated by the armed services as income of that spouse, regardless of whether those payments are made directly to the member or to an eligible former spouse. Given these circumstances, it may be advisable to include within any order or decree a specific statement of the intended income tax consequences of the proposed direct distribution.

Other Military Related Benefits

The above-discussed pension provisions are the principal focus of the USFSPA. However, the act also extended to certain former spouses continued medical benefits and continued entitlement to commissary and exchange privileges. Entitlements under these sections, however, are even more narrowly defined than the direct payment provisions in regard to a member spouse's military pension.

Under the USFSPA, Congress has extended to certain former spouses an entitlement to continued receipt of military health benefits.[16] However, in order to qualify for these benefits, the former spouse must satisfy all of the following conditions:

1. The divorce must have occurred subsequent to the effective date of the statute, February 1, 1983;

2. The parties must have been married for at least *20* years during which time the member spouse performed at least *20* years of creditable service;

3. The former spouse must not have remarried; and,

4. The former spouse must not have medical coverage under an employer-sponsored health plan.

The above conditions should be contrasted to those imposed upon a former spouse who seeks direct pension payments from a branch of the armed services under the USFSPA. Most importantly, in order to retain health benefits, the former spouse must have been married for *20* years, as opposed to *10* in the pension context. Additionally, the former spouse must not have remarried, and must not have available other employer-sponsored health plans. Clearly, Congress intended these benefits to apply to a relatively narrow set of circumstances. Nevertheless, it is important to be aware of their existence.

Consistent with the above, the USFSPA similarly provides for a continuation of commissary and exchange privileges. Section 1005 of Public Law 97-252 expressly authorized the Secretary of Defense to prescribe regulations continuing commissary and post exchange privileges to former spouses "to the same extent and on the same basis as the surviving spouse of a retired member of the uniform services." Eligibility for these benefits is limited to unremarried former spouses who satisfy all of the above limitations set forth in 10 U.S.C. 1072(2)(F).

Obviously, while these benefits apply to a relatively narrow line of cases, it is important that the Bar be aware of their existence. Certainly, in the context of a lengthy marriage, the continuation of health care benefits and even commissary and post exchange benefits may be of substantial importance to the recipient spouse.

Enforcing Entitlements Under the Act

In regard to obtaining direct payments from the armed forces of a member's pension benefits, the USFSPA requires effective service upon the secretary of the armed services and/or his designated agent.[17] In order to insure that any request is handled expeditiously, it is suggested that the request be tendered in writing accompanied with the following:

1. The member's name and social security number (the armed services serial number of the member may be viewed as insufficient);

2. A certified copy of the court order or decree. In order to insure enforcement, it is suggested that the decree be certified within 90 days of service upon the armed forces;

3. A written statement confirming that the enclosed order has not been modified and/or is not appealable, or certifying that the former spouse does not intend to take an appeal. This latter suggestion may be important to insure that

(continued on page 134)

The Use of Experts in Matrimonial Cases

by Lynne Strober

Over the past five years, the appointment of Court experts in matrimonial actions has evolved from an occasionally used mechanism of last resort to a regularly implemented method of fact finding. The implications of this trend on our adversarial system are substantial. The fundamental right of every litigant to independent discovery and a trial on the merits risks becoming subordinate to the findings of an appointed fact finding agent of the Court and judicial economy.

Traditional View

In *Rothman v. Rothman*[1], the Supreme Court of New Jersey in establishing a three prong procedure for determining equitable distribution noted that

> "the assistance of appraisers and accountants will *sometimes* be required."

In the context of *Rothman,* it is incumbent on the litigating parties to retain the experts to assist the Court in the valuation of the marital assets.

Subsequently in *Levine v. Levine*[2], the Appellate Division noted that the *parties* bear "the primary obligation in adducing those proofs which will enable the judge to make sound and rational evaluations." The Trial Court was directed to appoint an expert *only where* "the parties' proofs do not provide the Court with sufficient foundation and guidance[3] to properly distribute the marital assets." Furthermore, under such circumstances, the Court-appointed accountant only served the purpose of educating the Court in regard to the methodology and data base employed by the parties' own experts.

Court-Appointed Experts

Approximately four years later in *Mayer v. Mayer*[4], the Appellate Division noted that rather than having the parties obtain their own experts, the parties seeking to engage experts should contact the Court and, if possible, have the Court select a mutually agreed upon expert to make the evaluation of the marital assets subject to distribution. The *Mayer* case represented a subtle but significant shift from the more traditional view as set forth in the pre *Mayer* case law as well as the 1979 Pashman II Report. In *Mayer,* the concept of the experts as an arbitrator or mediator was first afforded serious consideration by the trial court.

In *Fellerman v. Bradley*[5], Judge Krafte expanded the *Mayer* holding and asserted the Court's prerogative to appoint an accountant in a case with a substantial amount of property subject to distribution. Judge Krafte's opinion reflects the growing consensus throughout the Courts of the State that for purposes of judicial economy, i.e. settlement, an accountant be immediately appointed to resolve all outstanding financial issues. The recently implemented rule amendments to the Family Part of the New Jersey Superior Court incorporate by rule the *Fellerman v. Bradley* position on Court-appointed experts.

Rule 5:3-3 entitled *Examinations by Experts; Social Investigations,* states in pertinent part:

> "Whenever the Court, in its discretion, concludes the disposition of an issue, will be assisted by expert opinion and *whether or not the parties' propose to offer or have offered their experts' opinions,* the Court may order any person under jurisdiction to be examined by a physician, psychiatrist, psychologist or other health or mental health professional assigned by it, designated by it and may appoint an accountant or other appropriate expert to appraise the value of any property or to report and recommend as to any other issues. The Court may also direct who shall pay the cost of such examination or appraisal. The Court may also require an investigation by a probation officer or other such person at any time during the proceeding before."

It is clear in the wake of the rule amendments that the appointment of experts by the Court is no longer predicated by any failure of the party to provide the Trial Court with sufficient foundation and guidance to render its decision. The transition from *Rothman* and *Levine* through *Fellerman* and *R. 5:3-3* clearly illustrates a trend that places great reliance on the findings of the Court-appointed expert in both the fact-finding and case settlement processes.

Litigants' Rights

Our system of jurisprudence is predicated on the ascertainment of the truth from the presentation of proofs by the parties in an adversarial

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trial context. The Rules of Court, specifically *R.* 4:10-2 (discovery) and *R.* 4:79-2a (Preliminary Disclosure Statement), guarantee the right of every litigant to procure material, documents and information as well as expert opinions in anticipation of litigation. Any procedure which inherently alters the aforesaid rights of litigants jeopardizes the very integrity of the adversarial process.

In matrimonial cases, the Trial Court itself bears the burden of extracting the truth from the proofs submitted by the parties. In selecting an expert to operate as an arm of the Court, the Trial Court has passed the burden of adjudicating the financial issues to the appointed expert. Unless extreme caution is exercised, the Court-appointed expert in effect becomes the ultimate finder of fact. Clearly, this result is anomalous to the fundamental precepts of our judicial system.

Examination at Trial

A collateral problem to the degree of influence afforded the Court-appointed expert is the effectiveness of examination of that expert witness at trial. The data base and methodology utilized by the expert is frequently limited by the discovery produced by the parties. In taking a so-called "objective" position, the Court-appointed accountant may not have the impetus of an expert retained by a party to explore and search for hidden assets. One litigant may have all the knowledge of assets and income and provide a slanted picture to the Court-appointed expert. The Court's interest in insuring future participation by that expert and other members of his profession may result in the Court protecting the witness and reducing the weight of the testimony produced by cross-examination. The Court, being subject to human frailty, may be placed in an adversarial position vis-a-vis one of the litigants. Clearly, an apparently insurmountable burden is imposed on counsel to demonstrate that the findings of this expert should be relied upon rather than the Court's own expert. In effect, the litigant becomes bound by the Court-appointed expert's conclusions.

In custody cases, for example, the Court is empowered with broad discretion in determining custody arrangements in the best interests of minor children. However, because the credibility of the Court-appointed expert is virtually unassailable, the discretionary power in the Court may be transferred to the expert. In such circumstances, the findings of the parties' experts are not afforded due consideration. The conclusions of the Court-appointed expert provide a self-serving security to a judge faced with the difficult decision of determining custody. The Court can readily justify its decision on recommendations of its own expert; it is far more difficult for the Court to conclude its expert erred.

Furthermore, the Appellate Division does not often set aside Trial Court determinations in matrimonial cases. The Family Part Judge is granted vast discretion in deciding issues of custody, support and equitable distribution. As a result, on Appellate Division review the burden of demonstrating the Trial Court's erroneous reliance on its own expert remains insurmountable.

Increased Costs

An additional concern raised by the increasing trend of bringing Court-appointed experts into matrimonial cases on a regular basis is the increased costs to the litigant. Since Rules permit the Court to impose an expert upon the parties, a party seeking to employ their own expert may be required to satisfy the expenses incurred by the Court-appointed accountant as well. A litigant seeking to exercise the full spectrum of his discovery rights will be financially penalized by his option to retain an independent expert. While the Court seems to encourage a more controlled procedure for matrimonial cases rather than permit the maximization of the adversarial system, the parties should not only have the right to control the expenses of litigations but should not be penalized for the exercise of fundamental rights afforded the system.

Preservation of Adversarial Process

The ultimate solution to this problem is not a question of implementing a blanket limitation on the use of Court-appointed accountants but rather the implementation of a procedure that would preserve the adversarial nature of the system. It is unquestioned that in custody and complex financial cases, evaluation by experts is necessary in the process of adjudicating a particular matter. While the Court should encourage the presentation of expert information in the subject area at issue, such invaluable testimony should not be presented at the expense of a litigant's right to challenge the opinions and methodology of an expert witness. For example, when undue weight is given to a psychiatrist or psychologist appointed by the Court in a custody matter, a child's future may be drastically altered by a few hours time the litigants spent with the Court-appointed expert. The concern is clear; the expert may be making a personal judgment revealing the stress and strains of his own personal circumstances. The Court-appointed expert may not believe a litigant. Unfortunately, the persuasive testimony of a detective, school official or neighbor is not heard. The Court's expert may conclude a litigant's motives are wrong and ignore the allegations. Fundamental fairness to the litigants as well as the child involved dictates that each party be afforded the opportunity to present expert testimony that presents their position to an impartial trier of fact.

In an area of the law replete with emotion and personal trauma, it is imperative that a litigant's rights not be compromised for the sake of judicial economy. While it is practical reality that the experts retained by the respective litigants will generally articulate an evaluation compatible with

their client's position, it is up to the Court, as the trier of fact, to weigh the testimony and credibility of such experts reaching its decision. Implementation of a strict and limited discovery mechanism wherein an agent of the Court becomes the finder of fact and settlement is implicitly coerced transforms the function of the Court. The adversarial process is supplanted by a mediation process. While statistics may demonstrate that the latter procedure is conducive to the early settlement of a case, it is the matrimonial litigants' rights which must be afforded priority. The Court system has an obligation to permit every litigant the opportunity to present their position to the Court with the benefit of experts and lay witnesses, particularly, where they disagree with the Court-appointed expert.

The instant argument goes beyond the issue of Court-appointed experts and is directed at the method in which matrimonial cases are to be resolved. So long as matrimonial cases are being heard within our present legal system, the procedures supporting the adversarial process must be used rather than curtailed and controlled. Accordingly, each and every litigant is entitled to have complete and adequate discovery and is similarly entitled to present the fruits of that discovery to the trier of fact for full and impartial review.

Clearly, a fair and just settlement is preferred to litigation. However, the boundaries of amicable resolution must not be defined by the Court-appointed expert. Negotiations must include input by the parties' own experts. It may make settlement discussion more complicated and require consideration of opposing expert viewpoints. However, as matrimonial practitioners, we should meet this challenge rather than abdicate our responsibilities to a Court-appointed expert.

Military Pensions Plus

(continued from page 131)

the request for direct payments are not withheld pending the expiration of the time period permitted for the filing of an appeal;

4. The name and address of the applicant;

5. Proof of marriage (i.e., marriage certificate), and certification of service of the member, designating the period of active service of the member during the marriage.

All of the above should be served upon the appropriate branch of the armed services. Pursuant to the USFSPA, service is to be effected upon the secretary of the appropriate branch of the armed services or such agent as he may designate under appropriately-adopted regulations.

In regard to medical, commissary and post exchange privileges, an appropriate ID card should be obtained through a local armed services issuing office. Again, the recipient spouse should submit a written request for the issuance of an identification card accompanied with proof of marriage (marriage certificate); proof of divorce after the effective date of the USFSPA (February 1, 1983); and, a certified statement setting forth the member's period of service during the marriage.

Summary

As with most governmental applications, enforcement of a recipient spouse's entitlements under the USFSPA requires careful attention to detail. This act, if followed carefully, provides an excellent remedy to eligible former spouses in cases involving military pensions. Through the use of this Act, the parties can avoid difficult and frequently litigated pension valuation questions. Additionally, the USFSPA can provide a remedy for the often-difficult question of insuring continuation of health benefits in the post-divorce setting. Hopefully, this article will benefit the Bar in insuring that the benefits available under this act are effectively utilized.

Footnotes

1. P.L. 97-252 is presently codified within the following sections of the United States Code: 10 U.S.C. 1072 (2) (F); 1086 (c) (3); and 1408. Additionally, P.L. 97-252 incorporated certain amendments to 10 U.S.C. 1076, 1448 and 1450.
2. *McCarty v. McCarty,* 453 U.S. 210 (1981).
3. 10 U.S.C. 1408 (c) (1).
4. See, e.g., Arenstein, Distribution of Military Benefits—Congressional Reform, N.J. Family Lawyer, Volume II, Number 4, December, 1982.
5. 10 U.S.C. 1408 (d) (2).
6. 10 U.S.C. 1408 (a) (2).
7. 10 U.S.C. 1408 (a) (3).
8. 10 U.S.C. 1408 (a) (2).
9. 10 U.S.C. 1408 (e) (6).
10. 10 U.S.C. 1408 (c) (4).
11. 10 U.S.C. 1408 (b) (1) (D).
12. 10 U.S.C. 1408 (a) (4).
13. 10 U.S.C. 1201 et seq.
14. 10 U.S.C. 1408 (e) (1).
15. 10 U.S.C. 1401 (a) (2) (C).
16. 10 U.S.C. 1072 (2) (F).
17. 10 U.S.C. 1048 (b) (1) (A).

Structured Mediation

by Theodore Sager Meth

Attorneys who have had direct experience with mediation, whether in labor, contract or matrimonial fields, recognize its virtues—and limitations. Those who have not had such experience tend to regard it as inferior to negotiation and litigation as methods for resolving legal conflicts. It is my view that these negative attitudes are not, as some suggest, rooted in any fear of losing law business, but rather arise because only the "pure" form of mediation is presented to them, i.e. the form in which an impartial person or panel meets with the disputants to bring them to mutual agreement.

In practice, however, there are many hybrid forms of mediation with which attorneys could be more comfortable, and which would maximize their useful inputs, strengthening their relationship to their clients rather than substituting a third person for themselves. One such variation, which I call "structured" mediation, I present here. The context is that of matrimonial law because it is there that the present controversy is most active.

In structured mediation the parties would not meet with the mediator until they had first met with their respective attorneys. Then they would meet with the mediator. Presumably he or she would be a person with both legal and psychological training although not necessarily a professional in both fields. They would thus come to the first mediation session with some knowledge of their goals, with an outline of the applicable law in mind, and with preliminary disclosure statements in hand. Presumably counsel will have assembled tax returns, pension and insurance data and the principal documents required by standard interrogatories, as well.

Initial session

At the initial session the mediator would seek to get to know the parties, and to have them know him or her, and to discover what their major areas of agreement and disagreement might be. The mediator would try to bring the parties to agreement on procedural issues such as the selection of a binding appraiser as to realty and pension interests, and, where custody issues or emotional issues which appear to threaten the success of the mediation require it, to convince them to embark on some short term counselling or therapy with an unrelated mental health professional.

Second meeting

The second session would be one at which (tentative) agreement on as many issues as possible would be arrived at, and at which a determination would be made whether the parties wish the mediator to make a binding arbitration award on one or more difficult issues. For example, where there was a closely-held business, the parties might choose to have the mediator recommend an accountant to make an investigation and report, or receive the reports of their personal accountants, and then to fix the value as a binding award, under classic arbitration procedures.

At this second session the parties might accept other techniques, such as the sealed-bid procedure for the sale or purchase of real estate; they might place other issues they had agreed to beyond further dispute, thus narrowing the scope of what remained for mediation.

In this model of a structured mediation the next step would be for the parties to return to their respective attorneys for an evaluation of the progress that had been made, specifically as to the areas agreed on, the areas resolved by experts, the areas fixed by award and the areas left for a more flexible and perhaps continuing consultation with a mental health professional. In many cases the attorneys and the parties might choose to finish the settlement process at that point by conventional negotiation, without resort to further mediation.

Subsequent sessions

In the event that a third or fourth session of mediation were desired by the parties, the mediator might rough draft a property settlement and support Agreement, so that the parties could see what the language of a final form might look like; the mediator should mark the unresolved issues, for example alimony, with one color or typeface to represent the most recent position of the one spouse, and another color or typeface to represent that of the other spouse, thus highlighting the range of disagreement. If this process led to resolution, the rough draft would be redrafted and then sent to the attorneys to finalize.

If final compromise were not reached, the last draft would be a most useful document in the hands of an Early Settlement Panel. (I regard these panels as essentially a form of nonbinding

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or advisory arbitration.) Certain familiar rules applicable to matrimonial law practice should apply to structured mediation. These include the rule that no agreement is binding until execution and the rule that settlement discussions may not be received in evidence.

Note that in this model of structured mediation we have the pure form of bringing-to-agreement mediation, the modified form utilizing fact-finding, experts and other resolution techniques such as bidding, and direct arbitration, i.e. all three conflict resolution instrumentalities.

Skills utilized

Note also that from the outset, throughout the process and at its culmination, there have been many opportunities for counsel to function in the skills they know best, the giving of legal advice, the analysis of facts, the assembly of evidence and the negotiation of settlements. At appropriate points in the mediation process the attorneys might also be asked by the parties to be present, to observe, or to participate directly in the mediation. And, as always, those (rare) cases which can only be resolved by adjudication, may go to trial with such further aids as Probation, Court-appointed experts and, of course, nonparty witnesses.

Adjunct rather than alternative

While it is taking time for a cadre of qualified mediators to be developed, the successes of the early few should encourage others to obtain the training and experience which has brought, for example, the Federal Mediation and Conciliation Service to such high regard. Then, far from seeing mediation in its various forms as an alternative to traditional legal services, attorneys will come to view it as a welcome adjunct to their professional work.