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JEFFREY P. WEINSTEIN
Section Chairman

Chairman's Report

1984 means more than a brave new world to the family law practitioner. It means the advent of the Family Part of the Superior Court—Chancery Division. The proposed Rules, as set forth in the *New Jersey Law Journal* on November 24, 1983, require a response. One cold rainy December night, Howard M. Danzig, our Section Rules Committee chair, and the four officers composed a letter to the Administrative Office of the Courts commenting on the Rules. The following is the collective work product of the aforesaid individuals:

As to R.3:30-4, the Rule should specifically indicate that the Court may assign legal clinics as counsel.

As to R.3:31-2(c), the words, "Or either of them," should be stricken so that the summons must be served upon both parents of the juvenile.

As to R.3:35-1(a), the Rule should be amended to provide that the Court on its own motion should be able to schedule the matter for hearing after thirty days.

As to R.4:4-2 and 4:4-4(a), the Rule must be modified so that the summons and complaint cannot be served upon the plaintiff at the plaintiff and defendant's place of residence or upon the children of the plaintiff and defendant. This would, of course, avoid the plaintiff accepting service of the summons and complaint and never notifying the defendant that service was made.

As to 4:10-1 and 4:77-1, the issue of the limitation of discovery in family actions should be addressed by the Family Part Practice Committee of the Supreme Court.

As to R.4:75-1, the first sentence should be modified. Matrimonial matters should not be conducted in private. Support matters should not be conducted in private. Custody matters should not be conducted in private. We commend the fact that a verbatim record shall be made of the testimony or interrogation of a child. There are certain issues, however, which must be addressed such as whether counsel should be present during the interrogation of a child, in chambers, whether counsel may have the right to voir dire or question the child, whether counsel would have the right to propound interrogatories to the Court concerning the child and whether the verbatim record would be made available to counsel. These issues should be addressed by the Family Part Practice Committee.

As to R.4:75-2, said Rule is not necessary. At the present time, without the benefit of a Rule, the Court can and does appoint experts. The Rule is not needed. The Pashman Committee voiced strong opposition to the promulgation of such a Rule. The Rule may prove very costly to litigants. The Rule is subject to abuse by counsel and the Court.

As to R.4:76-1(a), there is no reason why a complaint for divorce, for example, must include the statute or statutes relied upon by the plaintiff. It has not been done in the past. There is no reason for it.

As to R.4:76-1(e), which Rule provides that a supplemental complaint or counterclaim may be allowed to set forth a cause of action which has arisen or became known since the filing of the original complaint, said Rule, although not changing the Source Rule, is not necessary. The Source Rule was never followed by the trial Courts, and rightfully so. If the Rule were followed, in practice, the complaints filed would be much longer, much more volatile and would not promote settlement.

As to R.4:77-1(b), said Rule has been abused, in practice. The Rule emasculated the use of interrogatories.

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Editor's View

Whither Motion Practice?

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

*Beginning with this editorial, the future policy of the **Family Lawyer** will be that the subject matter, although not the text, of all editorials will be discussed among the editor-in-chief and the three editors. All editorials will 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.*

"There is no aspect of matrimonial practice that receives more criticism from the Bench and Bar than motion practice. This is unfortunate, because the role that motions play in matrimonial practice is enormous and far greater than in any other field of law." So began an articulate and thought-provoking article by Judge Michael Imbriani of Somerset County which appeared in last month's issue of the *New Jersey Family Lawyer.* Few will quarrel with Judge Imbriani's dual theses. First, motion practice does play a vital role in the administration of matrimonial justice. Similarly, as presently administered in at least some counties, motion practice continues to provoke at least controversy, if not criticism, from both the Bench and Bar.

As so well put by Judge Imbriani, the nature of matrimonial motion practice highlights its importance. Few substantive decisions rendered by judges in any division of our court system assume greater importance to the litigants involved than do pendente lite Orders. Such Orders, representing a bellwether of judicial perspective, not only establish the tone of all litigation and negotiations that follow, but frequently also create or negate the expectations of litigants as they embark upon matrimonial litigation. Pendente lite custody and visitation Orders frequently will dictate the extent to which both parents are permitted to continue to experience the joys and burdens of post-separation childrearing. Discovery motions will frequently determine whether the less advantaged spouse will be accorded adequate access to the facts which will permit his or her case to be appropriately presented upon final hearing. Enforcement motions will frequently determine whether respect will be accorded to prior Orders entered by the Court. Clearly, motion calendars pose formidable burdens on our matrimonial Bench. Those burdens have generally been met with dedication, compassion and skill. For that, our judges deserve high praise.

Praise should be directed not only to those judges who work so hard each or every other Friday on their motion calendars, but also to the system itself. How frequently have we heard that the New Jersey system of permitting litigants, on a regular basis, to have prompt access to our Courts, stands in sharp contrast to the more cumbersome procedures which exist in many of our sister jurisdictions. The New Jersey model of according litigants access to the Courts for interim relief on 14 days' notice, without the presentation of an Order to Show Cause, stands as a model for other jurisdictions to follow. For reasons which are self-evident, prompt access to the Courts is particularly important in matrimonial matters. If children need support, relief should not be long in coming. If a father is denied visitation, he should not have long to wait to address his plight to a caring judge. If a recalcitrant litigant chooses to violate a Court Order, he or she should not be allowed to hide behind extended judicial delay.

This is not to suggest, however, that matrimonial motion practice in New Jersey is by any means perfect or should not be the subject of ongoing dialogue. Indeed, such dialogue is important and for all practical purposes will be never-ending. For stimulating and renewing that dialogue, Judge Imbriani is to be commended.

In his article, Judge Imbriani suggested a number of specific motion reforms. Thus, he proposed three specific reforms. First, he suggested that limits should be imposed upon the scope and length of motion submissions. Second, he advocated the revision of ". . . the time limits applicable to the filing of motion papers." Third, he suggested that the rules should explicitly state that only ". . . the requests specifically enumerated in the Notice of Motion may be addressed by the Court." Each of Judge Imbriani's suggestions deserves discussion and thoughtful consideration. Motion practice in general and Judge Imbriani's suggestions in particular should be referred to the newly established Family Part Practice Committee. That Committee should be viewed as the most appropriate forum for an in-depth analysis of all aspects of matrimonial motion practice.

Should the Committee limit the number of issues that may be addressed in a single matrimonial motion? We think not. Regrettably, contested matrimonial practice lends itself to multiple applications in a single case. Were rules to be

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Negotiating the Marriage Settlement

by Robert Raphael

The trial of an equitable distribution/alimony matter should take place only when every effort at reaching a reasonable settlement has failed. The client's interest is far better served by a negotiated settlement than by trusting the results to the vagaries of a judicial determination. We are only catering to our own ego if we think that we can predict, with any degree of certainty, what some judge on any given day, in any given mood, will determine to be fair and just in the division of marital assets and the allocation of alimony.

Incurs additional expenses

A divorce trial is expensive. In addition to the cost of the lawyer's time in trial preparation and the trial itself, there are also the experts' fees for testifying and the lost income of the litigators and their witnesses as they sit through the time-consuming process of a court hearing.

Perhaps in the ever-expanding world of computers, we will someday be able to feed information into a machine and, based on particular factors, a predictable end-result will appear on a screen. For the present, we must deal with human judges whose responses to our client's testimony must remain a calculated guess. If we can reach a settlement that reasonably satisfies the client, both the lawyer and the client have achieved a successful result.

Of course, at times, the opposing counsel is so out of line in a settlement proposal that a court judgment is the only alternative. To pursue negotiations beyond that point may be a waste of the client's money. On the other hand, one's own client's unreasonableness or insecurity may preclude a settlement. In the latter instance, one should give serious consideration to withdrawing as counsel as the client will probably be unhappy whatever the result.

Compromise is inevitable

A settlement is a compromise by both parties; a willingness to accept or give less than they think a court would order. Both the Plaintiff and the Defendant should be a little disappointed, but satisfied that the overall result was fair. In settlements, as in court determinations, there should not be a winner and a loser in marital matters. A result is successful when both sides have prevailed in part and lost in part.

Another significant advantage in working out a settlement is the ability to analyze the tax ramifications of a proposed settlement in the quiet recesses of the lawyer's office. In many instances, a judge makes a ruling balancing the equities between the parties but ignores the financial consequences of the Internal Revenue Code. This could ultimately have a very serious financial impact on what a court felt to be a reasonable decree.

Unquestionably, there is no one way to negotiate a settlement and every technique has its variables depending upon the personality of the lawyer and his or her concept of the most effective way to negotiate in a particular instance. The personality of the opposing counsel may require a certain approach. An insight into the emotional framework of your client's spouse may invite a particular tactic.

Who attends negotiations

Do you, or don't you, have the clients sit in with counsel during settlement negotiations? Sometimes you do and sometimes you don't—usually not. As a general rule, I have found that in four-way meetings the anger of the clients and their caustic comments to each other result in a nothing-gained session. Negotiations generally work better when counsel alone endeavor to work out the differences and then relate back to the clients with suggested compromises. There are usually those last few items which cannot seem to be resolved. At this point, try bringing the two parties to the office, put them in separate rooms and with a little reasonable pleading by both lawyers, agreement can usually be reached. It frequently takes a great deal of time and patience but the rigors of negotiation in most instances bring about reasonableness in the contestants. I know of one lawyer who tries to keep negotiations going on, no matter how long it takes, and I was at a session with him that lasted until 2:00 a.m. We did settle, though.

In this article, I shall endeavor to tell you how I like to negotiate a settlement, and, like all generalizations, the ideas here suggested are not applicable to every situation.

Appraisals necessary

Obviously there can be no negotiations until the lawyer has all of the financial information in hand and fully comprehends it. If real estate is involved, there should be an appraisal by a competent,

Robert Raphael

Robert Raphael, a member of the Pittsburgh firm of Raphael, Gruener and Raphael, is a national vice-president of the American Academy of Matrimonial Lawyers, a past president of its Pennsylvania Chapter and serves on the Supreme Court of Pennsylvania Domestic Relations Executive Committee.

objective appraiser. If you need to know the value of a business, employ an experienced business appraiser or a qualified certified public accountant who is capable of making a fair valuation. Hire the right appraiser for each of the assets. If the experts' evaluations are such that they don't paint a true picture of the value of the assets, there is little likelihood of reaching the desired settlement. While two different appraisers can reach different valuations, it would appear that two ably-qualified persons would not be that substantially apart so that the differences could be compromised. If counsel for both sides can agree on a mutually acceptable asset evaluator, it eliminates the cost of a double fee. Hopefully, with that evaluation, both sides will be in accord on the value of the asset.

Consider negotiation techniques

There are some lawyers who begin the negotiations by asking for everything. This is frequently used as a psychological ploy to get the opposing counsel thinking at a higher level of settlement as well as to evidence counsel's reasonableness when they do get around to making the necessary settlement concessions. Their counterpart usually responds by offering nothing. Months and months can pass while each makes interim concessions until at some point the negotiators arrive at the place where the initial proposal should have begun. Both parties are now sufficiently worn down by the various offers and counteroffers. At this point, a settlement can result from the fatigue of negotiation and the accumulation of legal fees. I personally dislike this technique.

Where a demand is so outrageous, it frequently brings no response and efforts at reaching a settlement actually commence only at some pre-trial conference in the presence of a judge. This could be many months, or even several years later, and at considerable and unnecessary legal expense and emotional upheaval to the client. A lawyer who develops a reputation for these kind of tactics will have a difficult time reaching a prompt and reasonable settlement in all settlement negotiations. Even when such a lawyer begins with a reasonable proposal, the opposing counsel may be wary of the offer in light of previous experiences and wonder what kind of chicanery was afoot. It behooves the conscientious lawyer to begin with a reasonable offer of settlement and to develop a reputation for being a fair negotiator.

Begin reasonably

I make it a practice to propose a reasonable settlement at the outset, and communicate my intent to the other lawyer. Be assured, opposing counsel are not falling off their feet accepting my first offer. Experience indicates that there are usually adjustments to be made. A reasonable proposal, in most instances, invites a reasonable counterproposal and thus begins the process of compromise. Both lawyers should realize that certain issues are sacrosanct to clients and, if it is at all possible to be able to concede that issue, it is likely that a concession can be achieved on another matter. To a great degree, divorce negotiations involve a lot of emotion and objectivity must sometimes acquiesce to the emotional turmoil of the individuals. As much as a client may like the hand-painted vase in the living room, if that vase is a family heirloom of the other party, a strong position is probably better served on another item. The client should be forewarned that concessions must be made and there should be an acknowledgment on their part of this fact. In some marriages, one of the parties is so accustomed to getting everything he or she wanted that it is hard to accept the role of compromise. A counterpoint to this attitude is the anger of the previously put-upon spouse who now wants to get even for past abuses by insisting on receiving the lion's share. These kinds of clients should be apprised that a judge is going to decide the issues and his decision may not please either party. The competent attorney should convince the client that reasonable concessions by both parties are the best way to resolve the disputes of a marital break-up. The client with vengeance at heart who wants to get everything the other party has will never be satisfied with any result, since it is unlikely that their wishes will be fulfilled. Confronted with that kind of a situation, the smart lawyer probably should suggest that the client find other counsel.

Avoid ultimatums

There is probably no worse device in negotiation than the ultimatum or the "take it or leave it" threat. Psychologically, that attitude polarizes the discussion and generally ends the negotiations. Once having climbed out on that limb of no return, any backing off puts the negotiator in a very weakened position. A retreat from a no-compromise demand alerts the other lawyer that there is weakness on the other parties' part and is indicative that opposing counsel doesn't really mean what he or she says when the "bottom-line" is no longer the bottom-line.

Sometimes a lawyer has to make a counter-proposal to satisfy his client even though he knows that the offer submitted was a relatively good one and should be accepted. This is where a good negotiator can work out a settlement and still let the other lawyer save face. Come back with a proposal that accepts part of the counter-proposal but takes away some of the original offer. For example: if you had originally proposed a lump-sum equitable distribution settlement of a certain amount of dollars which the other side said was not enough, consider reducing that amount and offering some "alimony" payments which would total a larger amount. The result might make everyone happier. The "alimony" payments are deductible to your client and may result in your client paying less money while the other side gets more because of the differences in the parties' respective tax rates. The payments

can also be terminated by death, remarriage or cohabitation, in which case, your client may receive a windfall. The only real loser, of course, is the Internal Revenue Service, and since it plays no role in the negotiations, the financial arrangements can be tailored to best suit the clients' purposes at the expense of the Service. The tax laws can be a major factor in resolving standoffs.

Making the first proposal

Who should make the first settlement proposal? I do not believe that it makes a great deal of difference in most negotiations when both counsel are competent negotiators. There may be those who argue that the first proposal sets the guidelines for the ultimate settlement and therefore it is advantageous to the proposer. The contrary argument would be that having the other side's offer and the ability to counteroffer tips the scale in the favor of the counterproposal. Personally, I wouldn't take a strong position on either side but would agree to whatever will get the negotiations moving.

A good negotiator of marital settlements should develop a reputation for credibility, firmness and reasonableness. That reputation should stand your client and yourself in good stead when you sit down with opposing counsel. It should be a clarion declaration that your offer is going to be close to the ultimate settlement, that it will be basically fair to both parties, and that whatever assurances are made by you are honest and straightforward.

A fair settlement, reached expeditiously by two competent attorneys, reduces the judicial backlog, best serves the clients' interests, and reflects well on the legal profession.

Chairman's Report

by Myra T. Peterson

DISCOVERY—Husband who stipulates that he has ability to pay any amount ordered as increased alimony not required to answer specific interrogatories as to his income.

The parties had been divorced for more than eight years. In 1983 the plaintiff-wife moved for an increase in support. The Court, finding that the plaintiff had shown a *prima facie* change of circumstances, ordered that the parties exchange interrogatories.

The defendant refused to answer completely nine interrogatories dealing with his income and assets. The plaintiff moved to compel the defendant to answer completely these interrogatories as "the questions of defendant's income, assets and needs [are required to show] the *defendant's ability to pay increased child support."* The defendant countered by stating that he would be able to pay whatever the Court awarded the plaintiff based upon her alleged needs.

The Court, noting that it was only concerned as to the defendant's ability to pay, but that since the defendant had admitted that he would be able to pay whatever amount the court deemed appropriate, "interrogatories as to his income and assets are irrelevant." The plaintiff's motion was denied.

*[**Comment:** Too often* Lepis *motions become fishing expeditions with interrogatories propounded that are meant to harass. Obviously, one can paint a far more dramatic picture of the differences between the supported spouse's and supporting spouse's relative circumstances when one has access to the supporting spouse's income and assets. However, if the supporting spouse stipulates that whatever the amount the court orders him to pay, he can and will pay, there is simply no reason to compel him to divulge his financial status—unless one is attempting to upset an agreement because of fraud. A* Lepis *motion, however, is certainly not the ideal way to do this.*

The court, by its denial of the plaintiff's motion to know all about her former husband's finances simplified the discovery process to what it should be for a Lepis *motion—discovery as to those facts which are relevant to the proofs to be presented. The parties entered into an agreement. If the agreement was not reached as a result of fraud, if the agreement did not provide for parity in the parties' post-judgment financial levels, the husband's post-judgment income and assets are his business alone.]*

Fletcher v. Fletcher, Docket No. M-1213-76 (Chan. Div., Decided Nov. 16, 1983) (Bergen, Krafte, J.J.D.R.C. t/a) (not 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.
Stern, Steiger, Croland & Bornstein, P.A.
One Mack Centre Drive
Paramus, New Jersey 07652

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Chairman's Report

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As to R.4:77-5, it is the position of the Family Law Section that early settlement programs be mandated in all Counties. The Family Law Section will continue to promote early settlement programs and to monitor early settlement programs.

As to R.4:78-2(d), at the option of the payee spouse, support payments should be made, where there is a non-resident payor, in the County in which the payee spouse resides and the Rule should be so amended to permit such an option.

Please note that we did not deem it appropriate to comment on R.4:3-1(a)(2) which defined actions brought in the Family Part. The definition of family was omitted from the Rules. It is our belief that there will be litigation concerning what type of matters belong in the Family Part. It is our belief that the Family Part Practice Committee should attempt to define what is a "family or family-type relationship." The Family Court Committee, chaired by Justice Daniel O'Hern, defined family or family-type relationship. For some reason, this definition was not set forth in the Rules. I invite your comments as to whether family should be defined in the Rules.

Committee appointments

At the last Executive Committee meeting of the Family Law Section, I appointed members to David Ansell's Liaison Committee to the Family Part Practice Committee of the Supreme Court. The members I appointed are Patricia Voorhees of Princeton, Pasquale Cardone of Atlantic City, Richard H. Singer of Newark, and Katharine Sweeney of Chatham. Judge Serpentelli's Family Practice Committee was enlarged by two members of our Executive Committee. Frank Louis of Toms River and Alan Grosman of Short Hills were added.

Also at our Executive Committee meeting, I appointed Frank Louis to serve as chair of the Tischler Award Committee. The Committee also includes Edward Snyder of West Orange and George Whitmore of Red Bank.

Legislative positions

The Executive Committee of the Family Law Section opposed certain pending legislation. Senate bill #3085 was opposed by our Executive Committee. That bill seeks to modify our present support and maintenance statute by compelling the supporting spouse to supply the supported spouse and children with medical insurance where the supported family is on welfare, by directing that modification and support orders be perspective in situations where the supported family is on welfare, by establishing a standard of substantial material change in circumstances for perspective modification of support orders where the family is on welfare and by prohibiting the suspension or stay of support in maintenance orders pending any appeal. The purpose of this Senate bill may be laudable, but modifications are necessary before it should be supported by our Section. Assembly bill #3298 was also opposed by the Executive Committee. That bill provides that paternity actions involving children who are recipients of public assistance have priority over other paternity proceedings. The bill also modifies discovery rules. Due to the severe impact that the bill would have on discovery, our Section opposed the passage of said bill. We also opposed the passage of Assembly bill #255, which was designed to expand the rights of a payee spouse. In fact, it was the position of our Executive Committee that the bill would contract those rights.

Family Part issues to be studied

With the advent of the new year, I think it is particularly appropriate to attempt to set forth what issues should be decided in 1984 concerning the Family Part of the Superior Court and the practice of family law. Firstly, what about Early Settlement Panels? The Executive Committee, almost unanimously, endorses early settlement programs on a statewide basis. The early settlement panels must be expanded and must reach all counties. This is a viable alternative to mediation. Mandated mediation should be limited only to custody and visitation. The issue of separate calendars must be addressed forthwith and, of course, this issue must be followed by whether there should be judges who become specialized and whether there should be specialization for the matrimonial practitioner. Another issue which should be resolved in the year 1984, and hopefully by the Family Part Practice Committee, is whether there is a need for support guidelines. Also, as to guidelines, should standards be established for domestic violence proceedings? Should the Family Part Practice Committee establish pendente lite guidelines with respect to counsel fees? The issue of whether court appointed experts should be used or whether court appointed experts are abused by the court must be resolved in the year 1984. Once again, with our new Court Rules, the issue of whether family matters should be treated differently than other civil matters with respect to discovery must be resolved. I do not pretend to know all the answers or any of the answers to these issues. We must work together to provide suitable answers.

Reflecting upon 1983, and more particularly upon my chairmanship, I believe I can best characterize it by describing what happened in Bermuda at the Mid-Year Convention. Ronnie (my wife) and I were given first class tickets on the plane (it was only an hour trip). We were then given a room right next to the elevators. My point is simple; there is a great deal of prestige involved in being chairman of the Family Law Section and there is very little time for relaxation.

I wish all of you only the very best for a happy and healthy New Year.

1984—The Family Law Section is ready for you!

Joint Custody in New Jersey: The Best Alternative?

by Amy L. Hirsch

Traditionally, following divorce the mother was granted sole custody of the children of the marriage. Visitation rights were worked out by the parties pursuant to court order, or in the alternative, the single parent custodian regulated all contact between the child and the other parent. Today, awarding custody of a child to a single parent custodian is no longer the only possibility. Courts are free to choose between a wide range of custodial arrangements including divided custody,[1] split custody,[2] shared custody,[3] and joint custody.

In divided custody, only one parent at a time exercises legal custody combined with physical custody. The child lives with each parent for a part of the year, during which time the other parent will have visitation rights. The parent with whom the child is living has complete control over decision making.

Split custody is the "splitting" of siblings between the parents. In other words, the mother may have custody of one child while the father may have custody of the other child. Each parent will have visitation rights.

Shared custody differs from divided custody in that only one parent is granted legal and physical custody with the other parent having maximum visitation rights. One purpose of this arrangement is to avoid child snatching. Another is to maximize the child's relationship with the non-custodial parent, based on the premise that a child will benefit from a relationship with both parents. During visitation the non-custodial parent will be fully responsible for medical care, food, clothing, shelter and disciplinary decisions. In shared custody both parents are responsible for major decisions such as religion, name-change, non-essential or nonemergency serious medical treatment, and education. The custodial parent should keep the non-custodial parent fully informed on the educational progress of the child. Shared custody means shared quality time, both good and bad—"No weekend Daddys and Mommys."[4] In addition, there is a mid-week visitation period. Cultural holidays will be equally divided. However, this division shall not be such that the child spends Christmas with his mother one year and Christmas with his father the next year. Rather, if the child spends Christmas-eve and Christmas morning with his mother, he will spend from Christmas dinner until the following morning with his father.[5] Two holidays are better than one. One key to a successful shared custody arrangement is flexibility. Both parents must have the ability to make changes together. For example, the unexpected will happen and perhaps the mother will allow the child to accompany his father on a weekend trip, and perhaps the father will accommodate the mother during her busy work period by arranging for the child to stay with him.

Joint custody can be divided into two separate categories: joint legal custody and joint physical and legal custody (generally referred to simply as joint custody). In a joint legal custody arrangement, one parent is granted sole physical custody, the other parent having maximum visitation rights. The important characteristic of this arrangement is that both parents play a role in all decisions concerning their child.

Joint custody combines elements of both divided custody and shared custody; both parents share physical custody as well as the decision-making process. Joint custody aims at preserving the marital relationship as much as possible by granting each parent equal authority and responsibility. The child has contact with both parents and each parent continues to engage in child-rearing decisions.[6]

Among the factors courts consider in awarding joint custody are:

1. the willingness of the parties to cooperate, communicate and care for the child;
2. the ability of both parents to make rational decisions concerning the child's welfare;
3. the understanding of both parties of the necessity of following the arrangement and/or court order;
4. other considerations such as flexibility in work schedules, similarities in environments, financial means, proximity, age of the child and the child's preference.

Joint Custody: Advantages and Disadvantages

Judicial favoring of joint custody can be attributed to many factors. First and foremost is the recognition that children are generally better adjusted when both parents play a role in their lives. Evidence shows that children who adjust the best after divorce are those who can develop complete relationships with both parents.[7] Joint custody prevents adverse effects on a child caused by a parent's absence.[8] A positive atmosphere in both

Amy L. Hirsch

Amy L. Hirsch is a third-year student at Rutgers Law School in Camden and will graduate in May 1984. She is currently working for the Honorable Robert W. Page at the Juvenile & Domestic Relations Court in Camden as part of a Legal Intern Program. She is currently president of the Francis Deak International Law Society.

homes should increase the child's feeling of security and self-esteem.[9] By allowing the child to maintain a full relationship with both parents the family nucleus is better preserved. The child can identify with the parent of the same sex while enjoying the security of a loving relationship with both parents.[10] Furthermore, a child does not have to fear he is being disloyal to one parent by loving the other.[11] Joint custody creates an equilibrium between absolute father preference and absolute mother preference.[12]

From the parent's viewpoint, an award of joint custody can be very desirable. Joint custody gives both parents an opportunity for participation in their child's life[13] by sharing in the burdens and pleasures of childrearing.[14] If both parents play an active role in the decision-making process, neither parent can effectively use the child to his own advantage. In addition, such an arrangement helps eliminate a parent's fear that the other parent has a greater say, or unequal power in decisions concerning the child.[15] The allowance for extra-judicial changes in the custody agreement better accommodates the often conflicting schedules of parents and children. The flexibility of a joint custody arrangement also recognizes that at certain times a child may feel the need for the attention of one parent more urgently than the other.[16] Other advantages include avoiding feelings of hostility surrounding visitation rights,[17] the reduction of default payment in child support,[18] the authorization of medical care for the child by either parent,[19] a breakdown of stereotyped sex roles,[20] the elimination of child-snatching,[21] providing a guideline to the behavior of parents following divorce,[22] and easing the trauma if one parent should die.[23] Finally, joint custody leads to positive cooperation between the parents, which oftentimes does not exist in a sole custody arrangement, as "a breakdown of the arrangement will likely lead to an award of sole custody to the parent who did not precipitate the failure."[24]

There are however a number of disadvantages to joint custody. Joint custody can lead to emotional damage due to alternating care, conflicts of loyalty,[25] disruption due to absent parent's visitation rights,[26] divided authority,[27] rigid rotation schedules,[28] and inconsistency of discipline.[29] In sum, joint custody may challenge a child's relationship to both parents.[30] The failure of the joint custody arrangement could lead to another court proceeding and further disruption in a child's life.[31] The failure of both the joint custody arrangement and the marriage could lead a child to the conclusion that he himself is to blame. After the traumas of divorce, a child needs the certainty and finality that come with final and unconditional placement.

Joint custody may also work a financial disadvantage on both parents. Joint custody mandates that space must be provided for the child in both homes.[32] Additionally, there is a financial burden in shuffling objects and children back and forth. As a result of these factors and others, the estimated cost of joint custody is 25 percent higher than for sole custody.[33]

It is unlikely that parents who could not agree during the marriage will cooperate in a joint custody arrangement.[34] According to Judge Robert W. Page: joint custody is the ideal but is rarely attained.

> The cornerstone of joint custody is the ability of the parties to relate and communicate. It is only really achieved where the parties are mature enough to have "ended" their own relationship, not just divorce, but psychological terms as well. If the parties are still grieving or scorned, or haven't in some small way let go of the relationship, it is hard to have joint custody, because when the parties deal with each other, there is still a hidden ingredient not in the best interests of the child.

New Jersey Law

The pertinent statute which enables New Jersey courts to award joint custody of the children in a divorce proceeding is N.J.S.A. 2A:34-23. The statute provides as follows:

> . . . The court may make such order . . . as to the care, custody, education and maintenance of the children, or any of them as the circumstances of the case shall render fit, reasonable and just . . .

The New Jersey courts have interpreted N.J.S.A. 9:2-4 as indicative of a legislative preference for joint custody decrees in order to provide both parents with an active role in the lives of their children.[35] The New Jersey Superior Court in *Turney v. Nooney*[36] supports this position.

> . . . in promoting the child's welfare, the court should strain every effort to attain for the child the affection of both parents rather than one.[37]

The courts of New Jersey in *Beck v. Beck* and *Mayer v. Mayer*[38] followed the national trend toward an increasing number of joint custody awards by awarding joint custody to each parent in order that each parent may play an active role in the life of his child.

In *Mayer,* the Court stated that its primary consideration in awarding joint custody is the "best interests of the child," and the decision must depend on the facts of the particular case.[39] The New Jersey courts have followed the best interests doctrine every since it was first announced in 1944.[40]

In determining that both parents should be awarded custody, the Court in *Mayer* examined a number of factors: the fitness of the parents; the distance between the homes of the parents (as an obstacle to visitation); the wishes of the parents; and the age of the children.

In *Beck,*[41] the Superior Court held that the trial court's award of joint custody was improper in that particular case. The Superior Court largely

based its decision on the fact that neither party asked for joint custody and the parties were opposed to the arrangement.

The Supreme Court in *Beck,* reversed, holding that an award of joint custody was proper. However, due to the lapse in time since the original decree was awarded, and the possibility that essential facts and relationships could have significantly changed since the award, the Court remanded the case to the trial court for further fact-finding consistent with its opinion.

The Supreme Court considered an award of joint custody based largely on the factors examined in *Mayer.* The Court approved a joint custody award despite the fact that the two children were opposed to such an arrangement. The Court attributed the children's concerns to their misunderstanding of what joint custody would entail as well as the possibility that their mother's negative attitude had unduly influenced them.

Additional factors examined by the Supreme Court were the willingness of Mr. and Mrs. Beck to cooperate with one another; the testimony of doctors familiar with the concept of joint custody; the relationship between the parents and the children and whether the children would benefit from joint custody; the willingness of the parents to accept a joint custody arrangement (although their opposition would not preclude the Court from ordering that arrangement); the potential for cooperation of the parents in matters of child-rearing; and the practical considerations of the arrangement such as financing.

In *Mastropole v. Mastropole*[42] the Appellate Division reversed the trial court decision modifying the divorce judgment to require a joint custody arrangement for the child of the marriage. According to the Court, the circumstances did not justify a joint custody arrangement. The prime consideration is the best interest of the child. Even though the child might benefit from joint custody, the party seeking modification of the initial custody determination must show a change of circumstances warranting modification. In the Court's opinion, neither the father's remarriage and new home nor his confidence in his ability to care for the child were sufficient reasons to replace the initial sole custody order.

The Court stated that the standards established in *Beck* for joint custody had not been met. The Mastropole child had not sufficiently established a secure enough relationship with both parents to truly enable him to benefit from a joint custody arrangement. The child was ambivalent about his father and was not particularly enthusiastic even about overnight stays. It is important to note that the child was only 4½ years old at the time of the divorce. The Court held that despite the proximity of the two parents' homes and easy access to school, the situation did not warrant the shuffling from home to home which would be disruptive, possibly leading to emotional damage. In addition, the mutual hostility of the parties made the arrangement unwise. The *Mastropole* court typifies the trend in New Jersey to award joint custody in a limited class of cases.

Conclusion

Currently there is a bill in New Jersey which if passed would create a presumption in favor of joint custody in cases of divorce or legal separation.[43] According to the stated purpose of the Bill:

> The law and the judicial system have not kept pace with the changes in sex roles and family structure.[44]

The Bill's introduction is indicative of a need for aligning New Jersey law with the realities of modern times. The Bill has been in Committee since February, 1982 and prospects for passage are bleak.[45]

Joint custody is a viable alternative only in a limited number of cases. In most cases, the parties themselves are uncooperative thus making the initial hurdle insurmountable.

According to Judge Page, lawyers too often misuse the word "joint custody" as a means of settling cases. By assuring each parent that he or she will have joint custody, a lawyer may avoid hurt feelings but in fact will merely be postponing the inevitable battle. Shared custody with one legal custodian, liberal visitation rights for the non-custodial parent, and a clearly defined arrangement is much more likely to succeed.

Footnotes

1. Gourley, "Joint Custody: The Best Interests of the Child," 18 Tulsa Law Journal 159-71, 161 (Fall 1982).
2. *Id.*
3. Interview with Judge Robert W. Page, Superior Court, Camden County on October 28, 1983. Judge Page is temporarily assigned as the presiding judge of the Juvenile and Domestic Relations Court.
4. *Id.*
5. *Id.*
6. Jarboe, "A Case for Joint Custody After the Parents' Divorce," 17 Journal of Family Law 741-62, 741 (August 1979).
7. Gourley, infra note 1, at 164.
8. Miller, "Joint Custody," 13 Family Law Quarterly 345, 358 (1979).
9. Bratt, "Joint Custody," 67 Kentucky Law Journal 271, 298 (1978-1979).
10. Moller, "Joint Custody: A Critical Analysis," 14 Trial Law Quarterly 36-49, 43 (1982).
11. Gouge, "Joint Custody: A Revolution in Child Custody Law?" 20 Washburn Law Journal, 326-43, 333-34 (Winter 1981).
12. Miller, infra note 8, at 362.
13. Gourley, infra note 1, at 161.
14. Steinman, "Joint Custody: What we know, what we have yet to learn, and the Judicial and Legislative Implications," 16 U.C. Davis Law Review 739-83, 743 (Spring 1983).
15. Folberg and Graham, "Joint Custody of Children Following Divorce," 12 U.C. Davis Law Review 523, 569 (1979).

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The Effect of Post-Divorce Cohabitation on Alimony Payments

by Robert E. Goldstein

The issue of a dependent former spouse's right to receive alimony in the face of that spouse's post-divorce cohabitation with an unrelated member of the opposite sex has been one with which the courts have wrestled for a long time. While by legislative mandate in New Jersey, alimony must terminate upon remarriage, New Jersey has not chosen, unlike some other states, to mandate that an alimony-receiving spouse will lose all or a portion of that spouse's right to continued receipt of alimony upon "cohabiting" with an unrelated member of the opposite sex.[1] The very word "cohabiting" is intentionally surrounded by quotation marks above because it is not entirely clear what that word means, at least with respect to this particular issue. Perhaps, one might paraphrase Mr. Justice Stewart in describing the term "pornography," by saying that we can't define "cohabitation," but we know it when we see it. It is the purpose of this article to attempt to shed some light on this thorny, and obviously, emotional issue, both in the area of "cohabitation" where there is no agreement between the parties as to its effect on alimony, and in the area where the parties have, in some fashion, attempted by agreement to address the issue.

What is cohabitation?

In the family law context, the term "cohabitation" has been given numerous definitions.[2] Perhaps the simplest definition one could put forth is that cohabitation involves a situation where two (or more) people live together. However, the mere living together of unrelated adults is not automatically a reason for termination or modification of alimony in New Jersey.[3] Rather, as enunciated by the Supreme Court of New Jersey in *Gayet v. Gayet*,[4] "cohabitation" by a spouse receiving alimony constitutes changed circumstances so as to justify discovery and a hearing upon the payor spouse's application for modification of an alimony order, and the court will then employ an economic needs test to determine whether the payee spouse's relationship has reduced her (or his) financial needs.

The *Gayet* court felt that the trial courts would not have much difficulty in determining the true nature of the dependent spouse's relationship—i.e., whether the relationship constituted "cohabitation" giving rise to a prima facie case of changed circumstances. The court suggested that the trial court look to whether the new relationship " 'bears the generic character of a family unit as a relatively permanent household.' "[5] Thus, our trial courts are to search for a reasonable degree of continuity in a relationship, where the parties are presumably working together toward a common goal. Whether the parties have sexual relations may be relevant, but not necessarily determinative. Basically, I believe that what the court must do to find that there is "cohabitation" is to determine that the parties are living together, for all practical purposes, in a relationship so similar to a marital relationship that household services are exchanged as in most marriages. This does not mean that the "cohabitants" must necessarily sleep together or have meals together six or seven nights a week, but rather that the intention of the "cohabitants" is to have a relatively permanent relationship where they both share living accommodations *and* exchange household services.[6]

Quaere, however, whether "cohabitation" should be found to exist in the following hypothetical situation. An alimony receiving ex-wife, for a period of one year, maintains a separate residence from her boyfriend, but he and she sleep together at either his or her residence every weekend on Friday, Saturday and Sunday nights. They eat all of their meals together during the weekends which either the woman cooks or, if they go out to eat, the man buys for the two of them. The man regularly repairs her household appliances, and the women does his ironing but does not do his wash. Moreover, the man and woman sleep together occasionally during the week and eat meals together on those occasions, and the person at whose residence they eat pays for the food. While this example may seem somewhat farfetched, since under *Gayet* and *Lepis*[7] the spouse seeking modification has the burden of proving changed circumstances, one must question whether the moving party has made out a prima facie case of "cohabitation" in order to justify discovery and a hearing. Most probably the only evidence the moving party could adduce without further discovery would be that the parties stay together every weekend. The exact nature of the relationship remains within the knowledge of the participants. Assuming, however, all of the above facts to be stipulated, is it not the case that to some extent, the dependent spouse's economic needs are less than if the relationship did

Robert E. Goldstein

Robert E. Goldstein is a member of the Old Bridge firm of Heilbrunn, Finkelstein, Heilbrunn, Alfonso & Goldstein.

not exist? Yet this is very clearly not a relationship where the parties live together as man and wife as in a "normal" marital situation.[8]

It should be clearly noted that *Garlinger v. Garlinger,*[9] cited with approval by the *Gayet* court, did not couch its holding solely in terms of post-divorce cohabitation, although the facts in that case involved such a situation. A careful reading of *Garlinger* indicates that the court felt that the economic needs test would apply where the former wife chooses to cohabit with a paramour, "or otherwise consorts with him."[10] The *Garlinger* court states that relief may be warranted where the former wife is being supported wholly or partially by the paramour *or* where the paramour resides with her without contributing toward food purchases or payment of household bills. Thus, it is submitted that while, under *Gayet,* "cohabitation" constitutes changed circumstances, a case of changed circumstances can still be made out in a post-divorce relationship which does not strictly constitute "cohabitation" between the dependent former spouse and his or her paramour.

The cohabitation clause —is it effective?

The issue not yet addressed squarely by a New Jersey Court is the effect of a clause in a marital settlement agreement which provides that payment of alimony shall terminate upon the recipient's "cohabiting" with an unrelated member of the opposite sex. Surely we have all seen many agreements which provide for this, although not many such agreements define what the parties mean by the term "cohabiting." Therefore, the trial court may be called upon to determine the intent of the parties when they entered into the agreement. The greater issue, however, is whether, as a matter of law, where there is a non-cohabitation clause in an agreement, and where cohabitation in the sense of a living together occurs, the court should strictly enforce the contract between the parties or whether the court must judicially engraft upon the contract the requirement that the payor show that the payee spouse's needs have changed in that the payee to some degree is either being supported by or is supporting the other cohabitant.

It now appears to be settled in New Jersey that our courts have the power to modify orders for alimony based upon proof of changed circumstances warranting relief, whether the original basis for the alimony award was court ordered or by agreement between the former spouses.[11] Is there any reason to change this rule when the parties have agreed that cohabitation by the dependent former spouse is a cause for alimony to either cease or be reduced to some extent?

Since our courts have long held that they will only enforce contracts between spouses to the extent they are found to be fair and equitable,[12] and since there is a strong state policy guaranteeing individual privacy,[13] it is submitted that even in the face of contractual language purporting to terminate or reduce alimony in the event of cohabitation, a court faced with the application to terminate or reduce must make a two step factual and legal finding: (1) is the relationship such that "cohabitation" as contemplated by the parties and the law should be found to exist; and (2) if so, does the cohabitation render all or some of the support received unnecessary.[14]

Nevertheless, in other states which have considered the issue, there appears to be some divergence as to whether an agreement should be specifically enforced without regard to economic necessity.

In *Quissenberry v. Quissenberry,*[15] a Delaware Family Court judge held that where the spouses had agreed that alimony should terminate if the wife "cohabits" with an unrelated male, that agreement should be specifically enforced and there should not be engrafted thereon the requirement of a change in financial circumstances.[16]

Compare the *Quissenberry* case with a recent decision of the Appeals Court of Massachusetts in *Bell v. Bell.*[17] In that case the court was faced with an agreement which provided that alimony would terminate upon the wife's "living together with a member of the opposite sex so as to give the outward appearance of marriage." From June 1978 to October 1979, the ex-wife lived in another man's one bedroom apartment except for a total of three weeks spent by her with her daughter on an on and off basis. From October 1979 through June 1980, the ex-wife, for the most part, lived at her paramour's apartment. In June, 1980, having sold her own house, she moved into the other man's apartment totally. The lease was in the paramour's name and he paid the rent and utilities for same except for the ex-wife's long distance telephone calls. The living together relationship continued as of the trial date in May 1981. In this relationship, she purchased all of the food and did most of the cooking and cleaning. Part of the furniture in the apartment was hers. The ex-wife and her paramour did not commingle assets. She received her mail first at her own home, and when she sold that in April 1980, she received her mail at her place of employment and then through a post office box. The ex-wife and her paramour socialized together as a couple, tooks trips together and gave parties together. The cohabitation was never concealed, but the ex-wife never used her paramour's surname or represented to anyone that she was married to him.

In reversing a lower court's termination of Mrs. Bell's right to receive alimony, the Appeals Court of Massachusetts relied on the fact that the operative language in the agreement appeared in the same sentence of the agreement as the provisions for termination based on the wife's death or remarriage. The court regarded this as a strong indication that where the parties recognized a continuing need for support of the wife when the agreement was made, this must be the primary consideration in interpreting and applying the

language in dispute, especially in light of each party's right to be free from unreasonable interference by the other after their divorce.

The *Bell* court held that the clause in question should be interpreted as not calling for a cessation of alimony unless the ex-wife remarried or lived in circumstances so closely like marriage as to result in the ex-wife acquiring significant actual support or a new right to support from a man. The court, in so doing, pointed out that the relationship did not involve any permanent commitment. Her cohabitation, expense sharing and domestic services performed in the relationship were not deemed to be enough to trigger a termination of alimony.

While the *Bell* court did not say that it would not specifically enforce an agreement providing for termination of alimony based upon the wife actually holding herself out as being married to her paramour, it is clear that the court considered economic necessity a paramount concern. After *Gayet,* it seems clear that the New Jersey matrimonial courts will follow this view.

Conclusion

While the cohabitation/alimony issue is fraught with difficulties, and there is wide divergence from state to state as to the treatment of same, New Jersey family law practitioners now know, in the absence of agreement between the parties, the payor spouse must prove a lessening in economic needs of the payee spouse. Moreover, any agreement purporting to terminate or reduce alimony based upon the recipient's post-divorce conduct should be defined with as much specificity as possible, and even then, a court will be called upon to interpret the agreement and will, except in the clearest cases, apply the economic needs test.

Footnotes

1. See, e.g. *Gayet v. Gayet,* 92 N.J. 149, 456 A2d 102 (1983); *Garlinger v. Garlinger,* 137 N.J. Super. 56, 347 A2d 799 (App. Div. 1975); *Wertlake v. Wertlake,* 137 N.J. Super. 476, 349 A2d 552 (App. Div. 1975).
2. See e.g., *Matter of Marriage of Walter,* 27 Or. App. 721, 557 P2d 57 (cohabitation means living together as man and wife); *Boyd v. Boyd,* 39 Cal. Rptr. 400, 228 C.A.2d 374 (cohabitation is the mutual assumption of those marital rights, duties and obligations usually manifested by married people, including but not necessarily dependent on sexual relations); *Hicks v. Hicks,* 405 So. 31 (Ala. Civ. App.) (cohabitation, within meaning of statute providing for termination of alimony upon proof that recipient spouse is living openly or cohabiting with a member of the opposite sex, requires some permanency of relationship coupled with more than occasional sexual activity between the cohabitants.)
3. *Wertlake v. Wertlake,* 137 N.J. Super. 476, 349 A2d 552 (App. Div. 1975).
4. 92 N.J. 149, 456 A2d 102 (1983).
5. In this regard, the *Gayet* court cited *State v. Baker,* 81 N.J. 99, 108, 405 A2d 368 (1979), a case involving a challenge to a local zoning ordinance prohibiting more than four unrelated individuals to share a single housing unit.
6. See footnote 2 in *Gayet v. Gayet,* supra, which discusses the meaning of "cohabitation" under California law.
7. *Lepis v. Lepis,* 83 N.J. 139, 416 A2d 45 (1980).
8. *Cf.* Matter of Marriage of Vasconcellos, 58 Or. App. 390, 648 P2d 1358 (Or. App. 1982) in which a male friend moved in with the alimony-receiving wife, lived with her for about one month but then moved out, but thereafter spent about 80 percent of his nights at the wife's residence. *Held,* such facts do not constitute "cohabitation."
9. 137 N.J. Super. 56, 347 A2d 799 (App. Div. 1975)
10. 347 A2d 799 at 803
11. *Lepis v. Lepis,* 83 N.J. 139, 416 A2d 45 (1980)
12. *Carlsen v. Carlsen,* 72 N.J. 363, 371 A2d 8 (1977)
13. *State v. Saunders,* 75 N.J. 200, 381 A2d 333 (1977), cited with approval in *Gayet v. Gayet,* 92 N.J. 149, 456 A2d 102, 103 (1983).
14. The *Gayet* court noted that *Lepis* mandated that alimony should decrease when circumstances render the original amount unnecessary to maintain the standard of living reflected in the original decree or agreement. 456 A2d at 103, citing 83 N.J. 139 at 15B.
15. 449 A2d 274 (Del. Fam. Ct. 1982)
16. The *Quissenberry* court defined "cohabitation" as a relationship existing when two persons of the opposite sex live together, with some degree of continuity, as if they were husband and wife.
17. 16 Mass. App. 188, 450 N.E. 2d 650 (Mass. App. 1983)

Recent Cases

(continued from page 81)

ADOPTION—Adult adoption denied when motive for such adoption was only to allow prospective adopter to attend college at no cost by reason of prospective adoptive parent's employment.

M., the 29-year-old male plaintiff, a university professor, sought to adopt P., his 19-year-old unmarried first cousin. P. was a Greek national, in the United States on a student visa, attending the college at which M. taught. P. lived in the college dormitory but if the adoption was granted, he intended to move into M.'s apartment. P. intended to return to Greece when he completed his college education. Were the adoption granted, P. would receive free tuition at the university at which M. taught, a privilege granted to children of faculty members.

The families of M. and P. were "very close to each other." P.'s natural parents consented to the adoption. M. stated that he realized that the adoption, if granted, would require him to support P. and was willing to do so. P. stated that he understood that the adoption would sever his legal relationship with his natural parents. The court found M. to be of good moral character and reputation.

The court deemed the issue to be "whether the reason submitted for this adoption is appropriate pursuant to the statute." The court found that it was not.

Stating that the right to adopt did not exist at common law but was only a statutory right, the court noted that N.J.S.A. 2A:22-1 *et seq.* provided for the adoption of adults by persons of good moral character and reputation at least ten years older than the adoptee if the adoptee requests the adoption. "[T]he court must find [the reason for the adoption] to be to the advantage and benefit of the person to be adopted."

Finding that M. satisfied the statutory requirements of age or character, the court stated that

> The only advantage or benefit to the prospective adoptee is the economic privileges that he would gain at the university by virtue of being a professor's son. Strictly and narrowly construed, this is a benefit to [P.] and the statutory requirements appear to be fulfilled.

However, the court went on to say:

> [T]his court finds that the use of the adoption process by the plaintiff and adoptee profanes the legislative intent. The adoption statute must be construed to allow discretion in the court to deny an adoption which has as its primary purpose financial gain at the expense of an innocent third party. [cite omitted] The statute is concerned with the relationship, status and legal effect of adoption, all of which bear on the essential public interest as well as individual rights. [cite omitted] In construing the statute, the court cannot ignore the public interest and the effect that the adoption would have on third parties. The purpose of this act was to permit adults who are qualified to enter a contract to obtain the sanction of law to enter into a mutually beneficial adoptive relationship. Sponsor Statement, *Sen. Bill* 60 (Jan. 19, 1925). Normally a contract affects only the parties to the contract. Here, the parties are trying, in effect, to contract to have a third party, the university, assume the financial responsibility for one of the parties' education. This court finds no authority showing the intent of the legislature to provide legal approval for such a relationship or purpose. Indeed, it appears that here the benefit flows to the adoptee from a third party.

The court noted that the general approach of other jurisdictions has been to grant such adoptions pro forma when the adoptee is an adult, deemphasizing the motives and benefits to the parties, but that the New Jersey courts "have been mindful of the possibility of a fraud. While our courts have not yet denied adoption on the basis of fraud, inheritance by an adult adoptee has been denied for this reason. *In re Griswold,* 140 N.J. Super. 35 (Cty. Ct. 1976). Our courts have stated that an adoption would not be approved when the sole purpose of such was to give an interest in property. *In re Estate of Comly,* 90 N.J. Super. 498 (Cty. Ct. 1966).

Finding that adoption was not necessary to accomplish the goals that the plaintiff, M., said he sought to reach by adoption (other than the free tuition)—maintenance of a close family relationship, provision to P. of love and economic and emotional support—the court held that a *bona fide* second motive for adoption "does not detract from the fraudulent motive." Additionally, the court held that the adoption was prospectively harmful to P. in light of P.'s plan to return to Greece and his natural family after graduation because the adoption would sever all rights, privileges and obligations due to and from the natural parents (except inheritance). The adoption was denied.

***[Comment:** While the prospective harm to a competent adult adoptee should perhaps not be in the purview of the court's decision, the effect on the university—which probably had no idea of the parties' legal actions—as a result of the adoption and the parties' bona fides as to this potential effect was properly considered by the court.]*

In the Matter of the Action of M. for the Adoption of P., Docket No. 10547, (Prob. Div., Bergen Co., Decided Nov. 10, 1983) (Sorkow, J.S.C.)

ALIMONY—Tax Court rules alimony paid to remarried wife for stated period pursuant to agreement reportable income by wife and deductible by husband.

In 1973, husband and wife, both knowing that the wife was to remarry, executed an agreement whereby husband was to pay wife substantial alimony payments over a 20 year period. In addition, there was a division of property. Prior to any payments, the wife remarried. Thereafter, the husband made alimony payments of $55,000 per year for the years 1974 through 1977. In April, 1979, the husband exercised his right under the agreement and Judgment of Divorce to seek modification and moved for modification or termination of alimony based upon changed circumstances. The court determination of that motion was appealed by both parties; in 1981 the Appellate Court remanded the case for termination of alimony and determination of reasonable child support and educational payments for the children.

For the years 1974, 1975, and 1976, the wife reported all alimony received for tax purposes; the husband deducted the same. After the husband filed his motion, the wife stopped declaring the payments as alimony. On her 1977 federal tax return she attached the following explanation:

> Taxpayer, Carolee Eichelman, received $55,000.00 from her former spouse during 1977. It is the taxpayers' position that the payments received by Carolee Eichelman are not taxable income. The payments ($55,000.00) received during 1977 were child support because ever since Carolee Eichelman's remarriage on December 2, 1973, the payments received were no longer taxable alimony. Under Illinois law any "legal obligation" of the petitioner's former husband with respect to the payment of alimony was terminated upon the petitioner's remarriage. Therefore, the payments in question are not includable in petitioner's income under sec. 71(a)(1), I.R.C. 1954.

She also filed amended returns for 1974, 1975 and 1976 seeking a refund for taxes paid on the alimony she now deemed to be child support.

The Commissioner of Internal Revenue *disallowed* the deductions the husband had taken for alimony paid for 1973, 1976, 1977 on the ground that the deductible nature of the payments had not been established. The Commissioner also sent a notice of deficiency to the wife for the year 1977, rejecting the theory that the $55,000 received by her was non-taxable child support.

The husband maintained that all disputed payments made by him to the wife were alimony and deductible by him pursuant to Section 215. The wife maintained that the payments did not constitute gross income to her because they did not meet the requirements of Section 71 (a) and that the amounts received were non-taxable child support under Section 71 (b) and, therefore, are not properly included as gross income under either Sections 71 (a) or 61.

The Tax Court noted that even if a payment to a recipient-spouse is includible by her as gross income under Section 61 it is not necessarily a deductible payment by the payor-spouse under Section 215.

26 U.S.C. S.61(a)(8) defines "gross income" as including "alimony and separate maintenance payments."

26 U.S.C. S.71(a)(b) and (d) states:

(a) General rule—

(1) Decree of divorce or separate maintenance. If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

(2) Written separation agreement. If a wife is separated from her husband and there is a written separation agreement executed after the date of the enactment of this title, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such agreement is executed which are made under such agreement and because of the marital or family relationship (or which are attributable to property transferred, in trust or otherwise, under such agreement and because of such relationship). This paragraph shall not apply if the husband and wife make a single return jointly.

(3) Decree for support. If a wife is separated from her husband, the wife's gross income includes periodic payments (whether or not made at regular intervals) received by her after the date of the enactment of this title from her husband under a decree entered after March 1, 1954, requiring the husband to make the payments for her support or maintenance. This paragraph shall not apply if the husband and wife make a single return jointly.

(b) Payments to support minor children. Subsection (a) shall not apply to that part of any payment which the terms of the decree, instrument, or agreement fix, in terms of an amount of money or a part of the payment, as a sum which is payable for the support of minor children of the husband. For purposes of the preceding sentence, if any payment is less than the amount specified in the decree,

instrument, or agreement, then so much of such payment as does not exceed the sum payable for support shall be considered a payment for such support.

(c) Principal sum paid in installments.

(1) General Rule. For purposes of subsection (a), installment payments discharging a part of an obligation the principal sum of which is, either in terms of money or property, specified in the decree, instrument, or agreement shall not be treated as periodic payments.

(2) Where period for payment is more than 10 years. If, by the terms of the decree, instrument, or agreement, the principal sum referred to in paragraph (1) is to be paid or may be paid over a period ending more than 10 years from the date of such decree, instrument, or agreement, then notwithstanding paragraph (1) the installment payments for purposes of subsection (a), but (in the case of any one taxable year of the wife) only to the extent of 10 percent of the principle sum. For purposes of the preceding sentence, the part of any principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be treated as an installment payment for the taxable year in which it is received.

(d) Rule for husband in case of transferred property. The husband's gross income does not include amounts received which, under subsection (a), are (1) includible in the gross income of the wife, and (2) attributable to transferred property.

26 U.S.C. S.215 provides:

(a) General Rule. In the case of a husband described in section 71, there shall be allowed as a deduction amounts includible under section 71 in the gross income of his wife, payment of which is made within the husband's taxable year. No deduction shall be allowed under the preceding sentence with respect to any payment if, by reason of section 71(d) or 682, the amount thereof is not includible in the husband's gross income.

The Tax Court examined "[e]ach element of Section 71(a) to see if there was conformity with all elements to mandate inclusion of the payments made to the wife as income to her:

Periodicity—While Sections 71(a)(1) and (2) require periodic payments of an indefinite duration, Section 71(c)(2) permits periodic payments of a principal sum over a period of longer than ten years. The periodicity requirement of Sec. 71 was met.

Nature of payments—Sections 71(a)(1) and (2) require that payments be made "because of the marital or family relationship," not because of a property division. Here there was no question that the payments were made because of the marital or family relationship, not as a payment for property. Additionally, there was no specific amount of the payments to be made designated child support. "Under the clear language of Section 71(b), and for no other reason" payments by the husband to the wife "did not constitute child support where they were not designated as such in the agreement."

Payment under decree, instrument, or agreement—The payments were made under a decree (Sec. 71(a)(1)) as the agreement was incorporated into the Judgment of Divorce. As to whether the payments were made under an instrument, the wife argued that the agreement had merged into the Judgment and thus had not been made under an instrument. (Sec. 71(a)(2)) The Tax Court disagreed and found no merger.

Legal obligation—The requirement that the payments made are pursuant to a "legal obligation" applies only to payments made under Section 71(a)(1). Section 71(a)(2) does not contain the requirement of a "legal obligation."

Although the wife argued that the Illinois statutes in effect during the taxable years at issue provided that a party shall not be entitled to alimony and maintenance after remarriage, thus the husband had no legal obligation to make such, the Tax Court held that since Section 71(a)(2) did not have the requirement of a legal obligation and since the agreement had not merged into the Judgment, whether or not the husband had a statutory legal obligation to make the payments to the wife was of no importance.

The Tax Court concluded that the payments were alimony to the wife and thus includible in her income and deductible by the husband.

***[Comment:** Like the Illinois Statute in effect during the applicable tax period, N.J.S.A.34:25 provides that a court may not order alimony payments to a wife after remarriage. However, in* Ehrenworth v. Ehrenworth, *A-4643 (App. Div. 1982) the court approved the concept of a consensual agreement providing alimony after remarriage. Thus, while consensual agreements may provide for alimony after remarriage, such alimony to be considered income to the payee spouse and deductible by the payor spouse, if alimony is paid pursuant to a Judgment after trial, any alimony which is paid after remarriage is not deductible by the payor while it is also probably taxable income to the payee.]*

Mass v. Comm'r; Eichelman v. Comm'r, Docket Nos. 20863-80, 21191-80, 81 T.C. 112 (1983)

CHILD SUPPORT—Husband required to support wife's children of former marriage on basis of equitable estoppel

Plaintiff-wife was married to her first husband, Febre, in 1960. She and Febre separated in 1966 after they had had two girls, born in 1963 and 1966. Febre went to prison in 1968 and the plaintiff and Febre were divorced in 1969.

Plaintiff married the defendant-husband in 1972 when the girls were 9 and almost 7. The parties had no children together and separated in 1979 (when the girls were 16 and almost 13). The defendant held himself out as the girls' father. They called him "daddy." The defendant had the children's names changed on their school records from Febre to his surname. He participated in their activities, even becoming a Girl Scout Troop Leader; he enjoyed sports with them. He attempted to adopt them but the natural father Febre would not permit it. Despite the fact that the defendant had not adopted the children, he rejected support for the girls from Febre and strenuously opposed visitation by Febre. (Febre stopped attempting to visit or support the girls.)

At the time of the divorce, some two years after the parties separated, the husband was earning $31,000 per annum; the wife was also working and the trial court found her "able to economically sustain herself." The husband argued that he had no legal responsibility to support the girls.

The trial court held otherwise. The court noted that when the girls were interviewed in chambers, each "unequivocally referred to the defendant as their father." They knew Febre only as a stranger (although they had seen Febre for some time several summers earlier). They missed the defendant. They knew that he had wanted to adopt them. They were hurt by the defendant's apparent disregard of his relationship with them.

The trial court found that the defendant "knowingly and intentionally" had created emotional parental bonding between himself and the children and was equitably estopped from negating this relationship (at least financially). Relying upon *Amadeo v. Amadeo,* 164 N.J. Super 417, 425 (App. Div. 1960), the Court stated that "one standing on *loco parentis* can be obliged to pay support for children not his own." Relying upon *Ross v. Ross,* 126 N.J. Super. 394 (Cty. Ct. 1973), aff'd o.b. 135 N.J. Super. 35 (App. Div. 1975), the court stated that "equitable estoppel . . . can be used to compel a father to support a child not his by birth or adoption."

The criteria the trial court stated that establish equitable estoppel were:

1. The husband made a direct or implied representation to the child as his natural father;
2. The child relied upon the representation and treated the defendant as his father and gave him love and affection;
3. The child was ignorant of the facts.

In the case *sub judice,* the court found all three criteria to have been met. The court said:

> If [the defendant] choose to no longer give them his love, affection, and parenting, this court can at least oblige him to financially support the two young ladies who he has caused to be held out to the community as his daughters and who, indeed, look to him as their father.

The Appellate Division in an, as yet, unreported opinion affirmed. Finding of no merit the defendant's argument that the third criterion (the child's ignorance of the facts) was not met because the girls knew their natural father, the Appellate Court stated:

> This argument completely overlooks the fact that defendant actively interferred with the normal relationship between the girls and their natural father. He intruded into this void, terminated the girls' visitation with the natural father and rejected the natural father's proffer of support.

The narrow view of the scope of the doctrine of equitable estoppel taken by the defendant was rejected.

***[Comment:** This case has been granted certification by the Supreme Court. It will be interesting to see if that Court affirms, how the result is reconciled with* Koslowski v. Koslowski, *80 N.J. 378, (1979).]*

Miller v. Miller, Docket No. M-13516-79 (Ch. Div., Decided February 17, 1982) (Bergen, Sorkow, J.S.C.), aff'd Docket No. A-2968-81T2 (App. Div., Decided June 16, 1983) (*Bischoff* and *J.H. Coleman,* J.J.A.D.) (trial Court opinion is letter decision not submitted for approval for publication; Appellate Division opinion not yet approved for publication.)

TRIAL—Jury trial denied in palimony action.

The plaintiff lived with the defendant and her children in Vietnam and when he returned to the United States, they accompanied him and thereafter lived with him. In 1983, the plaintiff sued in the Law Division for exclusive possession of his home. The defendant answered and counterclaimed based upon cohabitation and an alleged contract by which the plaintiff was to support the defendant and her children in return for the defendant's living with the plaintiff in Vietnam, her accompanying him to the United States and her maintenance of a household with him. She sought equitable remedies or, in the alternative, monetary damages and demanded a jury trial. On her motion, the matter was transferred to the Chancery Division. Thereafter she moved in the Chancery Division to have a jury trial.

Citing the statement in *Crowe v. DeGioia,* 90 N.J. 126 (1982) that actions to enforce a support agreement between unmarried cohabitants where equitable relief is sought should be brought in the Chancery Division, that the relief sought by the

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Editor's View

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adopted limiting a litigant, who might wish to make ten requests in a single motion, to only five requests, would not that litigant respond by simply returning to Court on two successive motion days? Instead of easing the judicial burden, the proposed rule would not only increase that burden, it would also impose upon litigants considerable added expense and anxiety.

Should the Committee advocate the imposition of page limits upon matrimonial certifications? This is a far more difficult question. First, the role of certifications filed in support of applications must be remembered. The certifications represent the testimony on which an eventual Order will be entered. Certifications are filed in lieu of live testimony that might otherwise be received in an evidentiary hearing. Litigants have a right to be heard, albeit in writing. Should that right be limited?

Second, this issue is intrinsically intertwined with the question of whether oral argument is to be permitted in matrimonial motion practice. Alas, notwithstanding the mandate of R. 4:79-11, in many vicinages requests for oral argument are not granted even on "substantive and non-routine discovery motions. . . ." Indeed, it might be said that the farther north one travels, the less likely it is that oral argument will be permitted. Thus, in many of the southern counties oral argument is allowed on virtually all motions. In many of the northern counties this is not the case. Dangerous will it be not only to limit oral argument, but also to limit the number of pages of written testimony that will be permitted.

On the other hand, however well-intentioned, some attorneys do abuse the unrestricted privilege to file unlimited pleadings in support of their matrimonial motions. Matrimonial certifications need not rival in length Tolstoy's *War and Peace,* however apt that title might be to an issue then at bar. A college admissions officer once said that "the thicker the application, the thicker the applicant." Similarly, it might sometimes be said, "the thicker the motion file, the more tenuous the entitlement to relief." The lesson is that, through education rather than fiat, attorneys should be encouraged to temper the length of their submissions. Attorneys should be sensitive to the burdens imposed upon the Bench in preparing for a Friday motion day. If necessary, certifications should be permitted to be lengthy; when unnecessary, however, attorneys should be circumspect about the length of what they present to the Court.

Such circumspection should be accompanied by increased use of an expanded Preliminary Disclosure Statement form, particularly in pendente lite matters. The form at a glance should highlight to the Court the salient aspects of the case. The form should serve as a checklist for discovery and a blueprint to the issues that must eventually be resolved prior to final disposition. Certifications should augment, rather than duplicate, the contents of the preliminary disclosure form. The use of additional forms should also be explored.

Should the time limits applicable to the filing of motion papers be expanded? Would requiring 21 or 28 days' notice for the filing of motions significantly aid the process? Would a responding attorney be any more prompt with a 15-day, rather than an 8-day, rule? Would a Court faced with a weekly or bi-weekly motion call be able to devote more time to the motion list were the time limits to be expanded? The likely response to each of these questions is in the negative.

Procrastination is a fundamental trait of human nature. Lawyers in this area all too frequently exhibit their humanity. Lawyers are late in filing responses under the current rules; so, too, are they likely to be late if the time limits are expanded. If judges are overburdened with current motion lists, they will be no less overburdened if motion papers are filed a week or two earlier.

More importantly, extending motion time limits will hurt the public. To the extent that time limits were expanded, access to the Courts would be made just that much more time consuming and difficult. Children in need of support would have to wait just that much longer. A father denied visitation would have yet longer to wait and complain about the judicial process. A recalcitrant payor would have just that much longer to hide behind judicial delay. Indeed, extending the time limits as proposed might well have the effect of increasing the costs of matrimonial litigation, both to the system and to the individual litigants. Were motion time limits expanded, undoubtedly Order to Show Cause practice would then increase. Judges would be confronted with lawyers waiting in their outer offices to present innumerable "emergent" petitions. Two appearances, with all of the judicial and legal time involved and double expense to the litigants, would be viewed as a way of circumventing the delay occasioned by a rule expanding the time limits.

There must be and is a better way. That better way is to grant easier and prompter access to the Courts in order to resolve uncomplicated interim applications. Judges should be receptive to telephone applications, without the necessity of formal pleadings, where the nature of the matter warrants. Only very recently has our Court system discovered what lawyers have long employed—the telephone conference call. The "squawk box," as it is affectionately known, could and should be used to maximum advantage. If lawyers could only speak informally to a judge (always with opposing counsel present on the line), unnecessary pages might never find their way into lengthy certifications and untold motions might never appear on a Friday motion calendar. The spoken word can be uttered more cheaply than the written word can be prepared. Certainly, this suggestion should offer food for thought.

Should the rules explicitly state that only "... the requests specifically enumerated in the Notice of Motion may be addressed to the Court"? Absent consent by both sides, there is merit to Judge Imbriani's suggestion. There is particular merit where the motion is determined "on the papers." Is it not unfair, when an Order is entered without oral argument, when counsel and the responding litigant do not even perceive that a request has been made? On the other hand, where oral argument is heard and where consent is granted, flexibility is warranted. Better that a matter be resolved, even when no formal motion has been made, than to require the parties to return unnecessarily to court two weeks later.

As previously stated, motion practice does play a vital role in the administration of matrimonial justice. It is a subject that deserves ongoing dialogue. Judge Imbriani performed an admirable service in preparing his excellent article. The *Family Lawyer* editors hope that this column will further stimulate a dialogue. The editors welcome comments on this important topic from both Bench and Bar. We would be thrilled to share in future publications excerpts from selected correspondence received on this, as well as on any other topic which vitally affects our practice.

One further note is appropriate. In disagreeing with some of Judge Imbriani's suggestions, it is our hope that we will not inhibit our distinguished Bench from contributing to future issues of the *Family Lawyer.* One of the great strengths of this publication has been the willingness of judges to make significant contributions to many of our issues. Our editorial policy continues to give a preference to articles prepared by the Bench. Judge Imbriani's article stands in the long line of significant contributions made by our Bench. We take this opportunity to thank not only Judge Imbriani for his article, but also all of those judges who have contributed in the past. We may not always agree with what you have to say, but we respect your sincerity and appreciate your willingness to share your views with our readers.

Recent Cases *(continued from p. 92)*

defendant was equitable in nature—*quantum meruit,* quasi-contract and contract—the Court noted that the Chancery Division was the proper forum. The Court further stated that the case *sub judice* was based upon "purely equitable right and remedies," that the legal rights asserted by the defendant were ancillary to the equitable rights, and that "Chancery may proceed to a final determination of the controversy and settle purely legal rights. Stating that although a litigant in Chancery is not to be denied his or her constitutional right to trial by jury decision as to whether a jury trial is appropriate is subject to the inherent jurisdiction of equity, which has general jurisdiction to adjudicate ancillary and incidental matters. If the issue for which one would have the right to trial by jury is "ancillary and incidental to the subject matter of the equitable jurisdiction," the Chancery Court may try that issue *without* jury.

The Court found that the legal issues raised by the defendant were "sufficiently intertwined with and ancillary to the equitable issues that they are within this court's inherent equitable distribution" and therefore the defendant was not entitled to a trial by jury nor were the issues so complex so as to call for trial by jury pursuant to the court's discretion under R.4:35-2.

***[Comment:** The Court noted* Davis v. Davis, *182 N.J. Super. 397 (Ch. Div. 1981) wherein the court held that trial of a marital tort in conjunction with a divorce suit did not give a litigant the right to a jury trial for that tort and the* Supreme Court Committee on Matrimonial Litigation, Phase Two Final Report *recommendation that legal issues incidental or ancillary to an equity case should be disposed of without a jury trial.]*

Apollo v. Pham, Docket No. M-7194-83, (Ch. Div., Decided Dec. 6, 1983) (Bergen, Sorkow, J.S.C.) not yet approved for publication.

Joint Custody

(continued from page 85)

16. Gourley, infra note 1, at 165.
17. Gourley, infra note 1, at 165.
18. Miller, infra note 8, at 365.
19. Gourley, infra note 1, at 166.
20. Moller, infra note 10, at 44.
21. Gouge, infra note 11, at 333.
22. Folberg and Graham, infra note 15, at 570.
23. Miller, infra note 8, at 362.
24. Gouge, infra note 11, at 333.
25. Goldstein, Freud, Solnit, *Beyond the Best Interests of the Child* at 38 (1973).
26. *Id.*
27. Moller, infra note 10, at 44.
28. Bratt, infra note 9, at 300.
29. Goldstein, Freud, Solnit, infra note 25, at 38.
30. *Id.*
31. Moller, infra note 10, at 45.
32. Moller, infra note 10, at 44.
33. *Id.*
34. Gourley, infra note 1, at 167.
35. *Beck v. Beck,* 86 N.J. 480, 485 (1981).
36. 5 N.J. Super. 392, (App. Div. 1959).
37. *Id.* at 397.
38. 150 N.J. Super. 556 (1977).
39. *Mayer* at 561.
40. See *Armour v. Armour,* 135 N.J. Eq. 47, 52 (E. & A. 1944).
41. 173 N.J. Super. 33 (1980).
42. 181 N.J. Super. 130 (1981).
43. Bill A122, "An Act concerning custody of minor children, and Amending R.S. 9:2-3 and R.S. 9:2-4, sponsored by Representative Richard Visotcky.
44. *Id.*
45. Bill A122 has been in the Judiciary, Law, Public Safety and Defense Committee of the New Jersey State Assembly since February 1, 1982.

In the Best Interests of the Child

by Jane K. Hochberg, Psy.D.

The custody of the children of divorce has been, historically, a parental and legal matter. In recent years mental health professionals have become increasingly involved. In my practice as a clinical psychologist I often work with adults, adolescents and children who are embroiled in divorce or struggling with its aftermath. I am constantly reminded of the conflict and the pain caused by custody suits. It is important that those of us who struggle with this matter know as much as possible about it including approaches which may lead toward less painful and costly resolutions. My concern is the ways in which the mental health professional can work with attorneys and the courts on custody issues; some of the possible custody arrangements, especially joint custody; and the impact of custodial arrangements on children.

Initially, when custody disputes occurred, mental health professionals were enlisted by attorneys as advocates for one side or the other, to proclaim this parent or that "a fit parent." It now appears to many of us that this "hired gun" approach simply does not work. Like psychologists and psychiatrists who evaluate defendants in insanity pleas, we can line up on one side or another, solving nothing. Ours is not an exact science, but there is certainly some agreement that a well trained clinician can make an in-depth evaluation that has real merit. Thus more recently we have moved from parent advocate to the role of child advocate or "expert," asked by the judge or by both attorneys to evaluate the family and make a recommendation for custody. The 1980 Pashman Report underscores the importance of that role to the legal community.

Being an "expert" is an awesome responsibility when the quality of a child's life is at stake. Nonetheless it seems clear that when parents are at odds over children, when each has an attorney, the only meaningful service we can perform is that of child advocate. It becomes our obligation, using all of our clinical acumen and all the collaterals available to us such as schools, reports from therapists who may be treating family members, adult siblings, grandparents in residence, etc., then to make a recommendation that reaches beyond parental needs and conflicts. In short we must be primarily concerned with the best interest of the child. The data suggests that of the children born in the 1970's, 40 percent to 50 percent will at some time live in a single parent family.[1] Since 1973, each year one million children have become the victims of divorce.[2]

Jane K. Hochberg is a clinical psychologist in private practice in Florham Park. She is a consultant to the Family Service and Child Guidance Center of the Oranges, Maplewood and Millburn.

1979 government statistics indicate that 90 percent of divorced mothers retained custody of the children.[3] Still a small but growing number of fathers no longer wish to be "weekend Daddys," but seek more meaningful relationships with their children which implies new and innovative custody arrangements.

These attempts on the part of fathers to maintain closer relationships with their children are healthy for children. Children whose parents separate can experience grief, anger, guilt and feelings of abandonment. Although in a year or two most of the outward signs of such feelings, i.e. regression, poor school performance, sleeplessness and depression seem to disappear, recent studies indicate that five to ten years later the wounds are still there.[4]

The fact is that optimal emotional stability for children of divorce seems to require a minimal disruption in their lives, especially in the area of parenting. Children who experience the most emotional upheaval are often those for whom the father-child relationship has been disrupted.

Joint custody has therefore come into being. Whether the children move about or the parents move about, it simply states that the children's time will be divided equally between the two parents allowing the children's own lives to proceed as smoothly as possible.

Joint custody is not a panacea. It is an excellent solution to a difficult problem but it requires a monumental effort. It implies that parents will trust one another's parenting, cooperate, and coordinate with some good will. In short, joint custody, if it is to work, requires divorced couples to parent together at least as well as most married couples do.

A complicating factor is that divorcing couples, like their children, feel anger, grief, abandonment and fear. For many the anger is never totally mitigated, even after remarriage. I have seen numbers of adolescents in my office whose divorced parents, six and eight years later, still refuse to sit in the same room with one another to discuss problems of their mutual child. The large majority of divorcing couples cannot manage the joint custody arrangement, and when they try the children are caught in the endless conflicts which ensue. If a couple is seeking a joint custody arrangement, and in the course of the divorce the court becomes aware of continuing conflict over support, visitation, etc., it would behoove the court to evaluate any joint custody decision in order to avoid future problems for the children.

If joint custody is awarded, the arrangement should be carefully delineated in the beginning so that both parents and children understand clearly where they go and when. It is much simpler for children to adapt to a structured situation. It is also destructive for children to play manipulation

games: "I am mad at you, I am going to Dad's" or "You can't make me, I am going to Mom's." If the joint custody proceeds smoothly, it is then easier to relax the rules.

There are, of course, other custody arrangements that fall somewhere between sole custody and joint custody. In multiple child families one parent may choose to take only one or two of the children, thus dividing the children between two parents. For siblings who are young and close to one another in age this is usually a mistake. When parents break up, the children would do best to have one another. The greater the disparity in age between the children the more likely it is that this arrangement will work. Occasionally parents have arranged to take the children a year at a time especially if they live a distance from each other. This presents certain advantages, but it may create its own set of problems such as interrupted schooling and friendships.

Some parents have resolved the problem by using the term joint custody but the mother remains the primary parent. In this arrangement, father spends more time with the children then has been usual in sole custody decisions, and the implication is that the parents share in the decision making process regarding the children.

It is only in recent times that fathers have been awarded custody of the children. Obviously when the mothers are willing there is no issue, but when it is a matter in dispute we must look carefully so that children are not used as pawns in the divorce game. There are certainly families in which the father is truly a nurturing parent and is prepared to handle that role lovingly and competently, especially in a family where both mother and father are working, father cannot be automatically negated as a custodial parent simply because historically we have assumed that children can only be nurtured by mothers.

Custody decisions should be open to revision when children grow older. Family situations change and children may develop a closer relationship with one parent or another, but again this requires evaluation because it is destructive for a child or an adolescent to manipulate adults and play musical parents.

Young parents often complain that no one has trained them to be parents and that inevitably when their children develop one problem or another, parents feel inadequate and confused. This is true even more so for divorcing parents, who, feeling pain themselves, are trying to nurture children who are also in pain. Despite all of our efforts one fact is clear, divorce represents a loss to a child. Creative custody arrangements can mitigate a child's feeling of loss and help the child to grow into a healthier adult. In a final analysis, however, any arrangement is only as good as the parent's willingness to cooperate with one another.

Footnotes

1. Bane, M. 1976. Here to Stay: *American Families in the 20th Century.* Basic Books. N.Y.
2. Abairbanel, A. 1977. *Joint Custody Family. A Case Study.* Approved Doctoral Dissertation. California School of Professional Psychology. Los Angeles.
3. U.S. National Center for Health Statistics. 1979. Monthly Vital Statistics Report 28 (2). Government Printing Office. Washington, D.C.
4. Wallerstien, Judith S. Children of Divorce. *American Journal of Orthopsychiatry.* Volume 53, #2. April, 1953.