# New Jersey Family Lawyer

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CHAIR'S COLUMN

## This is Your Section—Celebrate it!

*by Madeline Marzano-Lesnevich*

This is my first column as chair. For those of you who attended the installation of this year's officers of the Family Law Section, thank you for celebrating with us. For those who were not able to attend the section's annual meeting, I hope you will make it a priority next year and in the years to come.

I am indeed honored to be chairing what I consider to be the most important and vibrant section of the New Jersey State Bar Association. Our section—your section—has a history of activism, of scholarly work, of compassion and of camaraderie. I am especially proud to be chairing the Family Law Section for the 2004/05 term, as we celebrate our 40th birthday! Our section started as a small committee. (The recently formed Gay, Lesbian, Bisexual, Transgender Committee of the State Bar should be encouraged by the rapid growth of what was once a small family law committee to the largest section of the State Bar). The earliest records I have of the Family Law Committee indicate a 1965 enrollment of 31. Forty years later, the Family Law Section has approximately 1,100 members.

We intend to celebrate the Family Law Section's 40th birthday at our annual Holiday Party. The reception will be held at the Governor Robert Minor Center on December 13, 2004, and you are all invited! Save the date, but watch for future announcements for registra-

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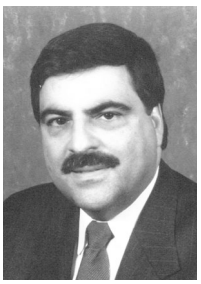
OUTGOING CHAIR'S COLUMN

## A Fond Farewell

*by John DeBartolo*

As one grows older, each year seems to pass more quickly. So it was for me from May 16, 2003, to May 20, 2004, as I served as chair of the Family Law Section. In my final column, I want to reflect upon the year's events, say thank you, and leave with a few thoughts about the future.

Those of you who were at our annual dinner in May at the Short Hills Hilton recall the celebration of goodwill for the section and recognition of the outstanding career of this year's Tischler Award winner, Patricia Barbarito. Please take a moment to read the tribute to Pat from our Editor-in-Chief Emeritus Lee Hymerling in this issue. Our section is justifiably proud of our position of leadership and service to the bar and the public. Pat is the embodiment of the dedicated family lawyer. May each one of us strive to achieve the level of success and admiration obtained by Pat.



Shortly after our Annual Dinner, the section conducted two successful sessions at the State Bar Annual Meeting in Atlantic City. Our current chair, Maderline Marzano-Lesnevich, presided over an informative and entertaining look at the divorce styles of the rich and famous. The rich are different, and the famous have their special needs. Our practice requires us to understand those differences and needs, and to bring them in compliance with the requirements of law and procedure.

The other seminar was the second Bench-Bar Conference held during the Annual Meeting. NJSBA Immediate Past President Karol Corbin Walker began the prac-

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tion and the opportunity for a journal ad. We intend to honor all past chairs of the section at this important, and happy, event.

Since being installed as chair of this section, I have a deeper appreciation of all the chairs who preceded me. I want to particularly acknowledge the chairmanship of my immediate predecessor, John F. DeBartolo, whose last column appears in this issue. John's leadership of this section was strong and steady; his devotion to family law and to the section is commendable. I am fortunate that he will continue as an officer of the section in his new post as immediate past chair. I want to publicly thank Frank Louis who, several years ago, stressed to the officers of the section the importance of our working together and developing a camaraderie that would sustain us through the differing opinions we might have, the differing votes we might cast, and the differing ideas we might have for what the section should be and how it should operate. Frank, and his wife, Nurit, whom I thank even more than

**[T]he purpose of the Family Law Section [is] "to improve the administration of justice in the field of Family Law by study, conferences, publication of reports and articles, with respect to both administration and legislation in all matters pertaining thereto."**

Frank, graciously made their home available for the officers to hold the first of what has now become a tradition among the officers—the Officers' Summit—where the officers meet for the weekend and plan the section's goals, the Executive Committee appointments, the objectives and the practical workings of the Executive Committee. Thank you. It has become a very important annual event, and now, with this year's summit having been held in Nantucket, MA, a moving site. (Thank you fellow officers for going the distance!)

My fellow officers—your officers of the section—are Chair-Elect Bonnie Frost, First Vice-Chair Patricia Roe, Second Vice-Chair Ivette Alvarez, and Secretary Thomas Hurley. You will read more about each of the officers in the next issue of this publication. In the meantime, know that each one of us is committed to what the March 1966 issue of the *Family Law Committee Newsletter*, the predecessor to this publication, reported as the purpose of the Family Law Section: "to improve the administration of justice in the field of Family Law by study, conferences, publication of reports and articles, with respect to both administration and legislation in all matters pertaining thereto."

To help accomplish our stated purpose, Edward O'Donnell is chairing—joined by Stephanie Frangos-Hagan and Brian Schwartz—our Legislation Subcommittee, which reviews all proposed legislation affecting family law and makes recommendations to the Executive Committee regarding whether we should support or not support a bill. The work of the subcommittee has become increasingly important, and, frankly, increasingly time consuming. Once the Family Law Executive Committee has taken a position on a particular bill, which may even include drafting amendments to a bill, our position goes before the Legislative Committee of the State Bar for a recommendation to the Board of Trustees regarding its support or non-support.

We have continued the Domestic Partnership Subcommittee to monitor the implementation of our recently enacted Domestic Partnership Act. The Domestic Partnership Subcommittee is co-chaired by Joan A. McSherry and Thomas Snyder who, of course, will follow carefully and report to us on the appeal of the *Lewis v. Harris* matter. The next issue of this publication will have more information for you on this very important development in our law.

We have strengthened and expanded the Young Lawyers Subcommittee, originally initiated by Lynn Newsome during her year as chair. Lynn emphasized the role of the young family lawyer and his or her growth within the Executive Committee, and this goal has certainly been reached and surpassed by our current members. Anyone who attended the last Family Law Retreat in Las Vegas can certainly attest to the fact that the young lawyers' Jeopardy Game stole the show,

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and sent the participating not-so-young family lawyers back to the books! The excellent work of the Young Lawyers Subcommittee will be led by Robin Bogan and Scott Laterra as co-chairs, and guided by Bonnie Frost and Patricia Roe. Our Young Lawyers Subcommittee has been very active already in contacting potential members, having happy hours throughout the state, and planning seminars and articles for publication. If you are a younger member of the Family Law Section, or a recently admitted practitioner, and wish to take an active part in your section, contact either Scott or Robin.

In addition to the Holiday Party celebrating the section's 40th birthday, we have several other exciting events planned.

From February 9 through February 13, 2005, the Family Law Annual Retreat will be held at the Royal Sonesta Hotel in New Orleans. Those of you who attended our prior retreats, such as those held in Las Vegas, Santa Fe and Charleston, know what a very special event this is. We have been fortunate in the past to receive the support of the Wells Fargo Bank and many of the forensic accountants and valuation professionals with whom we work; they have not only contributed to the practical success of our retreat but they have provided substantive seminars on issues important to us as family law practitioners. As part of this year's retreat, we have planned a welcoming reception at our hotel on Bourbon Street, a dinner at one of New Orleans' finest restaurants, a cocktail party at one of its largest antiques shops, a boat tour on the Bayou, and a Big Easy hoedown with a crawfish boil and zydeco music under a tent at Honey Island. The retreat provides a unique opportunity for all of us to take time from our busy practices to get to know each other and those with whom we work in a relaxed and fun setting. It promotes the civility with which we should treat each other even when adversaries in highly contested cases. The retreat begins February 9, 2005, the day after Mardi Gras. Those interested in getting an early start and enjoying Mardi Gras should book your hotel rooms early. Registration for the retreat began in September. If you are booking for Mardi Gras, be sure to mention that you intend to stay through the retreat so you receive group rates for the days of the retreat.

Our retreat has grown in size and in popularity so much so over the last several years that I would urge you to save the date and register early to guarantee a spot. As some of you know, the person to thank for each year's exciting retreat events, gourmet food, smooth running, and all else, is the section's event chair, Lizanne Ceconi. Since Lizanne is also a main organizer of the Holiday Party and the Tischler Award Dinner to be held on May 5, 2005, at the Oyster Point Hotel in Red Bank, we can expect all these events to be up to Lizanne's obviously exacting standards.

In looking over what records do exist from the early formation of our section, which have been provided to me by our own Alan Grosman (whose late father, Charles M. Grosman, was the first chair of the section) I note that the Executive Committee—the governing body operating on behalf of the Family Law Section—was first appointed in February 1966. That announcement included the following: '*Suggestions and comments concerning programs and activities of the Family Law Section are invited. Every section member has an opportunity to express himself as to what he believes should be done or considered by the section.*" I repeat the words of that invitation to you, and I add that each section member has the opportunity to express himself *or herself* as to what he *or she* believes are the subjects to which the section's attention should turn. Let us know. We want to hear from you. It is *your* section. ■

# *Section Seeks Tischler Award Nominees*

The Family Law Section Executive Committee is seeking nominations for the 2005 Tischler Award. The prestigious award honors an individual who has made significant contributions of service and scholarship to the practice of family law.

The selection committee will consider the contributions of potential recipients in the areas of promotion of the family unit; contribution to the positive development of family law by publication of articles; participation in seminars and service on committees; public service in the advancement of the development of family; the promotion and advancement of the goals of the legal profession, including service to the Family Law Section of the New Jersey State Bar Association; membership on Supreme Court committees; participation in early settlement panels and other complimentary dispute resolutions alternatives; membership and participation in groups that advance family law and the positive image of matrimonial lawyers; and active participation in family law activities on a county and local bar association level.

Any section member may nominate him or herself or any other person for consideration by the selection committee. All proposals for consideration, including details of the individual's qualifications, should be submitted to the chair of the selection committee, John F. DeBartolo, at Atkinson & DeBartolo, P.O. Box 8415, Red Bank, NJ 07701, and must be submitted before October 20, 2004. The award will be conferred during the Family Law Section Annual Dinner on May 3, 2005. ■

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tice of holding bench-bar conferences during the Annual Meeting for all divisions of the courts. This practice, continued by President Ed McCreedy, has proved successful, especially when judged by the attendance at the family part conference, and should be continued.

For those of you not in attendance, you missed the opportunity to hear Associate Justice of the Supreme Court James Zazzali, Appellate Division Judge Mary Catherine Cuff, Assignment Judge (Mercer County) Linda Feinberg, Presiding Judge of the Family Part (Essex County) Glenn Grant, and Municipal Court Judge Richard Russell discuss the practices, and problems, of their individual courts before a packed house. We have all heard about the special partnership between the bench and the bar in the family practice—bench-bar conferences are especially helpful in maintaining that relationship, introducing judges (from all levels) to the bar, and enabling lawyers young and old to meet, see, hear, and speak to judges. Thank you Justice Zazzali and the judges for participating. To all attorneys, take advantage of the many programs and exhibits at the NJSBA Annual Meeting, and don't miss next year's bench-bar conference.

Our executive committee met nine times during the year, and we discussed, dissected, and debated pending legislation and policies that affect every family practitioner in this state. Those meetings and discussions were among the most enjoyable events of the year. Our members are articulate, intelligent, sophisticated and pragmatic. The debates showcased those traits and illustrated to all the complex nature of this practice and the difficulty of trying to legislate domestic relationships. Our positions on the varied and wide-ranging legislation have been made known through the Bar leadership to the Legislature. We offer a unique perspective that must be considered by lawmakers. A huge thank you to our legislative co-coordinators, Charles Vuotto, Edward O'Donnell, and Thomas Hurley. Before each Executive Board, meeting these gentlemen prepared an analysis of recent bills, which enhanced our discussion.

You may have heard about, or better yet experienced, the annual Family Law Retreat in Las Vegas. Meeting with colleagues and other professionals in a relaxed atmosphere to examine pending issues and to sharpen litigation and negotiation skills is a highlight of each year. A public thank you again to all who attended, our sponsors, the judges and attorneys who participated in the seminars, and especially the young lawyers for their entertaining program. These retreats are here to stay. We have proven over the years that our members support and attend these programs. The retreats enhance our standing as a section and as a bar association. We have organized and executed the retreats in a financially responsible manner to keep the cost of attendance within reason. I thank the staff at NJSBA for their efforts. A special thank you is sent to our own event planner extraordinaire, Lizanne Ceconi. Lizanne's time and work in planning and executing these retreats is exceeded only by her imagination. Nothing succeeds like success, so plan to be in New Orleans, February 9-13, 2005, and at the retreats in the future.

On a personal note, this year has presented me with the opportunity to appear before the Supreme Court on two occasions. First, to argue the State Bar position as *amicus curaie* in *Weishaus v. Weishaus.* Second, to present the Bar's position on various aspects of the Supreme Court Family Practice Committee Report. On both occasions, each and every justice manifested an intense interest in the position of the organized bar. We now know the result in *Weishaus,* and are most satisfied that the Court's decision is in accord with our position. The results of the Court's consideration of the practice committee report are not yet known, but I am certain the Court had a better understanding of the practical concerns of practicing attorneys because this section reviewed and commented on the report.

Throughout the year, members of our section lectured and wrote for numerous Institute for Continuing Legal Education programs. Frank Louis put together another outstanding symposium that broke all attendance records. Bonnie Frost organized and executed a tremendously successful hot tips program that provided dozens of practical practice pointers to attorneys of every level of experience. Thank you to Frank and Bonnie and to all attorneys who devoted time and effort to the education of the bar. We have an ongoing duty to continually educate ourselves, and each year the programs staffed and organized by the section and our members satisfy this duty in extraordinary fashion.

The absolute highlight of the year has been the opportunity to work with wonderful and talented officers of the section. Immediate Past Chair Mike Stanton, Chair-Elect Madeline Marzano-Lesnevich, First Vice-Chair Bonnie Frost, Second Vice-Chair Patricia Roe and Secretary Ivette Alvarez are as fine a group of family lawyers and human beings as I can imagine. They have been supportive, hard working, dedicated and fun. Without them, this year would have lacked much of its enjoyment and accomplishments. I appreciate them all more than they will ever know, and wish to Madeline the same good fortune in her year. I also welcome incoming Secretary Tom Hurley as he joins the ranks of section officers. It is most satisfying to see the future of the section is in such good and capable hands as those of our current officers.

Now I must end, both this column and my year as chair. For all whom I have not mentioned by name, please do not think I do not appreciate your efforts. The editors allow me only so much column space. We practice a very special and specialized area of the law. This section, through its activities and the efforts of its members, enhances the practice in scholarship, professionalism, and collegiality. We should all strive to continue this fine tradition. I greatly appreciate my term as chair, and will continue my involvement. My parting wish is that when Madeline writes her goodbye column next year the membership of the section will have grown and the successes increased. ■

FROM THE EDITOR EMERITUS

# Pat Barbarito Our 2004 Tischler Award Recipient

*by Lee M. Hymerling*

At our section's 2004 Annual Dinner, held in Short Hills, Pat Barbarito was honored with this year's Saul Tischler Family Law Section's Award. Pat was a most worthy recipient.

Since her admission to the bar in 1981, Pat has distinguished herself and our profession in innumerable ways. Not only did she serve as chair of the Family Law Section and a lecturer for the New Jersey Institute for Continuing Legal Education and the American Academy of Matrimonial Lawyers, Pat has been, for more than two decades, a steadying influence in the development of our state's procedural and substantive family law. Among her greatest accomplishments has been the development—within the firm of Einhorn, Harris, Ascher, Barbarito, Frost & Ironson, P.C. in Denville—one of our state's largest family law departments. A *magna cum laude* Seton Hall graduate, Pat also received her law degree from Seton Hall, and has served with distinction as a member of the New Jersey Supreme Court Family Practice Committee and chaired the Battered Women's Legal Advocacy Project.

In addition to her service on Supreme Court committees, Pat has also contributed to family law practice through her writings. Her article "Relocating With the Children, Shifting the Focus," presented and published as part of the 1999 Family Law Symposium, thoroughly reviewed the difficult issue of removal. Her contributions to this publication have been exemplary.

While chair of our section, Pat was instrumental in presenting the section's positions to the Special Committee on Matrimonial Litigation that eventually rewrote so much of our procedural law. Shortly after the committee's appointment, as section chair she appointed a committee to present section positions to the special committee. Early in the work of the committee, Pat wrote in this publication about the committee hearings that took place in Newark and Trenton:

> Regardless of who testified—disgruntled litigants, lawyers or interested members of the public—one theme continuously emerged—the need for active case management by one judge for one case. We have heard stories of protracted litigation, resulting in increased legal and expert fees for litigants. A case that had been handled from day one by one judge was assigned to another judge on the eve of trial, sending panic into the hearts of litigants who have placed their fate in the hands of a judge with whom they had become familiar. Meaningful sanctions have not been imposed for violated orders issued by a judge previously assigned to the case, resulting in litigants losing faith in the system.

Pat understood, as she has continued to understand, the important work of family lawyers and how critical a role the family part plays.

In her writings, Pat has always known that family law is not static; that it evolves, constantly changing, and that with it, both family law practitioners and the Family Law Section must also change.

Pat also understands what being a family lawyer is all about. In the January 1997 issue of this publication, she wrote about how she regarded family law practice and the demands placed upon family lawyers. I quote extensively from that article because it summarizes how many feel. The article was written as Pat was turning 40, having worked "day and night to build a practice":

**…[Y]ears ago, when I was interviewing for a job, I was afraid to even mention (let alone think) that having a life outside the practice of law was important. I know now that integrating a personal life into the practice of law has become more and more important to young lawyers.**

> About five years ago, during interviews with young lawyers, the new graduates asked how practicing family law would affect how they lived their lives. Seventeen years ago, when I was interviewing for a job, I would

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# "Call Daddy and Tell Him I'm Sick"

## When Children Refuse to Visit

*by John Fiorello*

The task facing a lawyer representing a client who is not the residential custodial parent of a minor child in a divorce situation where the client complains that the child refuses to visit with the parent during his or her parenting time is often complex and difficult. The lawyer must first attempt to determine the cause of the child's refusal.

- Is the custodial parent interfering with the parenting time by discouraging the child, or disparaging the other parent to the child?
- Is the non-custodial parent engaging in conduct that has frightened the child or made it distasteful for the child to spend time with the parent?
- Has the child become empowered by its position as an object of disagreement between the parents so a refusal to spend time with either parent is a ploy to gain some material desire?
- Are there psychological or emotional problems involving all or some of the participants in the situation that are causing the refusal to visit?
- Does a combination of the foregoing factors exist and play a significant part in the child's refusal?

The starting point for the lawyer dealing with a child's refusal to participate in parenting time with a non-custodial parent is the general legislative policy and decisional law of the state. The Legislature has declared:

> that it is in the public policy of this State to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.[1]

In a statute enacted in 1997, the Legislature recognized an increase in the filings for dissolutions of marriages, and in connection stated:

> The best interests of the children of these marriages in maintaining close relationships with both parents regardless of which parent has the physical custody of the child is paramount…"[2]

For persons who interfere with provisions of orders granting parenting time to a non-custodial parent, the Legislature has provided both civil and criminal penalties.

Pursuant to N.J.S.A. 2A:34-23.3, the following civil sanctions are available against a party who violates the terms of a parenting time order: community service, awarding compensatory time for the time lost by the non-custodial parent, awarding monetary compensation for costs incurred when a parent fails to appear for a scheduled visitation, as well as other economic sanctions that may be decided on a case-by-case basis.

Criminal penalties are provided in N.J.S.A. 2C:13-4, which provides that a person, including a parent, is guilty of interference with custody or parenting time if the person takes or detains a minor child with the purpose of concealing the child and depriving the child's other parent of custody or parenting time. If a child is taken, detained, enticed or concealed outside the United States or for more than 24 hours, the offense is a crime of the second degree, otherwise such interference with custody or parenting time is a crime of the third degree. However, the presumption of non-imprisonment for a first offense will not apply. Additionally, a person convicted under the statute is required to make restitution of all reasonable expenses and costs, including reasonable counsel fees incurred by the other parent in securing the child's return.

Our courts have also spoken eloquently concerning the rights of a non-custodial parent. It is the general law in New Jersey that the law favors parenting time (visitation) between a parent and child, and protects against the thwarting of effective visitation rights. All doubts must be resolved against the destruction of such rights.[3]

In the case of *Wilke v. Culp*, the Appellate Division stated:

> that a parent's rights to the care and companionship of his or her child are so fundamental as to be guaranteed protection under the First, Ninth and Fourteenth Amendments to the United States Constitution.[4]

In *Fronz v. United States*,[5] cited in *Cosme v. Figueroa*,[6] the District of Columbia Circuit Court held: "[T]he freedom of a parent and child to maintain, cultivate, and mold their ongoing relationship" is

one of the most important of the fundamental rights. And, *In the Matter of Baby M*,[7] our Supreme Court held that custody and visitation encompass practically all of what are termed *parental rights,* and that a total denial of both would be equivalent to a termination of parental rights. Moreover, it has been held that visitation rights cannot be abandoned.[8]

In the case of *Barron v. Barron*,[9] the non-custodial parent had not exercised visitation for a period of five years, and acknowledged to the court that his children did not wish to see him and probably would be fearful of resuming contact with him. However, he insisted that their attitudes were influenced by their mother, who had physical custody. Citing *Fantony v. Fantony*,[10] the court in *Barron* stated that parental rights will be preserved unless enforcing them would have an adverse effect on the safety, happiness, physical and mental welfare of the child or children in question. The Chancery Division in *Barron* admonished and criticized the father for his past conduct, but nevertheless upheld his visitation rights.

Where the custodial parent has been found to interfere with the parenting time/visitation rights of the non-custodial parent, our courts have spoken clearly and without equivocation. As stated by the Chancery Division in the case of *Paterno v. Paterno*[11]:

> However, this court abhors nothing more than the abuse of visitation and custody provisions by a parent merely acting out of anger or a sense of revenge…Accordingly, when one parent willfully violates the visitation of the other parent, *this* court must act swiftly and affirmatively.

And, as stated therein, although the custodial parent might have been in violation of the above set forth criminal statute, N.J.S.A. 3C:13-4, she could also concurrently have been in violation of Rule 1:10-5, Violation of Litigant's Rights (now Rule 1:10-3 Relief to Litigant). Pursuant to Rule 1:10-3, a non-custodial parent who has been deprived of parenting time by the custodial parent contrary to an order or judgment of the court, may apply to the court for an order enforcing his or her parenting time rights pursuant to the prior court order. In such an application, the court has discretion to make an award of counsel fees.

Of course, where the cause of a child's refusal to engage in parenting time with a non-custodial parent is not clear or difficult to determine, our Court Rules provide both judges and attorneys with tools to assist in the determination. Under Rule 5:3-3(a) a family part court is specifically authorized, on its own motion, to appoint medical, psychological or social experts to assist in the disposition of an issue before it. The court can require any person under its jurisdiction to submit to examination by such a court-appointed expert. Often such experts include either psychologists or psychiatrists. Our Supreme Court, in *Kinsella v. Kinsella*,[12] stated that in implementing the best interest of the child standard, courts rely heavily upon the expertise of psychologists as well as other mental health professionals, recognizing the importance of mental health experts in custody disputes.[13]

Parties are free to retain their own mental health experts to produce custody/parenting evaluations even where a mental health expert has been appointed by the court.[14] The court-appointed expert conducts an independent investigation and submits his or her report to the court and the parties.[15] The reports may be admitted into evidence subject to cross-examination.[16]

In addition to the appointment of mental health experts, the court may appoint counsel for the child or children in question pursuant to Rule 5:8A, or a guardian *ad litem* pursuant to Rule 5:8B. The appointment may be on the court's own motion or upon application by both or one of the parties.

Counsel appointed for a child in a custody or visitation case pursuant to Rule 5:8A specifically represents the child, and acts as an independent legal advocate for the best interest of the child. A guardian *ad litem* in a custody and visitation case, appointed pursuant to Rule 5:8B, serves the court on behalf of the child. The guardian *ad litem* acts as an independent fact finder regarding what furthers the best interest of the child, and submits a written report to the court and, if necessary, testifies.

The duty of a custodial parent who desires to retain sole custody is to aid and encourage efforts of the non-custodial parent, "to enhance mutual love, affection and respect between the parent and the child."[17] It has even been held that, in an extraordinary case, where the actions of a custodial parent deprive a child of the kind of relationship with the non-custodial parent that was held to be in the child's best interest, a court may remove the child from the custody of the uncooperative parent.[18] The removal of a child from the custody of a parent in such a situation is based upon the touchstone criterion of the best interest of the child, and not upon any theory of punishment for the uncooperative parent. However, it is clear that the custodial parent has an affirmative and strong duty to encourage a healthy relationship between the child and the non-custodial parent.

An interesting question is whether our courts, in those situations where the parental rights of a non-custodial parent have been effectively terminated by the custodial parent, can reduce or eliminate child support paid by the non-custodial parent to the custodial parent. Of course as a general rule, it has been held that the obligation to support a child is not dependent upon the right of visitation/parenting time.[19]

Notwithstanding the said general principle upholding the obligation

of child support as being independent of the right of visitation, our courts, on occasion, and in exceptional cases, have recognized that reduction or termination of child support payments to the custodial parent may be justified. In the case of *Parivash v. Youself*,[20] a husband was ordered to pay support for his child, who the wife took with her to her native country of Iran and refused to return. The Appellate Division held that in exceptional cases, where the custodial parent removes a child from the jurisdiction of the court and deprives the non-custodial parent of an effective opportunity to participate in the upbringing of the child, economic sanctions may be imposed.

In the case of *Brennan v. Brennan*,[21] the Appellate Division reduced existing child support arrears as a sanction for the custodial parent's failure to comply with visitation orders. It appears that the draconian remedy of suspending or reducing child support where a custodial parent makes it virtually impossible for the non-custodial parent to have parenting time with their child, would probably only be considered in the most exceptional situations.

It should be noted that pursuant to the Uniform Interstate Family Support Act (UIFSA),[22] in a proceeding to establish, enforce or modify a support order from a foreign state, a responding tribunal of the state of New Jersey may not condition the payment of a support order issued under the act upon compliance by a party with provisions for visitation. The same prohibition existed under the prior Uniform Reciprocal Enforcement of Support Act (URESA).[23]

Notwithstanding the foregoing, in the case of *Daly v. Daly*, a URESA proceeding, the trial court, while recognizing the general rule that support and parenting time are not interdependent, conditioned the custodial parent's receipt of support upon her permitting the non-custodial parent reasonable rights of visitation.[24] In the *Daly* case, the mother of the children, the custodial parent, removed the children from the state of New Jersey to her parents' home in Kentucky.

In a non-URESA, pre-UIFSA case, *Smith v. Smith,*[25] the visitation rights of the father had been established incident to an original support order entered by a New Jersey court. Thereafter, the mother removed the children from New Jersey for the purpose of obtaining a divorce. The trial court held that courts from New Jersey retained power to grant a reduction of the amount of child support for the children based upon the mother's interference with the rights of visitation of the father pursuant to the New Jersey court order. Although recognizing the general rule that the obligation to support is not dependent upon the right of visitation, the *Smith* court continued:

> [N]evertheless a compelling contrary philosophy permeates almost all decisions relating to rights of visitation. This philosophy includes not only the obligation of both parents to know and love their children, but also the right and privilege a child has in getting to know, love and respect both parents. 'No court should permit either parent to interfere with the successful attainment of these facets of a child's welfare.'[26]

The Child Support Guidelines enacted by the New Jersey Supreme Court provide that the guidelines must be used as a rebuttable presumption to establish or modify child support orders; but they may be disregarded, "due to the fact that an injustice would result due to the application of the guidelines in a specific case. The determination of whether good cause exists to disregard or adjust a guidelines-based award in a particular case shall be decided by the court."[27] And, N.J.S.A. 34-23(A)(10) provides that in determining child support, the court may consider, other than the enumerated statutory criteria, "any other facts the court may deem relevant."

One could argue in an appropriate, exceptional case, although apparently not involving an application for support initiated by another state pursuant to UIFSA, that if a parenting/visitation order of a court in New Jersey has been or is being virtually completely frustrated and interfered with by the custodial spouse, and all other means of enforcing the parenting time/visitation order have been futile or have been met with a lack of success, there is some authority, as set forth above, for an application to reduce support or eliminate or reduce any arrears that may have accumulated, especially during the period of time when visitation/parenting time has been intentionally and completely eliminated by the custodial parent. Of course, the best interest of the child must always be a paramount concern.

The problems and issues involved in a situation where a child refuses to engage in parenting time with a non-custodial parent are difficult and complex. The remedies and procedures provided by the Legislature and our courts may be ineffective to cure the problem, especially where, regardless of the fault of either parent, the child simply continues to refuse to engage in any contact with the non-custodial parent. However, judges, lawyers and mental health experts must and should work together, be imaginative in their approaches and make every effort to assure that the relationship between a minor child and a non-custodial parent is protected, encouraged and made a reality. ■

**ENDNOTES**

1. N.J.S.A. 9:2-4.
2. N.J.S.A. 2A:34-23.2.
3. *Wilke v. Culp*, 196 N.J. Super. 487, 496 (App. Div. 1984), *cert. den.* 29 N.J. 243 (1984); *In Re Adoption of JJP*, 175 N.J. Super. 420, 428 (App. Div. 1980).
4. 196 N.J. Super. at p. 296.
5. 707 F.2d 582, 594 (D.C. Cir. 1983).
6. 258 N.J. Super. 333, 341 (Ch. Div. 1992).
7. 109 N.J. 396, 451 (1988).
8. *See Barron v. Barron*, 184 N.J. Super. 297,

**Continued on Page 51**

## Court Records and the Internet

# Public or Publish

*by Susan L. Goldring*

**The purpose of this article is…to draw the reader's attention to the issues and the perils of Internet publication of court records, and to involve the practitioner in the process of forming the policy as it develops in the state and federal courts.**

One of the fundamentals upon which our court system is based is its openness. In most cases, except those related to juveniles, court records are open to the public unless specifically sealed. Anyone can go to the courthouse and review the records.The openness of our system of justice forms the bedrock for the perception of fairness, honesty and accountability that our society relies upon. We believe in an uncorrupt, transparent system of law. It is the fabric of our country. But does public access to records mean the court systems should publish the information on the Internet?

The federal and state courts are struggling with this issue as more and more court records are being stored electronically. In July 2002, a report for consideration by the courts was published.[1] The proposed guidelines are based on the following premises:

- Retain the traditional policy that court records are presumptively open to public access;
- As a general rule, access should not change depending upon whether the court record is in paper or electronic form. Whether there should be access should be the same regardless of the form of the record, although the manner of access may vary. The Conference of Chief Justices/Conference of State Court Administrators (CCJ/COSCA) guidelines apply to all court records;
- The nature of certain information in some court records, however, is such that remote public assess to the information in electronic form may be inappropriate, even though public access at the courthouse is maintained;
- The nature of the information in some records is such that all public assess to the information should be precluded, unless authorized by a judge;
- Access policies should be clear, consistently applied and not subject to interpretation by individual court or clerk personnel.[2]

The purpose of this article is not to review the guidelines, but to draw the reader's attention to the issues and the perils of Internet publication of court records, and to involve the practitioner in the process of forming the policy as it develops in the state and federal courts.

Most court proceedings involving families require a large amount of sensitive personal information, which could be harmful to the individuals if readily available. This includes such items as the names and addresses of victims of domestic violence or elder abuse; and the name, address, date of birth, assets, medical information and immediate family members' names and addresses in guardianship/conservatorship matters. The requirement to file an initial inventory after guardianship is granted opens the way to further abuse since a detailed listing of assets and income of the incapacitated person is required.

By far the worst area of disclosure occurs in divorce actions. New Jersey is not unique in requiring the litigants to file statements containing birth dates of the parties and children; Social Security numbers; driver's license numbers; other identifying information such as eye color; detailed information on all insurance policies, bank and investment accounts; real estate and employment information and copies of tax returns that may provide business taxpayer identification numbers.

In any court proceeding, discovery motions create a further treasure trove of detailed information. When making the motion one has to disclose the information requested and the information provided, so the court can understand what is missing. In order to clarify the issue it is often necessary to provide copies of the documents in question, such as tax returns one claims

are incomplete or financial information that lacks full disclosure. These documents are now part of the court file to which the public has access. But should they be?

Currently, if a member of the public wants access to any of these records, he or she must physically go to the courthouse and obtain the records. This requirement stops the idly curious because of the effort involved. Internet publication and access changes the degree of effort and the opportunity for mischief. The batterer or abuser no longer has to present him or herself at the courthouse and sign in to obtain a copy of the records regarding the alleged abuse, which may provide the victim's location. The identity thief, from a PC, could peruse the court filings in divorce and guardianship cases, reviewing all the financial information, pick the *juiciest* victims and run off with their funds. Such a person is hardly likely to present him or herself at the courthouse and ask to see one file after another without arousing suspicion.

With files on the Internet, children could read their parents' filings, which may include information that is personally upsetting to them, such as allegations against the parents or about the children themselves. Neighbors, classmates and school personnel would also have access to these records. There may be reports on the children or psychological evaluations of the parents that would be available either directly or as quoted in pleadings.

Besides the above concerns, what about access to this information by the IRS or by a litigant's employer? What about an employer using allegation information to determine employment status? Allegations concerning drug or alcohol abuse or the need or desire for therapy could result in the loss of employment if employers started reviewing these records. What if there are allegations that might include defrauding the employer? And what's to prevent the IRS from using spousal allegations of tax fraud to trigger investigations. Remember, we are talking about allegations, not proof. Many people fear the invasion of privacy caused by the Patriot's Act. Internet publication of court records would trump these concerns in spades.

States are tackling the issue in different ways. Some states, like New York, have enacted statutes or rules regarding certain records (family court records in New York) directing the sealing of essentially all of the records except the names of the parties and the nature of the action. Other states, like Washington, have provided for redacted records in which only the last four digits of Social Security numbers or bank/investment accounts are used, and children are identified by initials. The onus is on the practitioner and not the court to make sure the client's information is properly redacted and protected. Other proposals include having court clerks do the redaction, without consequences if the personal information slips through the cracks.

In the age of the Internet, the issue becomes one of balancing the advantages of an open, public system against the rights of the individual to privacy and protection from harm in making use of the system. If this balancing is not done successfully, our justice system will become even more two tiered, with the wealthy having access to private judges so the public as no information while the rest of the citizenry has access to a public court system that could do as much harm as good. As practitioners with clients to protect, we must each work within our own state and federal jurisdictions, to make sure our clients are not harmed by the mere use of the judicial system. As immediate protection, we might routinely ask for the sealing or return of sensitive documents so they do not remain in the court file. On a long-term basis, we must work with the courts to fashion an equitable system regarding public access and publication of sensitive information. ■

**Currently, if a member of the public wants access to [court] records, he or she must physically go to the courthouse and obtain the records. This requirement stops the idly curious because of the effort involved. Internet publication and access changes the degree of effort and the opportunity for mischief.**

**ENDNOTES**

1. "Public Assess to Court Records: Guidelines for Policy Development by State Courts," by the Joint Court Management Committee of the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA). July 16, 2002. After consideration and public comment, a final version was published on 10/18/2002. The text is available at www.courtaceesss.org/modelpolicy.
2. CCJ/COSCA Guidelines, p. 1.

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# Tax Treatment of a Property Transfer Incident to Divorce

*by Barbara Ulrichsen*

Familiarity with the general rules concerning the tax treatment of capital gains and losses is a necessary prerequisite to understanding the tax treatment afforded transactions in a divorce setting. As a general rule, the sale or exchange of capital assets triggers the imposition of a capital gains tax. Capital assets are usually described as assets held by a taxpayer except assets held in the business of the taxpayer.[1] The tax is imposed on the amount realized from the sale (the total of the money and the fair market value of any property received in connection with the sale or exchange) less the basis in the property transferred.

The starting point for basis in property is the cost. Upward adjustments are made for capital improvements and downward adjustments are made for depreciation and amortization. The tax rate applicable to this gain is dependent upon the holding period; the type of asset involved; and the date of acquisition. The maximum federal long-term (*e.g.* held more than one year) capital gains tax rate is currently 15 percent.[2] Short-term (*e.g.* held one year or less) capital gains are taxed at ordinary income tax rates.[3]

## PRE-1984 TAX REFORM ACT RULE

The Tax Reform Act of 1984[4] amended I.R.C. Section 1041 to provide for non-recognition of gains or losses in transfers between spouses and former spouses incident to divorce or separation. Prior to this amendment, the transfer of property in connection with a marital settlement agreement or incident to a final judgment for divorce would trigger recognition of gain or loss to the transferor. For example, if a husband transferred his interest in an appreciated shore home to a wife in exchange for a waiver of alimony, the husband would incur capital gains tax on his share of the difference between the fair market value as of the date of the transfer and the basis in the property. This was the case even though this was a non-liquid transaction and the husband did not receive cash in hand.[5]

## INTERNAL REVENUE CODE SECTION 1041

The Tax Reform Act of 1984 amended the then-existing Section 1041 to include divorce-related transactions. Previously this section had been exclusively applicable to transactions between spouses. Pursuant to Section 1041, there is no gain or loss recognized on a transfer incident to a divorce. Further, the recipient spouse receives the transferring spouse's basis in the property. This has the effect of transferring responsibility for taxation on the gain and the benefits of any losses to the recipient spouse. The gain will not be recognized until there is a sale or exchange of the property to a third party by the receiving spouse. The recipient spouse can also deduct capital losses when appropriate upon that spouse's sale or exchange of the property. The overall effect of Section 1041 to qualifying transactions is the same as if a gift had occurred between the spouses or former spouses. The specific provisions of 1041 that provide for this treatment are as follows:

**Section (a) General Rule.** No gain or loss shall be recognized on a transfer of property from an individual to (or in trust for the benefit of):

(1) a spouse, or

(2) a former spouse, but only if the transfer is incident to the divorce.

**Section (b) Transfer Treated as Gift;** Transferee has Transferor's Basis. In the case of any transfer of property described in subsection (a):

(1) for the purposes of this subtitle, the property shall be treated as acquired by the transferee by gift, and

(2) the basis of the transferee in the property shall be the adjusted basis of the transferor.

## QUALIFYING TRANSFERS

If a divorce has been entered and the transferring parties are non-spouses, the transfer must be deemed to be incident to a divorce for the non-recognition provisions of Section 1041 to apply. If the spouses are still married, the non-recognition provisions apply as a matter of course. The term *incident for divorce* is defined pursuant to I.R.C. Section 1041 as follows:

**Section (c) Incident for Divorce.** For the purposes of Subsection (a)(2), a transfer of property is incident to the divorce if such transfer:

(1) occurs within one year after the date on which the marriage ceases; or

(2) is related to the cessation of marriage.

A further definition of the term *cessation of marriage* is set forth in Temp. Treas. Reg. Section 1.1041-1T(b), Q&A-7. Under this regulation,

a transfer qualifies as being related to the cessation of marriage if:

> (1) it is made pursuant to a divorce or separation instrument; *and*
> (2) the transfer occurs not more than six years after the termination of marriage;

The temporary regulation in turn refers to I.R.C. Section 71(b)(2), which defines a *divorce instrument* as follows:

> The term 'divorce or separation instrument' means:
> (A) a decree of divorce or separate maintenance or a written instrument incident to such a decree,
> (B) a written separation agreement, or …

The term *divorce or separation instrument* also includes any modification to the original document. For example, if the original marital settlement agreement provides that the parties will jointly hold a residence for a 10-year period of time to accommodate the needs of the children and the husband has a permanent alimony obligation, a subsequent amendment to this agreement transferring the husband's interest in the residence to the wife in exchange for a release of alimony rights will bring the transaction within Section 1041 as long as the transfer takes place within six years of the final judgment for divorce. The former wife will, of course, receive the husband's basis in the property as opposed to a stepped up basis. By permitting transfers pursuant to amendments to divorce instruments as qualifying transactions within Section 1041, significant flexibility is given to the transfer of appreciated property to resolve post-judgment issues.

If a transfer between former spouses occurs beyond the six-year timeframe from the termination of marriage, there is a presumption that the transaction was not related to the cessation of marriage. This presumption can be rebutted by a showing that the transfer did relate to the division of property owned by former spouses at the time of the termination of marriage. Temp. Treas. Reg. Section 1.1041-1T(b), Q&A-7, provides the following guidance in such situations:

> …for example, the presumption may be rebutted by showing that (a) the transfer was not made within the 1- and 6-year periods described above because of factors which hampered an earlier transfer of the property, such as legal or business impediments to transfer or disputes concerning the value of the property owned at the time of the cessation of the marriage; and (b) the transfer is effected promptly after the impediment to transfer is removed.

The general principal of this rule appears to allow Section 1041 treatment to transfer of property existing as of the time of the divorce as long as there is a viable explanation for why it did not occur within the six-year period; however, it does not provide non-recognition to a transfer between spouses of appreciated property acquired after the divorce outside of the six-year period.

The concept of transfer pursuant to a divorce instrument is broadly construed, and will extend to obvious sale situations. In Private Letter Ruling 8833018 (May 20, 1988), non-recognition was afforded in a circumstance where the wife took title to the marital residence pursuant to a marital settlement agreement and the husband subsequently purchased the residence from her three years later, pursuant to a right of first refusal also incorporated in the marital settlement agreement.

In *Young v. Commissioner*,[6] the tax court examined a situation where the husband initially received property pursuant to the marital settlement agreement and provided the wife with a promissory note of $1.5 million secured by a mortgage on the property under the marital settlement agreement. The husband failed to satisfy the note, and the wife obtained a judgment against him. Three years after the original marital settlement agreement, the parties entered into an extensive modification agreement under which the property was transferred back to the wife and the husband's debts under the agreement, which included a principal amount of $1.5 million, $344,938 of accrued interest; $306,000 of the wife's legal expenses, and $8,300 of the collection expenses, were assumed by the wife. The modification agreement also provided that the husband retained an option to re-purchase the property for $2,200,000, which he assigned to a third party. The third party exercised the option and purchased the property from the former wife.

The wife argued that the husband should recognize the gain and accordingly bear the capital gains taxes on the transfer of the property back to her, as it did not constitute a division of marital property, but instead satisfaction of a debt. This argument was not accepted by either the tax court or the Fourth Circuit, and it was held that the wife took title to the property at the husband's basis.

Stressing the existence of the modification agreement, the second transaction was found to be pursuant to a divorce or separation instrument. Since the property was then sold to a third party who exercised the husband's option, the tax court held that the wife should recognize the gain on the subsequent sale.

The Fourth Circuit compounded the wife's tax problems, finding that the payment of legal expenses out of the closing proceeds represented taxable income to her because she had assumed such expenses as her personal obligation under the modification agreement.

## NON-APPLICABILITY OF SECTION 1040 OF IRC SECTION 1041

### *Non-Resident Aliens*

The non-recognition provisions of I.R.C. Section 1041 specifically do not apply if the spouse or former spouse making the transfer is a

non-resident alien. This is specifically set forth in Section D of IRC Section 1041 as follows:

> **Section (d) Special Rule where Spouse is non-Resident Alien.** Subsection (a) shall not apply if the spouse of the individual making the transfer is a non-resident alien.

It is of significance that this exclusion applies even to the interspousal transfers in non-resident alien situations.

***Transfers in Trust Where Liabilities Exceed Adjusted Basis***

Finally, if property is transferred in trust and the property is subject to liabilities which exceed the basis in the property, a gain is recognized to the extent that such liabilities exceed the basis. This is specifically outlined in subsection (e) as follows:

> **Section (e) Transfers in Trust Where Liability Exceeds Basis.** Subsection (a) shall not apply to the transfer of property in trust to the extent that: (1) the sum of the amount of the liabilities assumed, plus the amount of the liabilities to the extent that the property is subject, exceeds (2) the total of the adjusted basis of the property transferred.
>
> Property adjustment shall be made under Subsection (b) and the basis of the transferee in such property to take into account gain recognized by reason of the preceding sentence.

As with non-resident aliens, this provision is applicable to both spouses and non-spouses.

## SPECIAL TRANSACTIONS UNDER SECTION 1041

***Transfers to Third Parties***

Technically, a transfer by a spouse of appreciated property to a third party under the terms of a marital settlement agreement does not appear to come within the non-recognition provisions of Section 1041, as it is not a transfer between spouses. However, under Temp. Treas. Reg. Section 1.1041-1T(c), Q&A-9, and circuit court considerations of such transactions are brought within Section 1041 in certain circumstances. Under Temp. Treas. Reg. Section 1.1041-1T(c), Q&A-9, the following three circumstances are outlined as affording non-recognition treatment to transfers made to third parties incident to divorce, as follows:

> (1) "where the transfer to the third party is required by a divorce or separation instrument";
> (2) "where the transfer to the third party is pursuant to the written request of the other spouse (or former spouse)";
> (3) "where the transferor receives from the other spouse (or a former spouse) a written consent or ratification of the transfer to the third party. Such consent or ratification must state that the parties intend the transaction to be treated as a transfer to the non-transferring spouse (or former spouse) subject to the rules of Section 1041 and must be received by the transferor prior to the date of the filing of the transferor's first return of tax for the taxable year in which the transfer was made."

This regulation adopts a substance over form approach to such a transaction. The transferring spouse is essentially deemed to be transferring the property to the other spouse, who then transfers it to the third party. The above-cited regulation further explains that the second portion of the deemed transaction is not afforded Section 1041 treatment and the non-transferring spouse recognizes the tax consequences. Temp. Treas. Reg. Section 1.1041-1T(c), Q&A-9, specifically provides:

> …in the three situations described above, the transfer of property will be treated as made directly to the non-transferring spouse (or former spouse) and the non-transferring spouse will be treated as immediately transferring the property to the third party. The deemed transfer from the non-transferring spouse (or former spouse) to the third party is not a transaction that qualifies for non-recognition of gain under Section 1041.

In *Craven v. United States*,[7] the court examined a circumstance where the marital settlement agreement required the wife to transfer appreciated stock to a bank in satisfaction of the husband's debt. The court followed the road map set forth in the above-cited regulation, and deemed that the stock first went from the wife to the husband and then to the bank. The wife was found not to recognize gain on the appreciated stock. The husband was taxed on the gain to the extent that the discharged debt exceeded the carry over basis of the stock. The court stressed:

> The effect of this would be to preserve the element of gain, but to shift incident of the tax from the wife to husband, 'on behalf of' whom wife made the transaction to 'third party' bank.[8]

***Transfer/Redemption of Closely Held Stock***

The tax treatment of the transfer or redemption of stock in a closely held corporation has recently been clarified in Treas. Reg. Section 1.1041-2. To fully understand the impact of this regulation, the tax treatment previously afforded such transactions must be reviewed. Technically, a redemption of closely held stock would be a transfer by a spouse or former spouse to a third party, the corporation. On its face, Section 1041 does not appear to apply; however, the prevailing view of the circuit court, tax court, and the provisions of Temp. Treas. Reg. Section 1.1041-1T(c), Q&A-9, applied the principles of Section 1041 to the transferring spouse. Pursuant to this temporary regulation, a transfer by the wife to the corporation was seen as being made on behalf of her spouse, and thus her loss or gain on the stock was not recognized. The Temp. Treas. Reg.

went on to provide that if the husband had a "primary and unconditional obligation" to purchase the stock, the payment made by the corporation for the stock was deemed to be a dividend to him and taxable as ordinary income.

The implementation of this regulation created harsh tax consequences in the corporate buyout situation. Frequently, the only funds available to purchase a spouse's interest were within the corporation. A redemption created an ordinary income liability on the spouse who was retaining the stock (albeit through corporate ownership), when that spouse was not receiving cash in hand to pay the tax. The tax consequences of a corporate redemption incident to a divorce were softened and made more *divorce friendly* by Temp. Treas. Reg. Section 1.1041-2, which is effective for all redemptions occurring after January 13, 2003, and applies to the redemption of Subchapter C and Subchapter S corporations.[9]

Section (a)(1) of Temp. Treas. Reg. 1.1041-2 pertains to circumstances where there is not a "primary and unconditional obligation" on the non-transferor spouse to purchase the stock, and thus the redemption is not a constructive dividend to that spouse. This section provides that the transaction will be considered a corporate redemption by the transferring spouse. The tax treatment of this transaction is set forth in Temp. Treas. Reg. Section 1.1041-2(b). This section brings the transaction within the corporate redemption provisions of the code; specifically, I.R.C. Section 302(d) for Subchapter C corporations and I.R.C. Section 1368 for Subchapter S corporations. These sections afford capital gains treatment to the redeeming shareholder if appropriate qualifications are met.

Section (a)(2) of Temp. Treas. Reg. 1.1041-2 pertains to circumstances where the spouse remaining with the corporation has the "primary and unconditional obligation" to purchase the stock. In these cases, the transaction is viewed as if the stock was first conveyed by the transferor spouse to the non-transferor spouse, and then redeemed by the corporation. The tax treatment afforded to this transaction is set forth in Temp. Treas. Reg. Section 1.1041-2(b)(2).

In this transaction, Section 1041 is applicable to the first step of the transaction since the transferring spouse does not recognize a gain. The spouse remaining with the corporation (the non-transferring spouse) is then treated as if he or she redeemed the stock and is eligible for capital gains treatment under I.R.C. Section 301(D) or I.R.C. Section 1368.

An element of flexibility is provided in Temp. Treas. Reg. Section 1.1041-2(c), which permits an election regarding which spouse should be taxed on the transaction. To properly elect tax treatment where the transferor spouse is taxed on the transaction (pursuant to I.R.C. Section 302(d) or Section 1368), the spouses must execute a divorce or separation instrument, or a value written agreement that expressly provides that

> (i) Both spouses or former spouses intend for the redemption to be treated for federal income tax purposes, as a redemption distribution to the transferor spouse; and
> (ii) such instrument or agreement supersedes any other instrument or agreement concerning the purchase, sale, redemption, or other disposition of the stock that is the subject of the redemption.

If the spouses wish to elect for the non-transferor spouse to be taxed on the transaction, the divorce or separation instrument, or valid written agreement, must provide that:

> (i) Both spouses or former spouses intend for the redemption to be treated for federal income taxes, as resulting in a constructive distribution to the non-transferor spouse; and
> (ii) such instrument or agreement supersedes any other instrument or agreement concerning the purchase, sale, redemption, or other disposition of the stock that is subject to the redemption.

The above-cited document must be executed by both spouses prior to the date on which the spouse bearing the tax liability first timely files his or her federal income tax return for the year that includes the date of the stock redemption, "but no later than the date such return is due (including extensions)." For example, if the transaction occurs in 2004 and the spouse who is going to bear the tax files his or her return on a valid extension on June 15, 2005, the agreement must be executed prior to that date. In drafting any agreements to implement this election, the exact wording of the regulation as cited here should be carried over into the agreement.

***Stock Option/Deferred Compensation***

Upon initial observation, transfer of stock options incident to a divorce would appear to be eligible for I.R.C. Section 1041 non-recognition treatment. In IRS Field Service Advice 20050006 issued November 1, 1999, the IRS stated a position that the transferring spouse incurred a tax at ordinary income rates on the value of the non-qualified options at the time of transfer. This position was based upon an assignment of income doctrine. This position has been superseded by Revenue Ruling 2002-22. This revenue ruling addresses tax treatment involving divorce-related transfers of non-qualified stock options and non-qualified deferred compensation. It provides that the recipient spouse incurs the tax obligation when the deferred compensation is paid or the options exercised. The assignment of income theory was rejected as follows:

> Applying the assignment of income doctrine in divorce cases to tax the transferor spouse when the transferee spouse ultimately receives income

> from the property transferred in the divorce would frustrate the purpose of §1041 with respect to divorcing spouses. The tax treatment would impose substantial burdens on marital property settlements involving such property and thwart the purpose of allowing divorcing spouses to sever their ownership interests in property with as little tax intrusion as possible…Accordingly, the transfer of nonstatutory stock options between divorcing spouses is entitled to nonrecognition treatment under §1041.

Revenue Ruling 2002-22 does provide limitations on its application with respect to unvested options or deferred compensation, stating:

> This ruling also does not apply to transfers of nonstatutory stock options, unfunded deferred compensation rights, or other future income rights to the extent such options or rights are unvested at the time of transfer or to the extent that the transferor's rights to such income are subject to substantial contingencies at the time of the transfer.

Many plans do not permit the outright transfer of options or deferred compensation, accordingly an arrangement is implemented whereby the owning spouse holds the other spouse's interest in these assets in trust pending exercise or distribution. In New Jersey, this arrangement applied to stock options is known as a Callahan trust. (A sample Callahan trust provision can be found at the end of this article as Appendix I.) A somewhat difficult issue in the Callahan trust situation is determining the owning spouse's tax rate that will be applicable to the options. A true calculation of this tax can only be made from the filing of the return for the year of the exercise, and is measured as follows:

> owning spouse's tax on total income from all sources including the former spouse's share of stock options (or deferred compensation)
>
> less
>
> owning spouse's tax on income from all sources except former spouse's share of stock options (or deferred compensation)

This approach is difficult, since it creates a delay in finalizing the stock option or deferred compensation transaction, and requires a post-divorce exchange of tax returns. A suggested approach is for the parties to agree in advance on a certified public accountant who will estimate the tax impact of the transaction based on income and deductions stated in the previous tax year. Another approach is to use the owning spouse's incremental tax bracket when considering the addition of the stock options into that spouse's income.

***Savings Bond Interest***

The accrued interest on U.S. savings bonds is taxable to the transferring spouse upon the transfer. This is provided in Revenue Ruling 87-112. The only exception to this rule is in circumstances where the owning spouse had elected to report the interest on an annual basis. The rationale supporting this revenue ruling was: 1) I.R.C. Section 454(c) required inclusion of such taxable income into the taxpayer's income when the bond is "disposed of", and 2) I.R.C. Section 1041 relates to non-recognition of capital gains and losses and does not "shield [the taxpayer] from recognition of income that is ordinarily recognized upon assignment of that income to another taxpayer."

Revenue Ruling 2002-22 takes the opposite position on the assignment of income issue; however, the Revenue Ruling 87-112 approach with respect to savings bonds is still operative. Revenue Ruling 2002-22 specifically amended Revenue Ruling 87-112 to delete the assignment of income doctrine as a rationale for tax recognition. The recipient spouse's basis in the savings bonds is the transferor's basis increased by the interest upon which the transferor was taxed.[10]

***Investment Portfolio***

The practitioner must exercise care to effectuate the intent of the court or an agreement between the parties in distributing an investment portfolio. In many instances this portfolio will include a mix of securities with varying accrued gains and losses. If the court and/or the parties intend an equal distribution of the portfolio, each party should have an equal tax basis. This can be most effectively accomplished by an in-kind distribution of each lot of securities. Any agreement between the parties should explicitly state the intent to distribute the tax basis in proportion to ownership of the account. The following language is suggested:

> The parties agree that Merrill Lynch Account No. 4827 presently standing in the name of Husband shall be distributed equally between the parties. The distribution shall be effectuated such that each party has an equal tax basis in his or her share of the account.

In more complex matters, the parties may want to retain the services of a certified public accountant to formulate a distribution plan to assure the tax basis reflects the ownership.

**MAINTENANCE OF RECORDS**

Pursuant to Temp. Treas. Reg. Section 1.1041-1T(e), Q&A-14, the transferring spouse is obligated to supply the recipient spouse with records that establish the adjusted basis and holding period of the property received in a Section 1041 transaction. If there is a possible investment tax credit recapture, the records must also be adequate to determine the amount and period of this liability. The temporary regulations impose an obligation upon the receiving spouse to preserve the records and keep them accessible.

Although the temporary regulations are couched in mandatory terms, there is no penalty imposed on a non-complying taxpayer. The appropriate practice would be to include a provision in the marital settlement agreement requiring the transferring spouse to supply the appropriate records and the recipient spouse to maintain records relative to investment tax credit recapture.

**IMPACT OF SECTION 1041 ON EQUITABLE DISTRIBUTION**

The non-recognition provisions of Section 1041 are clearly beneficial to the transferring spouse, as it eliminates an obligation to pay taxes on gains that have accrued within appreciated property. It must be kept in mind that Section 1041 is a postponement of tax liability and not an elimination of tax consequences. The tax consequences will ultimately be recognized when the property is sold or exchanged by the recipient spouse. This being the case, significant inequities can occur in the actual value a spouse receives as a result of such future tax consequences. This becomes apparent if an assumption is made that the assets in the hands of both parties are converted to cash immediately upon the transfer. For example, assume the parties hold the following assets:

| | | |
|---|---|---|
| Investment rental property | | |
| (basis $100,000) | $1,000,000 | |
| Mortgage | 200,000 | |
| Net Equity | | $800,000 |
| | | |
| Marital residence value | | |
| (basis $250,000) | $ 500,000 | |
| Mortgage | 200,000 | |
| Net Equity | | 300,000 |
| Cash | | 600,000 |
| Total Estate | | $1,700,000 |

Assume further that the parties agree to an equal division of the marital assets based on present value with the wife retaining the marital residence, the husband retaining the investment property and the cash being utilized to equalize the distribution. This results in the following distribution:

| | |
|---|---|
| ***Husband*** | |
| Investment Property (net) | $800,000 |
| Cash | 50,000 |
| | $850,000 |
| | |
| ***Wife*** | |
| Marital Home (net) | $300,000 |
| Cash | 550,000 |
| | $850,000 |

Although on its face, it appears that the parties are receiving assets of equal value, if the parties immediately converted their holdings to cash, the husband would have substantially less as a result of the capital gains taxes due and payable on the investment property. At current rates, the husband would have federal and state capital gains tax as follows:

| | |
|---|---|
| Investment Property Gain | $900,000 |
| (Approx. federal/state combined) | x .20 |
| Tax on Gain | $180,000 |

The wife would not have a tax liability as a result of the $250,000 exclusion of gain on principal residence. Accordingly, the wife has received assets having an after-tax value of $850,000 and the husband has received assets having an after-tax value of $670,000.

The above analysis leads to the question of whether it is appropriate to reduce the value of property received incident to a divorce to take into account potential tax liabilities in effectuating an overall distribution. This issue was before the New Jersey Superior Court, Appellate Division, in *Orgler v. Orgler*,[11] where the husband sought to reduce the value of his closely held corporation, which owned a number of Midas Muffler shops, by estimated future capital gains tax. The superior court rejected this approach, instead holding that such taxes were speculative in nature. Citing *Kruger v. Kruger*,[12] the court went on to note that if there was a court-ordered sale or sale to satisfy equitable distribution, taxes incurred on the transaction would be deducted. This is similar to the New Jersey approach to hypothetical real estate commissions with respect to real property.

In *Wadlow v. Wadlow*,[13] it was held that the value of real estate would not be reduced by hypothetical real estate commissions unless there was an imminent sale. The position rejecting a reduction in asset value by contingent taxes was reiterated in *Pacelli v. Pacelli*,[14] where the court described a balance sheet that reduced a spouse's net worth by hypothetical income taxes as "creative accounting."

The New Jersey position does not totally disregard potential capital gains tax and equitable distribution. The court stressed in *Orgler* that such hypothetical taxes could be considered with respect to percentage distribution. This is also clearly authorized by N.J.S.A. 2A:34-23.1, which states among the factors to be considered in equitable distribution:

> (j) the tax consequences of the property distribution to each party.

The *Orgler* decision, together with the statutory factors, provide a firm basis to request a disproportionate distribution in favor of a spouse who also assumes latent capital gains taxes.

The New Jersey rule is in conformity with the majority position, which rejects the reduction in the value of property for the amount of potential taxes unless the taxation is imminent.[15] A number of foreign jurisdictions have recognized a disproportionate distribution of property on account of potential tax consequences. In *Barnes v. Barnes*,[16] a disproportionate distribution of the marital residence (35 to 65 percent) was afforded as a result of the taxes the husband would incur in the event of an immediate sale of the residence.

This was also the approach taken in *Privet v. Privet*,[17] where there was a 36 to 64 percent distribution of a savings plan as a result of tax consequences.

There is also support in foreign jurisdictions for reducing the value of the asset by hypothetical tax liability. This was the position adopted by the court in *Miller v. Miller*.[18] It was further refined by the court in *King v. King*,[19] where the court held that it was appropriate to consider the fact that the parties were in unequal income tax brackets in connection with equitable distribution.[20] The Second Circuit, in considering valuation of a C corporation for gift tax purposes, reduced the value by contingent state and federal capital gain even though there were no plans for immediate sale.[21]

Although New Jersey is adamant in rejecting the proposition that hypothetical income taxes should be used to reduce value, evidence should be presented regarding the amount of such taxes, assuming a current dollar exchange of the property in the hands of the recipient spouse. This can typically be presented by a forensic accountant as a supplement to a valuation report or to a marital balance sheet. Such evidence is necessary to make appropriate arguments concerning the disproportionate distribution of property for tax reasons.

## INTEREST ON DEFERRED PAYOUTS

It is not uncommon for a marital settlement agreement or judgment for divorce to provide for the payment of interest to a spouse who is receiving distribution of property on an installment basis. Pursuant to I.R.C. Section 61(a)(4), the receipt of interest is typically a taxable event, and is included in a taxpayer's gross income for ordinary income purposes. It has been consistently held that the recipient spouse is not taxed on the principal portion of the equitable distribution payout pursuant to Section 1041; however, the interest portion of the payout is includable in the spouse's gross income.[22]

In a non-divorce installment sale situation, if interest is not provided under the terms of the transaction, interest income will be imputed to the recipient of the payment pursuant to I.R.C. Section 483, under what is commonly known as the imputed interest rule. In *Craven v. United States*,[23] it was held that interest would not be imputed to a wife pursuant to I.R.C. Section 483 because the note had emanated from a Section 1041 transaction. In affirming, the 11th Circuit stressed that the tax was not imposed on the interest because the transaction "is deemed to trigger the non-recognition provisions of Section 1041."[24]

The *Craven* decision appears to cloud the issue of whether the interest on equitable distribution payout is taxable to the recipient spouse. An Internal Revenue Field Service Advisory issued on January 18, 2002, and *Ciprino, supra* (post-*Craven*) reaffirm the position that interest that has been delineated in an equitable distribution payout scheme is taxable to the recipient spouse. Except in circumstances where the interest payment can be assigned to purchase of investment property or related to interest on a primary residence,[25] it will be deemed to be personal interest and not deductible to the payor spouse.[26]

Since the provision of interest in an agreement generates taxable income but not an offsetting benefit by way of deduction, it is advantageous for the parties to include the interest in the principal portion of the deferred payout. This approach is permitted without tax consequences, because the imputed interest rule is not applied to deferred payouts incident to a divorce. The amount of interest incorporated in the deferred payout may be significantly less than market because it is not taxable. If this approach is used, any right to repay should be adjusted by a discount rate equivalent to the incorporated interest.

Another way of handling interest on deferred payouts is to deem the interest to be contractual and non-modifiable term alimony, so it becomes tax deductible to the payor. Such alimony does not terminate upon remarriage, but must terminate on death of the recipient spouse to preserve its deductibility pursuant to I.R.C. Section 71(b)(1)(D). A major pitfall in utilizing alimony in this fashion is that in a change in circumstance the court may not recognize provisions calling for non-modification.[27] Additionally, interest over a three-year or less deferred payment period, either alone or in conjunction with a regular alimony payment, may create front-loading alimony and trigger the recapture provisions of I.R.C. Section 71(f).

## LOSSES

The existence of latent tax losses should also be considered in effectuating equitable distribution of marital property. Pursuant to applicable sections of the Internal Revenue Code, losses in capital assets may be offset against gains or transactions occurring in the same tax year. In the event that the losses exceed the gains, an additional loss of up to $3,000 may be deducted against ordinary income. In effectuating equitable distribution the tax benefit of the losses should also be equitably shared between the spouses.

I.R.C. Section 163 also permits a carry forward of a capital loss to future years until it is fully used up. Pursuant to I.R.C. Sections 1212(c)(1) and (2), capital losses shown on a joint return are allocated between the spouses in proportion to each spouse's individual long- or short-term losses on that return. New Jersey has not specifically considered the distributability of carry forward losses. If the losses are allocable to one spouse under IRS rules, there may be difficulties in effectuating the distribution of the future tax benefit. There is support for the position that capital loss carry forwards are subject to distribution between the parties upon divorce in foreign jurisdictions.[28]

In addition to capital losses, net operating losses pursuant to I.R.C.

Section 172; charitable contribution carryovers pursuant to I.R.S. Section 170(d); investment interest carry forward expenses pursuant to I.R.C. Section 163(d)(2); and passive activity losses pursuant to I.R.C. Section 469 also create a tax benefit that should be allocated upon divorce. ■

**ENDNOTES**

1. This is a simplification. IRC Sections 1221-1223 outline in detail the general rules for determining capital gains and losses.
2. *See, generally*, I.R.C. Section 1(h).
3. *See, generally*, I.R.C. Section 64. The maximum tax rate for individuals in ESP, is 35 percent.
4. 98 Stat. 494.
5. *United States v. Davis*, 370 U.S. 65 (1962).
6. 113 T.C. 152 (1999), *aff'd* 240 F.3d 369 (4th Circuit 2001).
7. 215 F.3d 1201 (11th Circuit 2000).
8. *Id* at 1205.
9. Since the regulation does not deal with LLCs, a redemption of shares in such entities may come under prior rules.
10. Revenue Ruling 54-143.
11. 237 N.J. Super. 342 (App. Div. 1989).
12. 139 N.J. Super. 413 (App. Div. 1976), *modified on other grounds* 73 N.J. 464 (1977) (an early pension case).
13. 200 N.J. 372 (App. Div. 1985).
14. 319 N.J. Super. 185 (App. Div. 1999) at 196.
15. *See Hovis v. Hovis*, 541 A.2d 1378 (Pa. Supreme Court. 1988).
16. 428 S.E.2d 294 (1993).
17. 535 So.2d 663 (Fla. Fourth D.C.A. 1988).
18. 662 So.2d 391 (Fla. Fifth D.C.A. 1995).
19. 719 So.2d 920 (Fla. Fifth D.C.A. 1998).
20. *See also, Calling v. Calling*, 910 P.2d 1165 (1996) where the court held it was appropriate to reduce the retirement account by the hypothetical income taxes.
21. *Eisenberg v. Commissioner*, 155 F.3d 50 (2nd Cir. 1998).
22. *Gibbs v. Commissioner*, T.C. Memo 1997-196; *Ciprino v. Commissioner*, T.C. Memo 2001-157.
23. 70 F. Supp. *2d* 1323 (N.D.Ga. 1999), *aff'd* 215 F.3d 1201 (11th Cir. 2000).
24. 215 F.3d at 1203.

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**APPENDIX I**

9.9 (A) The parties recognize that the following Merrill Lynch stock options were acquired during the marriage and are subject to equitable distribution pursuant to N.J.S.A. 2A:34-23.

| Date | No.Shares | Strike Price | Exp.Date | Vesting Schedule |
|---|---|---|---|---|
| 1/24/96 | 3,120 | $13.64 | 1/24/06 | 100% |
| 1/29/97 | 2,936 | $20.30 | 1/29/07 | 100% |
| 1/26/98 | 4,360 | $31.00 | 1/26/08 | 100% |
| 1/25/99 | 4,054 | $36.17 | 1/25/09 | 80% |
| | | | | (20% per year) |
| 1/27/00 | 10,180 | $43.78 | 1/27/10 | 60% |
| | | | | (20% per year) |
| 1/23/01 | 6,576 | $77.56 | 1/23/11 | 100% |

The HUSBAND acknowledges that the 1999 and 2000 grants will continue to vest with the passage of time.

(B) The WIFE is hereby granted a Fifty Percent (50%) interest in each grant of the above-listed options. HUSBAND is deemed to hold WIFE's share of the options in trust for her benefit until she exercises the options and is paid from the proceeds from same.

(C) WIFE shall proceed as follows in exercising her Fifty Percent (50%) share of the options:

(i) she shall provide HUSBAND with written notice at his residence via regular and certified mail of her desire to exercise all or a portion of the options, specifying the particular grant, with a copy to _____, CPA, or any other mutually agreed-upon or Court-appointed substitute CPA (hereinafter referred to as "Designated Accountant");

(ii) HUSBAND shall exercise WIFE's share of the options pursuant to her request within fourteen (14) days of his receipt of her request, provided that the shares are exercisable and provided that there are no other reasons why the shares cannot be exercised, about which HUSBAND shall inform WIFE as soon as he is reasonably able to do so;

(iii) the Designated Accountant shall calculate HUSBAND's projected Federal, State, local, employment and Medicare tax obligation on WIFE's share of the options. The taxes shall be determined as follows:

HUSBAND's projected tax obligation on all anticipated sources of income, including WIFE's share of the options
LESS
HUSBAND's projected tax obligation on all anticipated sources of income, excluding WIFE's share of the options

In making the tax projection, the Designated Accountant shall consider HUSBAND's base salary, any bonus received or expected to be received, the proceeds of any options exercised by HUSBAND and any other projected source of earned and unearned income less all anticipated deductions, including but not limited to, alimony to WIFE, anticipated itemized, exemptions, and 401(k) plan contributions. The fee for the Designated Accountant shall be equally shared. The calculation shall be provided to both parties.

(iv) The estimated taxes due on the exercise of the options as determined by the Designated Accountant shall be withheld from the proceeds and paid to the taxing authorities on HUSBAND's behalf. The balance of the proceeds, after payment of taxes and all costs of exercise, including strike price and commissions, shall be paid to WIFE within ten (10) days of HUSBAND's receipt of said proceeds.

(D) WIFE's share of the options shall participate in all splits and any adjustments to the option price. HUSBAND shall provide WIFE with all documentation which he receives relative to the options within ten (10) days of his receipt of same.

## When Children Refuse to Visit

**Continued from Page 40**

301 (Ch. Div. 1982), *Wilke v. Culp, supra*, 196 N.J. Super. at 500.

9. 21 N.J. 525, 536 (1956).
10. 254 N.J. Super. 190, 193 (Ch. Div. 1991).
11. 150 N.J. 276, 318 (1977).
12. *See also Fehnel v. Fehnel*, 186 N.J. Super. 209, 215-216 (App. Div. 1982).
13. R. 5:3-3(g), *Kinsella v. Kinsella, supra*, p. 320.
14. *See* R. 5:3-3(d)(e).
15. *See* R. 5:3-3(f), *Kinsella v. Kinsella, supra* p. 320.
16. *Beck v. Beck*, 86 N.J. 480, 499 (1981).
17. *See Beck v. Beck, supra*, 499; *Sheehan v. Sheehan*, 51 N.J. Super. 276, 291-292 (App. Div. 1958), *certif. den.* 28 N.J. 147 (1958).
18. *Fiore v. Fiore*, 49 N.J. Super. 219, 227 (App. Div. 1958); *Daly v. Daly*, 39 N.J. Super. 117, 122 (J.D.R. Ct. 1956), *aff'd* 21 N.J. 599 (1956); *Bruguier v. Bruguier*, 12 N.J. Super. 350, 354 (Ch. Div. 1951); *Hallberg v. Hallberg*, 113 N.J. Super. 205, 290 (App. Div. 1971).
19. 94 N.J. Super. 403 (App. Div. 1967).
20. 187 N.J. Super. 351, 357 (App. Div. 1982).
21. N.J.S.A. 2A:4-30.81(d).
22. N.J.S.A. 2A:4-30.65 - 30.123.
23. N.J.S.A. 2A:4-30.54; *Muller v. Muller*, 212 N.J. Super. 665, 672 (Ch. Div. 1986).
24. 39 N.J. Super. 117 (Juv. & Dom. Rel. Ct. 1956), *aff'd* 21 N.J. 599 (1956). (The Supreme Court did not address the issue of conditioning support on visitation.)
25. 85 N.J. Super. 462 (Juv. & Dom. Rel. Ct. 1964).
26. *Smith v. Smith, supra*, 85 N.J. Super. at p. 467. *See* UIFSA, N.J. S.A. 2A:30-65 *et seq*. For provisions regarding jurisdiction to modify a child support order entered in another state.)
27. Pressler, Current N.J. Court Rules, Appendix IX-A(2).

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## From the Editor Emeritus

**Continued from Page 37**

never have dreamed of asking a question about my quality of life. However, this now seems to be an accepted area of inquiry. I don't know how I feel about this. Maybe I am just jealous that many, many years ago, when I was interviewing for a job, I was afraid to even mention (let alone think) that having a life outside the practice of law was important. I know now that integrating a personal life into the practice of law has become more and more important to young lawyers.

The practice of matrimonial law places a particularly difficult burden upon a lawyer's ability to "have it all." We are not only lawyers, but therapists, sympathetic ears, and the bearers of good or bad news, all wrapped into one. We work at a pace most other people in the work force would not understand. We expend untold emotional energy, which exhausts us at the end of a long day. This often leaves us coming home from the office too drained to have "quality time" with our loved ones.

It seems to me that it is really important to recognize that we may have to start reevaluating our definition of "all." As a young associate in an office, the associate and the law firm may have to accept that a decision to have a family may result in an associate working less hours than if he or she had no family life. There may be economic consequences for the law firm and the associate as a result of that decision—so be it. As a result, maybe no one (neither the law firm nor the associate) ever has it "all."

Life is full of choices and their consequences. Maybe one's major focus early on is the practice of law, and the pursuit of other interests is delayed. Later, one's family life may be a priority, after establishing a practice. The point is, we all must take responsibility for the consequences of our decisions when we determine what is important at different times in our lives.

The reality is that 100 percent of our efforts cannot be expended on the practice of law if we also expect 100 percent to be expended on our personal lives. No one has that much energy. Being an effective lawyer requires the ability to make judgment calls. One can't exercise good judgment if one is pulled in many directions. We can't be all things to all people. It simply is not possible. Maybe what we need to do is realize that we all work with different goals and interests at different stages in our lives, and "all" may be available to each of us at different times and in different ways.

For me, "all" means continuing in my practice. I love the practice of family law. With all of its stresses, it is not such a terrible way to make a living. I'm lucky. I have partners and associates upon whom I can depend. My husband understands the importance of my practice and other professional commitments. On the other hand, I recognized a long time ago that the definition of "having it all" changes continuously, and every decision I make has its consequences. As long as I continue to redefine my "all," I believe that in my own way, I do have it "all."

Pat Barbarito is an articulate spokesperson for the profession. Pat does "have it all." We congratulate her as she receives the designation of a Tischler Award honoree. We look forward to Pat's continued contributions for years to come. ■

## Property Transfer Incident to Divorce

**Continued from Page 50**

25. *See Amacost v. Commissioner* (T.C. Memo 1998-150).
26. *See* I.R.C. Section 163 (h)(1).
27. *See Morris v. Morris*, 263 N.J. Super. 237 (App. Div.1993); *Smith v. Smith*, 261 N.J. Super. 198 (Ch. Div.1992).
28. *See Mills v. Mills*, 663 S.W.2d 369 (Mo.App.1983); *Finkelstein v. Finkelstein*, 700 N.Y.S.2d 52 (2000).

***Barbara Ulrichsen** is a certified matrimonial attorney and a partner in the firm of Fox Rothschild in Lawrenceville.*

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