New Jersey Family Lawyer

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CHAIR'S COLUMN

CourtSmart…Maybe Not So

Edward J. O'Donnell

This past year, New Jersey introduced a new system of digital recording called CourtSmart. The initial roll-out of this new system into the family part began in Hudson County in March 2008. Currently, it is operational in several counties and it is anticipated that, by the time this column is published, CourtSmart will be up and running throughout all family courtrooms and hearing officers' courtrooms within the state.

WHAT IS IT?

Unlike the previous recording system, CourtSmart utilizes digital recording that produces clearer, more distinct recordings. Recording of court proceedings is controlled remotely from the court clerk's computer. From the clerk's computer, one is able to not only start and stop recording, but also simultaneously add information to log sheets such as docket numbers, case names, attorney names, and key points for identification purposes. Further, by simply clicking a mouse, clerks and judges alike are able to access and listen to the digital recordings of any proceedings from either the courtroom or in chambers simply by entering the appropriate search terms.

While this new state-of-the-art system may seem a surefire way to modernize courtroom recording procedures and protect against the occasional problem of missed or corrupted recordings, it also presents a unique ethical dilemma that we, as attorneys, have never before encountered in the courtroom.

HOW IT WORKS

This dilemma arises out of CourtSmart's dual recording. The primary recording is the official court record from which requested transcripts are made. The primary recording system is activated by the court clerk and utilizes the same three microphones located on the judge's bench and each counsel table previously used with the old system. However, now there is a blue light on the bench that is illuminated when the primary recording is activated. A blinking blue light indicates that the primary recording is off and conversations are no longer on the record.

The second recording is a back-up recording, which continuously records within the courtroom between the approximate hours of 8:30 a.m. and 6:30 p.m. The same three microphones utilized in the primary recording are on at all times, so this secondary recording is being made throughout the day, whether or not the blue light is on. The purpose of this secondary recording is to provide continuous recording in the event the primary recording is lost or its recordings are inaudible. "*Big Brother is watching…*"[1]

SO WHAT'S THE PROBLEM?

Although the microphones are live and audio is being recorded continuously throughout the day, there is no access to these back-up recordings unless a request is approved by the assignment judge. For example, if there is a request for a transcript or audio, and there is a problem with the primary recording, the secondary recording may be requested. However, such a request would be limited to the specific time logged and recorded by the court clerk using the primary recording, representing the specific portion of the primary recording with which there is a problem. Only the IT manager of the county has access to the secondary recordings; even judges presiding over the matter do not have access to secondary recordings without proper approval from the assignment judge. While assurances have been given that transcripts and audio of secondary recordings will not be released absent approval from the assignment judge, no directive or Court Rule

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exists governing the release.

The continual recording within the courtroom throughout the day clearly presents an issue impinging upon the attorney/client privilege. Who among us has not whispered with their client in the courtroom while waiting for the case to be called? As attorneys, we routinely answer impromptu questions from clients and give last minute instructions while in the courtroom. While judges enjoy the use of a mute button, which they may utilize to shield certain statements from being recorded, there is no such option on counsel tables. Thus, even the whisper made to your client while waiting for the judge to take the bench unofficially makes its way onto the record by way of the secondary recording. Further, given the various configurations from courtroom to courtroom, there is no way to know whether even conversations with a client in the back bench of a courtroom are being picked up and recorded by the secondary recording. "*Any sound…above the level of a very low whisper, would be picked up…*"

WHAT ARE WE DOING ABOUT IT?

In order to address this dilemma, the Family Law Section formed a subcommittee, chaired by John Fiorello, to study the CourtSmart system. This committee noted that of paramount concern is the lack of an administrative directive or Court Rule in place to establish the protocol regarding access to the secondary recordings. The committee has suggested that an administrative directive be issued immediately, explaining the system and when access is permitted. It is further suggested that a Court Rule be issued specifically addressing the parameters of this secondary recording in order to eliminate an abuse of access.

On an immediate basis, the subcommittee has suggested that clear and prominent signs be posted in all courtrooms presently utilizing CourtSmart, alerting individuals to the ongoing recording. Additionally, the subcommittee has issued a report to the New Jersey State Bar Association communicating their recommendations regarding the establishment of a Court Rule and urges the NJSBA's involvement in formulating any rule that may be proposed. For a complete list of the subcommittee's recommendations, please go to www.njsba.com, log in with your member identification information and select the Family Law Section's web link.

SOME CLOSING THOUGHTS

One thing is clear, things will never be the same. Whatever guidelines are adopted, an attorney will need to be circumspect with regard to the private conversations he or she engages in with clients in the courtroom. In a sense, we will always be on the record. "*You had to live—did live from habit that became instinct—in the assumption that every sound you made was overheard.*"

Am I overreacting? I sincerely hope so. But the attorney/client privilege protects the most fundamental of our liberties. Any threat to its erosion is a threat to our system of justice. And, as noted by George Orwell in his fictional society in *1984*, where these liberties had been worn away, *"[w]ords such as…justice… had simply ceased to exist."* ■

ENDNOTE

1. All quotes in italics were taken from George Orwell's novel, *1984*, Copyright Hardcourt Inc., 1949.

EDITOR-IN-CHIEF EMERITUS COLUMN

The Family Lawyer's Mission Statement and Credo

by Lee M. Hymerling

In 2011, just two years hence, the *New Jersey Family Lawyer* will celebrate its 30th birthday. Over the almost 28 years of its existence, this publication has fulfilled the hopes of its founders to provide a quality publication offering well-written and reasoned articles of interest to New Jersey's matrimonial bar and bench; to be a credit to our common calling; and to give voice to some of the most pressing issues of the day.

These last almost 30 years have seen an evolution of our practice and a metamorphosis of our courts that few could have predicted. From vicinages with few judges and a manageable caseload, we have seen the volume of family law cases increase, not only numerically but also in complexity. Along the way, the *New Jersey Family Lawyer* has chronicled those changes; has critically analyzed concepts and judicial opinions; and has immeasurably contributed to the evolution of not only family law but also the administration of justice in the family part. Indeed, the creation of the *Family Lawyer* slightly preceded the creation of the family part.

Few in 1981 could have recognized that the scope of New Jersey matrimonial law would so expand. Dockets rapidly increased with the adoption of the Prevention of Domestic Violence Act, as well as with other legislative initiatives. It cannot be doubted that in the years ahead, family law will continue to evolve, and the *Family Lawyer* will continue to record, comment and sometimes even criticize matters along the way.

Through the years, our editorial board has had among its members some of the true greats. Not all of our colleagues are still with us. We recall with fondness and respect our former editors, Barry Croland, Tom Forkin and Jim Boskey.

Over the years, our publication has encouraged the professional growth of many. Our junior editors rise not only on the *New Jersey Family Lawyer*'s masthead but also to become officers of the Family Law Section. Indeed, now serving on the *Family Lawyer* Editorial Board are numerous past section chairs, as well as several editors who will assume that role in the immediate years ahead. And just as they rise through the chairs of a section, so too will they rise to provide further guidance, and, indeed, leadership for the publication in the years ahead.

It has also been part of our mission to be a printed forum wherein timely topics may be identified, and debated, and positions taken and disagreements aired. Family law is never static; it responds as society changes. Although there are certain truisms upon which family law will always stand, there are many topics about which lawyers, judges and even institutions will respectfully differ. It is with such topics that the *New Jersey Family Lawyer* has a special role to play and a responsibility to fulfill.

It has always been, and must always be, that our editors and contributors must be allowed to speak their mind and to voice their views. Some of those views will be provocative, prompting disagreement and debate. Other views may be accepted by most and trigger agreement. Some of those views may even challenge institutions we hold dear and highly respect. Upon occasion, opinions expressed in this publication may criticize particular judicial holdings, administrative determinations and even Rules of Court. Experience has taught us that providing voice to all sides of disputed issues is never unhealthy.

Occasionally, our editors and writers might also find themselves differing with either professional dogma or even the stated policies or positions of either the Family Law Section or even the New Jersey State Bar Association. Such occasions do not happen often. That such occasions do occur should be seen as assuring the strength of the ties that bind rather than differences in opinion that might momentarily divide. Is it not so that there are occasions in which, on matters of policy or otherwise, there is room for respectful disagreement? Does not our legal training teach us to identify such differences in a search for the truth? But are there not times when a particular position might neither be right nor wrong? Do we not frequently, as we argue our cases, deal with shades of gray? So on those rare occasions when we and our parent organizations may

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EDITOR-IN-CHIEF'S COLUMN

Receivables + Mandatory Lawyering = Depression

by Mark H. Sobel

The above is not a mathematical equation, although its absolute accuracy cannot be questioned. In the current economic reality, receivables are mounting at a historic pace. These receivables are not due to poor management, a lack of time-saving skills or an inclination to litigate based upon a 'scorched earth' policy. While individual anecdotal references to all of the above are known by practitioners, the prevalent standard of practice is one with an eye toward efficiency; an efficiency promoted by attorneys. Thus, many of the cost-saving measures presently incorporated into our court system were initiatives from lawyers. Such practices as staggered motion calendaring, telephonic case management, tentative decisions, decisions on the papers and a variety of alternative dispute resolution procedures first emanated from lawyers seeking to better serve their clients in a more cost-efficient manner. While these procedures have helped, the basic structure of our practice and our business model remains unchanged.

Ours is a labor-intensive business, requiring hours upon hours of preparation, travel to and from court, waiting to be heard in court and the enormous time commitment to properly meet the myriad requirements to process a case toward trial. Thus, the completion of case information statements, the submission of interrogatories, the days of depositions, the hours of mandatory economic mediation and the requirement to attend early settlement conferences remains largely unchanged, despite the clear economic need on behalf of both the litigants and the lawyers for such change.

Despite the fact many of my colleagues have for the first time declined to raise their hourly rates in the new year, the cost of family part matters is still increasing. A significant part of the overall litigant's cost has nothing to do with lawyers. Rather, the multitude of experts now required for such litigation creates 'teams' of professionals on each side. We now have forensic accountants, regular accountants, tax specialists, custody specialists, parenting coordinators, therapists, and mediators, all charging litigants for their services. In fact, some of those individuals have helped lawyers because their hourly fees are, in many cases, greater than the attorneys. The effect of all of this is that, from a limited source of funds, many professionals are now seeking compensation. The cumulative effect is that despite the best practices of many attorneys, their individual receivables have increased.

Despite protestations of the collaborative nature of bench-bar relations to effectuate resolution in the most time-efficient and cost-efficient manner, clearly, the judicial system has now become overburdened. Economic realities have necessitated a slowdown or stoppage of the appointment of new judges. Vacancies remain unfilled for long periods of time, and the utilization of scarce judicial resources often fails to meet the ever-expanding needs of the family part. Simply put, there are not enough judges available to try family matters, and that situation is worsening, not improving.

Furthermore, despite all the commentary from the Administrative Office of the Courts, close and careful inspection of the manner in which each vicinage deals with their backload, clears its calendar and handles cases outside of the best practices-suggested one-year period, remain a constant source of concern for our judges.

As a result of the above, the clear demarcation line for lawyers has become the early settlement panel. That clear demarcation line has nothing to do with resolution and everything to do with economics. It is now widely known that withdrawal from a non-paying case after the early settlement program has been completed is nearly impossible. Judges want and demand to clear their calendar. They neither want nor accept the adjournment of cases because a lawyer seeks to withdraw due to non-payment. While the court is clearly supported by the rules they themselves have set, such rules, in these present economic times, no longer are fair or meet the economic realities of the business of lawyering. They need to be rethought and readjusted.

Notwithstanding the tongue-in-cheek reference regarding receivables, that affluent lawyers would

simply make less or have to wait longer for their money, that is not the current reality. Instead, most of our colleagues practice in smaller firms in which the margin for error in calculating unpaid receivables becomes the difference between retaining staff or firing longstanding employees, staying in practice or disbanding. I know of several instances where substantial staffing cuts were required due to nonpayment in family matters where counsel was denied the permission to withdraw. Is that where the ultimate culpability should fall? Should attorneys be required to continue to practice in a case that results in such economic disaster that their own staff has to be sacrificed? Should lawyers be required to obtain lines of credit or mortgage their own homes in order to meet their ever-increasing economic demands, and at the same time continue to practice without compensation?

The current economic crisis requires new thinking on a broad range of subjects. Everyone is impacted by this economic crisis, even experienced family law practitioners. There needs to be change. A fundamental shift of the responsibility from the lawyer to the litigant is necessary. At a minimum, a litigant should not be allowed to place that economic responsibility upon the lawyer. In weighing the fairness between placing that responsibility upon the litigant or the lawyer, the conclusion seems obvious. We allow for self-represented individuals to proceed in all phases of litigation. In fact, it is their constitutional right. Now is the time to rely upon such a right rather than place an unfair burden upon lawyers.

The stark need for reform was perhaps no better illustrated than in the recent Appellate Division determination in *Donnelly v. Donnelly*.[1] In that matter, the former husband, a part-time family practitioner, sought relief due to the decline in his annual income. His request for relief was denied. Whether such a conclusion based upon the specific facts of that matter is appropriate is, for our purposes, not crucial. Rather, what is crucial is that we will see the effects of a declining economy upon law firm economics in post-judgment applications and outside of those boundaries. The need to deal with this issue cannot wait. It will affect more than just the attorney involved.

Make no mistake about this—law firms will go out of business, staff will be fired, associates will be released and partners will be dismissed unless the basic untenable proposition that litigants can make lawyers work for them for free is fundamentally changed.

This is not a time for self-pity, and lawyers should not be accused of it. We are not requesting a hand out. We are not requesting relief that lawyers in all other areas of practice uniformly are not granted. We are not requesting something for nothing. Rather, we are requesting that we do not get nothing for something.

The only thing that we have to sell is our services. We make no money when we are not working. We do not have manufacturing facilities or economies of scale associated with other business endeavors. We are hourly employees of our litigants, and as hourly employees we should, just like plumbers, electricians and court-appointed experts, get paid for our services. Similarly, when refusal of payment is established, we should be relieved of the obligation to continue to work into perpetuity for free.

The mathematical equation referenced in the title does not refer to a mental depression, although I am sure some of us get quite depressed when looking at our receivables and court-inflicted *pro bono* work. However, the depression I am talking about is the economic disaster facing our area of practice. For too long we have been singled out, perhaps due to some non-mathematical, non-quantifiable view that family lawyers are well off. The reality of the present economics illustrates otherwise. The necessities of the present economics demand a different course of conduct.

Although most litigants probably believe, inaccurately, that a lawyer's efforts are somehow commensurate with their payment, we all know that is not the case. Lawyers toil just as hard, if not harder, on the cases for which they are not getting paid. Lawyers prepare just as long, if not longer, for the cases in which there is a large receivable. Lawyers argue just as forcefully, if not more so, in matters that have long exceeded the retainer amounts. We do this because of our commitment to the system, our belief in obtaining a correct result for our client and our commitment to honor our profession. We should not have to do so at a sacrifice to the individuals who work with us, who live with us and who depend upon us.

As we approach the current economic crisis and the expansive need for collaborative solutions, cooperation between the bench and bar to make certain lawyers do get paid, and if not, do get relieved, is imperative. It is a subject matter that we do not have the luxury to merely think about anymore. We must act now. ■

ENDNOTE

1. A-2389-07T3 (approved for publication Feb. 2, 2009).

(Editor's Note: This column represents the author's opinions and not necessarily those of the New Jersey State Bar Association.)

Retirement: Is There a Light at the End of the Tunnel for the Payor?

by Brian M. Schwartz

How do you envision your retirement? Is it a fishing boat off the coast of Puerto Rico? Is it a modest home in Florida on a golf course? Is it spending hours with grandchildren? For some, the dreams of retirement help get them through each day of work—with each day, one day closer to retirement. Each month, workers receive statements concerning their retirement accounts, and annually they receive statements from the Social Security Administration regarding their estimated Social Security benefit upon retirement. Perhaps with the assistance of a financial planner, workers plot and plan for the date when they can enjoy the fruits of their labor, never again being a slave to alarm clocks, deadlines and the dreaded commute. At some point, a worker hopes to have saved or accumulated enough to achieve the ultimate end game—retirement.

However, for some in New Jersey, the dream of retirement is less clear. A divorced person in New Jersey has one other factor to consider when plotting and planning—the payment of alimony.[1] When is one 'allowed' to retire in New Jersey? What effect does retirement have on an alimony obligation? How does the payor spouse know whether the alimony obligation will be terminated or modified? How does the payor spouse decide whether to accept the 'early retirement incentive plan' being offered by the employer without knowing how retirement will affect the alimony obligation? (Can that employee ignore the fear of rejecting the early retirement incentive package only to be terminated without the package shortly thereafter?) When is a business owner, or sole practitioner, or any self-employed person, allowed to retire?

For the payee spouse, how does one truly prepare for a potentially significant reduction in income based upon the payor spouse's retirement? How does the payee spouse 'make up' that lost income when, most likely, the payee spouse is also nearing 'retirement age'? Should the payor spouse be permitted to retire when doing so will likely lead to the payee spouse being required to work far beyond the 'normal' or 'customary' retirement age?

In *Deegan v. Deegan,*[2] then-Judge Virginia Long wrote:

> It goes without saying that issue of possible voluntary early retirement and the like should be resolved in the first instance at the time of the divorce in a negotiated agreement. No thoughtful matrimonial lawyer should leave an issue of this importance to chance and subject his or her client to lengthy future proceedings such as we have here.

Yet, unless the parties to an action are nearing retirement, most matrimonial practitioners do *not* resolve the issue of retirement "in the first instance at the time of the divorce in a negotiated agreement." Mainly, this is due to the lack of real guidance by the current state of the law in New Jersey regarding retirement. Much like the issue of contribution toward college for parties with a three-year-old child, most attorneys punt on the issue; that is, resolution of the retirement issue will abide the event. Consequently, this lack of guidance does not permit either the payor spouse or the payee spouse to be properly prepared for their golden years; instead, they are most likely subjected to lengthy future proceedings.

This article will discuss the law concerning retirement—more specifically, whether retirement is a changed circumstance permitting a retiree to a modification or termination of alimony—beginning with an overview of the various approaches taken in addressing this issue in other jurisdictions, and then a more detailed discussion of the state of the law in New Jersey. The article will then address where the law of New Jersey could be heading—based upon changes to federal law and our present understanding of normal or customary retirement age—and also where New Jersey law, in the author's humble opinion, *should* be heading.

APPROACHES TO THE RETIREMENT ISSUE

Throughout the country, there have been a variety of approaches utilized in evaluating an application for a modification of support based upon retirement.

Voluntary retirement as a bar to modification: This line of cases states, quite simply, retirement, which was not compulsory, but rather a voluntary decision of the payor spouse, bars a modification of support. In *Shaughnessy v. Shaughnessy,*[3] the parties had been married for 36 years. At the time of the

divorce in October 1987, the husband had been employed by IBM. (The ages of the parties are not provided in the decision.) In December 1988, only 14 months after entry of the divorce decree, the husband voluntarily retired from his management position with IBM in exchange for a lucrative incentive package, in which he received twice his annual salary of about $68,000, plus $25,000 in bonuses. Upon his retirement, the husband filed an application for a modification of his support obligation. The trial court reduced the husband's support obligation from $2,000 per month to $1,000 per month. The wife appealed this decision. The appellate court in Arizona cited Arizona Revised Statute Section 25-327(A), which stated that "the provisions of any decree respecting maintenance or support may be modified or terminated only on a showing of changed circumstances that are substantial and continuing" as the standard for modifying an award of support.

Applying the facts of the case, the court found that the only evidence of a change in circumstances was the voluntary retirement of the husband, further finding that there was no evidence that the retirement was "forced or involuntary."[4] The court determined that, "[v]oluntary retirement does not, in and of itself, provide grounds for reduction of spousal maintenance."[5] As such, the order for a modification of support was reversed. As noted by Judge Long in the *Deegan* decision: "This rule has the virtue of simplicity, but little else."[6]

Motivation of the retiree: In these cases, the motivation of the retiree is the focus of whether the application for modification should be granted. In *Tydings v. Tydings,*[7] the parties had been married for 27 years at the time of the divorce decree in 1967. At the time of the divorce, and for several years thereafter, the husband had been employed by the telephone company. In December 1974, at the age of 55 (the earliest retirement date without forfeiting his pension rights), the husband retired, and moved before the court for a modification of his support obligation. During the hearing, the husband testified that his retirement was voluntary—that he had no physical or psychological disability that impaired his ability to work. The court also noted that the husband's new wife was employed, and contributed toward their household expenses.

At the conclusion of the hearing, the court found:

> It is well settled that *if the husband's inability to pay alimony or child support is self-inflicted or voluntary*, it will not constitute a ground for reduction in future payments (citations omitted). Accordingly, voluntary reduction in income or self-imposed curtailment of earning capacity, *absent a substantial showing of good faith*, will not constitute such a change of circumstances as to warrant a modification. In the instant case, appellant's income was decreased as a result of his election to voluntarily retire. Since the decline in income was self-induced, we find that the trial court did not abuse its discretion by refusing to modify appellant's alimony obligation.[8]

Unlike the court in *Shaughnessy*, which established a bar to modification if retirement was voluntary, the *Tydings* court noted that voluntary retirement, upon a substantial showing of good faith, *could* warrant modification.

In *Misinonile v. Misinonile,*[9] the parties were divorced in 1980, after a 19-year marriage. In 1993, at the age of 68, the husband filed an application for a modification of alimony based upon his voluntary retirement from Sikorsky Aircraft, the company for which he had worked for 33 years. The wife challenged the application, arguing that the retirement of her former husband was a voluntary decision on his part, and therefore not a reasonable basis for modification. The trial court modified the husband's alimony obligation based upon a substantial change in circumstances. The wife appealed that decision.

The reviewing court found:

> Our review of the record discloses *no basis for a finding that the defendant retired for the purpose of avoiding or reducing his obligation*. Rather, the defendant, who had been eligible for retirement six years earlier, chose, after working for thirty-three years with health problems, to retire at age sixty-eight. Under such circumstances, it is not unreasonable for the defendant, as he stated, to be "tired" and to seek the less strenuous and demanding lifestyle offered by retirement. The trial court chose to credit the defendant's testimony. On the basis of these facts, we conclude that the finding of the court, that there was a substantial change of circumstances, was neither unreasonable nor constituted an abuse of discretion.[10]

In *Re Marriage of Richards,*[11] the parties had been married for 33 years at the time of the divorce in 1987. The husband, who had been employed by 3M throughout the marriage, was directed to pay permanent spousal support in the amount of $1,800 per month. After the divorce, the husband's income (and retirement benefits) rose significantly. In September 1990, the husband sought to terminate his spousal maintenance obligation, based upon his retirement. It should be noted that, at that time under the 3M retirement plan, the husband was permitted to retire without any diminution in benefits. However, according to the plan itself, "normal" retirement was age 65.

The trial court significantly reduced the husband's alimony obligation, based upon his reduced level of income. The wife appealed, arguing that the trial court had failed to make specific findings regarding the husband's motives in retiring early. In fact, the wife had

contended the husband had deliberately retired early to avoid his support obligation, and she produced two affidavits from their adult sons, stating that the husband had told them that he was retiring early, in part, to avoid his obligations.

The appellate court noted that, "[w]here an obligor voluntarily creates a change in circumstances, *the trial court should consider the obligor's motives*. If the change was made in good faith, then the obligee should share in the hardship."[12] Applying that rule to voluntary retirement, the court then held:

> [w]hen an obligee raises a colorable claim of bad faith, an obligor must show by a preponderance of the evidence that a decision to retire early was not primarily influenced by a specific intent to decrease or terminate maintenance."[13]

Similar to the good faith standard established in *Tydings* and *Misinonile*, and the bad faith standard from *Richards*, other courts have applied a "sole motivation" standard. In *Commonwealth ex rel. Burns v. Burns,*[14] the parties had been married for 12 years when they entered into a separation agreement. According to the agreement, the husband was to pay the wife $160 per week. The husband made these payments for six years, until he retired at age 61, after 45 consecutive years of employment. During a hearing regarding whether he was entitled to a termination of his obligation, the husband testified that, two years prior to his retirement from Gimbel's he had asked the company to begin searching for his replacement. The husband testified that he was seeking to retire because: 1) his only son had recently died from a brain tumor at age 32, causing him to lose some interest in working; and 2) he had various medical conditions that were making work more difficult, including a diabetic condition. The company agreed and, after the husband had "broken in" his replacement, he retired. The husband also testified at the hearing that his retirement was voluntary, and that he could still be earning $45,000 per year. He also noted that, at the time of the separation agreement, he had been earning $58,000.

The trial court reduced the level of support, but only to $123 per week, determining that the husband could still be earning $45,000 per year and, as such, based the new award on the assumption that the husband was not entitled to retire. The husband appealed.

The appellate court fashioned the question before it as follows:

> Therefore, the first question to be considered is whether or not a 61 year old man, employed for 45 consecutive years previously, may retire even though the effect of such retirement is to reduce the amount of support he is able to pay his wife. If the evidence demonstrates that he retired *solely to extinguish or reduce his earning for the purpose of avoiding support payments to his wife* the lower court would then be justified in setting a support order based on his pre-retirement income. (emphasis added)[15]

The appellate court concluded that, before basing support on the assumption that the husband was not entitled to retire, all of the circumstances surrounding the retirement needed to be considered.[16] (Holding that the husband's voluntary retirement, and its effect on his financial status, was a sufficient change to allow modification of the alimony award, as the retirement was not solely to avoid his support obligation.)[17]

The sole purpose standard, like the *Shaughnessy* standard above, has bright-line simplicity. However, in application, it is not a difficult burden to overcome, as most retirees can demonstrate at least one good faith reason for retirement.

It would appear that the majority of jurisdictions employ a more flexible standard when considering the motivation of the retiree. Often referred to as the primary purpose standard, so long as the obligor's primary purpose in retiring is not to avoid the support obligation, the obligor will be found to have made a *prima facie* showing of changed circumstances. In utilizing this standard, the Supreme Court of Maine noted:

> [a]s compared to the sole-purpose rule, the primary-purpose rule allows a more searching inquiry into the financial circumstances of the retiring party and makes it more difficult for a parsimonious payor spouse to disguise his motives for retiring.[18]

Effect on the obligee spouse: While the approaches above focus on the retiree, this approach focuses on the party receiving support. In *Moseley v. Moseley,*[19] after an initial support award had been entered, the husband retired, and sought a reduction in his support obligation. The trial court denied that application. In affirming the trial court decision, the appellate court noted:

> The needs of the wife and daughter have nevertheless continued. The requirements of the daughter have probably increased due to her attendance in college. There is no proof defendant was forced to retire from his employment or that he is unable to earn sufficient income to support his wife and daughter. A father's obligation to support his wife and child are paramount to his right of voluntary retirement.

RETIREMENT: A NEW JERSEY PERSPECTIVE

Horton v. Horton

The first case in New Jersey regarding voluntary retirement was *Horton v. Horton.*[20] In that matter, the parties were married for 15 years at the time of the divorce. The parties had executed a property settlement agreement where the wife retained the marital residence and the husband retained his pension. The agreement further called for

the husband to pay $110 per week for alimony, which would increase to $125 per week upon the graduation from college of their youngest child. At no time during the negotiations, or within the settlement, did the husband discuss an impending retirement, or any retirement for that matter. Yet, approximately 18 months after the parties executed their agreement, the husband, at age 56, opted for retirement.

One year after his retirement, the husband filed an application to terminate his alimony obligation. The husband relied upon the holding in *D'Oro v. D'Oro*[21] in support of his application. In *D'Oro*, the wife received the proceeds from the sale of the marital residence, and the husband retained his pension. Upon his retirement, the husband sought a termination of his alimony obligation. The husband argued that it would be inequitable for the wife "to be able to include his pension income *twice* for her benefit, first for a share of equitable distribution, and second, for inclusion in his cash flow for determination of an alimony base."[22] In that case, the wife argued that, with his pension income, he still had the ability to pay support. Judge Conrad Krafte agreed with the husband in *D'Oro,* and found that the court could not consider the pension income twice.

However, in *Horton,* Judge Krafte found the husband's argument "misplaced." Although not in the reported decision, Judge Krafte noted that the husband in *D'Oro* had testified during trial that his retirement would occur within several months; Mr. Horton had given no indication at the time of the agreement that his retirement was imminent. Judge Krafte stated:

> When imminent retirement is anticipated and equitable distribution and alimony are bargained for, or, barring those factors, the parties *specifically* anticipate alimony adjustment on retirement (early or otherwise) *D'Oro* will apply.[23]

The concept of double dipping, as described in *Horton,* was later prohibited by statutory amendment to N.J.S.A. 2A:34-23(b), which now includes the following provision:

> "When a share of a retirement benefit is treated as an asset for purposes of equitable distribution, the court shall not consider income generated thereafter by that share for purposes of determining alimony. [L. 1988, c. 153, § 3.][24]

Dilger v. Dilger

In 1990, the Honorable William Bassler decided *Dilger v. Dilger.*[25] In that matter, Judge Bassler framed the issue as follows: "[W]hether voluntary retirement at the age of 62½ years constitutes a change of circumstances justifying a termination of the obligation to pay alimony."[26]

In *Dilger*, the parties were divorced in 1983, after 30 years of marriage. The parties had executed a property settlement agreement, which was incorporated into a judgment of divorce. The parties' agreement called for the husband (age 57 at the time of the divorce) to pay the wife (age 54 at the time of the divorce) $1,000 per month as and for alimony. The alimony obligation had been based upon the husband's gross annual income of $60,000 and the wife's gross annual income of $7,000. The obligation was to continue until the earliest of the following events: 1) the wife's remarriage; 2) the wife's cohabitation in avoidance of marriage; or 3) the death of either party. Further, the husband transferred his interest in the marital residence (equity of approximately $145,000) to the wife; in turn, the wife waived her interest in the husband's pension.

During the plenary hearing in December 1989, the following facts were revealed:

The husband had been employed by the New York Stock Exchange for nearly 20 years. In 1987, his gross annual income was $85,852; in 1988, his gross annual income was $93,211. Further, in the three-and-one-half months before he retired in 1989, he had earned $41,621. Just prior to his retirement, the husband purchased an 86-acre farm in Pennsylvania for $80,000 ($20,000 down and a $60,000 mortgage). His assets at the time of retirement also included a bank account of approximately $27,000 and a 401(k) plan valued at approximately $28,000. He also was receiving $75 per month in Social security benefits and $1,529.89 per month from his pension. (Had the husband retired at 65, the monthly income from his pension would have been $1,913 per month.) When testifying about the reasons for his retirement, the husband stated that he was dissatisfied with his job. According to the husband, six years earlier he had been transferred from a supervisory position; however, his rate of pay was unaffected and he still received bonuses. The husband also alleged that the commute was intolerable, and that the quality of his apartment in Elizabeth had deteriorated. The husband did not claim he was in poor health, nor did he allege that he was forced to retire. In fact, he testified that he could have worked until he was 65 or 70, or longer.

The wife was employed full time by Citibank. Her gross annual income was $17,704 in 1987; $17,666 in 1988; and $19,100 in 1989. Because the husband terminated his alimony obligation upon his retirement (without court order), the wife suffered financial hardships. Her mortgage fell into arrears and foreclosure proceedings had been threatened. In order to satisfy the arrears, the wife, at first, borrowed money; however, upon receiving proceeds from a personal-injury action, she paid off the mortgage balance in order to prevent further foreclosure actions.

After acknowledging that an award of alimony can be modified upon a showing of changed circumstances, whether or not foreseeable at the time of the judgment or agreement, Judge Bassler began

the examination of the issue by first reviewing the parties' agreement. The court noted: "[I]n this case, as is probably true of most, the parties did not explicitly provide for the consequences attendant upon [the husband's] retirement."[27]

The court further noted that, in fact, if the agreement had been read literally, retirement had not specifically been listed as a basis for termination of alimony. That said, Judge Bassler found that, "the absence of a modification clause does not make a property settlement agreement unmodifiable."[28]

The court then noted that, other than *Horton v. Horton*, *supra*, there was no decisional authority in New Jersey regarding the issue of early retirement. As such, Judge Bassler reviewed opinions from other jurisdictions. The court noted that other jurisdictions looked to the motivation of the retiree—good/bad faith of the retiree, sole/primary purpose[29] to avoid an alimony obligation, voluntary/involuntary retirement—in making a determination regarding whether modification had been appropriate. Ultimately, the court held:

> It seems to this court that a better approach in assessing whether early retirement constitutes a change in circumstances is to inquire not only as to whether the retirement was in good faith but also whether, in light of all the surrounding circumstances, it was reasonable for the supporting spouse to elect early retirement. Relative to this inquiry are "the age, health of the party, his motives in retiring, the timing of the retirement, his ability to pay maintenance even after retirement and the ability of the other spouse to provide for himself or herself."[30] Also significant are the reasonable expectations of the parties at the time of the agreement, evidence bearing on whether the supporting spouse was planning retirement at a particular age, and the opportunity given to the dependent spouse to prepare to live on reduced support.[31]

In applying this standard to the facts, the court determined that the husband was not entitled to a modification based upon his early retirement. First, the court found that the husband's testimony—and reasoning for retirement—lacked credibility. The court also noted that the husband made no attempt to advise the wife in advance of his intention to retire; rather, the husband "simply sent a check bearing the inscriptions 'final alimony check' with a note telling her that he was retiring at the end of the month."[32] Concerning the husband's motivation in retiring, the court ultimately concluded:

> This court is convinced that [the Husband] did not elect early retirement in good faith. It was done in order to rid himself of his alimony obligations so he would be free to engage in more pastoral pursuits in Pennsylvania.[33]

Interestingly, the court did not end the discussion at that point. Instead, the court discussed whether the husband had retired at a "reasonable" age. The husband had argued that his retirement at 62 was reasonable and not "early." He based this argument on the fact that IRAs could be liquidated, without penalty, at age 59½, and that many companies at that time were offering retirement at age 62. In other words, the husband argued, if retirement at a certain age meets the requirements of a retirement plan, then it should likewise be that, attaining that age, is a change of circumstances.

In responding to this argument, the court first discussed the concept of early retirement. Judge Bassler noted that, "*While what constitutes the customary retirement age today may be changing, it is still generally accepted to be the age of 65*."[34] The court further noted that, while the parties had not discussed retirement at the time of the negotiation or execution of their agreement, the wife conceded at the hearing that she expected the husband to retire at age 65, and the husband acknowledged that 65 was his anticipated retirement age. As such, the court determined that the parties had had an expectation that the husband would not retire until age 65; therefore, the court deemed the husband's retirement to be early.[35]

Next, the court noted that the husband's argument was confusing pension law with matrimonial law. Continuing, Judge Bassler noted:

> The needs of the dependent spouse and the contractual obligations of the parties are in a distinct category from the requirements that Congress may determine from time to time with respect to the regulation of pensions. Moreover, such a position puts the dependent spouse in severe jeopardy, since in New Jersey…pension income cannot be considered when fashioning a modification of an alimony award [citing the holding in *Innes v. Innes*]. The supporting spouse could, therefore, substantially reduce or eliminate alimony all together simply by selecting the first available retirement age sanctioned by the pension plan for any reason or no reason at all.[36]

Consequently, the court denied the husband's application for modification of his alimony obligation, finding that the husband's retirement was not made in good faith and was not reasonable; instead, "it constitutes self-induced 'changed circumstances.'"[37] The court concluded:

> The amount of alimony required of defendant must 'be calculated on the basis of his ability to pay which, in turn, is linked to the amount he could have made had he chosen not to resign.' [citation omitted] Defendant shall, therefore, be required to continue to pay the alimony stipulated in the property settlement agreement until he reaches age 65.[38]

Deegan v. Deegan

In 1992, the issue of voluntary retirement reached the appellate

court. In *Deegan v. Deegan,*[39] then-Judge Long framed the issue before the court as follows:

> [W]hat standard should apply in determining whether unanticipated early retirement, or any other voluntary life style alteration, constitutes a change in circumstances warranting a support modification….

In *Deegan*, the parties were divorced in 1985. Pursuant to their agreement, the husband was to pay the wife alimony in the amount of $250 per week. The agreement also called for the wife to receive one-third of the husband's vacation pay and one-third of the value of his pension benefit, both payable from the husband's share of the proceeds from the sale of the marital residence.

In the beginning of 1990, the husband advised the wife by letter that he had decided to retire, and that he wished to amicably resolve the issues. The wife did not respond. Subsequently, on April 27, 1990, four months shy of his 62nd birthday, the husband retired. In August 1990 (the month of his 62nd birthday), the husband filed an application with the court seeking to terminate his alimony obligation. In support of his application, the husband listed the following factors:

- The Steamfitter's Union, for whom he had worked for 42 years, offered a single-sum pension option of $189,801.03, which the husband placed into an IRA, generating an annual income of $13,106.25;
- At the time of the decision, work was "very slow," and there was a chance that the husband could be laid off;
- Work as a steamfitter involved a "great deal of physical labor, including bending, lifting and climbing, and working in the elements;"
- At the time of the divorce, the wife had been unemployed; at the time of the application, the wife was earning approximately $20,000 per year.

In response, the wife argued that:[40]

- The husband's decision to retire prior to the availability of Social Security left them without adequate income;
- The husband could have invested his lump-sum payment to yield a better return;
- The husband's decision to retire was "totally voluntary."[41]

Without holding a plenary hearing, the trial court denied the husband's application. In doing so, the court found:

> Individuals who have obligations and in particular alimony and child support obligations cannot voluntarily retire and then say to the court, we have a substantial change in circumstances, I don't have the income to comply with the previous judgment of divorce. When he retired, he knew he had this obligation to this woman and he continues to have this obligation to this woman, and he will continue to pay the alimony of $250.00 per week.[42]

The husband appealed, claiming that the trial judge erred in finding that he had failed to meet the burden of establishing that he had undergone changed circumstances, and, at the very least, he should have been entitled to a plenary hearing on the issue.

Initially, in reviewing the standard to be applied, Judge Long noted that, consistent with the holding in *Lepis v. Lepis,*[43] "the party seeking modification must demonstrate that changed circumstances have substantially impaired the ability to support himself or herself." In order to make that determination, the court must review the parties' circumstances at the time of the divorce and at the time of the application. Judge Long then noted:

> Where the change is involuntary, all that is required is an analysis of the alterations in the parties' financial circumstances. *However, where the change is a voluntary one, other considerations come into play.*[44]

The court then reviewed the *Horton* and *Dilger* decisions, particularly Judge Bassler's analysis of the factors to consider.[45] The appellate court also noted that Judge Bassler had considered the various approaches taken by other jurisdictions. Ultimately, after reviewing these approaches, the court determined: "Regardless of the outcome, all of these courts have focused to one extent or another on two issues: the motive of the payor spouse and the effect on the payee."[46]

Consequently, the appellate court concluded that the following factors are a "good starting point":

> The age, health of the party, his motives in retiring, the timing of the retirement, his ability to pay maintenance even after retirement and the ability of the other spouse to provide for himself or herself.
>
> We also agree with Judge Bassler…that the 'reasonableness' of the early retirement should be a factor, as should the expectations of the parties and the opportunity of the dependent spouse to prepare to live on the reduced support. In short, whether a spouse may voluntarily retire will depend upon the individual circumstances of a particular case.[47]

In other words, it appeared that the appellate court had essentially adopted the standard set forth by Judge Bassler in *Dilger*. However, Judge Long then added an additional layer to that standard:

> We have also concluded that, in the final analysis, even in a case in which the retiring spouse has been shown to have acted in good faith and has advanced entirely rational reasons for his or her actions, the trial judge will be required to decide one pivotal issue: *whether the advantage to the retiring spouse substantially outweighs the disadvantage to the payee*

> *spouse. Only if that answer is affirmative, should the retirement be viewed as a legitimate change in circumstances warranting modification of a pre-existing support obligation….*
>
> Where the interests are in equipoise, the payor spouse's application will fail because he or she is unable to show that the advantage substantially outweighs the disadvantage to the payee….Where the sole problem is timing, the trial judge may condition approval on a preparatory hiatus during which the movant may retire or not as he or she chooses but during which the financial obligations will continue.[48]

Prior to reversing the trial court's decision and remanding the matter for a full review of the parties' respective financial circumstances in light of this new standard, Judge Long famously commented:

> This ruling should not be viewed as a limitation on freedom of choice or freedom of action. By it, the payor spouse whose good faith early retirement or other life style change would not deleteriously affect the former spouse is free to follow his or her star. Where a significant disadvantage to the payee spouse is foreseen, the payor spouse is still not precluded from such a change. Any party is free to retire, take a vow of poverty, write poetry or hawk roses in an airport, if he or she sees fit. The only limitation is discontinuance of the financial aid the former spouse requires. The reason for this is that the duty of self-fulfillment must give way to the pre-existing duty which runs between spouses who have been in a marriage which has failed.[49]

Since *Deegan*, several jurisdictions have adopted the standards annunciated therein.[50]

Silvan v. Sylvan

In 1993, the Appellate Division was faced with a payor spouse who had attained the age of 65 and, as such, sought a modification of his alimony obligation. In *Silvan v. Sylvan,*[51] the parties had been married for 27 years and were divorced in 1981. Pursuant to the terms of the parties' property settlement agreement, the husband agreed to pay alimony in the amount of $10,400 per year. In 1988, the wife sought, and obtained, an increase in alimony to $15,600 per year. At the age of 63½, the husband retired and sought a modification of his alimony obligation. His application was denied, and affirmed by the Appellate Division in an unreported decision. However, by that time, the husband had reached age 65, and he filed another application for a modification of his alimony obligation. This application was again denied by the trial court.

The husband argued on appeal that he was unable to continue to pay alimony based upon his change in circumstances. In reviewing the matter, the court noted that, "Although it seems clear that the plaintiff-husband's financial situation is far better than that of his former wife, the reasons for that are not entirely clear."[52] The court then noted that, at the time of the divorce, the parties' equitable distribution of assets left the parties with assets of comparable values. Additionally, the court noted that, at the time of the application, the husband's income consisted of $900 per month in Social Security benefits and approximately $900 per month in investment income. The wife's income of approximately $18,000 per year consisted of pension and Social Security benefits. Each of the parties also claimed to be in ill health at the time.

Judge Dorothea Wefing started the analysis by finding that:

> We are satisfied that in certain circumstances, good faith retirement at age 65 may constitute changed circumstances for purposes of modification of alimony and that a hearing should be held to determine whether a reduction in alimony is called for.[53]

Next, the court set forth the various factors to be "considered in analyzing whether such changed circumstances do, in fact, exist as would justify a modification of alimony."[54] The court continued:

> A court may consider, for example, the age gap between the parties; whether at the time of the initial alimony award any attention was given by the parties to the possibility of future retirement; whether the particular retirement was mandatory or voluntary; whether the particular retirement occurred earlier than might have been anticipated at the time alimony was awarded; and the financial impact of that retirement upon the respective financial positions of the parties. It should also assess the motivation which led to the decision to retire, *i.e.*, was it reasonable under all the circumstances or motivated primarily by a desire to reduce the alimony of a former spouse. A court may also wish to consider the degree of control retained by the parties of the disbursement of their retirement income, *e.g.*, the ability to defer receipt of some or all. It may also wish to consider whether either spouse has transferred assets to others, thus reducing the amount available to meet their financial needs and obligations.
>
> This enumeration of factors is meant to be illustrative, not exhaustive.[55]

Interestingly, there is no reference to either *Dilger* or *Deegan* in the entire decision. This was likely because the court viewed the issue in the prior decisions as an early retirement issue and the matter presently before it as a reasonable retirement age issue.

The court concluded that the trial court had not considered the factors enumerated by the court. In fact, apparently other than noting that the husband's retirement was foreseeable when the parties had divorced, the trial court made no other findings in denying the husband's application. As such, the matter was remanded to the trial court

for further consideration.

Moore v. Moore

In 2005, the Appellate Division was faced with a different type of retirement issue: What happens when the employee-spouse continues to work, thereby depriving the non-employee-spouse of her interest in the pension benefits? In *Moore v. Moore,*[56] the husband was a tenured college professor at Montclair State University and, as such, was enrolled in the Teachers' Pension and Annuity Fund (TPAF). The parties divorced in 1985. At the time of the divorce, the wife agreed to a term of alimony (despite more than 31 years of marriage); in consideration for the term of alimony, the wife was to receive one-third of the husband's pension benefit valued at the time of his retirement (as opposed to utilizing a coverture fraction or otherwise establishing her interest at the time of the divorce).[57] The husband was approximately 53 years old at the time of the divorce.

However, the husband continued to work as a professor at Montclair State University beyond the age of 70, which effectively prevented the wife (and the husband) from receiving the pension benefits, as the TPAF pension benefits cannot be paid until the employee retires. The trial court found that nothing in the parties' agreement required the husband to retire at any specific date and, as such, the wife's request for her share of the pension benefits was denied. The wife appealed, contending that "there was a reasonable expectation that the [husband] would have retired at age sixty-five or at the latest age seventy"[58] and, as such, she was entitled to her share of the pension from the husband's present income, retroactive to the husband's 70th birthday.

The court began by reviewing the reasonable expectations of the parties at the time of the divorce in 1985. According to the wife, the parties had considered the retirement age of the husband to be 62 or 65. The husband, on the other hand, testified that at the time of the divorce he had no plan to retire, and that he did not recall any other discussions concerning a planned retirement.

In addition to her testimony regarding her expectations, the wife cited N.J.S.A. 18A:66-43(b), which specifically mandated retirement for all TPAF members at age 70. The appellate court found that, "the existence of this statute in 1985[59] supports a reasonable belief by the parties that a college professor in the TPAF could not work beyond age seventy."[60] In fact, the wife further testified that she believed the husband would have to be retired by age 70 in accordance with this statute. Her attorney also acknowledged the existence of the statute, and that he himself was aware of the required retirement at age 70 because his mother was a New Jersey teacher and participant in TPAF.

Based upon the testimony, and the existence of the statute in 1985, the court found that, "the competent credible evidence supports the [wife's] contention that both parties expected in 1985 that [the husband] would have to retire, at the latest, by age seventy."[61] Although the court found that the husband's working beyond age of 70 did not violate the literal terms of the agreement, his continued employment "disadvantaged" the wife. "No matter how much money [the husband] earns, his continued employment risks not only his pension interest, but also [the wife's]. Should [the husband] die before retiring, his entire pension would be forfeited, along with [the wife's] share."[62]

In reviewing the circumstances, the court noted that, at the time, the husband would receive approximately $6,195 per month from his pension, meaning that the wife would receive approximately $2,065 per month. By continuing to work, although he (and she) would receive an incremental annual increase for each year of work, "the amount of the increase [in pension benefit] would not allow [the wife] to recover the amount she loses each year [the husband] chooses work over retirement."[63]

Consequently, the court held:

> Under these circumstances, [the husband's] voluntary decision to continue working compels a court of equity to intervene.[64] "[T]he pre-existing duty which runs between spouses who have been in a marriage which has failed" must be enforced to prevent [the husband] from disadvantaging his former spouse.[65] Rule 4:50-1(f) can be utilized to prevent further devaluation, or perhaps total loss, of [the wife's] interest in [the husband's] pension. (citation omitted)
>
> The TPAF will not pay [the husband's] pension until he retires…. [The husband] can be directed to pay [the wife's] prospective share of his pension out of his pre-retirement income, or to borrow the funds necessary to make the payments as long as he continues to devalue and risk [the wife's] pension share by continuing to work beyond the date when the parties expected him to retire.[66]

The husband argued that these pre-retirement payments are not appropriate because, by continuing to work, he shared the same risk of pension loss as the wife. The court countered that, "This argument has some merit for the usual pension situation where neither party reasonably relied upon any specific retirement age, and no bad faith was evident."[67] However, the court again relied upon the existence of the statute for mandatory retirement, and the wife's apparent reliance upon it, to find that this matter was "unusual." As such, the court held that:

> Because a particular retirement date was reasonably expected and relied upon, [the husband] may be compelled to provide [the wife] with pre-retirement payments of her share of [his] pension for each month that [he] chooses to continue working beyond

> the expected retirement date. In other words, [the husband] can choose to risk his own pension, but he should not be allowed to risk [the wife's] share of the pension.[68]

The court remanded the matter on the issues of a funding source for the pre-retirement payments and the issue of retroactivity (whether the relief should be granted retroactive to the date on which the husband turned 70 or some other date).

"CAN I RETIRE AT 65?": CHALLENGING NEW JERSEY'S TRADITIONAL RETIREMENT AGE

Based upon the New Jersey cases set forth above, it would seem that retirement prior to age 65 is deemed early and, as such, would be subject to the *Dilger/Deegan* analysis; and retirement at or after 65 would be subject to the *Silvan* analysis. However, the retirement issue may not be that clear, as practical considerations may lead to a change in what is considered the normal/ traditional retirement age.

The Supreme Court of Florida in *Pimm v. Pimm,*[69] explained the use of age 65 as the traditional retirement age:

> The age of 65 years has become the traditional and presumptive age of retirement for American workers: many pension benefits maximize at the age of 65; taxpayers receive an additional federal tax credit at the age of 65 in recognition of the reduced income which accompanies retirement; under the Social Security Act the definition of retirement age includes "65 years of age"; the Employee Retirement Income Security Act of 1974 defines "normal retirement age" as including the "time a plan participant attains age 65." Based upon this widespread acceptance of 65 as the normal retirement age, we find that one would have a significant burden to show that a voluntary retirement before the age of 65 is reasonable.

This seemed a logical analysis at the time, and in fact, several jurisdictions had adopted age 65 as a "traditional" retirement age.[70]

However, over 15 years have passed since 1992, the year of the decisions in *Deegan* and *Pimm.* There have been changes that suggest the normal or traditional retirement age is now some time after age 65. The most obvious example is the change to Social Security benefits. In 1983, there were amendments to the Social Security Act,[71] which included a provision for raising the normal retirement age—the age at which someone is entitled to receive full benefits—beginning with people born in 1938 or thereafter.[72] There is a sliding scale, starting with people born in 1938 and continuing through the birth year 1960. Below is the scale provided by the Social Security Administration on its website (http://ssa.gov/pubs/retirechart):

AGE TO RECEIVE FULL SOCIAL SECURITY BENEFITS	
Year of Birth	**Full Retirement Age**
1937 or earlier	65
1938	65 and 2 months
1939	65 and 4 months
1940	65 and 6 months
1941	65 and 8 months
1942	65 and 10 months
1943–1954	66
1955	66 and 2 months
1956	66 and 4 months
1957	66 and 6 months
1958	66 and 8 months
1959	66 and 10 months
1960 and later	67

Clearly, then, if 'traditional retirement age' is linked to the 'normal/ full retirement age' as defined by the Social Security Administration, 65 can no longer considered the traditional retirement age.

There is further evidence that the traditional retirement age may be increasing. In 2006, the National Center for Health Statistics published "Life Expectancy at Birth by Race and Sex, 1930–2004." Note the comparison of life expectancy for people born in 1992 versus 2004 (the last year for available statistics):

	1992	**2004**
All races, both sexes	75.8 yrs.	77.9 yrs.
All races, male	72.3 yrs.	75.2 yrs.
All races, female	79.1 yrs.	80.4 yrs.
White, both sexes	76.5 yrs.	78.3 yrs.
White male	73.2 yrs.	75.7 yrs.
White female	79.8 yrs.	80.8 yrs.
Black, both sexes	69.6 yrs.	73.3 yrs.
Black male	65 yrs.	69.8 yrs.
Black female	73.9 yrs.	76.5 yrs.

This analysis demonstrates that, since 1992, the life expectancy for the population at large has increased by over two years—similar to the two-year increase in the normal retirement age, according to the Social Security Administration.

There are examples within the workplace as well. In the legal field, for example, in September 2007 the legal consulting firm Altman Weil conducted a survey on lawyer retirement policies. Among other things, the firm found that in all firms where retirement is mandatory, 38 percent mandate retirement at age 65; however, 36 percent mandate retirement at age 70, six percent at age 67 and five percent at age 68. It further found that in smaller firms (in the 50–99 lawyer category) with mandatory policies, the most common retirement age is 70.[73]

In August 2007, at its annual meeting, the House of Delegates of the American Bar Association recommended that law firms end the policy of mandatory retirement for partners in recognition of the benefits older partners can bring to a

firm.[74] Several firms have, in fact, abandoned mandatory retirement policies.[75] The survey and the ABA recommendation are likely in response to the settlement, in June 2007, of the largest age discrimination case filed against a law firm. Commencing in 2002, the Equal Employment Opportunity Commission brought a suit on behalf of 32 former partners against Chicago law firm Sidley Austin. The suit settled, with the firm agreeing to pay $27.5 million.

There is also legislation pending regarding an increase to the mandatory retirement age for judges in New Jersey. ACR-271 and SCR-109 both call for an amendment to the New Jersey Constitution increasing the mandatory retirement age from 70 to 75.

These are merely a few examples of the clearly changing views regarding the normal retirement age. So can one truly advise a client with any certainty that the normal retirement age in New Jersey is 65? The answer is likely no, as it seems clear that, in the near future, a supported spouse will challenge a voluntary retirement at age 65 as being early. In addition to the data presented above (including the fact that a 65-year-old cannot presently obtain full Social Security benefits), the supported spouse can cite the holding in *Silvan* for support: "We are satisfied that in certain circumstances, *good faith retirement at age sixty-five may constitute changed circumstances* for purposes of modification of alimony."[76] In concluding the argument, the supported spouse will ultimately ask a trial court (and, perhaps, an appellate court) to find that retirement at age 65, without more, must be deemed early, and, as such, the court must apply the *Dilger/Deegan* standard. This uncertainty may make negotiating a retirement age even more difficult.

IS THERE A BETTER WAY? ISSUES WITH THE PRESENT STANDARD

This article began with a reference to a quote from then-Judge Long in *Deegan:*[77] "No thoughtful matrimonial lawyer should leave an issue of this importance to chance and subject his or her client to lengthy future proceedings such as we have here." Yet, the standards established by the *Dilger*, *Deegan* and *Silvan* courts make it nearly impossible for attorneys, on behalf of their clients, to negotiate a fair retirement date. Most supported spouses see agreeing to a retirement date as a bargaining chip; that is, the supported spouse *expects* to receive consideration (often substantial consideration) in exchange for an agreement to a specific retirement date/age. Most supporting spouses, on the other hand, view retirement as a right,[78] for which no consideration should be paid. Hence, the parties generally, either explicitly or implicitly, let the issue abide the event. In doing so, as pointed out by the *Deegan* court, the parties are then subject to potentially lengthy proceedings at a time in their lives when, very likely, they can afford it the least.

There are further complications. In *Deegan*,[79] the court noted that, "even in a case in which the retiring spouse has been shown to have acted in good faith and has advanced entirely rational reasons for his or her actions," in order to obtain relief, the prospective retiree must also demonstrate "that the advantage to the retiring spouse substantially outweighs the disadvantage to the payee spouse," and that "only if that answer is affirmative, should the retirement be viewed as a legitimate change in circumstances warranting modification of a pre-existing support obligation." In truth, this is a nearly impossible standard for the prospective retiree to meet. Frankly, there are very few circumstances in which the receiving spouse will be in a better financial condition than the prospective retiree. Adding to this complication, at the time of the potential retirement, the supporting spouse is generally unaware of the financial status of the supported spouse, which, based upon the *Deegan* standard, leaves him or her "flying blind" when making an application for modification.

By adding this second layer to the *Dilger* standard, the *Deegan* court made it nearly impossible for the retiree to succeed in his application. The *Deegan* standard makes it difficult enough to negotiate retirement at the time of retirement, let alone at the time of the divorce.

On the other hand, although it appears that the supported spouse is 'protected' by the current state of the law, the receiving spouse is never quite sure when the litigation may commence—or how frequently, if the first application is denied, the payor spouse may file—and is often unprepared financially. In essence, then, by abiding the event, both parties are significantly disadvantaged.

But there are other concerns with not resolving this issue at the time of the divorce:

'Early' retirement: In *Deegan*, the court framed the issue on retirement as follows:

> [W]hat standard should apply in determining whether unanticipated *early retirement,* or any other voluntary life style alteration, constitutes a change in circumstances warranting a support modification…[80]

But what is "early" retirement? Notwithstanding the argument above, at present, it appears that retirement prior to age 65 is early.[78] However, has the construction worker, who has been employed since age 18, retired early at the age of 63—that is, after 45 years of employment? Has the Wall Street analyst retired early when, after being laid off at age 58, she can no longer find employment in her field and, instead, decides to retire?

More importantly, should the same standard be applied to all employees? Should there be a one-size-fits-all approach to the normal

retirement age? To put this question into perspective, data shows that the life expectancy of a 40-year-old blue-collar male worker is 38.61 years; the life expectancy of his 40-year-old white-collar male counterpart is 40.69 years—a two year difference.[81] The life expectancy for a 40-year-old female blue-collar worker is 42.01 years—a nearly three-and-one-half year difference from her male counterpart.[82] Yet, all have the same normal retirement age in the eyes of the law.This data merely emphasizes the need for some consideration to be given to the occupation of the potential retiree when determining whether, in fact, a retirement is early.

Voluntary v. Mandatory: Similarly, how do we distinguish between voluntary and mandatory retirement—one of the factors set forth by both the *Deegan* and *Silvan* courts, as well as others?[83] Quite often, older employees are offered retirement incentive packages, an inducement from the company to hasten the retirement of an older workforce without fear of reprisal. Many of these older workers firmly believe the offer is merely an indication from management that, whether or not they accept the package, their days are numbered. But how could an employee ever prove this? Should the retiree be expected to present a certified statement or testimony from a representative of the company in which that management representative will state under oath that the company was, in essence, forcing the older employee out? Not likely. As such, the employee is left to certify or testify that he or she had a choice—accept the package or be fired shortly thereafter without the additional benefits—and make that presentation without the aid of any extrinsic evidence—really, nothing other than a gut feeling.

Likewise, is there a different standard applied to employees versus those who are self-employed? As an example, an accountant who is employed by a firm may have an expected or anticipated retirement date from the firm—perhaps established by the firm. However, the same accountant who owns a small firm or is a solo practitioner could, presumably, continue his or her practice indefinitely. In this circumstance (and absent any disability), the solo practitioner's retirement is almost certainly voluntary, no matter the age at what it occurs.

In commenting on the issue of voluntary retirement, one court noted:

> Absent some tragedy or combination of unfortunate circumstances, retirement from further employment in the workforce is always voluntary and foreseeable because, at some point, every worker will eventually retire. Moreover, taken to its logical extreme, [a bar against modification if the retirement is voluntary] would force an obligor to work until physically incapable of doing so merely to avoid the allegation that he or she was "voluntarily" avoiding spousal obligations….
>
> At some point, parties must recognize that 'just as a married couple may expect a reduction in income due to retirement, a divorced spouse cannot expect to receive the same high level of support after the supporting spouse retires.'[84]

There seems to be no reason to focus on whether the retirement was voluntary. As the court noted in *Bogan* at footnote 6, "As we do not consider the voluntariness of the retirement as a factor, many of these factors may be relevant only to the extent that they tend to show that the retirement was taken in bad faith to defeat the support obligation." In other words, a factor that considers the motivation of the retiree must reasonably include voluntariness as part of the consideration of the circumstances under which the supporting spouse retired.

Retire first, then file the application: Under the current law, a supporting spouse must first retire in order to file an application with the court; otherwise, the issue is not deemed to be ripe. In other words, a supporting spouse must give up his or her position—perhaps irretrievably parting company with his or her employer—and then seek a modification.

In *Boardman v. Boardman,*[85] at the conclusion of the trial, the court awarded permanent alimony to the husband; however, the court further ordered that alimony would automatically terminate upon the wife's retirement. The appellate court reversed, determining that "prospective termination provisions are contrary to the law that has developed under *Lepis v. Lepis,*[86] and its progeny."[87] Then, after citing the holdings in *Deegan*, *Silvan* and *Dilger*, the court determined that, "[The husband's] financial dependence will not automatically terminate when [the wife] stops working. Nor will [the wife's] ability to pay. Any modification should abide the event…."[88]

In light of the present standard, this places the payor spouse in a very precarious position. He or she must first retire and then file an application for a modification. However, as noted earlier, he or she usually does so with very little, if any, knowledge of the supported spouse's current financial circumstances. Considering the *Deegan* standard—whether the advantage to the retiring spouse substantially outweighs the disadvantage to the payee spouse—even if the supporting spouse has "acted in good faith and has advanced entirely rational reasons for his actions," the application may still be denied, leaving him or her without employment in order to continue support payments. This is a substantial risk many are unwilling to take.

Implicit expectation of a retirement date: In choosing a career, some employees are motivated by an implicit retirement date. For example, a New Jersey teacher knows he or she can receive full retirement benefits as early as age 55, as long as he or she

has been teaching for 25 years.[89] A New Jersey State Trooper has a mandatory retirement age of 55.[90] In other words, in selecting these types of careers, it is likely that the employee—and his or her spouse—understood during the marriage that there was an implicit retirement date, which date may have been before 65. Yet, under the current standard established by the courts, almost no consideration is given to the field in which the supporting spouse is employed or this implicit retirement date.

Reverse *Moore* issue: In *Moore*, the court found that the husband's continued employment "disadvantaged" the wife. "No matter how much money [the husband] earns, his continued employment risks not only his pension interest, but also [the wife's]. Should [the husband] die before retiring, his entire pension would be forfeited, along with [the wife's] share."[91] In essence, the court noted that the wife had bargained for her share of the pension and the husband's continued employment obstructed her ability to receive her share of this asset.

In many cases, the two largest assets are a house and a pension. Quite often, the supporting spouse retains the pension and the supported spouse retains the house. Assume the supporting spouse is a teacher who, at age 55 with 25 years of service, is now eligible for retirement. Further assume that, at the time of the divorce, he had waived his interest in the former marital residence in order to retain his pension, without claim from his former spouse. Under the current standards, his retirement at age 55 would be deemed early and, barring disability or other unfortunate circumstances, his request for relief would almost certainly be denied. Yet, by requiring him to continue teaching, he cannot avail himself to the asset which he had received in equitable distribution, as a teacher's pension can only be paid upon termination of service. Consequently, much like Ms. Moore, he is "disadvantaged" by his continued employment and, each day he continues to work, he risks his pension interest. Worse, if he has already retired (because he needed to do so in order to file the application in the first place), then the husband will be utilizing the asset he received as part of equitable distribution (*i.e.,* his pension benefit) to pay support.

Phased retirement: For many older employees, a complete break from employment is difficult—both financially and emotionally. Phased retirement is the term given to the process for transitioning from full-time employment to full-time retirement.[92] Phased retirement can include: rehiring retirees as consultants or part-time workers; retraining workers for or reassigning workers to different or less-stressful positions; job-sharing; or other similar arrangements where an employee can work less and, as such, earn less.[93] This arrangement raises a question regarding which standard is applied: a retirement standard or a simple *Lepis* standard, or some form of hybrid. If it is the retirement standard, because the supporting spouse has not actually retired, is the application premature? Using either standard, does the voluntary decision to reduce hours and income essentially prevent the supporting spouse from obtaining relief?

These are just some of the issues raised by the New Jersey standard regarding retirement—whether applying the *Deegan* or the *Silvan* standard. There needs to be a better approach—more specifically, an approach that takes into consideration the issues noted above. But more importantly, there needs to be an approach that will provide parties with an incentive to address the issue of prospective retirement at the time of the divorce, regardless of their age, so they can prepare for the day in which the supporting spouse retires.

A DIFFERENT APPROACH: *BOGAN V. BOGAN*

In 2001, the Supreme Court of Tennessee was faced with the issue of retirement. In *Bogan v. Bogan,*[94] the parties were divorced in July 1991 after 30 years of marriage. At the time of the divorce, the husband was 53 years old and employed by Eastman Chemical. In August 1997, the husband filed an application to modify or terminate his alimony obligation, based upon his retirement. After a plenary hearing, the trial court made the following findings:

- The husband's retirement was motivated by his own dissatisfaction with his job. At the time of the divorce, the husband was the head of development and a senior research chemist, supervising over 40 people. In 1993, he was moved to "group leader," supervising only 12 employees and, in 1996, he was again moved to the position of "individual contributor," supervising only one person. It should be noted that, despite all of these moves, the husband's income did not decrease.
- Eastman Chemical employed a policy to downsize its workforce by encouraging employees to retire. It instituted a policy titled "Advantage Cost 2000," a part of which was the modification of employee benefits. At the hearing, the employee benefits director of Eastman testified that over 2,200 other employees retired during the two-year period preceding Jan. 1, 1998, when the company would have a change in its employee benefits. Note that, although the benefits directed denied that the company was specifically encouraging employees to retire, this level of retirement had been the highest for any other two-year period in the company's history.
- With regard to the change in employee benefits, if the husband had retired after Jan. 1, 1998, his lump-sum retirement benefits would decrease in value (as they would be replaced by

monthly annuity payments), and he would lose value in his joint survivor and life insurance benefits.
- At the time of his retirement, the husband had exceeded the qualifications for retirement with full benefits.
- After his retirement, the husband's income would be reduced by 50 percent from his pre-retirement income.
- The wife's need for support had decreased because, due to the terms of the parties' settlement agreement, she would share in the increased benefits, earning additional investment income of between $14,736 and $16,306 from her share of the lump sum payment from the husband's retirement benefits.
- Since 1991, the wife's opportunity to gain additional income had increased because her business had improved its earning potential.

After making these findings, the trial court determined the husband was entitled to a modification (not a termination), and reduced the alimony from $2,300 per month to $945 per month.[95]

The wife appealed, arguing that her former husband's retirement was voluntary and foreseeable at the time of the divorce, and therefore, under Tennessee law, he was not entitled to a modification. A majority of the court of appeals agreed, finding that, although retirement may not always be a foreseeable event, in this matter, the husband's retirement was foreseeable at the time of the parties' agreement and, as such, there was no material change in circumstances. However, the dissenting opinion noted that "retirement is usually always voluntary and foreseeable and that these two factors should not preclude a finding of substantial and material changed circumstances." Consequently, the dissent in the court of appeals believed that, "that retirement should be considered a substantial and material change in circumstances so long as it is taken in good faith and without intent to defeat the support obligations."[96]

The husband sought appeal to the Supreme Court, framing the issue as follows: "[W]hether a good-faith retirement, though voluntary and foreseeable, may constitute a substantial and material change in circumstances warranting a reduction in spousal support obligations."[97] A majority of the Supreme Court held that:

> When an obligor's retirement is objectively reasonable, it does constitute a substantial and material change in circumstances—irrespective of whether the retirement was foreseeable or voluntary—so as to permit modification of the support obligation. However, while a bona fide retirement after a lifetime spent in the labor force is somewhat of an entitlement, an obligor cannot merely utter the word 'retirement' and expect an automatic finding of substantial and material change in circumstances. Rather, the trial court should examine the totality of the circumstances surrounding the retirement to ensure that it is objectively reasonable… Although we decline to confine this inquiry to consideration of a list of factors, in no case may a retirement be deemed objectively reasonable if it was primarily motivated by a desire to defeat the support award or to reduce the alimony paid to the former spouse.[98]

Interestingly, the majority opinion noted that the dissenting opinion had, in fact, recited a list of factors within that opinion, noting that several jurisdictions (including the court in *Silvan*) had adopted such an approach. In declining to recite a list of factors for a trial court to consider, the Court noted, in footnote 6:

> We decline to follow suit, because many of these factors *seem designed only to lead to the conclusion that the retirement was voluntary.* For example, the lack of advanced age or the good health of the obligor essentially proves nothing more than that the obligor chose to retire free from any physical compulsion to do so. As we do not consider voluntariness of the retirement as a factor, many of these factors may be relevant only to the extent that they tend to show that the retirement was taken in bad faith to defeat the support obligation….
>
> The absence of a long list of factors is simply recognition that trial judges are fully capable, on their own, of analyzing the reasonableness of a retirement decision from the totality of the circumstances.

The Court also noted that a determination that the retirement is objectively reasonable does not end the discussion; rather, once this has been determined, the trial court must then apply the alimony factors set forth in the statute (as each factor may apply) in determining whether a modification or termination is appropriate.[99]

The Court was also critical of the court of appeals' oft-cited conclusion that "the need of the receiving spouse is the most important factor to consider when deciding whether to modify a support award."[100] The majority noted that:

> [W]hen addressing an *initial* award of support, the need of the spouse must necessarily be the most important factor to consider, because alimony is primarily intended to provide some minimal level of financial support to a needy spouse. [citations omitted] Nevertheless, when deciding whether to *modify* a support award, the need of the receiving spouse cannot be the single-most-dominant factor, as a substantial and material change in circumstances demands respect for other considerations. While the need of the receiving spouse remains an important consideration in modification cases, the ability of the obligor to provide support must be given at least equal consideration. Accordingly, to the extent that any case would compel giving more weight to the

> need of the receiving spouse than all other factors in order to *modify* a support obligation, it is overruled."[101] (emphasis in original)

Last, the wife took issue with her former husband's age at retirement—just a few weeks shy of his 60th birthday. The majority rejected this argument, or the use of any presumptively reasonable age for retirement (citing several states as utilizing 65 as the presumptive age):

> Although an obligor's retirement age may be considered in assessing the overall reasonableness of the retirement, we are reluctant to establish a presumptive age for an objectively reasonable retirement. All things being equal, an obligor who retires at an exceptionally young age will necessarily run a greater risk of being unable to establish that the retirement is objectively reasonable so as to demonstrate a substantial and material change in circumstances.[102]

In concluding, before reinstating the modification of support as ordered by the trial court, the majority noted:

> [R]etirement is a unique circumstance in support modification cases. Notwithstanding the views of the dissent to the contrary, retirement is simply not like other forms of voluntary underemployment. Because retirement is somewhat of an entitlement, the foreseeability or voluntariness of the retirement decision does not affect the support modification analysis, and the weight given to various considerations is not precisely the same as that given under different circumstances. So long as the retirement is objectively reasonable and taken in good faith, we will not look to the potential income of the retired obligor, and we will give the reduced ability of the retired obligor to pay support at least equal consideration with the need of the receiving spouse.[103]

The dissenting opinion was critical of the analysis provided by the majority. It appeared to the dissent, for example, that, "The result of the majority's standard is that a presumption of a substantial and material change is created for retirement, regardless of the financial positions of the parties."[104] The dissent was likewise critical of the fact that the majority failed, "to provide any meaningful guidance to the trial courts in determining what a reasonable age for retirement might be. According to the majority, it is apparently reasonable for a fifty-nine-year-old man in good health to retire due to job dissatisfaction regardless of his former spouse's obvious financial need."[105] As for the majority's belief that retirement "is somewhat of an entitlement" as the majority had found, the dissent noted that, "Retirement is a privilege enjoyed by those in a financial position to afford it." Although the author recognizes the right of each individual to pursue happiness and to make reasonable decisions, this right must be balanced against the need for support and maintenance.

Yet, the dissent was most critical of the lack of guidance, which the majority opinion provided to trial courts when faced with the issue of retirement. The dissent felt that the "objectively reasonable" standard provided no such guidance:

> I would favor a less nebulous method for determining whether an obligor's decision to retire constitutes a substantial and material change of circumstances warranting modification of an alimony obligation. The following factors would be considered by the trial court in reaching its determination: 1) the obligor's age and health; 2) the obligor's field of employment; 3) the normal age of retirement for those in that field; 4) the age when the obligor became eligible for retirement; 5) the obligor's motives in retiring, including any pressures to retire applied by the obligor's employer; 6) the ability of the obligor to maintain support payments following retirement; 7) the obligee's level of financial independence; 8) the opportunity of the obligee to prepare to live on reduced support; and 9) any other relevant factor affecting the obligor's decision to retire and the parties' respective financial positions. [citations omitted] These factors take into consideration the circumstances surrounding the obligor's retirement, including the touchstone factors of need and ability to pay.[106]

Applying these factors to the matter at hand, the dissent would have reversed the trial court decision, reinstating the original alimony award.[107]

A BETTER WAY

This article has provided a comprehensive review of the present state of the law in New Jersey regarding retirement. It has also detailed the numerous significant issues arising from application of the present standards. To paraphrase the *Bogan* majority, the list of factors and standards as they presently exist in New Jersey seems designed only to lead to the conclusion that the application of the prospective retiree should be denied in the ordinary course. With the significant disparity in bargaining positions, how can we, as attorneys, ever fulfill Judge Long's hope to resolve the issue of modification due to retirement "in the first instance at the time of the divorce in a negotiated agreement?"

The answer is simple—modify the standard to be applied so the supporting spouse has a real opportunity to retire in good faith, while not ignoring the financial circumstances of the supported spouse. By leveling the playing field, attorneys and their clients will be more willing to negotiate a fair and reasonable retirement age "in the first instance, at the time of the divorce in a negotiated agreement."

The obvious starting point would be to utilize the "objectively reasonable" standard established by the *Bogan* majority as the overall rule; that is, using New Jersey lingo, an obligor would have to demon-

strate that retirement is objectively reasonable in light of all the circumstances in order to satisfy the *Lepis prima facie* showing of changed circumstances.

However, unlike the majority opinion in *Bogan*, there should be a list of factors, so trial courts—not to mention attorneys and clients—have some guidance regarding what constitutes an objectively reasonable standard. Therefore, the author would adopt the following factors to a *prospective or actual* retiree:

1. the age and health of the parties at the time of retirement;
2. the obligor's field of employment;
3. the normal age of retirement for those in that field;
4. the age when the obligor became eligible for retirement;
5. the obligor's motives in retiring, including any pressures to retire applied by the obligor's employer;
6. the reasonable expectations of the parties regarding retirement at the time of the divorce;
7. the ability of the obligor to maintain support payments following retirement;
8. the obligee's level of financial independence;
9. the financial impact of the retirement upon the obligee;
10. the opportunity of the obligee to prepare to live on reduced support; and
11. any other relevant factor affecting the obligor's decision to retire and the parties' respective financial positions.

A court would review each of these factors, granting each factor equal weight, in order to determine whether retirement at the time of the application is objectively reasonable. Further, like any other *Lepis*-type application, the retiree would need to attach an updated case information statement. If, after applying the factors as set forth above, the court determined the retiree had met his or her burden, the retirement would be deemed a substantial change in circumstances, entitling the retiree to a review of the alimony obligation based upon the parties' then-existing circumstances, including the reduction in income of the supporting spouse.

Does this standard rectify the problems with the present standards that had been previously noted?

1. The second prong of *Deegan*: Recall that the *Deegan* court determined that:

> [I]n the final analysis, even in a case in which the retiring spouse has been shown to have acted in good faith and has advanced entirely rational reasons for his or her actions, the trial judge will be required to decide one pivotal issue: *whether the advantage to the retiring spouse substantially outweighs the disadvantage to the payee spouse. Only if that answer is affirmative, should the retirement be viewed as a legitimate change in circumstances warranting modification of a pre-existing support obligation.*

In response, the *Bogan* majority resolved:

> [W]hen deciding whether to *modify* a support award, the need of the receiving spouse cannot be the single-most-dominant factor, as a substantial and material change in circumstances demands respect for other considerations. While the need of the receiving spouse remains an important consideration in modification cases, the ability of the obligor to provide support must be given at least equal consideration. Accordingly, to the extent that any case would compel giving more weight to the need of the receiving spouse than all other factors in order to *modify* a support obligation, it is overruled.

By granting equal weight to all of the 11 factors, this stipulation from the *Bogan* court is satisfied.

2. Early and voluntary retirement labels: As for early retirement, this is a distinction utilized to differentiate between the *Deegan* standard (for early retirement) and the *Silvan* standard (retirement at or after 65). When applying the factors set forth above, there is no distinction—that is, the same factors are applied for retirement at any age. Also, there is no arbitrary good faith age for retirement; thereby rendering moot the discussion, *supra*, concerning whether the normal retirement age is 65 or some age beyond that. Instead, the reasonableness of the age of the retiree is taken into consideration in factors 1, 3, 4 and 5.

As for voluntary retirement, to once again quote the *Bogan* majority, at 728:

> Absent some tragedy or combination of unfortunate circumstances, retirement from further employment in the workforce is always voluntary and foreseeable because, at some point, every worker will eventually retire. Moreover, taken to its logical extreme, [a bar against modification if the retirement is voluntary] would force an obligor to work until physically incapable of doing so merely to avoid the allegation that he or she was "voluntarily" avoiding spousal obligations.

In lieu of an arbitrary discussion on the voluntariness of the retirement, factor 5 takes into consideration the motivation of the retiree, including any pressure placed upon the retiree by his or her employer to retire, including reductions in force, and factor 3 reviews the normal retirement age for those in the retiree's field.

3. Retire first, then apply: The standard above would not require a supporting spouse to actually retire before filing an application. Instead, a prospective retiree would certify that he or she is considering retiring by a date certain—which would be in the not-too-distant future—and then set forth the factual basis to support an application for a mod-

ification or termination of support.

4. Implicit retirement age: Factors 3 and 4 specifically encompass this issue.

5. Reverse *Moore*: By removing from consideration any minimum age for retirement *and* by taking into consideration factors 2, 3 and 4, the retiree is less likely to be disadvantaged by being required to work well beyond the reasonable age of retirement for others in his or her field, and more likely to enjoy the pension benefits.

6. Phased retirement: In many cases, a retiree may need to supplement his or her retirement income—for example, by working part time in his or her field or in another, less demanding field. However, the retiree may be concerned that this reduction in hours or in income, as opposed to a complete termination of employment, would not be deemed retirement for purposes of modification. Factors 7 and 11 would appear to permit the retiree to argue that he or she has, for all intents and purposes, retired; however, in order to supplement his or her income, which in turn would provide him or her with a better ability to maintain some level of alimony post-retirement, he or she needs part-time employment.

Most importantly, does this new set of factors *really* provide incentive to parties—and their attorneys—to resolve the issue of retirement *at the time of the divorce*? The answer should be "Yes." First, by removing the implicit advantage to the obligee spouse provided by the *Deegan* court, the supporting spouse has a fair opportunity to seek a modification at the time of retirement. No longer will the obligor have to prove good faith *and* demonstrate that the advantage to him or her outweighs the detriment to the oblige—a nearly impossible standard.

Further, by removing the mandatory minimum age for retirement, there is an incentive for *both* parties to discuss, at the time of the divorce, a reasonable retirement age. If the obligor, for example, is a New Jersey State Trooper, with a mandatory retirement age of 55, perhaps a court may find—based upon factors 2, 3, 4 and 5—that 55 is a reasonable retirement age. A similar argument could be utilized by a teacher, a construction worker, a Wall Street analyst, or nearly any field of employment. In order to avoid what the obligee may deem an early retirement and, therefore, a potentially drastic reduction in support at that early age, the obligee may negotiate this issue more willingly—and without seeking substantial consideration in exchange for same.

Last, because a finding of changed circumstances only leads to a *review* of the alimony obligation—as opposed to a termination of the obligation—based upon the parties' then-existing circumstances, an obligee may be more willing to negotiate what is, in essence, a fair and reasonable retirement date on which that review will occur.

CONCLUSION

As the law presently stands, supported spouses have no incentive to negotiate a fair and reasonable retirement date. In fact, prior to age 65—and, in the near future, maybe after that—the obligor has very little chance of having an alimony obligation modified based upon retirement, and, even after that age, the obligor has a difficult standard to meet. In fact, the payor spouse has too many hoops to jump through to make it even worthwhile. Instead, to paraphrase the *Bogan* majority, the present standard in New Jersey forces an obligor to work until physically incapable of doing so merely to avoid the allegation that he or she was avoiding spousal obligations. This is not the retirement envisioned by most workers.

There needs to be a better way. The supporting spouses of New Jersey need to know that there is a light at the end of the tunnel. The author believes the factors set forth above provide that light and should be adopted. ■

ENDNOTES

1. This article is limited to the issues concerning retirement and its effect on alimony. For a discussion on the effect of retirement and child support, *see Lissner v. Marburger*, 394 N.J. Super. 393 (App. Div. 2007).
2. 254 N.J. Super. 350, 359 (App. Div. 1992).
3. 164 Ariz. 449, 793 P.2d. 1116 (Ariz. Ct. App. 1990).
4. *Shaughnessy,* at 1118.
5. *Id.*
6. *Deegan,* at 356.
7. 349 A.2d. 462 (D.C. 1975).
8. *Id*. at 463-4 (emphasis added).
9. 35 Conn. App. 228, 645 A.2d. 1024 (Conn. App. 1994), *cert. den'd* 231 Conn. 929, 649 A.2d 253 (1994).
10. *Id.,* at 1027 (emphasis added).
11. 472 N.W.2d 162 (Minn. App. 1991).
12. *Richards*, at 164-5.
13. *Id.* at 165.
14. 232 Pa. Super. 295, 331 A.2d 768 (Super. Ct. 1974).
15. *Id*. at 299.
16. Interestingly, in remanding the case, the court noted:
    > If there is evidence indicating that a man planned his retirement so as to retire at the age of 61, then we are of the strong opinion that even if he and his wife were living together there could be no complaint on the part of the wife that her income would be reduced. Certainly, this being so, an estranged wife would have no greater claim on such a husband.
    Burns, at 300.
17. *See also, McFadden v. McFadden,* 386 Pa. Super. 506, 563 A.2d 180 (Pa. Super. 1989).
18. *Smith v. Smith* 419 A.2d. 1035 (Me. 1980).
19. 216 So.2d. 852 (La. Ct. App. 1968).
20. 219 N.J. Super. 76 (Ch. Div. 1987).

21. 187 N.J. Super. 377 (Ch. Div. 1982), *aff'd,* 193 N.J. Super. 385 (App. Div. 1984).
22. *D'Oro*, at 379.
23. *Horton*, at 78 (emphasis in original).
24. *See Innes v. Innes*, 117 N.J. 496, 504-6 (1990).
25. 242 N.J. Super. 380 (Ch. Div. 1990).
26. *Dilger*, at 382.
27. *Dilger,* at 385.
28. *Id.*
29. As for the "sole purpose" and "primary purpose" standards, Judge Bassler noted:
    > Having to decide whether avoiding financial responsibility to the former spouse is the "sole purpose" or "primary purpose" for electing early retirement invites scholastic distinctions of dubious value." *Dilger,* at 387.
30. *In Re Marriage of Smith*, 77 Ill. App. 3d 858, 33 Ill. Dec. 332, 336, 396 N.E. 2d 859, 863 (App. Ct. 1979).
31. *Dilger*, at 387-8.
32. *Id,* at 389.
33. *Id.*
34. *Id*. at 389 (emphasis added).
35. Importantly, however, the court noted, at footnote 5:
    > Therefore, this decision does not address the issue whether persons eligible for retirement under a particular retirement plan can be forced to continue working solely because their ex-spouse's need for support cannot otherwise be met.
36. *Id*. 390.
37. *Id.* at 391.
38. *Id.*
39. 254 N.J. Super. 350, 352 (App. Div. 1992).
40. *Deegan*, at 353.
41. *Id.*
42. *Id.* at 354.
43. 83 N.J. 139, 157 (1980).
44. *Deegan*, at 355. (emphasis added).
45. *See Dilger,* at 387-8 and *supra.*
46. *Deegan*, at 357.
47. *Id.* at 357-8.
48. *Id*. at 358 (emphasis added).
49. *Id*. at 358-9.
50. *See, e.g, Ebach v. Ebach,* 700 N.W.2d. 684, 2005 ND 123 (N.D. 2005); *Barbarine v. Barbarine*, 925 S.W.2d 831 (Ct. App. 1996); *review denied,* Aug. 21, 1996; *Pimm v. Pimm,* 601 So.2d 534 (Fla. 1992).
51. 267 N.J. Super. 578 (App. Div. 1993).
52. *Silvan*, at 580.
53. *Id.* at 530.
54. *Id*. at 531.
55. *Id*.
56. 376 N.J. Super. 246 (App. Div. 2005), *cert. denied,* 185 N.J. 37 (2005).
57. In fact, this issue had been the subject of a prior appeal. The Appellate Division, in an unreported decision, determined the Wife was entitled to a tax-free, one-third share of the Husband's TPAF pension valued at the time of retirement, not at the time of the divorce.
58. *Moore*, at 247.
59. The court also noted, in footnote 2, that the "TPAF no longer enforces this provision because of controlling Federal law," citing the Age Discrimination in Employment Act, 29 U.S.C.A. § 621-634. Consequently, "unless a specific exemption applies, the ADEA protects tenured college professors from forced retirement."
60. *Moore*, at 248.
61. *Id*. at 249.
62. *Id.* at 250.
63. *Id*. at 251.
64. *See, Deegan v. Deegan,* 254 N.J. Super. 350, 355 (App. Div. 1992).
65. *Deegan*, at 359.
66. *Id. (citations omitted).*
67. *Id.* at 252.
68. *Id*.
69. 601 So.2d 534, 537 (Fla. 1992).
70. *See Bogan v. Bogan,* 60 S.W.3d 721, 731 (Tenn. 2001), ("Several states have held that age sixty-five is the presumptively reasonable age for retirement…").
71. P.L. 98-21, (H.R. 1900).
72. Because it affected people born in 1938 and thereafter, the first people affected by the change were only 54 years old at the time of the *Deegan* decision.
73. Altman Weil, Inc. 2007 Lawyer Retirement Flash Survey, pp. 3-5.
74. *ABA Journal*, August 2007.
75. Illman, James, K&L Gates ditches mandatory retirement age, Legalweek.com, July 11, 2007. *See also*, Coscarelli, Kate "A New Twist on an Old Idea: Law firms increasingly dropping mandatory retirement for aging lawyers," *Star Ledger*, Dec. 23, 2007.
76. *Silvan*, at 530 (emphasis added).
77. *Id*. at 359.
78. Quoting the concurring/dissenting opinion of Judge Birch in *Bogan*, "In my view, the decision to retire, particularly among workers nearing the ends of their careers, is personal, private and nearly sacrosanct."
79. *Id.* at 358.
80. *Deegan*, at 352. (emphasis added)
81. *See also*, *Pimm v. Pimm,* 601 So.2d 534, 537 (Fla. 1992), (accepting 65 as the "normal retirement age," and determining that "one would have a significant burden to show that a voluntary retirement before the age of sixty-five is reasonable").
82. RP-2000 Combined Healthy Mortality Tables for Males and Females with White/Blue Collar adjustments.
83. *Id.*
84. *See e.g., Misinonile v. Misinonile,* 35 Conn. App. 228, 645 A.2d. 1024 (Conn. App. 1994), *cert. den'd,* 231 Conn. 929, 649 A.2d 253 (1994), *Tydings v. Tydings,* 349 A.2d. 462 (D.C. 1975), *Commonwealth ex rel. Burns v. Burns,* 232 Pa. Super. 295, 331 A.2d

768 (Super. Ct. 1974).
85. *Bogan v. Bogan,* 60 S.W.3d 721, 728-9 (Tenn. 2001). (citation omitted).
86. 314 N.J. Super. 340 (App. Div. 1998).
87. 83 N.J. 139, 416 A.2d 45 (1980).
88. *Boardman*, at 346.
89. *Id.* at 346-7.
90. *New Jersey Teachers' Pension and Annuity Fund Member Handbook*, New Jersey Department of the Treasury.
91. *New Jersey State Police Retirement System Member Handbook*, New Jersey Department of the Treasury.
92. *Id.* at 250.
93. Wiatrowski, William J., Changing Retirement Age: Ups and Downs, *Monthly Labor Review*, April 2001, *citing Phased Retirement: Reshaping the End of Work* (Watson Wyatt Worldwide, 1999).
94. Wiatrowski, William J., Changing Retirement Age: Ups and Downs, *Monthly Labor Review*, April 2001.
95. 60 S.W.3d 721 (Tenn. 2001).
96. *Bogan*, at 726.
97. *Id.* at 727.
98. *Id.*
99. *Id.* at 729.
100. *Id.* at 730.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 734.
105. *Id.* at 734.
106. *Id.* at 735.
107. *Id.* at 735-6.
108. There was an additional concurring and dissenting opinion. After stating that retirement for workers nearing the end of their careers was "nearly sacrosanct," this dissenter noted that, "In place of the "objectively reasonable" standard, I would substitute a "presumptively reasonable" standard in cases involving retirement decisions made by those persons over 62 years of age."

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Notice

Pursuant to Article IV of the By-Laws of the Family Law Section of the New Jersey State Bar Association, more specifically Section 1:

> "The slate of officers shall be nominated by a Nominating Committee and said slate shall be published in the New Jersey Family Lawyer no later than six weeks prior to the Annual Meeting of the New Jersey State Bar Association. Additional nominations may be made by petition signed by twelve members of the Section in good standing. Said petition shall be submitted to the Chair of the Section no later than three weeks prior to the Annual Meeting of the New Jersey State Bar Association.

On February 10, 2009, the members of the Family Law Section's Nominating Committee met and deliberated on the 2009–2010 slate of officers. Their recommendations are as follows:

CHAIR
Charles F. Vuotto Jr.

CHAIR ELECT
Thomas Snyder

1ST VICE-CHAIR
Andrea White-O'Brien

2ND VICE-CHAIR
Patrick Judge Jr.

SECRETARY
Brian Schwartz

Pursuant to Article IV, Section 3: "Election of officers shall be conducted by voice vote or by show of hands or by secret ballot, and each office shall be filled by that person receiving the majority vote of members of the Section present at the Annual Meeting." ■

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Valuation in Divorce

Personal Goodwill vs. Enterprise Goodwill

by Charles F. Vuotto Jr. and Barry S. Sziklay

This article shall explore whether New Jersey follows the majority of states that do not distribute "personal goodwill" in a divorce. Based on an analysis provided by the New Jersey Supreme Court in *Dugan v. Dugan*[1] and other relevant New Jersey cases, the authors suggest our courts intended to provide for the distribution of only "enterprise goodwill" (defined as "that which attaches to a business entity and is associated separately from the reputation of the owners and will transfer upon the sale of the business to a willing buyer") and not "personal goodwill" (defined as "that part of increased earning capacity that results from the reputation, knowledge and skills of individual people").[2] With those definitions in mind, it is suggested that the goodwill of many service businesses, such as professional practices, consists largely of personal goodwill.

OVERVIEW OF THE LAW OF GOODWILL

Decisions of Other States

The West Virginia case of *May v. May* provides an excellent overview of this issue, stating that divorce courts in most states agree that personal goodwill should be excluded from the property distribution, and if any goodwill is to be distributed, it should be limited to enterprise goodwill.[3] This avoids, or at least reduces, the double-dip when a portion of the business value based on the business owner's income is distributed to the non-owning spouse, and that same income is used to fix spousal and child support obligations.

In *May,* the husband operated a dental practice. The trial court adopted the fair market value of the practice submitted by the wife's expert, including a value for goodwill. The husband appealed.[4] The appellate court held that the lower court erred in adopting a valuation that included a value for goodwill.[5] The *May* court further discussed three approaches taken by various states: 1) 13 states make no distinction between personal and enterprise goodwill in a professional practice and hold that both constitute marital property; 2) five states hold that neither personal nor enterprise goodwill in a professional practice constitutes marital property; and 3) 24 states hold that personal goodwill is not marital property, while enterprise goodwill is marital property.[6]

The *May* court adopted the third approach, and stated:

> Personal goodwill, which is intrinsically tied to the attributes and/or skills of an individual, is not subject to equitable distribution. It is not a divisible asset. It is more properly considered as the individual's earning capacity that may affect property division and alimony. On the other hand, enterprise goodwill, which is wholly attributable to the business itself, is subject to equitable distribution.[7]

The court reasoned that this holding was consistent with its declaration that a professional degree is not marital property subject to equitable distribution.[8] Thus, the court held that personal goodwill is an asset that cannot be separated from its holder.[9]

In 2008, Maine resolved the issue of whether it would include the value of personal goodwill in its calculation of equitable distribution. The matter of *Ahern v. Ahern*[10] outlines that state's concerns regarding personal goodwill compared to enterprise goodwill and whether those concerns should come into consideration in divorce matters. The Aherns had been married 21 years when the complaint for divorce was filed. Mr. Ahern was a dentist and the sole principal in a practice that was acquired during the marriage, and therefore was subject to equitable distribution. It was the first time Maine addressed whether personal goodwill in a practice (such as the dental practice) was subject to equitable distribution. The court went further to note that the majority view in the United States is that such a practice is not subject to equitable distribution. In this matter, however, both parties' experts agreed that Mr. Ahern's business had goodwill, but they could not agree on the number or attribute a number to the value it purportedly held. The one thing both experts did agree upon was that the value of the goodwill of Mr. Ahern's business was attributable to his skill and reputation.

The court defined enterprise goodwill as "intangible, but generally marketable, existence in a business of established relations with

employees, customers and suppliers that may include a business location," name recognition and reputation.[11] Personal goodwill, following *May*, was identified as being "...associated with individuals. It is that part of increased earning capacity that results from the reputation, knowledge and skills of individual people."[12]

The court in *Ahern* found that an insurance agency has goodwill, and its value is divisible upon divorce. A professional practice, degree or license, however, such as Mr. Ahern's dental practice, is not divisible. The ultimate reasoning was that personal goodwill of a professional practice was not a "species" of property, and therefore was not subject to equitable distribution.

New Jersey Decisions

In one of the earliest New Jersey cases addressing whether goodwill is available for equitable distribution in a divorce, the court discussed whether there was an intangible asset of goodwill to be evaluated in distributing the value of the husband's law practice.[13] The husband was a solo practitioner for many years, and in the year before the divorce he hired an associate and incorporated as a professional association.[14] The court explained that goodwill is measured by excess net earnings, and stated that it requires a comparison of the net earnings with the reasonable value of the personal services that produced them to determine the excess net earnings for a service organization.[15]

The court concluded as follows:

> ...determination of goodwill is a question of fact and not of law; expert opinion on the subject is helpful, but like any other evidence, not conclusively binding upon the tryer of the fact; what is being measured in the final analysis are those "excess earnings" of an enterprise which are properly attributable to its goodwill, and they are to be derived by deducting from the properly determined average earnings whatever reasonable amounts are appropriate to compensate for a *proper return on the capital or the reasonable value of the personal services or both*, to the extent that either enters into the production of the income of the enterprise. What is being measured is in reality the capacity of repeat patronage and a certain immunity to competition to produce earnings beyond the average for that kind of business. Hence, the multiple to be applied by way of "number of years purchase" will vary inversely with the amount and intensity of competitiveness in the line of business being appraised.[16]

By deducting a "proper return on the capital and the reasonable value of the personal services," the authors assert that the *Levy* court was intending to exclude personal goodwill from the computation. In light of these conclusions, the court determined that there was no goodwill in the husband's law practice. Based on the expert opinion, the court concluded that the value of the husband's personal services would not be less than the average earnings of his practice, and thus no excess net earnings would exist.[17]

In *Dugan v. Dugan, infra,* the New Jersey Supreme Court defined goodwill as "essentially reputation that will probably generate future business," and held that the attorney's goodwill in his solo practice was a marital asset subject to equitable distribution.[18] Goodwill, the court held, includes "a whole host of intangibles including the quality of management, the ability of the organization to produce and market efficiently, and the existence and nature of competition."[19] The court explained that the price paid for goodwill "is equivalent to the excess of actual earnings over expected earnings based on a normal rate of return on investment."[20]

The *Dugan* court declared that goodwill does not exist at the time a license to practice law is obtained.[21] Rather, reputation is at the core of goodwill in a law practice, and is earned after accomplishment and performance.[22] The court stated:

> Future earning capacity *per se* is not goodwill. However, when that future earning capacity has been enhanced because reputation leads to probable future patronage from existing and potential clients, goodwill may exist and have value. When that occurs the resulting goodwill is property subject to equitable distribution.[23]

The court reasoned that following a divorce the law practice will continue to benefit from the goodwill it developed and had during the marriage and the non-attorney spouse's contribution to that goodwill should not be ignored.[24]

In valuing goodwill in a law practice, the court should first ascertain what *an attorney of comparable experience, expertise, education and age would be earning as an employee in the same general locale*. Next, the attorney's five-year net income before federal and state income taxes should be averaged, and then be compared with the employee norm. If the attorney's actual average exceeds the total of the employee norm and a return on the investment in the physical assets, the excess would be the basis for evaluating goodwill. Where information about a *comparable attorney* is unavailable, it is possible to evaluate the partnership agreement that sets forth value in excess of capital accounts.[25] Given these conclusions, the *Dugan* court remanded to the trial court to determine the value of the husband's law practice with respect to goodwill and accounts payable and to modify equitable distribution.[26]

The next significant case is *Piscopo v. Piscopo*,[27] which addressed the issue of celebrity goodwill. The husband (Joe Piscopo of *Saturday Night Live* fame) conceded that celebrity goodwill was a distributable marital asset, but argued that goodwill could not be distributed in his case because his reputation

as a celebrity could only be related to *possible* future earnings.[28]

The appellate court agreed with the trial court's analogy to the professional goodwill in *Dugan*, finding that "the goodwill value of plaintiff's business was a distributable marital asset."[29] Under *Dugan,"the valuation of goodwill is not measured by future earnings, but by past earning capacity and the probability that such past earnings will continue."* (emphasis added)[30] The court determined that the plaintiff had achieved celebrity during the marriage, and that his record of past earnings was undisputed.[31] The court further stated that:

> [w]hile the trial judge recognized that it would be difficult to value plaintiff's celebrity goodwill, that difficulty would not affect its includability in the marital estate.[32]

Thus, the court held that the celebrity goodwill of the husband's corporation was a distributable marital asset.

In *Berrie v. Berrie*,[33] the appellate court rejected the husband's argument that one person's effort cannot be determinative of the value of a public corporation.[34] As a business grows, the court stated that it becomes a question of fact of how much one individual influences its value.[35] "The issue becomes intertwined with the valuation of the *entity's goodwill*, which is itself equitably distributable in an appropriate case."[36]

With respect to a public corporation, the court explained that "[t]he efforts expended by the principal or even his or her mere presence may cause a willing buyer to pay more for the stock."[37] Moreover, the court stated that "the fact that market forces might combine with such effect to control the price of the stock does not eliminate the factors relating to the individual. Each can be analyzed separately, one as a passive factor, the other as an active factor."[38] Thus, the court held that expert analysis was admissible to determine whether the husband's efforts had an effect on the value of the corporation, and if so, whether any part of the premarital cohabitation period could be considered in determining the base from which any active increase in the value would be measured for purposes of equitable distribution.[39]

In *Seiler v. Seiler*,[40] the husband operated an insurance agency exclusively representing Allstate. The husband was an employee of Allstate, could hire and fire employees only with the consent of Allstate, collected all insurance premiums in trust for Allstate without any deduction or commission or expenses, and received an allowance for expenses from Allstate.[41] Allstate owned all of the office equipment, assigned the phone number for the agency, maintained the signs for the agency, and designed and paid for all advertisements.[42] Although goodwill existed in the insurance agency, the court determined that the goodwill belonged to Allstate, and not to the husband, who was deemed an employee.

FINANCIAL AND ECONOMIC CONSIDERATIONS

Although goodwill has been defined in a variety of ways, the key financial and economic point is this: *However defined, goodwill represents expected future economic benefit from an asset, albeit the most intangible of intangible assets.* The capitalized excess earnings valuation method is commonly used (and often, misused) by business appraisers to quantify the value of enterprise goodwill, which appears to be the only distributable asset. To do so, one must:

1. Estimate the net tangible asset value for the subject business.
2. Estimate a normalized level of economic earnings.
3. Quantify the amount of excess earnings.
4. Estimate an appropriate direct capitalization rate to apply to the amount of excess economic earnings.
5. Capitalize the excess economic earnings at that estimated direct capitalization rate.
6. Add the values from step 1 (*i.e.*, the net tangible asset value) and step 5 (*i.e.*, the intangible value). The sum of these two values indicates the value of the subject business.
7. Perform a sanity check by calculating the implied overall capitalization rate.[43]

The definition of "normal level of compensation," as stated above, is one of the most litigated aspects in the valuation of closely held businesses. The failure to normalize owner compensation may lead to the distribution of personal—rather than enterprise—goodwill. To the extent that the business appraiser understates reasonable compensation, the business value will ultimately be overstated. Barring the court compensating for this error through a reduction of the non-owner spouse's equitable share of the business, this failure to normalize owner compensation may result in a possible distribution of personal goodwill. Likewise, overstating reasonable compensation could lead to an insufficient distribution of value unless the court compensates by increasing the allocation percentage. In any event, it is incumbent upon the business appraiser to present a credible analysis to the court in this respect.

Inherent difficulties in this undertaking include, but are not necessarily limited to: properly identifying and measuring the value of different tasks performed by the owner; estimating adequate compensation to the business owner based upon his or her experience, expertise, education and age as compared to an employee in the same general locale (*i.e. Dugan* factors); estimating the required rate of return on the owner's investment; estimating the cost of obtaining a replacement for the business

owner; and ensuring that earnings are properly being attributed to the superior ability and competency of the business owner (personal goodwill) as opposed to the enterprise (enterprise goodwill). In short, *goodwill should only be considered enterprise goodwill if it would continue to exist in the enterprise if the practitioner were not present.*[44]

Thus, it is often insufficient to simply compare a particular professional's or entrepreneur's compensation to some survey 'average' or 'median' comparable individual compensation level. Rather, the business appraiser has to analyze the business owner's unique experience, education, expertise and age, as the *Dugan* court noted. In making that analysis, the business appraiser should review a person's *curriculum vitae*; employment history; number of hours worked; specific job responsibilities; time spent per day, per week and per month by task; and the quality and success of the individual's endeavors.

Furthermore, in nearly all actual (as opposed to hypothetical) transactions, a standard term is the expectation that the seller shall enter into a commercially reasonable covenant-not-to-compete (covenant). A business appraiser in estimating value using a *fair value* standard of value for New Jersey matrimonial dissolution purposes is *implicitly assuming that the business owner shall be (not would be) entering into a commercially reasonable covenant.*[45] (*Caveat*: Such a covenant is not even possible in the context of a law firm valuation.) In the absence of such an assumption, the appraiser's valuation of enterprise goodwill (and therefore, the business as a whole) should be reduced by the estimated value of a lack of a covenant.

The manifestation of goodwill is in enhanced cash flow. The business appraiser's task is to separate out, to the extent possible, the enhanced cash flow attributable to the business owner and who he or she is (personal goodwill) versus the enhanced cash flow attributable to the business itself (enterprise or practice goodwill). Until the aforementioned analysis is satisfactorily completed, the business appraiser is not in a position to reach a valuation conclusion to a reasonable degree of professional certainty.

CONCLUSION

From a legal standpoint, we see from *Levy* that the goodwill being valued is determined by "those 'excess earnings' of an *enterprise* which are properly attributable to its goodwill."[46] In *Dugan*, the New Jersey Supreme Court explained that the price paid for goodwill "is equivalent to the excess of actual earnings over expected earnings based on a *normal rate of return on investment.*"[47] That investment includes the long years of education, educational cost, work experience and a host of other factors that must be quantified and *deducted* from the "expected earnings" to determine "excess" earnings.

It thus becomes imperative that the business appraiser properly evaluate the reasonable compensation of the business owner by taking into consideration all of the *Dugan* guidelines, not blindly relying upon averages or median levels of compensation contained in compensation surveys. In valuing goodwill in a law practice, the *Dugan* court described one method that would consider "the amount by which the attorney's earnings exceed that which would have been earned as an employee by *a person with similar qualifications of education, experience and capability.*"[48] It is very possible that an employee with similar qualifications of education, experience and capability will earn substantially the same as the subject professional; therefore, there will be little or no goodwill. This does not mean that the *Dugan* court's approach is wrong, or that it must be tweaked to back into a value, but rather it must be recognized as an intentional element needed to exclude personal goodwill from being distributed.

Likewise, in considering the asset of celebrity goodwill, the court in *Piscopo* concluded that the "*goodwill value of plaintiff's business* was a distributable marital asset." In *Berrie*, the court stated that "[t]he issue in the case (*i.e.*, the extent of Mr. Berrie's impact on the increase in value of the company) becomes intertwined with the valuation of the *entity's goodwill*, which is itself equitably distributable in an appropriate case."[49] Again, we see the importance of "entity" or "enterprise" goodwill.

In *Seiler*, the husband operated an insurance agency exclusively representing Allstate.[50] Although goodwill existed in the insurance agency, the court determined that the goodwill belonged to Allstate and not to the husband, who was deemed an employee.[51] The *Seiler* court noted that no case in New Jersey has recognized goodwill "as an asset unassociated with the business entity," and thus, it was Allstate's goodwill and not the personal goodwill of the husband that mattered.[52]

Lastly, business appraisers must consider that in the real world, a business seller is expected to execute a covenant-not-to-compete in the ordinary course of selling a business, particularly in connection with the sale of a professional practice. If the appraiser does not acknowledge this obligation, the preliminary valuation must be reduced by the value of the missing covenant. Frankly, the failure to take the preceding issues into consideration in a business appraisal may result in the gross overvaluation of the business or professional practice, thus leading the court to effectively distribute personal, as opposed to enterprise, goodwill in the absence of a downward adjustment to the percentage share awarded to the non-titled spouse. ■

ENDNOTES

1. 92 N.J. 423 (1983).
2. *May v. May*, 589 S.E. 2d 536 (W.Va. 2003).
3. *Id.*

4. *Id.* at 540.
5. *Id.* at 551.
6. *Id.* at 543-46.
7. *Id.* at 547.
8. *Id.*
9. *Id.*
10. 2008 Me. Lexis 1 (Jan. 3, 2008).
11. *Frazier v. Frazier,* 737 N.E. 2d 1220 (1225 (Ind. Ct. App. 2000).
12. *May*, at 542.
13. *Levy v. Levy*, 164 N.J. Super. 542 (Ch. Div. 1978).
14. *Id.*
15. *Id.* at 547.
16. *Id.* at 553-54. (emphasis added).
17. *Id.* at 555.
18. *Dugan,* at 429.
19. *Id.* at 430.
20. *Id.* at 431.
21. *Id.* at 433.
22. *Id.*
23. *Id.*
24. *Id.* at 434.
25. *Id.* at 440 (emphasis added).
26. *Id.* at 444.
27. 232 N.J. Super. 559, 560 (App. Div. 1989).
28. *Id.*
29. *Id.* at 562, 565.
30. *Id.* at 562.
31. *Id.* at 563.
32. *Id.*
33. 252 N.J. Super. 635 (App. Div. 1991).
34. *Id.* at 643.
35. *Id.*
36. *Id.* (emphasis added).
37. *Id.*
38. *Id.*
39. *Id.* at 644.
40. 308 N.J. Super. 474 (App. Div. 1998).
41. *Id.* at 476.
42. *Id.* at 477.
43. Pratt, Shannon P., CFA, FASA, MCBA, MCBC, CM and AA & Alina V. Niculita, CFA, MBA, *Valuing a Business: The Analysis and Appraisal of Closely Held Companies* pp 334-335 (New York: The McGraw-Hill Companies, Inc., 2008.
44. *See Deluxe BVUpdate, October 2000 (Judges and Lawyers),* Editor's Column, "Practice" goodwill must be independent of the practitioner.
45. *Brown v. Brown*, 348 N.J. Super. 466, *cert. denied*, 174 N.J. 193 (2002)
46. *Levy*, at 553-54 (emphasis added).
47. *Dugan,* at 431 (emphasis added).
48. *Id.* at 439 (emphasis added).
49. *Berrie, at* 463 (emphasis added).
50. *Seiler,* at 476.
51. *Id.* at 477.
52. *Id.* at 480.

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The Transformation of Alimony

by Toby Solomon

The main purpose of spousal support today is to "provide the dependent spouse with a level of support and standard of living generally commensurate with the quality of economic life that existed during the marriage."[1] However, the concept of alimony has evolved throughout the years, and its evolution can be tied to the economic and moral climate of the times.

Historically, the concept of alimony reflected the reality that most women were economically dependent on their husbands and lacked the ability to support themselves. Interestingly, however, the history of alimony also indicates that alimony was only available to so-called "innocent wives."[2] Alimony was awarded only to wives who separated from their husbands for cause, or who were abandoned.[3] If the husband established a cause of action for divorce based upon adultery, any obligation to pay alimony would be terminated.[4]

In the 1970s and 80s, the concept of a "fault-based" divorce was gradually phasing out and the evolution of the no-fault divorce brought with it significant changes concerning alimony.[5] New Jersey was among the jurisdictions that saw an end to fault-based divorce.[6] With the advent of the no-fault divorce, the New Jersey courts have rejected the concept of an automatic bar to an award of alimony based upon adultery. For example, in *Gugliotta v. Gugliotta,*[7] the court awarded alimony to the wife in a 23-year marriage who had engaged in an affair with her employer for a four-month period. The court distinguished the facts from those of *Mahne v. Mahne,*[8] decided just one year prior, where the wife's flagrant adultery justified denial of alimony.[9]

Marital fault or adultery is not specifically listed as a factor in the alimony statute to determine alimony.[10] However, the alimony statute provides:

> [i]n all actions for divorce or dissolution other than those where judgment is granted solely on the ground of separation *the court may consider also the proofs made in establishing such ground in the determination of the amount of alimony or maintenance that is fit, reasonable and just.*[11]

In each case where alimony is an issue, a review of the statutory factors set forth pursuant to N.J.S.A. 2A:34-23(b)(1)-(13) is necessary in order to determine an appropriate amount and duration of the alimony award. The statutory factors to be considered are as follows:

1. The actual need and ability of the parties to pay;
2. The duration of the marriage;
3. The age, physical and emotional health of the parties;
4. The standard of living established in the marriage and the likelihood that each party can maintain a reasonably comparable standard of living;
5. The earning capacities, educational levels, vocational skills, and employability of the parties;
6. The length of absence from the job market of the party seeking maintenance;
7. The parental responsibilities for the children;
8. The time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
9. The history of the financial contributions to the marriage by each party;
10. The equitable distribution of property ordered and any payments on equitable distribution, directly or indirectly, out of current income, to the extent this consideration is reasonable, just and fair;
11. The income available to either party through investments;
12. The tax treatment and consequences to both parties of any alimony award;
13. Any other factors the court may deem relevant.

While fault is not specifically delineated as a factor within N.J.S.A. 2A:34-23(b)(1)-(13), the Legislature left the courts with the discretion to consider fault by virtue of the inclusion of a catch all provision. N.J.S.A. 2A:34-23(b)(13) permits a court to consider "any other factor" that may be deemed relevant.

The New Jersey courts eventually began to reject fault as being among the relevant factors in the court's determination of an alimony award.[12] In 2005, the New Jersey Supreme Court was called upon to determine whether marital misconduct should play a role in the alimony determination.[13] The Court in *Mani v. Mani* held that fault was irrelevant to alimony determinations *almost* all the time, but not in every case.[14] The Court referred to

two limited situations where marital misconduct would be relevant to an award of alimony. First, the Court stated that fault may be considered in the calculation of alimony when the misconduct has directly affected the economic status of the parties.[15] The Court referenced an example of a spouse who gambles away the parties' entire savings and retirement, and the remaining assets are insufficient to allow the other spouse to recoup her share. In that event, a savings and retirement component may properly be included in the alimony award.[16] Therefore, a greater alimony award would be appropriate because of the misconduct.

Second, the Court discussed egregious misconduct as a bar to an award of alimony.[17] The Court held that alimony may not be available to a potential recipient spouse who has engaged in misconduct that "is so outrageous that it can be said to violate the social contract, such that society would not abide continuing economic bonds between the parties."[18] The Court discussed the examples of a spouse who tries to murder the other spouse, or who intentionally infects the other with a "loathsome disease."[19]

REHABILITATIVE ALIMONY

The evolution of the concept of alimony has led to significant changes to the actual form of the alimony award. In early alimony cases, prior to the Divorce Reform Act in 1971 and the introduction of equitable distribution, there was no suggestion that a court should, or even could, award alimony for a fixed term. Decisions pertaining to an award of alimony addressed the amount but never the duration of support.[20] Accordingly, permanent alimony was the only form of alimony that was recognized. However, as the economic climate began to change with the economic boom and double-digit inflation of the 1970s, the concept of alimony began to further transform.

In 1978, the concept of rehabilitative alimony as a valuable technique to reach an equitable resolution was introduced.[21] In *Turner v. Turner*, the Honorable Michael R. Imbriani made the observation that with the entry of a large number of women into the marketplace, "[i]t is imperative that courts recognize that society has changed."[22] Rehabilitative alimony was defined in *Turner* as "alimony payable for a short, but specific and terminable period of time, which will cease when the recipient is, in the exercise of reasonable efforts, in a position of self-support."[23]

The appellate court, however, disapproved of the concept of rehabilitative alimony and its utilization as a valuable technique as espoused by the *Turner* Court.[24] The appellate court held that "[i]n the absence of unusual facts…which support a cut-off date for alimony payments, such a technique should be avoided."[25] However, our Supreme Court gave back this tool to practitioners in *Lepis v. Lepis*, albeit in a footnote.[26] Our courts began to recognize that although case law is replete with language that a divorced woman is entitled to maintain the lifestyle to which she became accustomed during the marriage, this was simply not possible. Unless a family's income virtually doubles, neither party would have access to the same amount of funds after a divorce, and hence, to the same lifestyle.[27]

As the economic climate continued to change, the courts further began to realize that cases in which a woman should not be obligated to work to lighten the burden must be limited to cases where a former husband is able to support two households.[28] This new philosophy signaled by our Supreme Court reflected the continuing evolution of alimony. Courts were turning toward the view that a divorced woman, when able, should be required to mitigate the burden of her former husband to pay alimony by utilizing her earning potential.[29]

In *Kulakowski v. Kulakowski*,[30] the court stated that the "[t]he purpose of rehabilitative alimony is to exert fair and compassionate pressure upon a wife…to develop marketable skills and obtain employment which will enable her to contribute…to her support."[31] Earning capacity quickly became the rule, not the exception.[33]

In response to a changing economic climate, a modification to the alimony statute was warranted. In 1988, the Legislature amended the alimony statute to permit an award of rehabilitative alimony.[33] The statute provides the following:

> Rehabilitative alimony shall be awarded based upon a plan in which the payee shows the scope of rehabilitation, the steps to be taken, and the time frame, including a period of employment during which rehabilitation will occur. An award of rehabilitative alimony may be modified based either upon changed circumstances, or upon the nonoccurrence of circumstances that the court found would occur at the time of the rehabilitative award.[34]

Rehabilitative alimony does not necessarily reflect the parties' social status or lifestyle during the marriage or the duration of the marriage. It is paid for a specific purpose.[35] It is still recognized, however, that even the rehabilitation of a dependent spouse might not totally eliminate economic dependency, but merely reduce it. Therefore, an award of both rehabilitative alimony and permanent alimony might be warranted.[36] In 1998, the appellate court reviewed a trial court's decision to grant an award of rehabilitative alimony to a dependent spouse following a 10-year marriage.[37]

In *Hughes v. Hughes*, the appellate court took issue with the lower court's characterization of the parties' marriage as short term and instead viewed the marriage as mid-length.[38] The court determined that the wife was entitled to both permanent and rehabilitative alimony upon considering the length of the mar-

riage in conjunction with the parties' marital lifestyle, which reflected the husband's financial prosperity, and the opportunities the wife gave up in becoming a full-time homemaker.[39] The court acknowledged the wife's low earning potential even after a period of rehabilitation.[40]

TWO NEW FORMS OF ALIMONY: REIMBURSEMENT AND LIMITED DURATION ALIMONY

On Sept. 13, 1999, the Legislature further amended the alimony statute to recognize two additional forms of alimony: reimbursement alimony and limited duration alimony. The Supreme Court, in *Mahoney v. Mahoney,*[41] addressed a classic example of an instance where reimbursement alimony would be appropriate. The *Mahoney* Court held that professional degrees and licenses are not property subject to equitable distribution.[42] However, the Court recognized that the spouse who contributes to a former spouse's education should receive compensation.

Reimbursement alimony was defined in *Mahoney* as a fair and effective means of compensating a former spouse who has contributed financially to the supporting spouse's professional training with the expectation of a future benefit from that spouse's increased earning capacity.[43] Reimbursement alimony covers all of the financial contributions toward the former spouse's education, including household expenses, educational costs, school travel expenses and any other contributions used by the supported spouse in obtaining his or her degree or license.[44] The *Mahoney* Court noted the scenario of the professional, who, after being supported through graduate school, leaves his mate for greener pastures, and observed that "[o]ne spouse ought not to receive a divorce complaint when the other receives a diploma."[45] In contrast to permanent alimony, reimbursement alimony does not terminate upon one spouse's remarriage.[46]

In *Lynn v. Lynn,*[47] decided the same day as *Mahoney*, the Supreme Court awarded both reimbursement alimony and a separate continuing alimony obligation.[48] The precise test of economic dependency was enunciated by the Supreme Court in *Lynn* as follows:

> ...the length of the marriage and the proper amount or duration of alimony do not correlate in any mathematical formula. Where the circumstances of the parties diverge greatly at the end of a relatively short marriage, the more fortunate spouse may fairly be called upon to accept responsibility for the other's misfortune—the fate of their shared enterprise.[49]

In contrast to reimbursement alimony, limited duration alimony was not intended to facilitate earning capacity of a dependent spouse, or to make a sacrificing spouse whole. Instead, limited duration alimony was made available to a spouse who made "contributions to a relatively short-term marriage that...demonstrated the attributes of a marital partnership" and has the skills and education necessary to return to the workforce.[50] Again, limited duration alimony is reflective of the changing times.[51] Limited duration alimony was the response to those short-term marriages where there is an economic need of a dependent spouse, but given the short duration of the marriage, permanent alimony is not appropriate.

However, the availability of limited duration alimony does not preclude a dependent spouse from being entitled to permanent alimony simply because the marriage is considered short term. All alimony factors still must be considered.[52] After analyzing the facts of the case against the statutory criteria, if all alimony factors remain equal, then the duration of marriage will dictate whether the award should be permanent or limited in duration. Neither the courts nor practitioners negotiating a settlement can dispense with this essential analysis in determining an appropriate alimony award. In other words, too often there is an automatic presumption that a short-term marriage will result in an alimony award equal to the length of the marriage or less. This presumption is based upon simply the length of the marriage, without consideration of all other relevant factors. Under proper circumstances, the courts have found that permanent alimony was appropriate in short-term or mid-term marriages.[53]

The Legislature, in amending the alimony statute to include limited duration alimony, implemented several safeguards within the statute that would protect a spouse who was entitled to receive an award of permanent alimony from receiving a shorter term of alimony.[54] As set forth within the statute, the courts must consider and make specific findings on evidence regarding a request for an award of permanent alimony. If an award of permanent alimony is not warranted, the courts must make specific findings with regard to this issue. The courts are then obligated to review other kinds of alimony and make specific findings on the evidence with regard to the other forms of alimony that may be available.[55]

N.J.S.A. 2A: 34-23c states that "[t]he court shall not award limited duration alimony as a substitute for permanent alimony in those cases where permanent alimony would otherwise be awarded." The appellate court, in *Gordon v. Rozenwald,*[56] in reviewing the two forms of alimony, has reasoned as follows:

> Limited duration alimony, like permanent alimony, is based primarily on the marital enterprise. It is distinguishable from permanent alimony because the length of the marriage does not warrant permanent support and from rehabilitative alimony because the term is not based upon projections about time needed to acquire education or job skills.[57]

The courts have been empowered with the authority to modify limited duration alimony awards

pursuant to the statutory standard set forth within N.J.S.A. 2A:34-23c. The statute provides that:

> [a]n award of alimony for a limited duration may be modified based either upon changed circumstances, or upon the nonoccurrence of circumstances that the court found would occur at the time of the award. The court may modify the amount of such an award, but shall not modify the length of the term except in unusual circumstances.[58]

The "unusual circumstances" standard set forth pursuant to N.J.S.A. 2A:34-23c requires a showing that goes a step beyond the traditional changed circumstances required to be established in order to modify the alimony amount.[59] However, what constitutes unusual circumstances? A review of the case law reflects the limited attention this statutory standard has been given by our reviewing courts.[60] Accordingly, the trial courts are left with wide discretion in determining what situations will fall within the category of unusual circumstances.

THE FUTURE OF PERMANENT ALIMONY

As the concept of alimony has continued to transform throughout the years, an inevitable question that merits pondering is whether the availability of permanent alimony will gradually diminish. With the availability of other forms of alimony, and with societal changes reflecting a trend toward shorter-term marriages and two-income households, permanent alimony, once the only form of available alimony, seems to be awarded less frequently. Even presently, permanent alimony often appears to litigants as somewhat of a misconception. Is permanent alimony really only permanent in name? Practitioners are faced with the difficult position of explaining to their clients that while there may be no dispute that he or she is entitled to permanent alimony, the alimony award is only permanent to the extent that it is not modified by the court at some later date due to changed circumstances.

Many litigants are surprised to learn that an award of permanent alimony may likely end upon the good faith retirement of the payor spouse. In *Dilger v. Dilger,*[61] the issue before the court was whether the payor spouse's voluntary retirement at age 62 constituted a change of circumstances to allow termination of his alimony obligation. The Court's analysis centered on the good faith and voluntariness of the defendant's retirement, and whether it was reasonable in light of the circumstances. The factors to be considered are the age of the parties, health of the parties, motives in retiring, timing of the retirement after final judgment of divorce, ability of the supporting spouse to pay maintenance even after retirement and the ability of the payee spouse to provide for him or herself.[62] The *Dilger* Court concluded that the defendant's decision to voluntarily retire early at age 62 was not made in good faith, and therefore he was not entitled to terminate his obligation to pay alimony.[63]

The issue the appellate court addressed in *Deegan v. Deegan*[64] was the standard to be applied in determining whether an unanticipated early retirement constitutes a change in circumstance warranting a support modification. The pivotal question was whether the advantage to the retiring spouse substantially outweighed the disadvantage to the payee spouse.[65] The answer must be affirmative to consider a good faith retirement as a legitimate change in circumstances warranting modification or a pre-existing support obligation.[66]

A dependent spouse's cohabitation with another is also a changed circumstance that may warrant a modification of support, including a termination of a permanent alimony obligation.[67] The test to determine whether cohabitation affects the spouse's existing alimony award is whether the relationship has reduced the financial needs of the former spouse.[68] There must be a showing of support or subsidization of the supported spouse, sufficient to entitle the supporting spouse to relief.[69] The economic needs test reflects a radical change from the prior law, which required a spouse seeking support to be free from fault.

CONCLUSION

Whatever the future may hold for alimony awards, it is clear that an award of alimony will continue to be based on the needs of the supported spouse and the supporting spouse's ability to pay. It is also clear that the argument that the dependent spouse has no obligation to contribute to his or her support is no longer viable. A dependent spouse will continue to have the obligation to mitigate the payor spouse's responsibility to support him or her. In this way, given changing economic times, both spouses will be able to plan realistically for their own futures. ■

ENDNOTES

1. *Koelble v. Koelble*, 261 N.J. Super. 190, 192 (App. Div. 1992); *Crews v. Crews*, 164 N.J. 11, 751 (2000).
2. *See e.g. Warwick v. Warwick*, 76 N.J. Eq. 474 (N.J. Ch. 1910).
3. Joanna Grossman, *Can an Adulterer Receive Alimony? The New Jersey Supreme Court Says Yes, but Martial Misconduct can Lower the Award in Egregious Circumstances,* Legal Commentary, May 3, 2005, *available at* http://writ.news.findlaw.com/grossman/20050503.html.
4. *Warwick*, 76 N.J. Eq. at 475.
5. Grossman, *supra*.
6. *Id.*
7. *Gugliotta v. Gugliotta*, 164 N.J. Super. 139 (App. Div. 1978).
8. *Mahne v. Mahne*, 147 N.J. Super. 326 (App. Div. 1977).

9. *Gugliotta*, 160 N.J. at 165.
10. N.J.S.A. 2A:34-23(b)(1)-(13).
11. N.J.S.A. 2A:34-23(g). (emphasis added).
12. *See e.g. Kinsella v. Kinsella*, 150 N.J. 276, 314-15 (1997) (noting that "in today's practice, marital fault rarely enters into the calculus of an alimony award").
13. *Mani v. Mani*, 183 N.J. 70 (2005).
14. *Id.* at 91.
15. *Id.* at 90.
16. *Id.*
17. *Id.* at 91-92.
18. *Id.* at 92.
19. *Id.*
20. *Khalaf v. Khalaf*, 58 N.J. 63 (1971).
21. *Turner v. Turner*, 158 N.J. Super. 313 (Ch. Div. 1978).
22. *Id.* at 316.
23. *Id.* at 314.
24. *Arnold v. Arnold*, 167 N.J. Super. 478, 481 (App. Div. 1979).
25. *Id.* at 481.
26. *Lepis v. Lepis*, 83 N.J. 139, 155, n.9 (1980).
27. *Turner*, 158 N.J. Super. at 317-18.
28. *Id.* at 321.
29. *See generally Lepis*, 83 N.J. at 155.
30. *Kulakowski v. Kulakowski*, 191 N.J. Super. 609 (Ch. Div. 1982).
31. *Id.* at 611.
32. *Lepis*, 83 N.J. at 155.
33. N.J.S.A. 2A:34-23(d).
34. *Id.*
35. *Smith v. Smith*, 224 N.J. Super. 559, 562 (Ch. Div. 1988).
36. *Kulakowski*, 191 N.J. Super. at 614.
37. *Hughes v. Hughes*, 311 N.J. Super. 15 (App. Div. 1998).
38. *Id.* at 32-33.
39. *Id.* at 33-34.
40. *Id.* at 32.
41. *Mahoney v. Mahoney*, 91 N.J. 488 (1982).
42. *Id.*
43. *Id.* at 501.
44. *Id.*
45. *Id.* at 503 (*citing The New York Times*, Nov. 21, 1982, at p. 72, col. 2).
46. *Reiss v. Reiss*, 205 N.J. Super. 41, 47 (App. Div. 1985); *Smith v. Smith*, 224 N.J. Super. at 562.
47. *Lynn v. Lynn*, 91 N.J. 510 (1982).
48. *Id.*
49. *Id.* at 518.
50. *Cox v. Cox*, 335 N.J. Super. 465, 483 (App. Div. 2000).
51. *See* U.S. Bureau of the Census, Current Population Reports, P23-180, *Marriage, Divorce, and Remarriage in the 1990's*, U.S. Government Printing Office, Washington, DC, 1992 (analyzing data that reflects a decline in the duration of marriages from 1980 to 1990 among woman ages 25 to 34."For example, among woman 25 to 29 who ended a first marriage in divorce, the median length of marriage before divorce in 1990 was 3.4 years compared with...4.0 years in 1980. For women 30 to 34, the durations of first marriage before divorce were 4.9 years in 1990, 5.2 years in 1985, and 5.5 years in 1980."
52. N.J.S.A. 2A:34-23(b)(1)-(13).
53. *See McGee v. McGee*, 277 N.J. Super. 1 (App. Div. 1994) (57-year-old unskilled and unemployed wife was entitled to an award of permanent alimony after a two year marriage but economic dependence commencing prior to the marriage); *Robertson v. Robertson*, 381 N.J. Super. 199 (App. Div. 2005) (39-year-old woman who surrendered employment opportunities was entitled to permanent alimony after a twelve year marriage).
54. N.J.S.A. 2A:34-23(c).
55. *Id.*
56. *Gordon v. Rozenwald*, 380 N.J. Super. 55 (App. Div. 2005).
57. *Id*. at 66.
58. N.J.S.A. 2A:34-23c.
59. *See Lepis*, 83 N.J. at 153.
60. *See e.g. Gordon v. Rozenwald*, 380 N.J. Super. 55 (App. Div. 2005).
61. *Dilger v. Dilger*, 242 N.J. Super. 380 (Ch. Div. 1990).
62. *Id*. at 387-88.
63. *Id*. at 391.
64. *Deegan v. Deegan*, 254 N.J. Super. 350 (App. Div. 1992).
65. *Id.* at 358.
66. *Id.*
67. *See e.g. Konzelman v. Konzelman*, 307 N.J. Super. 150, 704 (App. Div.1998).
68. *Gayet v. Gayet*, 92 N.J. 149 (1983).
69. *Id.* at 153-54.

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Battle on the Homefront

by Kimarie Rahill McDonald

During the week of June 15, 2008, more than 2,800 New Jersey National Guardsmen were deployed to Iraq. That is close to 50 percent of New Jersey's National Guardsman—the largest Army National Guard combat deployment since World War II. Governor Jon Corzine told the soldiers at a ceremony on June 14, 2008: "We will stand firmly with you now and we will stand firmly behind you when you are in Iraq. There is not a New Jerseyan that does not pray for you."[1] While there is no doubt that every New Jerseyan, as well as every American citizen, would agree with Governor Corzine's sentiment, the question remains: Will the courts stand behind the brave young men and women when they return from Iraq?

Many servicemembers have found the answer is "No." A lieutenant in the National Guard had raised her daughter for six years following her divorce, handling many of the responsibilities of a primary parent. The lieutenant was mobilized with the Kentucky National Guard, and her daughter went to live with her father. A year and a half later, her assignment completed, the lieutenant returned home with one thing in mind—bringing her little girl home. She called her ex-husband, advising that she would be coming to pick up her daughter the following day. "Not without a court order you won't," was the response she received. Within a month, a judge would decide that the father should have custody, since it was in the best interests of the child.[2]

There are many more stories like this. For example, a marine corporal helping to fight the insurgency in Fallujah, Iraq, while battling for custody of his son in a Kansas family court; or a sergeant of the Iowa National Guard, whose two children lived with him until he was mobilized to train troops after September 11.

The sergeant thought he was serving the best interests of his children when he arranged for his son and daughter to stay with his mother before reporting for duty in August 2002. She lived a few blocks from the children's school in Clarksville, Iowa, and he felt "there wouldn't be much disruption." He had raised his children since his 2000 divorce when his ex-wife turned physical custody over to him. After mobilizing, the sergeant was served with a custody petition from his ex-wife, delivered to his unit's attorney. His lawyer tried twice to request a stay under the federal law. His commanding officer even wrote a letter stating that the sergeant's battalion was charged with protecting U.S. facilities deemed national security interests, and that his case would cause the entire command structure "to refocus away from the military mission." Nevertheless, the trial judge held hearings without the sergeant and temporarily placed the children with their mother. A year later, although the sergeant had returned from duty, the judge awarded primary physical custody to his ex-wife.[3]

This dilemma continues to this day. In January 2008, a New York court, after awarding temporary custody to a father for the duration of the mother's deployment, modified the temporary custody order and awarded primary physical custody to the father.[4] The court found that the best interests of the child would be to grant permanent custody to the father, despite the fact that the mother's deployment was not her fault.

Many Americans believe soldiers fighting in Iraq should not be burdened with worry that their children will be taken away because of their service. Thus, there is a serious debate regarding whether or not service members like those described above should have their parental rights specially protected or whether the long-established best interests of the child standard should be paramount. The issue with regard to custody is much more sensitive than the numerous legal protections that have been afforded to service members in the past.

FEDERAL LEGISLATION

During World War II, the federal government enacted legislation known as The Soldiers' and Sailors' Civil Relief Act (SSCRA).[5] The basic protections of the SSCRA for the service member, included:

1. Postponement of civil court hearings when military duties materially affected the ability of the service member to prepare or be present for civil litigation;
2. Reducing the interest rate to six percent on pre-service loans and obligations;
3. Barring eviction of a service member's family for non-payment of rent without a court order for monthly rent of $1,200 or less;
4. Termination of a pre-service residential lease; and,
5. Allowing service members to maintain their state of residence for tax purposes despite military

reassignment to other states.[6]

On Dec. 19, 2003, President George W. Bush signed into law the Servicemembers Civil Relief Act,[7] which was written to clarify the language of the SSCRA, to incorporate many years of judicial interpretation of the SSCRA and to update the SSCRA to reflect developments in American life since 1940.

1. The SCRA expanded the application of a service member's right to stay court hearings to include administrative hearings. Previously, only civil courts were included, causing problems in cases involving administrative child support determinations, as well as other agency determinations that impacted service members. Criminal matters are still excluded.[8]
2. The former statute referred to "dependents" and provided several protections that extended to them, but it never defined the term. 50 USC App 511(4) now contains a definition of the term "dependent" to include anyone for whom the service member has provided more than half of his or her support during the 180 days before an application for relief under the SCRA. This is intended to include dependent parents and disabled adult children.
3. In a situation where the military member has notice of the proceeding, a similar mandatory 90-day stay (minimum) of proceedings applies upon the request of the service member, so long as the application for a stay includes:
   a. A letter or other communication that:
      i. States the manner in which current military duty requirements materially affect the service member's ability to appear, and
      ii. Gives a date when the service member will be available to appear and
   b. A letter or other communication from the service member's commanding officer stating that:
      i. The service member's current military duty prevents appearance; and
      ii. That military leave is not authorized for the service member at the time of the letter.[9]
4. Historically the SSCRA applied to members of the National Guard only if they were serving in a Title 10 status. Effective December 2002, the SSCRA protections were extended to members of the National Guard called to active duty for 30 days or more pursuant to a contingency mission specified by the president or the secretary of defense. This continues in the SCRA.[10]

The SSCRA also addresses specific issues for installment contracts, mortgages, life insurance, and taxes. However, the SCRA is silent regarding custody issues. There is federal legislation pending; to wit, Senate Bill 1658A and H.R. 6048, both of which seek to amend the Servicemembers Civil Relief Act to provide for the protection of child custody arrangements. H.R. Bill 6048 states that if a motion for change of custody of a child of a service member is filed while the service member is deployed, no court may enter an order modifying or amending a previous child custody judgment, except if there is clear and convincing evidence that it is in the best interest of the child. The bill also prohibits any court from considering service members' absence due to deployment, or even possible deployment, in support of a contingency operation in determining the best interest of the child. However, to date, neither bill has been enacted.

STATUTES ENACTED BY OTHER STATES

In response to the lack of guidance, several states have enacted legislation to address this serious void. Kentucky, Wisconsin, California, Arizona and Florida each enacted recent legislation providing that the previous custody arrangement must be reinstated when the deployment or activation ends, unless the soldier/parent agrees to have the modified arrangement continued for a longer time. In Kentucky, Wisconsin and several other states, the courts have gone so far as to rule that the best interest standard shall not be applied; as such, in those states, regardless of the numerous changes the child may have endured while the custodial parent was deployed, the child shall be reunited with the custodial parent.

The Kentucky State Child Custody Statute concerning deployed parents mandates that custody modifications be temporary when based in whole or in part on a parent or *de facto* custodian's: 1) deployment as a member of the armed forces outside the United States, or 2) call to federal active duty as a member of a state's National Guard or Reserve component.[11] The previous custody arrangement must be reinstated when the deployment or activation ends, unless the soldier-parent agrees to have the modified arrangement continue for a longer time.[12]

The Wisconsin Legislature passed a law in 2006 that prohibits courts from considering a parent's active duty or the likelihood of future deployments when: 1) determining or modifying child custody arrangements, or 2) reinstating periods of physical custody after the parent is discharged from active duty. If temporary custody changes are made during deployment, the law requires that the previous arrangement be reinstated when the deployment ends.[13]

California law states that a parent's absence, relocation or failure to comply with custody and visitation orders is not a legally adequate reason for modifying a child custody order when caused by the parent's activation to military service and out-of-state deployment.[14]

The Arizona Child Custody Law states that if a parent will be deployed for less than six months,

and has filed a military care plan that addresses and identifies the issue of substitute caregivers and their responsibilities, then a custodial parent's military deployment is not a legally sufficient reason for modifying child custody.[15]

Florida law allows temporary modifications of a custody order if supported by clear evidence that it is in the child's best interest.[16] However, Florida prohibits courts from permanently modifying a custody order when the parent's ability to continue as the child's primary caretaker is affected by the parent's deployment, activation or temporary military assignment.[17] Furthermore, when temporary modifications are allowed, the court must reinstate the previous order when the parent returns from deployment.[18]

NEW JERSEY

Currently, N.J.S.A. 9:2-4 provides:

> The Legislature finds and declares 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. In any proceeding involving the custody of a minor child, the rights of both parents shall be equal and the court shall enter an order which may include:
>
> A. Joint custody of a minor child to both parent, which is comprised of legal custody or physical custody which shall include (1.) provision for residential arrangements so that a child shall reside either solely with on parent or alternatively with each parent in accordance with the needs of the parents and the child; and (2.) provisions for consultation between the parents in making major decision regarding the child's health, education and general welfare;
>
> B. Sole custody to one parent with appropriate parenting time for the noncustodial parent; or
>
> C. Any other custody arrangement as the court may determine to be in the best interests of the child.
>
> In making an award of custody, the court shall consider but not be limited to the following factors: the parents' ability to agree, communicate and cooperate in matters relating to the child; the parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; the interaction and relationship of the child with its parents and siblings; the history of domestic violence, if any; the safety of the child and the safety of either parent from physical abuse by the other parent; the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of the child's education the fitness of the parents; the geographical proximity of the parents' homes; the extent and quality of the time spent with the child prior to or subsequent to the separation; the parents employment responsibilities; and the age and number of the children. A parent shall not be deemed unfit unless the parents' conduct has a substantial adverse effect on the child.
>
> The court, for good cause and upon its own motion, may appoint a guardian ad litem or an attorney or both to represent the minor child's interests. The court shall have the authority to award a counsel fee to the guardian ad litem and the attorney and to assess that cost between the parties' to the litigation.
>
> D. The court shall order any custody arrangement which is agreed to by both parents unless it is contrary to the best interests of the child.
>
> E. In any case in which the parents cannot agree to a custody arrangement, the court may require each parent to submit a custody plan which the court shall consider in awarding custody.
>
> F. The court shall specifically place on the record the factors which justify any custody arrangement not agreed to by both parents.

On Jan. 28, 2008, a bill was introduced in the New Jersey Senate that would prohibit permanent change of child custody during a parent's period of active military duty, and would provide that absence due to active military duty in and of itself is not sufficient to justify modification of a child custody or visitation order.[19] If passed, N.J.S.A. 9:2-4 would be amended to include a provision that would state:

> If a motion for a change of custody is filed during a time a parent is in active military duty, the court shall not enter an order modifying or amending a judgment or order previously entered, or enter a new order that offers the custody arrangement in existence on the date the parent was called to active military duty, except that the Court may enter a temporary custody order if there is clear and convincing evidence that it is in the best interest of the child. If a motion for a change of custody is filed after a parent returns from active military duty, the Court shall not consider a parent's absence due to military duty, by itself, to be sufficient to justify a modification of child custody or visitation order.

The bill has yet to be passed, and has caused considerable debate. While most support the service members and admire their service to our country, many do not believe a special standard should be carved out.

The New Jersey State Bar Association, through its Military Law and Veterans Affair Committee, and in conjunction with McCarter & English, L.L.P., has established the Military Legal Assistance Program. This program provides assistance to New Jersey residents who have served overseas as active-duty members of reserve components of the armed forces after Sept. 11, 2001. The program will refer members of the military who contact the New Jersey State Bar Association to attorneys who have volunteered their services, *pro bono*, who are qualified to assist the returning servicemembers with their specific legal issue.

Unquestionably, this is a difficult issue. Many believe the best interest of a child must remain paramount, and is the only factor that should be considered. Others believe the rights of servicemembers must likewise be protected. Without the passage of legislation amending N.J.S.A. 9:2-4, the conflict of these military cases is not necessarily a legal one, but an ethical one. While it is true the court has acknowledged that the child is the most vulnerable party in the proceeding and their best interest must be the central concern, is it morally wrong to deprive a servicemember of their fundamental right to raise their child while they bravely defend their country in times of war? One thing is clear: The battle lines between a child's best interests and protecting the parental rights of our service members has been strongly drawn by both sides. With neither side clearly being designated as the enemy camp, resolution is made that much more difficult. ■

ENDNOTES

1. Woolley, Wayne, Ft. Dix Bleachers are Packed for Sendoff for 2,800 Soldiers, *Star Ledger*, June 15, 2008.
2. Arrillaga, Pauline, Deployed Troops Battle for Custody of Children, *USA Today,* May 5, 2007.
3. *Id.*
4. *Matter of Diffin v. Towne,* 2008 NY Slip Op 21 (Jan. 3, 2008).
5. Act of Oct. 17, 1940, ch. 888, 54 Stat. 1178.
6. Id.
7. 50 U.S.C. App. § 501 *et seq.*
8. 50 U.S.C. App. 511-512.
9. 50 U.S.C. App. § 522.
10. 50 U.S.C. App. § 511(2)(A)(ii).
11. Ky. Rev. Stat. Ann. §403.340.
12. *Id.*
13. Wis. Stat. §767.24 and 767.325.
14. Cal. Fam. Code §3047.
15. Ariz. Rev. Stat. §25-411.
16. Fla. Stat. Ann. §61.13002.
17. *Id.*
18. *Id.*
19. *cf:* P.L. 1997, c. 299, s. 9.

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Mission Statement

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differ, as long as we identify those differences, should they not be aired through articles or editorials? This publication has always answered that question in the affirmative. So should it ever be.

As we conclude our third decade, we should be proud of our past; proud of the responsibility given to us by a generation and a half of Family Law Section chairs and executive committees; and proud of the fact that we provide, not only for our readers but also for the New Jersey State Bar Association, one of the greatest benefits made available to its members.

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