New Jersey Family Lawyer

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CHAIR'S COLUMN

Bench/Bar Relations: A Partnership to Achieve Substantial Justice on the Merits

by Bonnie C. Frost

Being a family lawyer is perhaps the most difficult, and yet the most satisfying practice area in the law. What this also means, however, is that the job of family part judges is equally difficult.

Unfortunately, the difficulties inherent in the family part are magnified by the reality that the newest judges are being placed in family court. Every September, we, as practitioners, have to work with new law clerks and new judges. This means that, in order to assist the court, we must do more legal work on behalf of our clients to brief issues on the most basic precepts that form a basis for the practice of family law.

Added to that, the family part is the busiest part of the judicial system. Surely, civil and criminal part motions do not number 24-30 on one motion day, and rarely are they inches thick with attachments as they are in family. Almost every family case has motions involving interim court involvement. The numbers do not give a realistic picture of the heavy workload involved. Last court year, 30,107 cases were filed and 34,145 were decided. In some counties where the majority of the cases end in defaults, the judges clear their calendars quickly. Certainly those counties *look good* if one only looks at the speed with which cases are resolved. In other counties where there is more population and more income/assets to be divvied up, and thus fewer defaults, the calendars are heavier and cases take longer to resolve. Thus, through circumstances beyond judicial control, some judges have family calendars more onerous than others.

The family part judge is under a great deal of pressure to move cases, regardless of the facts of the case or the needs—emotional or financial—of the parties. To many of us who practice in the family part, it seems speed and completion are the goals, not a just determination of the issues.

Into this milieu is thrust the brand new judge who has to learn law, has to learn how to move a calendar and deal with *pro se* litigants and, sometimes, overzealous lawyers. It is no wonder that the new judges feel like deer in headlights.

The family part is the most important part of the judicial system. Only a small percentage of the population ever comes in contact with the court system, and those matters usually involve municipal or family court. To those participants, we owe our best efforts, judges and family lawyers alike. One wonders if this is happening. Two recent Appellate Division decisions, *Lehr v. Afflito*[1] and *Miller v. Lambert*,[2] demonstrate that the pressure to move cases and adhere to arbitrary time frames has resulted in justice being denied to litigants and judges being reversed, not to mention the emotional and economic cost to litigants for the trials and appeals.

The family part judge is under a great deal of pressure to move cases, regardless of the facts of the case or the needs—emotional or financial—of the parties. To many of us who practice in the family part, it seems speed and completion are the goals, not a just determination of the issues.

Putting our best foot forward for these litigants, however, requires the cooperation of the bench and the bar, and maybe a systemic accommodation. Noting the over-

whelming pressure to move cases, judges are burdened with the daily schedule of conferences and motions, sometimes becoming frustrated by issues judges soon come to deem to be *insignificant* and *a waste of time*. When people decide to divorce, it is because they cannot get along. The court seems surprised and frustrated that during this emotional time, judges are called on to make decisions that litigants cannot make themselves. While a judge may only see one or two motions per case, he or she is in most cases unaware that the lawyer may hear from that client multiple times per day, forcing motions to be filed to meet the client's emotional needs. Many times judges may chastise attorneys for filing such motions, but the attorney had the competing interest of the demanding client who calls many times a day.

The adherence to timelines and the need to meet systemic clearance goals can thwart justice being meted out. Take the client who is the custodial parent of several children and is recovering from cancer. This client may be unable to meet the timelines because of medical and custodial obligations, and the reality of just getting through one day at a time. In this case, the interest of the judge and the attorney and his or her client diverge. Or, what about the parties who have filed for divorce but want to go to mediation. Mediation then fails, and the court will not extend timelines for discovery, because of the deadlines set on the case management order are inviolable and the pressure is on the courts to move cases expeditiously.

How are these legitimate dilemmas addressed so the client can get a just determination? Some judges utilize their rule-given discretion to accommodate the special needs. Sadly for all involved, others do not.

One way to address these concerns is to encourage more bench-bar cooperation and communication. In the past, when the New Jersey State Bar Association and various county bars have sponsored bench-bar meetings, they have been extremely successful. Now is the time to take this cooperation to the next level.

We, as family lawyers, should urge the court to take a cooperative case management approach with the bar, *i.e.*, consider the facts, the needs of the attorneys, who are so frequently held hostage to the schedule of experts (over whom they have no control), and then the needs of the client. Eliminate the practice of multiple case management conferences, and set realistic time goals for each case to begin with, thus freeing up attorney and court time. Do not make litigants and attorneys travel to court for case management conferences unless requested by the attorneys or by the judge.

The adherence to timelines and the need to meet systemic clearance goals can thwart justice being meted out.

Also, we might have a bench-bar conference with only assignment judges, to educate them on the administrative needs of the family part. They are the ones to whom the family judges must report their clearance statistics.

What would happen if the chief justice were to appoint one or two experienced family law judges to stay in the family part for a period of time rather than be rotated out after a few years? Less time would be taken up educating new judges every year, and new judges who are in the family part would have more than one mentor to turn to for guidance. It may be that if judges felt that they had more discretion regarding the timeframes for clearance, and were not judged on clearance rates, there would be more who would want to stay in the family part and be that senior judge. To that end, lawyers must cooperate with judges by understanding their job requirements so that justice may be delivered and everyone's job will be easier. There should only be realistic, not arbitrary, deadlines in the family part.

Knowing that the family part deals intimately with the lives of adults and children, we must be flexible, not only in scheduling most routine matters, but also scheduling economic mediation and trial. Economic mediation has made great inroads in providing another step in the process, which helps litigants settle their case. This, too, however, can be misused. Mediation should not be used for the case with one small issue left to resolve, but for the case that needs the parties to work on many interrelated issues where there can be give and take, and thus a resolution can be reached. To force litigants to go to economic mediation when there is only one small issue takes advantage of the good will of the volunteer attorneys and increases legal fees. This is another example of understanding the needs of each case.

Every litigant and family leads a different life. Each family has different needs. They do not always fit into neat boxes and specific timeframes. We who are involved in the process must adjust to those needs.

The bar can only change itself. But we can and should, every chance each of us gets, encourage more cooperation, and, as individuals, work collaboratively with the bench. It is only when we are all in the same boat, rowing in the same direction, that the system will meet the needs of the litigants and grant them "substantial justice on the merits."[3] ■

ENDNOTES

1. 2005 WL 3676782.
2. Unpublished, A-273-05T3.
3. *Tucci v. Tropicana Casino*, 364 N.J. Super. 48, 53, (App. Div. 2003).

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FROM THE EDITOR-IN-CHIEF

Do We Now Have to be Kreskin, Too?

by Mark H. Sobel

Okay, I admit it; I was a geek in high school. (For those who know me that's not a stretch, and for those who don't know me, conjure up the image of a family lawyer in his adolescence attending high school.) Anyway, after school I would watch the *Mike Douglas Show,* and, while it had an assortment of guests that were not particularly intriguing, one I always found compelling was the mentalist, Kreskin. I know it's a trick, but I was convinced this guy could actually read minds. I always thought that was an unbelievable super power as I was imaging the super powers I would like to acquire (for example, those $2.99 x-ray glasses advertised on the back of comic books) but I never thought that I might actually be called upon to have such abilities in representing clients seeking to execute prenuptial agreements.

A little history in this area might be helpful. Prior to the passage of the Uniform Premarital Agreement Act,[1] the proper procedure for implementing a premarital agreement and the necessary disclosure and terms to be contained within the premarital agreement were outlined by the Court in *DeLorean v. DeLorean*[2] and *Marschall v. Marschall.*[3] In essence, those cases set forth the requirements that: 1) each party should have independent counsel or at least the access to independent counsel that is voluntarily waived; 2) the agreement must not be the product of fraud, misrepresentation or duress; 3) there must be full and complete financial disclosure; and 4) the parties must be competent and voluntarily enter into the agreement.

With respect to the somewhat open-ended directive of full and fair financial disclosure, the courts illustrated that compliance could be achieved by the attachment of a statement of assets and liabilities and the recent tax returns of both parties. Interestingly, prior to the passage of the Uniform Premarital Agreement Act, the party seeking to enforce the agreement had the "burden of going forward" and the "burden of proof," although that bar was not relatively high. Further, the testing of such an agreement would be based upon an unconscionability rather than a fair and equitable standard, a questionable requirement, especially considering more recent determinations in a variety of areas that our courts will not enforce an agreement that is not fair and equitable. However, notwithstanding this, a basic barometer for enforcement was whether, at the time the parties entered into the agreement, their agreement was not unconscionable.

After considerable political debate, the evolution of the New Jersey version of the Uniform Premarital Agreement Act provided two dramatic differences from pre-existing, pre-statute requirements. The first is that the burden to set aside the agreement was now on the person seeking to set it aside, and that burden is now the heightened standard of clear and convincing evidence. More interesting and more important, however, and possibly as a *quid pro quo* for that shifting of the burden, the agreement can now be set aside if it is deemed unconscionable at time of enforcement rather than at time of contract. Hence, perhaps the need for present-day family lawyers to obtain some Kreskin-like abilities.

[T]he [premarital] agreement can now be set aside if it is deemed unconscionable at time of enforcement rather than at time of contract.

While the articulation of what is unconscionable, as defined in the Uniform Premarital Agreement Act,[4] requires a determination that the agreement would either: a) render the spouse without a means of reasonable support, either due to a lack of property or unemployability; b) make the spouse a public charge; or c) provide a standard of living far below that which was enjoyed before the marriage, the fact remains that the measuring stick is at some point in the future, with all of the myriad of unknown facts that could occur.

My contracts professor in law school informed my first-year class that all law school hopes to accomplish is to get individuals to start "thinking like lawyers." What I found that to mean was if there is a logical fact pattern, disregard it and come up with the most convoluted series of occurrences that call into question legal issues, for that is

where case law is made and, unfortunately, malpractice suits sometimes are generated. Thus, there is a need in our area of practice to deal with the macabre (perhaps more often than we would like to admit), and to plan for the unusual.

Two illustrations highlight the difficult position family lawyers are now placed in while having to predict or anticipate the future. For example, suppose a high-flying American Olympic skier at the winter Olympics meets a similarly successful American snowboarder, each of whom has a myriad of endorsements, making many millions of dollars. They both determine to enter into a prenuptial agreement, which, for simplicity sake, maintains a complete separation of assets and a complete separation of income with a complete waiver of any alimony of any nature. Subsequently (take your pick) either the skier starts imbibing even more alcohol and falls off a cliff, breaking his legs and, thus, is unable to ski and obtain continuing endorsements, or the snowboarder, who has become an unruly "showoff," develops into such a diva that no one wants her endorsements any longer. If either of those events occur in the future, can the premarital agreement be set aside because the future anticipated income of that party no longer exists, whether through their fault or the fault of others? Does that make the agreement unconscionable at time of enforcement? If so, how do lawyers protect against such unknown eventualities, given the clear direction in the act that the measuring stick for unconscionability is at some point in the future?

Alternatively, you are confronted with two *middle-aged* individuals (that is a term I have come to embrace because, after all, what's the alternative), planning to get married for the second time. The man has a successful business, earning significant income, and the woman had a previously successful divorce earning her significant income. As a result of the marriage, the wife to be is going to lose her substantial alimony. The parties get married after a *standard* prenuptial agreement is drawn, and a year later the husband determines the third time is the charm, and seeks to divorce his second wife to marry another. Clearly, the current wife's new standard of living, after a short one-year marriage and the elimination of her alimony, will be "far below that which was enjoyed before the marriage," but does that, in and of itself, make the agreement unconscionable? Do we as practitioners have to alert our clients regarding all of the potential events from the relatively predictable (subsequent divorce) to the unpredictable (unusual loss of income) given the standard by which premarital agreements are to be viewed when one seeks enforcement?

I am always troubled by standards in the law that seek to preclassify events that are to date unknown. That is perhaps some of the difficulty in achieving hypothetical values for businesses not sold, determinations of custody for ever-evolving children, relocation of a party with children subsequent to a divorce, and now, the effectuation and enforcement of a premarital agreement that may have laid dormant for many, many years.

It is those dormant years that the statute now subjects to analysis and review. While Kreskin might be able to do it, I doubt most family lawyers are equally capable of that type of assignment. While family lawyers are often viewed as individuals with many abilities, the ability to predict the future is not one of them. If we had that ability, we wouldn't be family lawyers; we'd probably be managing a hedge fund somewhere on a warm tropical island. Instead, we have to deal with the realities that exist at the time our clients are seeking a definitive assessment of their risks in both implementing and obtaining effectuation of an agreement. Their agreement seeks to establish the division of property and the division of financial obligations that may or may not occur, or that may occur within a short period of time or after many years of marriage. It may occur after children are born of the marriage, or a wide variety of facts both individual to those parties or, more universal (*i.e.*, outside economic or social factors), all of which could dramatically impact the appropriateness or unconscionability of an agreement to be placed into effect at some unknown date in the future. It is an area of inquiry that we must consider, advise our clients about when they are entering into these agreements, and, ultimately, draft appropriate language to hopefully deal with these unknowns.

Unfortunately, while my imagination is very fertile, I'm not sure it is that fertile. I really wish I had TiVo when I was in high school so I could go back and watch how Kreskin did it. Such prognostication abilities may now be required for family practitioners drafting premarital agreements. ■

ENDNOTES

1. N.J.S.A. 37:2-32 *et. seq.*
2. 211 N.J. Super. 432 (Ch. Div. 1986).
3. 195 N.J. Super. 16 (Ch. Div. 1984).
4. N.J.S.A. 37:2-32(c).

IN MEMORIAM

Edward Schoifet

1931–2006

by John P. Paone Jr.

The Family Law Section lost a leader and a true gentleman of this profession with the passing of Edward Schoifet on Jan. 18, 2006.

Ed was affectionately known as the "Dean" of the Middlesex County family lawyers. He earned that title by setting a sterling example for all family law attorneys to follow during more than 45 years in the practice of law. We can all do well by following the path of this most beloved and respected practitioner.

Ed was honest; his word was better than the most tightly drafted contract. If you left his office with an agreement, it didn't change the next day. If you were with him in court when the judge made a decision from the bench, you never needed to obtain a transcript to settle the form of order.

Ed was fair; he did not subscribe to the shortsightedness of some who handle cases with the approach that their client is always right. Instead, Ed looked at both sides of the case with a view toward finding a fair resolution. In the words of retired Judge Mark Epstein, "Ed was practicing 'mediation' before they invented the term." Truly, if you couldn't settle your case with Edward Schoifet, there was either something very wrong with you or with your client.

Ed had a great legal mind. Although he attempted to settle every case, he could try the most complex matrimonial matter with the best of them. Because he took such reasonable positions, if you tried your case against Ed, you most likely came out on the short end.

Ed cast a long shadow over the practice of family law in Middlesex County. He, along with Martin Goldin, helped form the county Family Law Committee and made it the vibrant and influential body it remains to this day. He was one of the organizers of the early settlement panel program in Middlesex County, and he ran the program (at no charge to the court or the public) for many years, until his passing. He took an interest in and mentored many young lawyers in Middlesex County. An inexperienced attorney never had to worry about being patronized or taken advantage of by Ed.

Those of us who knew and loved Ed will never forget the special kindness he demonstrated to everyone he touched in the practice of law. He helped lower the blood pressure of divorce litigants and attorneys. I would often hear from hard-nosed litigators from outside of Middlesex County, after having encountered Ed for the first time. They didn't know what to make of him—was he for real or engaged in some plot to get them to drop their guard? In the end, they all came to learn that having a case with Ed was a uniquely pleasant experience, which benefited the clients who avoided the rancor and cost of divorce litigation.

Ed leaves behind his faithful and loving wife Lona, who was also his office manager for many years. Lona is a large part of what kept Ed at the top of his game right to the end. Ed's partner, Jean Ramatowski, an active member of our section, continues the practice in New Brunswick. We all wish Jean well as she carries on a brilliant and wonderful legacy. ■

Escrow Agreements

by Robert J. Durst II

An escrow agreement evidences an arrangement whereby a third party deposits something of value with a person or entity (the escrow agent) who is charged with holding the item pending the performance or accomplishment of specified conditions and to then distribute the item deposited in accordance with pre-existing directives. An escrow agreement creates both a fiduciary and legal relationship between the escrow agent and the third party.[1] The escrow relationship creates a binding legal obligation on the part of the escrow agent to retain the money, documents or objects until the performance of the escrow condition, and to then distribute them only in accordance with the terms of the escrow agreement.[2] The escrow agreement also establishes a fiduciary relationship between the escrow agent and the third party.[3]

In many matrimonial actions it is not uncommon that funds, stock certificates or other items of value are held in escrow pending the conclusion of the case or completion of certain precedent conditions to the distribution or release of the monies, documents or objects. For example, the proceeds from the sale of the marital residence are often held in escrow pending further agreement of the parties or a determination by the court as to how the proceeds should be divided. Stock options may be held in escrow pursuant to the terms of a Callahan trust.

Stocks or other valuable instruments may be held in escrow pending their ultimate distribution, the college matriculation of the children and as security for the payment of various obligations. To the extent that one or both of the attorneys involved in the underlying matrimonial action serves as the escrow agent, various Rules of Professional Conduct are called into play, in addition to the legal and fiduciary obligations set forth above.

An attorney who releases escrow funds in violation of an escrow agreement may be disciplined.[4] In *In the Matter of Susser*, an attorney who prematurely released escrow funds was suspended from practice for three years.[5] *In the Matter of Leahy*,[6] an attorney who had represented a husband in a divorce was disciplined for dissipating that portion of the escrowed proceeds from the sale of the marital residence that should have been maintained for the wife.

It would very likely be an indefensible disbarment pursuant to *In Re Wilson,*[7] if such funds were appropriated by the attorney her or himself, but even a wrongful distribution of the funds to the attorney escrow agent's own client in derogation of their spouse's rights was found to be a sanctionable offense. It is also a sanctionable offense for an attorney to maintain escrow funds in an account outside the state of New Jersey and/or in an institution that is not approved by the Supreme Court of New Jersey as a trust depository.[8]

In order to avoid a violation of an attorney's legal responsibility, fiduciary duty or ethical responsibilities, a specific escrow agreement in a matrimonial case should be carefully crafted. It should be specific to the circumstances of a case and unequivocal in the definition of the conditions for the disbursement of the funds. It also should waive any conflict that may otherwise occur as a result of an attorney assuming a legal and fiduciary obligation to an adverse party.

At minimum, the escrow agreement should:

- Specifically identify the subject matter. If the subject of the escrow is simply an amount of cash, the amount, of course, should be set forth in the agreement. If the object of the escrow is something other than cash, it should be specifically identified by certification number, date, or other unequivocal identification.
- The place of deposit should be identified. If funds are to be deposited into a bank, the account and the signatories on the account should be defined. If the escrow object is something other than cash, it should be safeguarded in an identified safe, lock box or other secured location identified in the agreement.
- The terms of holding the funds or object should be defined. Whether the funds should be deposited in an interest-bearing or non-interest-bearing trust account should be defined; the persons who have access to the safe, lock box or other secure area should also be defined.
- The conditions for release should be unequivocal and self-executing. The escrow contract should be so complete that the release of the funds or objects should be self-executing. The

agreement may require an authorization signed by both parties, an executed matrimonial settlement agreement, a confirmed judgment of divorce or it may relate to a specific date (a child attaining the age of 21, a stock option becoming exercisable, etc.).

- The Escrow agreement should define a resolution of any disputes. Counsel should anticipate the possibility that the escrow agent may be discharged as counsel, or that a dispute may arise regarding the distribution of the escrowed objects regardless of the care taken to craft the escrow agreement. The agreement should anticipate that by, for example, providing that the escrow agent may pay the funds into court, the other party may make further application regarding their continued deposit and/or distribution.

A simple form of escrow agreement such as the following should be completed to address the facts, circumstances and conditions relevant to a particular case in every matrimonial escrow arrangement.

ESCROW AGREEMENT

THIS ESCROW AGREEMENT made this _____ day of _____, _____ to _____,_____ ___, _____ (hereinafter referred to as the "Escrow Agent") by and between the parties, _____ (hereinafter referred to as the "Husband") and _____(hereinafter referred to as the "Wife").

WITNESSETH THAT:

WHEREAS, the funds, documents or objects hereinafter more specifically described are required to be held in escrow pending or as a result of the parties' action for divorce; and

WHEREAS, the Husband and Wife agree that the Escrow Agent may serve as an Escrow Agent regardless of his/her role as attorney for one of the parties; and

WHEREAS, counsel for the other party, by their signature thereof, consent to not only the terms of this Escrow Agreement, but to the service and role of the Escrow Agent and waive any conflict of interest which may otherwise arise by the Escrow Agent's role and service as escrowee and also as attorney for one of the parties.

NOW, THEREFORE, in consideration of their mutual promises herein contained, and obligations and undertakings created by the terms of this Agreement, the parties do covenant and agree as follows:

1. The following funds or property should be delivered to the Escrow Agent to be held by him/her in accordance with the terms and provisions of this Agreement.
(Describe in detail)
2. The Escrow Agent shall deposit such funds into a separate trust account established in his/her name as Escrow Agent for the parties. aid account shall bear interest at the normal customary rate, untimed, unlimited and unconditioned savings, deposits in the banking institution selected by the Escrow Agent. — OR —

2. The escrowed documents and objects shall be held by the Escrow Agent in a lock box/safe deposit box in his/her name at a banking institution selected by him and hereinafter identified as: Name of bank — OR —

2. The documents and objects shall be held by the Escrow Agent in a locked cabinet or safe in his/her office to which only he or she have access or persons specifically delegated and authorized by him or her have access with the understanding that the Escrow Agent shall have no responsibility for any loss or damage to the escrowed documents or objects for occurrences beyond his or her control such as fire, third party theft or the like.

3. The funds or documents and objects shall be maintained by the Escrow Agent until the occurrence of the earlier of the following events:
(Describe written agreement of the parties, entry of a judgment of divorce, execution of a matrimonial settlement agreement, etc.)
4. Upon the occurrence of the earlier of the above-said events, the escrowed proceeds shall be released and distributed to the parties or party as follows:
(Insert party to receive the funds or objects, the percentages to be distributed to each party or insert that the distribution shall be in accordance with the parties' written instructions, matrimonial settlement agreement, judgment or other relevant document).

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year written below their names.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

_____
_____

_____
_____

HUSBAND
Dated:

_____
_____

_____
_____

WIFE
Dated:

_____
_ _ _ _ _ _ _ _ _
_____
_____

ESCROW AGENT
Dated:

I hereby Consent to the terms and conditions of this Agreement and further consent to _____ serving as the Escrow Agent herein.

_____
_____

Opposing Counsel
State of NEW JERSEY :
: ss.

County of _____ :

BE IT REMEMBERED, that on this _____day of _____ , _____, before me, the subscriber, an Attorney at Law of New Jersey, personally appeared _____ who, I am satisfied, is the person named in and who executed the within instrument, and thereupon he acknowledged that he signed, sealed and delivered the same as his own voluntary act and deed for the uses and purposes therein expressed.

_____

State of NEW JERSEY :

: ss.

County of _____ :

BE IT REMEMBERED, that on this _____day of _____ , _____, before me, the subscriber, an Attorney at Law of New Jersey, personally appeared _____ who, I am satisfied, is the person named in and who executed the within instrument, and thereupon he acknowledged that he signed, sealed and delivered the same as his own voluntary act and deed for the uses and purposes therein expressed.

_____

State of NEW JERSEY :

: ss.

County of _____ :

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_____

ENDNOTES

1. *Colegrove v. Behrle,* 63 N.J. Super. 356 (App. Div. 1960).
2. *Id.,* p. 365.
3. *Id.,* p. 366.
4. 152 N.J. 37 (1997).
5. *In Susser*, the attorney's conduct was exacerbated by his subsequent misrepresentation as to the status of the escrow funds.
6. 111 N.J. 127 (1988).
7. 24 N.J. 277 (1957).
8. *See In Re Feurestein*, 93 N.J. 441 (1983) and *In the Matter of Jacoby & Meyers*, 147 N.J. 374 (1997).

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Confidentiality and Nondisclosure Agreements: The Prevention of Indiscriminate Disclosure

by Mark H. Sobel

Within the context of current family law practice it is becoming increasingly necessary to have an agreement limiting the disclosure of sensitive financial information exchanged during the course of matrimonial litigation. Family practitioners now have been sensitized to the public nature of filed documents and the potential exposure of the contents. Furthermore, the companies employing these litigants often have separate concerns regarding the disclosure of, for example, the existence of stock options, the salary of highly paid executives, the maintenance of various retirement programs, and a host of other financial information they do not wish divulged to their competitors or the public.

There is litigation now pending in a number of states addressing whether and to what extent documents filed with the court during a divorce action may be protected from public scrutiny. That public scrutiny is often just a click away—currently, state court records are available over the Internet in approximately 30 states, and the ability to obtain financial and non-financial disclosures of filed documents is exceedingly easy without any significant constraints or controls.

While certain states have either passed legislation or are in the process of drafting legislation limiting access to this type of information, currently only Virginia, New Hampshire and California have such laws. In view of the above, family practitioners must understand both the necessity and the importance of the utilization of confidentiality agreements in their cases.

Set forth below is a draft of a proposed confidentiality and non-disclosure agreement. In essence, it seeks to deal with the following issues:

- The type of material covered under the agreement
- The individuals who may have access to the information
- The utilization of the information
- The retention of the information.

CONFIDENTIALITY AND NONDISCLOSURE AGREEMENT

THIS IS AN AGREEMENT between ____, residing at ___, and ___, residing at ___, executed this ___ day of _____, 200_.

WHEREAS, the terms of this Agreement apply to any information or documents exchanged by the parties or supplied to ___, having a business address of ___, (hereinafter sometimes referred to in this Agreement as "___"), previously, or in the future with regard to ___ evaluation of ___ (hereinafter said business entities being referred to collectively as "the Entities") for the purpose of determining the values of ____'s interests in the Entities, which values will be used in connection with the preparation and negotiation of a prenuptial agreement between _____ and ____ or supplied to the counsel for either ____ or ____, or supplied to any other professionals or individuals in connection with the preparation and negotiation of a prenuptial agreement between ____ and ____ (hereinafter ____ and ____ being referred to as the "Parties").

I. DISCLOSURE OF DOCUMENTS AND COMMUNICATIONS

a. "Documents" shall include but not be limited to the originals and any copies of any income tax returns, financial statements, annual budget statements, compensation information, letters, memorandums, reports, records, contracts, agreements, handwritten notes, working papers, briefs, charts, tapes, data sheets, corporate documents, data processing cards, or any other written, recorded, transcribed, punched, taped, filmed, or graphic matter, however produced or reproduced, or any other written tangible materials.

b. "Communications" shall mean any oral or written statements made from one person to another, including but not limited to, letters, memoranda, telephone conferences, meetings, interviews, certifications, affidavits, emails, briefs and testimony of any kind.

c. Documents and communications, including but not limited to any documents and communications containing any infor-

mation relating to the business, operation or ownership of one or more of the Entities, shall be kept confidential by the Parties, counsel for the Parties, experts retained by the Parties, and the representatives of the Parties, and shall be subject to the terms of this Agreement. Such documents and communications shall be available for inspection only by the following:

1. Counsel for _____;
2. Counsel for _____;
3. Experts retained or to be retained or consulted with by either _____ or _____ in accordance with Section II below (Retention of Experts);
4. The Parties and their representatives and agents.

d. It is understood and agreed by the Parties that any documents, communications or information produced or made available to the parties as well as their employees, agents, and representatives, are not to be made available to, inspected by, communicated to or discussed with any other person other than those listed in subpart c above.

e. Each such person identified by executing this Confidentiality and Nondisclosure Agreement covenants that he or she will not use or in any way reveal to any other person or entity any of the information or documents they have received or exchanged in connection with the preparation and negotiation of a prenuptial agreement between _____ and _____, or any of the documents or reports prepared by experts retained by _____ and/or _____.

f. It is understood and agreed that the Entities may rely on this Agreement and shall be third party beneficiaries of this Agreement with full rights hereunder.

II. RETENTION OF EXPERTS

_____ and _____ may each select and retain, or counsel may agree on joint experts for the purposes of conducting discovery in connection with the preparation and negotiation of a prenuptial agreement between ____ and ____. Each expert shall execute the Addendum to the Confidentiality and Nondisclosure Agreement annexed hereto which incorporates the terms of this Agreement, which will be attached to it and pursuant to which the experts will further covenant not to use or in any way reveal to any other person or entity any of the proprietary information relating to the Parties and/or the Entities.

III. DOCUMENT CONTROL

a. Persons who have access to information subject to this Confidentiality and Nondisclosure Agreement shall follow procedures reasonably sufficient to preclude any unauthorized disclosure of information at any time that would constitute a breach of confidentiality. All protected information should be kept strictly confidential and shall be used only as may be necessary to provide full and complete financial discovery in connection with the preparation and negotiation of a prenuptial agreement between ____ and ____.

b. Any documents or information which may contain information subject to this Agreement shall be submitted to (i) opposing counsel, (ii) retained experts, (iii) ____, or at his specific direction, to one of his representatives or agents, or (iv) to ____, or at her specific direction, to one of her representatives or agents, in a protective inner envelope which shall be marked with the notice: "Confidential — Contents may not be disclosed, except as provided in Confidentiality and Nondisclosure Agreement."

c. The substance of information subject to this Agreement shall not be distributed, disclosed or otherwise conveyed except as provided by this Agreement.

d. If information or documents subject to this Agreement are used as an exhibit in any prenuptial agreement between ____ and ____, those exhibits shall be designated as documents subject to this Agreement.

e. No information which has been obtained pursuant to this Agreement shall be disclosed or revealed in the course of any court proceeding other than any court proceedings involving the enforcement of any prenuptial agreement between ____ and ____, or unless specifically directed otherwise by Order of the Court.

f. Upon evidence of any breach of this Agreement, ____, ____, or the Entities, may apply for appropriate sanctions including, but not limited to, an order for monetary damages, injunctive relief, and any other legal or equitable relief which the Court may deem appropriate, it being the Parties' understanding that a breach of this Agreement could result in significant personal and financial harm to the Parties and the Entities.

g. Any and all documents provided by ____, or his representative or agents, or by the Entities or their agents, employees or representatives to any experts retained by ____, or such expert's agents or employees, which are subject to this Agreement shall be returned to ____ within sixty (60) days of the delivery to ____ of such retained expert's final written evaluations of all of the Entities, or within thirty (30) days of the termination of such retained expert's services by ____, if sooner.

h. Any and all documents provided by ____, or his representative or agents, or by the Entities or their agents, employees or representatives to counsel for ____ or to any experts retained by ____, or such expert's agents, employees

or representatives, which are subject to this Agreement shall be returned to ____, or his representatives or agents, or his counsel, within fifteen (15) days of the execution of the prenuptial agreement between _____ and ____, or within thirty (30) days of the termination of such retained expert's services by ____, if sooner.

IV. APPLICABLE LAW

This Confidentiality and Nondisclosure Agreement and the enforcement rights arising hereunder shall be construed in accordance with and governed by the laws of the State of New Jersey. This Agreement is binding upon the Parties, legal counsel for the Parties, the Parties' retained experts, the Parties' agents and representatives, and all other persons who have notice of its existence upon execution of this Confidentiality and Nondisclosure Agreement or upon execution of the Addendum to the Confidentiality and Nondisclosure Agreement attached hereto and made a part hereof, as the case may be.

Dated:

WITNESS:

ADDENDUM TO NONDISCLOSURE AGREEMENT

I have read the attached Confidentiality and Nondisclosure Agreement, understand its terms, have voluntarily executed this Addendum to the Confidentiality and Nondisclosure Agreement which I understand incorporates the terms of the Confidentiality and Nondisclosure Agreement and agree to comply with its terms.

Dated:

Hopefully the above form can assist family lawyers in both conceptualizing the issues that arise in the area of confidentiality and providing an outline for the drafting of such agreements. ■

Increased Need for Indemnification Agreements

by Amanda S. Trigg

Pending divorce, the litigants likely find disputes over many issues. The parties might actually agree, however, that they should maximize the amount of income available to their family and minimize the amount of taxes paid to the government. Under the Internal Revenue Code, different tax rates apply to married persons filing joint returns and married persons filing separate returns.[1] Although an accountant can provide the actual figures, it is generally thought that filing separate returns generates more taxes, cumulatively. Therefore, spouses minimize taxes by filing a joint income tax return, *pendente lite*.

Joint income tax returns can be filed while the parties are separated, until the year in which they are actually divorced.[2] In the recent decision of *Burzstyn v. Bursztyn*,[3] the Appellate Division specifically ruled that New Jersey courts have discretionary authority to compel divorcing parties to file joint income tax returns even if one party prefers not to do so.[4] Whether it is appropriate for the court to compel that result depends upon the facts of any given case. Among the factors cited by the *Bursztyn* court as a reason why it was appropriate to compel the wife, who did not work outside the home, to execute joint returns over her unspecified objection, was the fact that her husband indemnified her with respect to the returns.[5]

Whether the joint filing is voluntary or compelled by the court, a written indemnification agreement establishes the parties' obligations to each other in the event that the federal and/or state taxation authorities determine a liability exists, including prepaid or past-due income taxes. By entering into a consensual agreement that is tailored to the parties' particular circumstances, one or both of them may obtain protection against economic loss imposed by taxes, interest, penalties and/or counsel fees related to defending against a claim for payment by the taxation authorities. The last holds particular importance, because an indemnification agreement binds only the parties, and not the taxation authorities.[6] The agreement recognizes that married individuals filing a joint return expose themselves to joint and several liability for any fraudulent or erroneous aspect of the contents and assigns, at least between the parties, responsibility for the taxes and any other liabilities or costs that arise as a result of the joint filing.[7]

The *Bursztyn* court enumerated such universal factors in support of its order to compel Ms. Bursztyn to sign the joint income tax returns that many other divorce cases are likely candidates for the same relief. For example, the *Bursztyn* court noted that filing separately would unnecessarily deplete the funds available to support the family, a situation common to many divorces, and that compelling joint filing satisfied the trial court's obligation to consider the tax implications of its decisions in its alimony and equitable distribution analyses.[8] The fact that one spouse was the source of all income to be reported and that there was not any evidence that he had filed fraudulent income tax returns in the past also carried weight in *Bursztyn*. Perhaps most importantly to the analysis, however, after the payment of marital debts, insufficient assets remained from which the court could compensate the working spouse for the adverse tax consequences of filing separate returns.[9]

Due to the archetypal factors that persuaded the Appellate Division that joint returns were properly compelled in *Bursztyn*, future litigants in similar factual circumstances should anticipate similar results and proceed accordingly. The trial court always bears responsibility for preserving the marital estate, and "[T]here is no need for, and every reason to avoid, making the taxing authorities beneficiaries of the litigation."[10]

Post-*Bursztyn* and the factors the Appellate Division found to be persuasive underpinnings of the trial court's order that a reluctant spouse must file joint income tax returns, indemnification agreements provide one means of ensuring that if parties must file joint income tax returns, any resulting losses are specifically apportioned between the parties. The following samples contemplate first mutual indemnification between the parties, as if both were employed and required to report income to the federal and/or state government. As reflected in the second form, unilateral indemnification agreements are also permissible, as are agreements for credits in equitable distribution if marital assets are used to pay tax

liabilities pending resolution of a divorce action.

An indemnification agreement may not resolve all potential problems with a joint filing.[11] It can, however, provide the parties with a measure of protection against economic loss and a means of collecting reimbursement from the party who bears responsibility under the separate indemnification agreement.

FORM #1
MUTUAL INDEMNIFICATION AGREEMENT AS TO FILING OF INCOME TAX RETURNS FOR THE YEAR 2005

This agreement is between *, hereinafter referred to as the "Husband," and *, hereinafter referred to as the "Wife."

Husband and Wife shall file their Federal and State income tax returns jointly for 2005. The parties reserve the right to seek equitable distribution of the 2005 overpayment of federal and state taxes which are, pursuant to the 2005 income tax returns, currently designated to be applied towards income taxes in 2006.

Husband assumes sole liability for the accuracy of the income and deductions reported by him individually and in connection with his business. Wife assumes sole liability for the accuracy of the income and deductions reported by her individually and in connection with her business. Husband and Wife hereby acknowledge that in the event that either party has incurred any Federal or State income tax liability for income not disclosed in the parties' joint income tax returns, each party agrees that he or she will be individually responsible for the payment of such amount, if any, and he or she will also pay any interest or penalties thereon, as well as all accounting expenses which may be incurred in the event of same. Husband and Wife shall each save and hold the other harmless and indemnify the other from any claim, damage or expense whatsoever, including legal fees and accounting fees, arising out of any deficiency assessments or additional taxes due, of any sort, if such deficiency assessment arises solely out of any separate income of either party which he or she has failed to report individually, or deductions disallowed by the taxation authorities, as previously set forth herein.

FORM #2
UNILATERAL INDEMNIFICATION FOR THE DEPENDENT SPOUSE

This agreement entered into this _____ day of _____, 2005 by and between [NAME] and [NAME], hereinafter referred to respectively as husband and wife.

W I T N E S S E T H :

WHEREAS [NAME] and [NAME] are husband and wife living separate and apart; and

WHEREAS the parties have previously filed joint federal and state tax returns and husband desires to have wife join with him in filing joint returns for 2005; and

WHEREAS husband has provided the information for and procured the preparation of all such returns including the returns for 2005; and

WHEREAS wife has relied and continues to rely upon the representations of husband regarding the preparation and statements contained within said returns; and

WHEREAS in consideration of wife agreeing to join in signing joint returns for 2005, husband agrees to assume certain responsibilities and warrant the information contained in said returns, including specifically the returns for 2005.

NOW, THEREFORE, in consideration of the mutual promises hereinafter set forth, the parties agree as follows:

I. Joint Returns for 2005

Wife agrees to join with husband in filing joint federal and state income tax returns for 2005. Husband shall be responsible for the preparation and filing of said returns.

II. Payment of Amounts Due & Refunds

Husband shall be solely responsible for and shall make any and all payments due, whether for taxes, interest, penalties, deficiency claims, assessments or otherwise in connection with the joint federal and state income tax returns for the year 2005 and all previous years wherein joint returns were filed by the parties. Any refunds shall be shared equally between the parties.

III. Warranties as to Accuracy

A. Husband warrants that the federal and state joint returns for 2005 attached hereto as Exhibits A and B are true, accurate and complete copies of such returns as filed with the federal Internal Revenue Service and Treasurer of the State of New Jersey.
B. Husband warrants and represents that the representations and statements including specifically his personal or business income and expenses on the 2005 returns and all prior joint returns are true and accurate.
C. Husband warrants that he shall not cause any amended return to be filed without the express written agreement of wife.

IV. Indemnification and Hold Harmless Protection

A. Husband shall indemnify and hold wife harmless from any and all financial responsibility or sums found to be due arising out of the filing of the 2005 joint returns or for any later imposed tax payments, interest, penalties, assessments or deficiency claims on said returns or any joint returns previously filed by the parties.
B. In the event that wife retains counsel to represent her interests due to any audit, deficiency assessment or other proceeding related to the 2005 joint returns or any joint returns heretofore filed by the parties, any costs incurred by her for such purpose shall be assumed and paid by the husband who hereby indemnifies and holds the wife

harmless from the payment of any such costs.

V. Full Cooperation

Husband and wife agree to fully cooperate in the signing of any and all powers of attorney or other documents which may be necessary for them or their authorized agents to defend against deficiency claims, claims for deficiency, penalty or interest assessment and/or papers required to complete any tax audits. The parties shall extend the same full cooperation as expressed in the foregoing sentence to any papers compromising or settling any dispute which may arise with regard to previously filed joint tax returns.

VI. Revocable Power of Attorney

On request of the husband or his authorized representative the wife shall sign a revocable power of attorney to designate husband or his designated agent as her attorney-in-fact to sign her name on any papers related to tax audits or asserted claims for tax deficiency, penalties or interest. The husband or his representatives shall inform the wife when the revocable power of attorney is used by the husband or the designated agent. Copies shall be provided to the wife or her counsel. Such power of attorney provided for in this Article shall be limited to matters arising out of filed joint tax returns.

VII. Amendments

If deemed appropriate, joint returns may be amended and the husband or his designated agent shall have the right to file such amended returns, after first submitting same to wife. The Full Cooperation and Revocable Power of Attorney articles of this agreement shall apply equally to any amended return so filed. All provisions of the Indemnification and Hold Harmless Protection article shall apply to any amended returns so filed. If any refunds are generated by amended returns, the parties shall be entitled to same equally.

Both parties represent and acknowledge that they have sought and received the benefit of independent legal counsel before signing this agreement.

IN WITNESS WHEREOF the parties have signed and acknowledged this indemnification agreement in four counterparts, each of which shall constitute an original. ■

ENDNOTES

1. I.R.C. §1(a), (d).
2. 26 U.S.C.A. §6013(a), (g)(4)(c); *Weinkrantz v. Weinkrantz*, 129 N.J. Super. 28, 31-36 (App. Div. 1985).
3. 379 N.J. Super. 385 (App. Div. 2005).
4. *Bursztyn v. Bursztyn*, 379 N.J. Super. 385, 398 (App. Div. 2005).
5. *Id.*
6. *Leftwich v. Leftwich*, 442 A.2d 139 (D.C. App. 1982); I.R.C. §6013(d)(3).
7. *Wadlow v. Wadlow*, 200 N.J. Super. 372, 380 (1985).
8. *Bursztyn*, *supra*, at 398, *citing* N.J.S.A. 2A:34-23(b)(12) and N.J.S.A.2A:34.23.1 (j).
9. *Wadlow*, *supra*, at 380 (granting an appropriate credit when determining equitable distribution of property at trial was a "far wiser course" in that case than compelling the parties to file joint income tax returns).
10. *Leftwich, supra*, at 145.
11. *Id.*

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Stock Option Distribution Via Constructive Trusts in Divorce Settlements

by Charles F. Vuotto Jr. and Jeffrey D. Urbach

This article examines the legal and financial theories behind the use of constructive trusts in the body of a matrimonial settlement agreement (MSA) for purposes of effectuating equitable distribution of stock options in divorce. Part 1 of the article introduces the more common financial options the matrimonial practitioner will encounter. This section briefly describes these options and touches on the complex valuation issues associated with them (the taxation of options is outside the scope of this article). Part 2 contains a practical discussion of how to implement and structure the equitable distribution of options with the use of a constructive trust within the matrimonial settlement agreement.

PART 1

Options are financial derivatives, *i.e.*, they derive their value from other assets, in this case the price of the stock to which the option is related. The stock options matrimonial practitioners will commonly see are as follows:[1]

Incentive Stock Options (ISOs)

- Granted to employees only
- Cannot exceed 10 years from grant to expiration
- Generally taxed on date of exercise for AMT purposes

Nonqualified Stock Options (NQSOs)

- May be granted to non-employees
- Generally causes ordinary compensation income when exercised
- Subject to all withholdings

When dividing stock options in a divorce, the practitioner faces three choices: value the options and determine the equivalent offsets when distributing the remaining marital property; transfer actual ownership of the options (rarely available); or use a Callahan trust as discussed in Part 2.

Until 2002, when the IRS issued Revenue Ruling 2002-22, ISOs and NQSOs could not be divided between spouses (assuming a company plan would allow it) without triggering tax under the assignment of income doctrine. Revenue Ruling 2002-22, followed by Revenue Ruling 2004-60 (clarifying the withholding obligations of employers) has made this possible. Revenue Ruling 2002-22 exempts the transfer of options pursuant to a divorce decree from the assignment of income doctrine. Revenue Ruling 2004-60 clarified the withholding and other requirements for employers and employees.

As a practical matter, however, the authors have not yet seen any publicly held company change its stock option plan to accommodate the change in tax treatment; thus, valuation/offset or using a trust are still often the only available solutions.

Why be so concerned? After all, if an option can be exercised at say $25, and the stock is trading for $100, isn't there an *intrinsic* value of $75? Or, if the stock is trading below $25 the option is *underwater* or worthless, and doesn't need to be worried about? Not so, says financial theory.

The value of options is influenced by a variety of factors, including but not limited to time to expiration (expiry), dividend payout, risk-free rate of return based on zero coupon U.S. Treasuries of the same duration as the option, and perhaps the most important factor, the volatility[2] of the security.

Today, almost everyone has heard of the Black-Scholes (B-S) formula to value options. It was developed in the 1970s, and led to a Nobel Prize.[3] Over the years it has been tweaked, changed, and otherwise modified to account for how American options are traded versus the European options used in the original model.[4]

For those with a masochistic bent, the formula[5] is as follows:

$$C = SN(d_1) - Xe^{-rT}N(d_2)$$

Where:

$$d_1 = \frac{\ln(S/X) + (r + \_^2/2)T}{\_\sqrt{T}}$$

$$d_2 = \frac{\ln(S/X) + (r - \hat{U}2/2)T}{\_\sqrt{T}} = d_1 - \sqrt{T}$$

Where:

S = Stock Price; *X* = Strike Price; r = Risk-free interest rate; *T* = Time to expiry in years; Û = Volatility of stock price; and *N(x)* = Cumulative normal distribution function.

Modern option theory tells us that even an underwater[6] option may have value. In fact, the longer the time to expiry and the greater the volatility of the stock, all other factors held constant, the greater the value of any option whether under water or in the money.

Accordingly, in theory at least, an option should be held to expiry, although most employees engage in "suboptimal exercise behavior," *i.e.,* exercising before expiry.

Real people often earmark options for exercise to pay for children's education or other large ticket items. Others have their own investment agendas. Thus, we might find that in any given company there is an average holding period before exercise, often less than 10 years when all employees are considered. When valuing specific options in a divorce matter, the practitioner should look at the exercise history of the spouse(s). Does he or she hold until the last minute or have a pattern of, say, exercising every few years? Are there any plans to earmark the funds for education expenditures?

Needless to say, today there are software programs available for purchase that calculate these values.[7] It is important to remember, however, that the input of data requires a great degree of subjective judgment, and is not as black and white as an Excel spreadsheet might imply.

Experts may have legitimate reasons to disagree on any one of the variables. Finally, Black-Scholes, while the best known and most frequently used formula, is not the last word, and has many known shortcomings when used for employee options. Other models, such as the Cox-Ross-Rubenstein binomial model and binomial lattice models,[8] have emerged to challenge Black-Scholes, and have been gaining recognition and acceptance.

Where does this leave the practitioner? The risk of valuing options and calculating other asset offsets means that one spouse will more than likely benefit from an increase or decrease in value at actual exercise. Remember, the value calculated using mathematical formulas is based on a probability, and rarely, if ever, does it predict value with great certainty. Indeed, it will be wrong 1/3 of the time, and below or above the predicted high 2/3 of the time.[9] An angry husband or wife may come knocking on your door about the windfall the other person had, or the spouse now holding underwater options will lament about what was given up as an offset at settlement for now worthless.

Risk is allocated equally between the spouses if the options are placed in trust. Both parties rise or fall with the same tide. Language should be used that clearly reflects when the options are exercised. Is it a unilateral decision by the holder? Do both parties need to agree on exercise? How do you break a deadlock? Are they exercised at a specific date certain? Careful wording of the trust, as discussed below, will insure equity between the parties and perhaps keep the peace between practitioners and clients when things don't turn out like the models say they should.

A final practice tip: Soon-to-be ex-spouses need to understand, preferably in writing, from the attorney or expert, that placing options in a constructive trust is no guarantee of value. As the authors explained above, the litigants may indeed hit a home run, but can also very well strike out.[10]

PART 2

The deferred distribution method is the most commonly implemented method for distributing options and restricted stock in divorce settlements. Moreover, this method was utilized in one of the earliest New Jersey cases dealing with stock options incident to divorce.[11] The *Callahan* court ruled that options acquired during a marriage were subject to equitable distribution even though: 1) the options were potentially terminable; 2) the husband had to make an expenditure to exercise the options; and 3) the options were subject to various SEC regulations.[12] In so holding, the court impressed a constructive trust on the husband, in favor of the wife, for a portion of the options.[13] The court reasoned that imposition of a constructive trust would result in the most equitable outcome to the parties without creating undue financial and business liabilities.[14] It should be noted that all of the options were granted during the course of the marriage.[15] Although not specifically stated, however, it appears that some or all of the options were not fully vested because they were subject to divestiture under certain circumstances.[16] This may be why the wife was awarded only 25 percent of the options at their maturation.

Many provisions must be considered when devising trust-like language to be included in a MSA. Examples of some of these clauses follow. Other provisions may be needed depending upon the exact nature and content of the stock option or restricted stock plan involved. What follows is sample language based on a particular fact pattern.

CALLAHAN TRUST CLAUSES

The parties acknowledge that the Husband has received various awards of stock options, restricted stock and portfolio grants through his employment with ABC Corp. The following is a summary of the outstanding stock options, restricted stock and portfolio grants awarded to Husband as of July 2001, which are subject to equitable distribution:

The following chart delineates each option grant based on the respective vesting dates. It does not include the 13,825 stock options awarded to the Husband in February 2002. Since the awards received by the Husband in a certain year are for work performed both in the preceding years and work to be performed in all subsequent years up until the applicable vesting periods, the complaint for divorce in this matter was filed on May 23, 2001, it is hereby agreed that 17.5% of the 13,825 options awarded in January 2002 shall also be included in the group of unvested options to be distributed incident to this agreement. This would add 2,419 stock options from the February 2002 award to

	Date of Grant	Type	Number of Options Awarded	Option Price	Vesting Date	Expiration Date
Vested Options						
1	2/24/97	NQSO	1,167	22.15	2/24/98	2/23/07
2	2/24/97	NQSO	1,167	22.15	2/24/99	2/23/07
3	2/24/97	NQSO	1,167	22.15	2/24/00	2/23/07
4	2/23/98	NQSO	2,534	29.30	2/23/99	2/22/08
5	2/23/98	NQSO	2,534	29.30	2/23/00	2/22/08
6	2/23/98	NQSO	2,534	29.30	2/23/01	2/22/08
7	2/22/99	NQSO	4,000	35.29	2/23/01	2/21/09
Total Vested Options			**15,103**			
Non-vested Options						
1	2/23/98	SRNQSO	9,900	29.30	2/23/02	2/22/08
2	2/23/98	SRNQSO	9,900	29.30	2/23/03	2/22/08
3	2/25/98	SRNQSO	9,900	29.30	2/23/04	2/22/08
4	2/23/99	NQSO	4,000	35.29	2/23/02	2/21/09
5	2/24/99	NQSO	4,000	35.29	2/23/03	2/21/09
6	2/28/00	NQSO	4,450	43.67	2/28/02	2/27/10
7	2/28/00	NQSO	4,450	43.67	2/28/03	2/27/10
8	2/28/00	NQSO	4.450	43.67	2/28/04	2/27/10
9	2/26/01	NQSO	4,667	44.47	2/26/03	2/26/11
10	2/26/01	NQSO	4,667	44.47	2/26/04	2/26/11
11	2/26/01	NQSO	4,667	44.47	2/26/05	2/26/11
Total Non-vested Options			**65,050**			
Total			**80,153**			

the pool of unvested stock options, which the wife shall receive.

The Husband also received restricted stock awards (RSA) as a result of his employment with ABC Corp. A summary of his outstanding RSAs as of July 10, 2001, (none were awarded in 2002) is as follows:

The RSAs held by Husband begin to vest in 2004 and are not fully vested until 2006. At the time of each vesting date, the then fair market value of the shares will be taxed to Husband as ordinary income. At that time, the Wife shall be entitled to receive 25% of the vested RSAs upon tendering to the Husband the total tax due on her share of the then vesting RSAs at the agreed upon rate of 44%. Thereafter, the Husband shall transfer title to the Wife's share of the RSAs within ten (10) days of his receipt of same.

	Date of Grant	Type	Number of Restricted Shares Awarded	Vesting Date
Restricted Shares				
1	2/28/00	RSA	2,000	2/28/04
2	2/28/00	RSA	2,000	2/28/05
3	2/28/00	RSA	2,000	2/28/06
Total Restricted Shares			**6,000**	

Additionally, as part of his income, and as part an employment retention device, the Husband received *Portfolio Grants*.

A target incentive is awarded annually. The Husband represents that the value of the ultimate award increases or decreases based on the Husband's performance over a three- or four-year period. In addition, the ultimate payout is strictly conditioned upon ABC Corp.'s financial performance and total shareholder return as compared to the Standard and Poor's 500 Index over a three or four year performance period, depending on the year of grant. The target incentive listed below is the initial value of

Grant	Target Amount	Amount Paid	Ratio of Amount Paid to Target Amount	Date of Payout or Expected Payout
5/24/93	22,000	57,312	2.61	12/31/95
2/28/94	25,000	59,421	2.38	12/31/96
2/27/95	35,000	89,694	2.56	12/31/97
2/26/96	30,000	81,995	2.73	3/15/99
2/24/97	35,000	100,320	2.87	3/31/00
2/23/98	30,000	78,900	2.63	3/15/01
2/22/99	30,000	Not Yet Vested		9/30/02
2/22/99	30,000	Not Yet Vested		9/30/03
2/28/00	33,660	Not Yet Vested		9/30/04
2/26/01	35,500	Not Yet Vested		9/30/05

the award at the time of grant.

The payments have historically been made in cash and the ultimate award has been larger than the target incentive. Based on the payouts received by Husband including the 2002 grant that has been set and shall be paid in September 2002, the average pay-out was 2.52 times the target incentive.

The vesting period of the portfolio grant had historically been three years. The PGs awarded in 1999 will pay $55,000. Beginning in 1999, the vesting period was increased to four years and a supplemental award was received in 1999 to compensate for the additional vesting year. This will effectively provide a bonus to Husband in 2003.

The above chart does not include a Portfolio Grant received by the Husband in February 2002 with a target value of $30,786. Since the awards received by the Husband in a certain year are for work performed in the preceding year together with performance over the subsequent year vesting period and the Complaint for Divorce in this matter was filed on May 23, 2001, it is hereby agreed that 17.5% of the ultimate pay-out of the Portfolio Grant awarded in February 2002 shall also be included in the group of Portfolio Grants to be distributed incident to this Agreement. For example, the Wife's share of the PG to be paid in September 2002 (*i.e.*, $55,000) shall be paid as follows: $55,000 times Wife's share (25%) equals $13,750. This figure shall then be reduced by the agreed upon marginal tax rate of 44% ($6,050), resulting in a net payment to the Wife of $7,700.

All of the aforementioned stock options, restricted stock and portfolio grants awarded to Husband as stated above shall be distributed in accordance with the "Callahan Trust" provisions that follow. The Parties acknowledge that neither party shall have rights with respect to the grants of stock options and restricted stock and portfolio grants that were paid out or inured to the benefit of either party subsequent to the date of the filing of the complaint for divorce as referred to above.

The parties agree that the Wife is hereby granted an equitable and constructive interest in the aforementioned stock options, restricted stock and portfolio grants granted to Husband by ABC Corp., as noted above. As part of this Agreement, subject to the ABC Corp. policy procedures and restrictions in place, Wife is entitled to fifty percent (50%) of the vested stock options. Further, the Wife is entitled to 25% of the unvested Stock Options, Restricted Stock (RSAs) and Portfolio Grants awarded prior to the Complaint for Divorce. For the stock options and Portfolio Grant awarded in 2002, the Wife is entitled to 17.5%. As to the stock options, the Wife is entitled to direct Husband to exercise on her behalf a total of fifty percent (50%) of the vested stock options, and twenty-five percent (25%) of the unvested stock options (except for those awarded in 2002, in which the Wife's share is 17.5%), culminating in a total of 7,552 vested options and 18,681 unvested options from the total of 93,978 stock options and 1,500 RSAs which represents 25% of the 6,000 RSAs, as set forth above and subject to policies, procedures and limitations of ABC Corp. which are in full force and effect at the time of the request of the exercise by either party. These options, PGs and RSAs vest across various dates, as noted in the above chart. Husband shall hold the options, PGs and RSAs allocated for Wife as a fiduciary and in constructive trust for her, subject to the following provisions as well as the policies, procedures and limitations of ABC Corp. governing the stock option plan. As to the restricted stock and portfolio grants, the Wife shall receive her share of these benefits immediately upon Husband's receipt of his share subject to deduction of 44% for applicable federal, state and local taxes.

For example, Husband shall hold in constructive trust 3,801 of the 7,602 options awarded on February 23, 1998, through and including their vesting date of February 23, 2001, until their expiration date of February 22, 2008. The Husband shall act as a fiduciary to the Wife with respect to these options and shall not act in any manner contrary to his duties therein. However, voluntary or involuntary termination of employment for any reason shall not be construed as a breach of his fiduciary obligations pursuant to the terms of this paragraph.

Husband shall hold in constructive trust for the Wife the following portions of the options, both vested and non-vested, until she so directs him to exercise these options. The Wife has sole and complete control

Date of Grant	Type	Number of Options Awarded	Percentage Allotted to Wife	Portion Set Aside for Wife
Vested Options				
2/24/97	NQSO	1,167	50%	584
2/24/97	NQSO	1,167	50%	584
2/24/97	NQSO	1,167	50%	584
2/23/98	NQSO	2,534	50%	1,267
2/23/98	NQSO	2,534	50%	1,267
2/23/98	NQSO	2,534	50%	1,267
2/22/99	NQSO	4,000	50%	2,000
Non-vested Options				
2/23/98	SRNQSO	9,900	25%	2,475
2/23/98	SRNQSO	9,900	25%	2,475
2/25/98	SRNQSO	9,900	25%	2,475
2/23/99	NQSO	4,000	25%	1,000
2/24/99	NQSO	4,000	25%	1,000
2/28/00	NQSO	4,450	25%	1,112
2/28/00	NQSO	4,450	25%	1,113
2/28/00	NQSO	4,450	25%	1,112
2/26/01	NQSO	4,667	25%	1,167
2/26/01	NQSO	4,667	25%	1,166
2/26/01	NQSO	4,667	25%	1,167
2/26/02	NQSO	13,825	17.5%	2,419

over the exercise of the stock options allotted to her (as limited by the provisions of the stock option plan, and/or ABC Corp. policies, practices and procedures in effect at that time.

The following provisions shall govern the exercise of the wife's share of those options:

1. Notice and Instructions: When the Wife wishes the Husband to exercise the stock options allocated to her herein, or any portion thereof, she shall send written instructions to the Husband at his then current email work address. The current email work address: _____@xxx.com. In order to carry out the terms of this agreement, Husband agrees to keep Wife informed of any changes in his email address by notification in writing to Wife at her email address at _____@xxxxx.com with such a change. The written instructions from Wife to Husband shall include the exact number of stock options that she wishes Husband to exercise on her behalf and shall designate the particular grant (*i.e.*, "flight") from which the shares are to be exercised. The parties may agree to alternative notice provisions if one or both emails become unavailable.

2. Taxes: The parties understand that the income tax withholding in conjunction with the exercise of stock options or receipt of RSAs or Portfolio Grants for Wife will be reported on Husband's earnings statement at the end of each year. (*Caveat*: If, however, any of the stock options, RSAs or Portfolio Grants, in which the Wife shares, can be taxed at her tax rates, pursuant to present or future tax laws (e.g. Rev. Rule 2002-22), then her tax liability shall be limited to the amount computed on her own individual tax returns.) If, however, the Wife's share of the income associated with the Stock Options, RSAs and Portfolio Grants cannot be transferred to the Wife, the parties agree that the Wife is obligated for her share of the taxes owed on the "taxable amount" resulting therefrom. This shall be effectuated by the Husband, at the time of exercise or receipt of benefits due to the Wife, deducting 44% as the Wife's complete and full tax liability for the taxes related to the options exercised, or RSA's/Portfolio Grants received. The Husband shall be fully responsible for all other taxes owed with regard to said assets and indemnify the Wife fully for same. To the extent possible, the taxes attributable to any option exercise on Wife's behalf shall be deducted from the proceeds distributed to her from a same-day sale.

3. Same-Day Sales Rights (Cashless Exercises): Husband shall make available to Wife any cashless or other exercise rights that are available to him for the exercise of stock options. The Wife shall be liable and responsible for any and all actual costs associated with the exercise of such rights as mandated by the Husband's employer, including but not limited to administration fees, documentation fees, and service fees.

4. Exercise of Options and Sale of Stock: In the event Wife instructs Husband to exercise the options and sell the stock allocated for her (*i.e.,* via a same-day sale, cashless exercise or otherwise), the Husband agrees to instruct the stock brokerage firm to remit the net proceeds of the sale of the stock on Wife's behalf, by a wire transfer to an account as directed by her. The Wife shall be responsible to provide any and all current account data including ABA and routing information at the time of each exercise request to insure the accuracy of such transfers. The "net proceeds of the sale" of stock options are defined as the proceeds available after deduction of the state and federal taxes at the agreed upon marginal rate of 44%.[17]

When possible, Husband will enable Wife to take advantage of all cashless transaction rights for the exercise of options. Thus, Wife shall have the right to exercise options less the net value of the strike price without putting forward cash for the exercise of the options, to the extent this right is granted to the Husband through ABC Corp. However, the Wife shall pay all applicable fees and out-of-pocket costs incurred by the Husband in connection with the exercise of such right.

5. Limitations on Amount of Options Exercised: The Wife acknowledges that the exercise of stock options by the Husband, for his benefit as well as hers, is now subject to certain ABC Corp. policies that require senior executive approval of such exercise, if said exercise exceeds 40% of all vested stock options. At this time, the senior executive in his or her sole discretion may expressly withhold approval for a period of 90 days subsequent to a scheduled meeting to review the exercise. For this reason, the Wife expressly agrees not to exercise more than 20% of the total vested options (calculated as all of the vested stock options in which the Husband has an interest as of the date of her request to exercise). However, should the Husband be granted the right to exercise more than 40% of all vested stock options, the Wife shall have the right to exercise 50% of the amount in excess of 40% of all vested stock options to which permission was granted.

6. Exercise of Options and Distribution of Stock to Wife in Kind: In the event Wife wishes Husband to exercise the stock options allocated for her and receive the stock in kind, the Wife shall deliver to Husband all funds necessary for the exercise of the specified stock options prior to the exercise, including the agreed upon 44% federal and state income taxes attributable to the exercise,[18] if any, at the time of exercise of the specified stock options applied by the taxable amount together with any and all applicable fees and out-of-pocket expenses, required to be paid to the Husband's employer as a result of said exercise. This delivery shall be made in the form of a wire transfer to an account as outlined in accordance with the aforementioned procedures. In the event that the company will not authorize the issuance of stock in the name of the Wife, then the Husband shall cause the stock to be issued in his name, as the trustee and the fiduciary for the benefit of the Wife and shall immediately thereafter transfer the stock into the Wife's name. Any stock transfer or related cost associated with the exercise of the options for the wife's benefit or the transfer of the stock into the name of the Wife, shall be borne solely by the Wife.

7. Damages for Untimely Exercise of Options: The Husband shall be liable for any intentional delays in the exercise of options requested by Wife pursuant to the procedures set forth herein and subject to ABC Corp. processes and procedures.

8. Exercise of Husband's Options: In the event that Husband desires to exercise his share of the ABC Corp. stock options, he will provide written notice to the Wife at the aforementioned email or residential mailing addresses at least 24 hours prior to the exercise of the options.

9. Termination of Husband's Employment (Claw-back Provisions): The parties expressly acknowledge the existence of portions of the ABC Corp. policies and procedures, which are called "claw-back" provisions. These claw-back provisions may require a disgorgement of the total gain realized on the exercise of stock options within a certain stipulated period of time before an employee's termination. It is acknowledged that these terms may change from time to time. The Husband shall provide Wife with a copy of the current applicable "claw-back" provisions and any changes to such "claw-back" provisions. Therefore, it is the parties' intention as to the distribution of the specific stock options, restricted stock and portfolio grants listed above, that they each be bound by the actual claw- back provisions that may be in effect at the time of the triggering event (*i.e.*, the Husband's termination of employment with ABC Corp.[19]). Further, it is the intention of the parties that should the husband involuntarily or voluntarily terminate his employment with ABC Corp., that the claw-back provisions shall equally apply to the Wife should said company make a final, internally non-appealable decision to require the return of gain received (*i.e.,* profits on the exercise of stock options), exercised within the "claw-back period" and the Husband actually returns his total gains. In that event, the Wife shall be obligated to do the same within 15 days of the Husband's return of the total gain.[20] She shall return promptly her total gains to the Husband so that such total gains may be returned to the company. The amount to be returned shall be calculated in accordance with the policies and procedures of ABC Corp. in place at that time. (Example: Presently, the funds to be returned are the gross profit (*i.e.,* fair market value of stock on date of exercise less strike price, exercise fees and other allowable fees), not the net amount received from the exercised stock options.) The Husband shall return these total gains to ABC Corp. in accordance with ABC Corp.'s stated policies, procedures and limitations in effect at that time. The Husband shall be obligated to provide the Wife with any documentation that he receives from ABC Corp. with respect to compliance with this policy. To the extent that the Husband loses any stock options, portfolio grants or restricted shares or rights for stock options, portfolio grants or restricted shares due to a change in employment, but receives stock options, portfolio grants, restricted shares or other form of compensation directly or

indirectly attributable to the loss of such stock options, portfolio grants or restricted shares, the Wife shall be fully compensated for her lost rights and shall share in said recompensed stock options, portfolio grants or restricted shares or other form of compensation in the same proportions as with the original ABC Corp. stock options, portfolio grants or restricted shares subject to forfeiture due to the Husband's termination of employment. Housing allowances and moving expenses shall not be construed as compensation for lost stock options.

10. Notice of Termination of Employment: In the event Husband's employment at ABC Corp. is terminated, Husband shall notify Wife within 24 hours of said termination of employment, by telephone and/or email, followed by immediate written notice (within 48 hours of termination), mailed to Wife's residential mailing address.

11. Failure to Comply with Notice Provisions: In the event Wife loses the right to have Husband exercise any stock options on her behalf as a result of Husband's intentional failure to comply with the notice provisions herein, the Court shall have reserved jurisdiction to determine the amount of the monetary loss, if any, resulting to Wife as a consequence of said failure and shall order reimbursement to her by Husband of that monetary loss, plus counsel fees and associated costs.

12. Re-Pricing: In the event ABC Corp. declares a re-pricing of the exercise price of the stock options, or makes any other adjustments to the options allocated to Wife in this agreement, Husband shall notify Wife of the adjustments or re-pricing within 15 days of his knowledge of such event by telephone and/or email Husband shall not exercise any right to re-price any of the stock options allocated for Wife unless and until Wife has given Husband written instructions to do so. As soon as ABC Corp. notifies Husband of the opportunity to re-price such stock options, Husband shall notify Wife of the opportunity and provide her with copies of all documents from ABC Corp. pertaining thereto.

13. Reload Options: To the extent that the Husband is granted or has any reload rights in the existing options listed in paragraph 45 above, the Wife shall also share in those rights up to her proportionate share allocated to her herein. However, provided that the Wife has and presents to the Husband ABC Corp. stock in the amount required for reload at the time of the requested stock option exercise, it is expressly agreed and understood that the Wife shall have no reload options granted for any post complaint period.

14. Reservation of Jurisdiction: The Court shall have reserve jurisdiction to enforce the terms of this section subject to the then existing stock option plan terms and conditions regarding the exercise of said options and all applicable retention agreements of ABC Corp. in place at the time of the exercise. The Court shall also be able to make any further Orders as necessary to carry out the intent of the parties with respect to this section in the event of changes in the stock option plan for loss of options due to the voluntary termination of employment with ABC, Corp. or any other unforeseeable event that the parties have not contemplated as part of this Agreement, relating to the designation of the parties' option rights subject to distribution under this Agreement.

15. Death: In the event of the death of the Husband, all rights of the Wife shall be preserved subject to the rules, policies, and procedures with respect to said options. The Husband's estate is hereby bound to honor the obligations imposed upon the Husband pursuant to this Agreement. The Estate shall, at the direction of the Wife, exercise the Options prior to any accelerated expiration, if any, resulting from the Husband's death. ■

ENDNOTES

1. Options on the shares of privately held securities are beyond the scope of this article. In such a case, the underlying value of the privately held company must first be determined; comparable public stocks must be found as a proxy to determine volatility.
2. What is Volatility? *FAS 123:* "…annualized standard deviation of the differences in the natural logarithms of the possible future stock prices." Simply put, it is a statement of the probability of where a stock price will be 2/3s of the time.
3. "In 1970, Myron S. Scholes found the formula for success. Nearly three decades later, it earned him the 1997 Nobel Memorial Prize in Economic Science. Along the way, it changed the way investors and others place a value on risk, giving rise to the field of risk management, the increased marketing of derivatives, and widespread changes in the valuation of corporate liabilities. Scholes, the Frank E. Buck Professor of Finance, Emeritus, at the Business School, shares the Nobel prize with Robert C. Merton of Harvard Business School. The prize was awarded by the Royal Swedish Academy of Sciences for "a new method to determine the value of derivatives" developed by the two, along with the late Fischer Black. Black and Scholes first published the formula as "The Pricing of Options and Corporate Liabilities" in the Journal of Political Economy in May 1973. The formula was further developed by Merton, who showed its broad applicability." http://www.gsb.stanford.edu/community/bmag/sbsm1297/faculty_news.html
4. European options can be exercised at only date of expiry. The original B-S formula did not contemplate American options with a 10-year life, able to be exercised at any point in time until expiry. Additionally it doesn't contemplate publicly held options, which generally have a life of nine months.
5. From "The Complete Guide to Option Pricing Formulas" by Espen G. Haug.
6. An option with an exercise price above the market price of the stock.
7. The authors used *FinTools Software®,* Montgomery Investment Technology, Inc. for this article.

8. Binomial lattice models consider employee exercise behavior, employee demographics, blackout periods, and other factors not considered in B-S. According to Robert Dysan in an article in *The CPA Journal* (Sept. 2005), "no acceptable lattice computer model is available as of this writing" because of the computing power required to compute more accurate price predictions. Thus while in theory a more accurate result can be obtained, at this time it is not practical.
9. Standard distribution is a measure of how far the observations in a sample deviate from the mean. In a normal distribution of stock prices, prices will fall within one standard deviation approximately 2/3 of the time. Standard distribution is a measure of how far the observations in a sample deviate from the mean.
10. The following is a brief bibliography for those inclined to pursue this subject in greater depth:
    - *Black-Scholes and Beyond*, Neil Chriss, PhD.
    - *Option Pricing, Black–Scholes Made Easy*, Jerry Marlow
    - *FAS 123(R)* www.fasb.org/pdf/fas123r.pdf
    - *FinTools Software®,* Montgomery Investment Technology, Inc. *The Complete Guide to Option Pricing Formulas,* Espen G. Haug
11. *See Callahan v. Callahan*, 142 N.J. Super. 325, 328 (Ch. Div. 1976). In New Jersey, these constructive trusts have been known as Callahan trusts, after the name of the case.
12. *See Id.* at 327-29. Certain SEC regulations required the employee option holder to forfeit "any profits [...] from the sale of stock within a specified period from the date of purchase." *Id.*
13. *See Id.* at 329.
14. *See Id.*
15. *See Id.* at 327.
16. *See Id.* at 330.
17. If the income becomes taxable to the wife on her individual tax returns pursuant to Paragraph XX (ii) and the husband has no liability for her share of the asset, then the husband shall remit the gross pre-tax amount of the wife's share without deduction for taxes.
18. *See* prior footnote.
19. If the husband knows or intends that he is going to voluntarily terminate his employment with ABC Corp., or commences interviews with prospective employers, he shall advise the wife in writing as soon as possible so that the wife may be guided accordingly in terms of exercising her rights as to the stock options in a timely manner to avoid, to the extent possible, the effects of the claw back provisions. The wife shall keep such disclosure confidential.
20. However, should the husband receive from ABC Corp. some other money, stock, option, portfolio grant, restricted shares, compensation, benefit or other consideration which is attributed strictly to the return of the total gain, the wife shall share in said money, stock, option, portfolio grant, restricted shares, compensation, benefit or other consideration to the extent that she was entitled to share in the stock options, restricted stock and portfolio grants.

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