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LEE M. HYMERLING
Section Chairman

Chairman's Report

This column will be devoted to according a status report to our members concerning several topics of common concern to all attorneys engaged in matrimonial practice.

First, I will discuss where our Section stands with regard to proposed Rule 1:27-7a dealing with written retainer agreements. Second, I will report on a recent resolution adopted by our Section's Executive Committee concerning proposed rule amendments to proposed R. 4:79, following up on my more lengthy discussion in my report in the December issue of the *New Jersey Family Lawyer.* Third, I will announce a number of additional appointments I have made to our Executive Committee. Finally, I will report on a number of exciting initiatives which the Section has now undertaken. As will be seen, this column will be devoted to a broad spectrum of Section activities.

Proposed Rule 1:27-7a

First, dealing with the proposed retainer agreement rule, the Section will recall that I appointed a Blue Ribbon Committee to critically analyze the rule and report to the Section's Executive Committee at its February meeting. I am pleased that the Blue Ribbon Committee, chaired by Gary Skoloff and consisting of Sid Sawyer, Don Gaydos, Charles De Fuccio and myself, has commenced its work in earnest. I am assured by the chairman that its report will be in hand so that our original time schedule might be met. Since the announcement of the proposed rule by Justice

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Tax Seminar Set for February 27

The Family Law Section, in conjunction with the Institute for Continuing Legal Education and the New Jersey Society of Certified Public Accountants, is pleased to announce a major, full-day seminar and workshop entitled "Tax Aspects of Divorce and Separation" to take place on Saturday, February 27, 1982 at The Landmark Inn in Woodbridge, New Jersey. The list of panelists selected to participate literally "speaks for itself" with respect to the quality and depth of the program. The speakers at the seminar (morning program), which will be moderated by Section Chairman Lee M. Hymerling, are: Professor Frank E. A. Sander of the Harvard University School of Law; Honorable Virginia A. Long, Judge of the Superior Court, Union County; Thomas S. Forkin, Esquire, of Forkin & Eory, Cherry Hill, and Raymond Silverstein, C.P.A., also from Cherry Hill.

Professor Sander is currently Professor of Law at Harvard Law School. He is a nationally recognized authority, lecturer and author in the field of divorce taxation (co-author—Foott, Levy & Sander—"Cases and Materials on Family Law"; author, B.N.A. Tax Management Portfolio, "Divorce and Separation"). He will make a two-hour presentation entitled, "An In-Depth Discussion of Tax Implications of Divorce and Separation."

Professor Sander will be followed by Judge

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Novelist and Judge Goldmann to Address Annual Dinner

All Section members and other readers should mark their calendars well in advance of the annual Family Law Section Dinner to be held on Wednesday, March 10, 1982 at the Mayfair Farms Restaurant in West Orange. This new location was selected on the basis of quality cuisine and the ability to accommodate substantially more persons than previous sites.

Likewise breaking from tradition, the guest speaker will be best-selling novelist Mary Higgins Clark, author of *The Cradle Must Fall.* Accordingly, members are strongly encouraged to bring their spouses or other guests (whether Section members or not) to the dinner, which will be highlighted by the dedication of the Tischler

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Tax Seminar *(continued)*

Long, who will address "Judicial Responsibilities with Respect to Taxes Incident to Divorce," Mr. Silverstein, speaking on "The Role of the C.P.A. in Divorce and Separation Cases," and finally by Mr. Forkin, who will conclude the seminar portion of the program by discussing "The Practical Application of Tax Laws on Divorce and Separation."

The program will then break up into workshops chaired by an attorney and C.P.A. in order that specialized topics be discussed and analyzed in an informal setting, permitting individual contribution and exchange of ideas. The workshops will be chaired or co-chaired by the following persons: Gary N. Skoloff, Esquire—Skoloff & Wolf, Newark; Raymond Silverstein, C.P.A., Cherry Hill; Howard A. Goldberg, Esquire—Horn, Kaplan, Goldberg & Gorny, Atlantic City; Herbert Rudnick, C.P.A.—Wiss & Company, East Orange; Thomas S. Forkin, Esquire—Forkin & Eory, Cherry Hill; Jerome M. Newler, C.P.A.—Newler & Company, Union; Ira A. Levy, Esquire, Newark; Stanton Meltzer, C.P.A.—Gold, Meltzer, Plasky & Wise, Collingswood; Melvin J. Wallerstein, Esquire, West Orange and Gordon Asnis, C.P.A.—J.H. Cohn, Newark.

Reservations should be made well in advance by completing the I.C.L.E. registration form located on page 79 of this issue. Since the program is being offered to accountants as well as attorneys, response is expected to be very strong and will no doubt exceed the number of available spaces; therefore, early registration is a must, in order to insure a space at what promises to be a key educational event not to be missed by any matrimonial practitioner.

Award Created

The Executive Committee of the Family Law Section is pleased to announce the creation of the Family Law Section Saul Tischler Award, which will be given annually to one or more persons who have made a significant contribution in the advancement of matrimonial justice in New Jersey. The intention of the committee in establishing the award is to recognize those individuals who carry on the dedication and spirit of Mr. Tischler, whether those persons are members of the bench, bar or in a related discipline. The Tischler Award will be dedicated at the upcoming annual dinner of the Family Law Section on March 10, 1982, the details of which are discussed in a separate article in this issue of *New Jersey Family Lawyer.*

The Executive Committee urges all members to consider appropriate candidates for the award and to make their views known to the committee in order that the names of any prospective recipients not be overlooked. In this regard, it should be noted that presentation of the award may be posthumous, thereby permitting full, and perhaps overdue, formal recognition to those persons who have lived up to the standards upon which the award is founded.

Annual Dinner *(continued)*

Award, as discussed in a separate article in this issue. Participating in the dedication ceremony will be the Honorable Sidney Goldmann, retired Presiding Judge of the New Jersey Superior Court, Appellate Division. Judge Goldmann has kindly consented to share with those attending reminiscences stemming from his lengthy friendship with the late Standing Master.

The cost of the dinner is $42.50 per person or guest, and a reservation coupon is supplied below for the convenience of all members who wish to attend. Since response is expected to be very strong, it is urged that you take a moment to complete and mail the coupon at an early date. Advance registration will no doubt be more necessary than previously.

Reservations are guaranteed to advance registrants only. To make your reservation, please complete the form below and mail your check payable to the New Jersey State Bar Association for receipt no later than *Friday, March 5, 1982.* All refund requests for cancellation of reservations will be honored until Friday, March 5, 1982. As mentioned above, non-Section members, spouses and friends are welcome.

Mail to:
New Jersey State Bar Association
172 West State Street
Trenton, NJ 08608

Family Law Section Annual Dinner
Wednesday, March 10, 1982 – 6:30 p.m.
Mayfair Farms Restaurant, West Orange

Enclosed is a check for $_____ for _____ reservation(s) @$42.50 per person. Please list all attendees. (Attach an additional sheet if necessary.)

Name(s):_____

Address:_____

Telephone:_____

Chairman's Report

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Pashman, numerous matrimonial practitioners throughout the state have reported to Gary and to me, as well as to the Administrative Office of the Courts, commenting upon the draft rule. Many attorneys have commented that the draft in its present form is unworkable, requires substantial reflection and redrafting. Many lawyers have stressed that matrimonial lawyers are being "singled out" for special regulation.

At its December meeting, our Executive Committee adopted a formal resolution requesting that the Supreme Court defer action on the rule for a period not to exceed four months, to permit thorough analysis and comment. I am pleased to report that State Bar Association President Octavius Orbe, at the direction of the State Bar Board of Trustees, has communicated with the Supreme Court requesting that the Court defer action on the rule until careful study has taken place. Additionally, Mr. Orbe has accepted my invitation to be present at our Section's Executive Committee meeting in February, so that he might participate in the discussion which will follow receipt of Gary Skoloff's report. What I am saying essentially is that your Section is on top of the situation; it has attempted and will continue to be responsive to your views.

As I mentioned in my previous column, our Section's analysis of this controversial topic must be handled responsibly, recognizing that the Supreme Court did not unilaterally adopt a rule, but instead merely offered a proposed rule for comment. Our Section, and matrimonial practitioners individually, should not ignore the concerns which prompted the rule but, by the same token should not simply accept a rule which on its face leaves much to be desired.

I have asked the editors of the *Family Lawyer* to include in the February issue the complete text of Gary Skoloff's report, as well as an article reporting on whatever action the Executive Committee takes on the report. So that the procedure to be followed is completely understood, you should be aware that the resolution that will be adopted by the Executive Committee in this regard will, in turn, be submitted to the New Jersey State Bar Association for final action by the Trustees. This procedure is consistent with the requirements of the by-laws of the State Bar.

Parenthetically, in that regard I will devote a future column to my thoughts with regard to the Section's autonomy and the desirability of the State Bar permitting various Sections to state positions without approval of the Board of Trustees. The topic, however, requires more than a passing comment.

Resolution Adopted Regarding R. 1:6-2 and R. 4:79

Second, I will turn my attention to the action taken by our Executive Committee with regard to amendments to R. 1:6-2 and R. 4:79. Responding to the wishes of many of our Section's members, as expressed in Acapulco and also in correspondence I have received, our Executive Committee in December adopted the following resolution which was submitted to the State Bar Trustees for final approval:

WHEREAS, effective September 14, 1980 the Supreme Court of New Jersey adopted certain procedural rules dealing with matrimonial practice as a result of the work of the Supreme Court Committee on Matrimonial Practice (the Pashman Committee); and

WHEREAS, the Executive Committee of the Family Law Section of the New Jersey State Bar Association solicited views from matrimonial practitioners throughout the state with regard to the rule amendments and as a result of that review concluded there is a consensus among matrimonial practitioners in New Jersey that certain modifications of the rules are appropriate and will aid in the administration of justice; and

WHEREAS, the Executive Committee specifically has concluded that said modifications can be accomplished without impairing the intent and purpose of the rules announced by the Pashman Committee, and further will have no significant due process impact upon matrimonial litigation; and

WHEREAS, one of the modifications pertains to R. 1:6-2 which requires submission of a proposed form of order with regard to matrimonial motions consistent with a similar mandate dealing with other motions dealt with by the court system, but that the matrimonial bar strongly believes that matrimonial motions are qualitatively different from other motions involving multiple parts and equitable relief, and that the requirement that proposed forms of order be submitted causes litigants and the system unnecessary time and expense;

THEREFORE, be it RESOLVED that the New Jersey State Bar Association, Family Law Section, urges that the Supreme Court make the following modifications of the Rules Governing the Courts of the State of New Jersey:

1. The requirement contained in R. 1:6-2 that proposed forms of order be submitted with matrimonial motions should be deleted from the rules;

2. R. 4:79-2 (the Preliminary Disclosure Statement rule) should be modified to delete the requirement that said form be submitted in default and settled cases.

As can be seen, our Section's Executive Committee has strongly endorsed rule amendments which would exempt default and settled cases from the requirements of R. 4:79-2, and exempt matrimonial motions from the requirements of R. 1:6-2 that proposed forms of order be submitted when motions are filed. I appeared before the

Chairman's Report *(continued)*

State Bar Trustees in late December. I am pleased that that body has approved our resolution and has submitted or will shortly submit same to the Supreme Court, not only as the position of the Family Law Section, but as the position of the State Bar Association itself.

Senate Bill 1020 Vetoed

Parenthetically, at the same time the State Bar Trustees approved another resolution adopted by our Executive Committee publicly recommending to former Governor Byrne that he veto Senate Bill 1020, which would have amended N.J.S.A. 2A:34-23 (the alimony and equitable distribution statute) by setting forth specific standards for rehabilitative alimony, while deleting "ability to pay and actual needs of the parties" as standards applicable to such awards. As reported in Jeff Weinstein's legislative column in this issue, former Governor Byrne recently vetoed this legislation. I am gratified that the State Bar Trustees have approved our position in this regard and am convinced that their approval, together with our resolution, was instrumental in convincing former Governor Byrne of the wisdom of vetoing what could have been extremely dangerous legislation. This is not to suggest that I oppose the concept of rehabilitative alimony; indeed, I am most supportive of that concept as originally approved in *Lepis v. Lepis*, 83 N.J. 139 (1980). However, I questioned the wisdom of engrafting upon our statutory law detailed standards which could more appropriately have been dealt with in the common law process. Additionally, I very much questioned the wisdom of deleting from the statute "need" and "ability to pay" the two single most important standards in the law of alimony, from the statutory criteria for the award of spousal and child support. The vetoing of this legislation is a perfect example of how influential our Section can be when an organized, balanced and reasonable approach to those in positions of influence is advanced.

Executive Committee Appointments

Third, I am pleased to announce a number of additional appointments to our Section's Executive Committee. Thus I have appointed Edwin J. Jacobs of Atlantic County; Alan J. Domers of Camden County; and Allen Zeller of Camden County. Ed Jacobs currently serves as president of the Atlantic County Bar Association. He also serves as the associate editor of the *New Jersey Law Journal.* He devotes a great deal of his practice to matrimonial work and will give to our Executive Committee the perspective of one who practices in an area of the state which has been inadequately represented in the past.

Alan Domers agreed to join with George Whitmore, an Executive Committee member from Monmouth County, and Larry Cutler, an Executive Committee member and past Section chairman from Morris County, the task of coordinating early settlement programs throughout the state. Alan's prime responsibility will be to encourage the establishment of such programs in the southern counties.

I am certain Sandy Zeller will make a major contribution to our Executive Committee, offering not only the perspective of one who is now engaged in private practice but also the perspective of one who had devoted a number of years to the Camden Regional Legal Services program. In this regard, it is important that our Executive Committee be sensitive to the needs of the poor and particularly sensitive to the challenge posed within the Pashman Committee Report, suggesting that the private bar make a *voluntary* commitment to insuring that all members of society have access to the matrimonial courts.

I welcome Ed, Alan and Sandy to our Executive Committee. I am certain they will make major contributions in the months ahead.

Plain Language Retainer Agreement Studied

Finally, I would like to comment upon a number of initiatives taken by our Section in its effort to continue to be on top of our ever-expanding area of practice. First, you should be advised that on an emergency basis I have appointed a small committee, chaired by Jim Yudes, to review a draft matrimonial retainer agreement that had been prepared by the Plain Language Committee of the State Bar, and to prepare such alternate forms of agreement as might be deemed appropriate. The background of the committee stems from the adoption of the Plain Language Law, Ch. 274, P.L. 1981. As reported in the December issue of the *Advocate* of the State Bar Association, the State Bar had appointed a committee to complete preliminary drafts of agreements for fees and representation in matrimonial matters, criminal defense matters, personal injury cases and general matters. The chairman of the committee, Mark F. Hughes, Jr. of Newark, furnished me with a draft matrimonial retainer agreement. Dalton Menhall, executive director of the State Bar, requested that our Section comment on the draft. After a preliminary review of the draft, I became convinced that many of our members would be very much concerned by the draft as prepared by the Plain Language Committee. It was at that point Mr. Yudes's committee was appointed.

Time was of the essence. It had been decided that the State Bar Trustees would act upon the Plain Language Committee's recommendations at their December meeting. Fortunately, Mr. Yudes's committee was able to function promptly, draft alternate agreements and submit same to the State Bar Trustees. Following discussion, I am pleased to report that the Trustees submitted to the Administrative Office of the Courts and to the Supreme Court not only the Plain Language Committee's agreements, but also the draft agreements submitted by the Yudes committee. My thanks to Jim Yudes and Jeff Weinstein for their work in this regard.

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Admissibility of Opinion Evidence in Custody Cases

by Francis W. Donahue

No one takes pleasure from custody cases, least of all the trial judges who must decide between contesting parents. The judiciary's distaste for deciding custody has been exacerbated by burgeoning case loads resulting from the socio-economic changes in society. Hence, beleaguered trial judges are increasingly relying upon the opinions of so-called experts to determine the ultimate issue, custody.

Most jurisdictions mandate home studies which are generally conducted by social workers. However, judges, with alarming frequency, are using their discretion to appoint psychiatrists and psychologists to conduct evaluations, even in cases where there are no allegations nor evidence of behavioral or emotional problems. These studies often contain opinions and recommendations as to custody that are given substantial weight by trial judges.

At the recent A.B.A. Family Law Section conference in New Orleans, leading attorneys from throughout the country debated the value of such studies.[1] The conference criticized both the evaluators, and their methods. Specific areas of complaint involved the disparity in training, experience and education of the evaluators and their procedures which permit bias, speculation and hearsay to become part of the court record. The obvious defects of such studies, e.g. lack of qualifications, bias and hearsay, are easily exposed. The home study is particularly susceptible to being "loaded" by a shrewd advocate with statements favorable to his client from neighbors, friends and relatives. Psychiatric evaluations are also subject to similar imperfections, but the flaws are usually less pronounced. What is more problematic is the opinion of an evaluator which is untainted by obvious defects. The question arises whether under any circumstances opinion is admissible in custody cases. This is a fundamental evidence problem.

Opinion evidence is admissible in two instances.[2] If a witness is not testifying as an expert, to be admissible his opinion must be rationally based upon his perceptions. If a witness is testifying as an expert, his opinion is admissible if it is based upon established facts within the scope of the special knowledge, skill, experience or training possessed by the witness.

The issue in each custody case is the best interest of the child. Determining the best interest of the child requires consideration of the individual child's personal safety, morals, health, general welfare and the character, conditions, habits, and surroundings of the respective parents. These are questions of fact. It is difficult to imagine any special knowledge, skill, experience, training or education which would qualify an individual as an expert in custody per se. The emotional and physical needs and relationships between a child and parents are simply not susceptible to expert opinion.

A psychiatrist, for example, can be qualified as an expert in psychiatry and, after having interviewed the parties on one or more occasions, he may have an opinion within his field of expertise. The opinion would be admissible if the opinion were relevant to the issue of custody. Hence, psychiatric opinions can be helpful to the trial court but cannot be dispositive of the ultimate issue. A psychiatric opinion which includes a custody recommendation is objectionable and inadmissible.

Ironically, the opinion evidence which is probably admissible as to the issue of custody is lay opinion testimony. The best interests of the child is a fact issue which anyone of ordinary intelligence could determine. If a lay witness has observed the parents and child for sufficient periods of time and has intimate knowledge of the behavior, personalities and character of the parties and the child, then his opinion is admissible if it is rationally based on those perceptions.

In conclusion, trial courts must not be permitted to delegate their responsibility to determine custody cases. The judiciary must be educated to the fact that custody experts do not exist and that opinion evidence as to the issue of custody is generally inadmissible. Although there is no pleasure in custody cases, the bench and the bar have a responsibility to adduce all of the facts relevant to custody and to resolve the issues objectively. Agonizing as it may be, the decision as to which parent should be awarded custody is a decision the trial court must make. Psychiatric reports and other expert reports may be helpful, but they are certainly not conclusive. The ultimate issue of custody still remains with the trier of fact.

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Francis W. Donahue is a partner in the firm of Skoloff & Wolfe, P.A., located in Newark.

Child Custody Recommendations: Solution or Predicament?

by George Landberg

Soon after the decision in *Beck vs. Beck,* the *Supreme Court Committee on Matrimonial Litigation, Phase Two, Final Report* was released. (See *N.J.L.J.* July 16, 1981 Supp.)

Among the most painful and difficult issues with which the Committee dealt was that of child custody. Specifically noted by the Committee were roles of "family members" and indeed of the entire concept of the family in society. Recognizing the issue of the duality of the concept of the psychological parent, the Committee acknowledged that both parents are contributors to the growth and development of their child and relegated to the past the "tender years doctrine" wherein women were presumed to be better equipped to raise children until age seven or eight.

Also, for the first time, a comprehensive statement was made which recognized the need to temper the adversarial approach to divorce and expedite the resolution of child custody. To temper the adversarial approach, the Committee strongly endorsed the use of [mental health] professionals and suggested that such use should not be limited to mere reporting, but extended "by attempting the reconciliation of differences."

To expedite the resolution of child custody, the Committee recommended that the custody issue be separated from all others and resolved first. It was noted that "the experience of judges and attorneys has been that if child custody issues are resolved at an early stage of the proceedings, there is greater likelihood that the parties will settle other issues." To this end, the Committee recommended that "all issues pertaining to child custody be determined within three months after issue is joined."

The Committee clearly recognized the suffering of children torn between conflicting loyalties and sought by this latter recommendation to settle the problem as quickly as possible for both parents and children. There is an abundance of anecdotal literature which demonstrates that when the issue of custody is settled quickly, many cases that might have been acrimoneously fought were more amicably settled outside the judicial process. Indeed, in certain cases, judges have been known to participate directly in frank discussions that have facilitated resolution of custody cases.

However, despite the Pashman Committee's insight into the need for more sensitive and effective use of mental health professionals, the Committee failed to address itself to the psychological and factual complexities inherent in the majority of custody cases. Indeed, it is the rule rather than the exception that custody issues are inexorably intertwined with other non-custody considerations. To attempt such separation would be artificial. As an example, for most families, the marital home is the most valuable marital asset; often, the only one. If, as in many cases, the parent who has physical custody of the children remains in the home with them, determination of the custody is *de facto* determination of which parent will possess (at least for some time) the home.

In a recent case in which joint custody with equal time-sharing was agreed upon, the couple stalemated on the issue of which parent was to remain in the marital home. The husband agreed to leave but the wife could not afford to purchase his interest. The husband offered to purchase the wife's interest, but she refused because the purchase of another home at inflated prices and interest rates was an impossible undertaking for her. In this not atypical example, the custody determination could not expedite the resolution of equitable distribution. The two issues needed to be addressed simultaneously.

Moreover, in many cases the issues surrounding custody are too complex and overlapping to be easily separated from one another and the conflicts between the marital partners too deeply entrenched for quick resolution. Frequently, the litigants are unaware of underlying resentments often at the heart of the controversy over custody. Therefore, to place a three month limit on determining all issues of custody seems unrealistic.

One can see how the recommendations to utilize mental health professionals for mediation and the early determination of custody are joined, for if it is possible to separate custody from ancillary issues, then it should be possible to dispose of the backlog of cases facing the matrimonial courts more quickly. However, as admirable the intent, such an arbitrary limit fails to take into consideration the complexities and entrenchments of human relationships .

Many issues stem from long-standing marital conflict, personality differences, and prior life experiences. Often, the time period needed just to evaluate the significant family members can take an inordinate length of time. Exposure and resolution of significant issues preventing accord can often take several months to a year. Moreover, the hostility, suspicion, and distrust by family members of each other engendered by the dissolution of the marriage militates against the logic, reason, and good judgment necessary for resolution in only three months. Mental health professionals are all too aware of the difficulties inherent in resolution of human conflicts. They would be hard pressed to meet such a timetable, however well-intentioned.

In a paper presented at a custody seminar sponsored by ICLE in June 1980, I listed nine underlying issues that in my experience delayed or prevented resolution of custody disputes. Among them were contradictory and anxiety-provoking child-rearing practices; long-term psy-

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Child Custody *(continued)*

chological stress in the marriage; conflict with extended family members; envy and jealously by one spouse of the other in current or past relationships; and distrust and animosity resulting from the dissolution of the marriage. Commonly couples involved need much longer than three months to reconcile their differences. That the period of time for reconciliation of differences might stretch from six months to two years does not imply that progressive decisions toward resolution were not being made.

In one case, a couple who accepted the concept of joint custody could not agree on the time-sharing arrangement for their child. Rather than force a decision, the trial judge appointed a psychiatrist to mediate an agreement. The surface issue that prevented a simple accord had to do with opposite child-rearing philosophies, with the resultant fear by each parent of the other's overall influence upon the child (the more time with the child, the more influence). An important underlying issue, far more pervasive, however, was the wife's fear that the husband would continue to exert influence over her through contact with the child with whom she strongly identified. Following identification and recognition of this fear, specific safeguards for the mother were built into the custody agreement. An accord was eventually reached after five and one-half months.

Marital demise fosters a host of sudden changes in the lives of family members who need time to "settle in." Simply because custody is decided in favor of one or the other parent, or even both (joint custody with or without equal time-sharing) does not mean *a priori* that the lives of those involved, especially the children, are settled. As children grow and develop, they interact differently with parents and peers; they acquire new modes of relating and expressing their needs and wishes. Parents change too. Many *win* the custody dispute only later to relinquish responsibility for the children because of changing feelings and circumstances.

Expeditious resolution of child custody requires time and patience, in addition to the special expertise necessary to reconcile disparate feelings involved in custody disputes. The Committee would do well to consider more flexible recommendations regarding the resolution of custody disputes. In difficult cases where both parents are found to be fit, I have recommended a period of judicially-mandated custody consultations to begin at the outset of the proceedings. In some cases I have proposed that the specialist periodically report progress or lack of it to the Court. Attorneys may be called upon in this cooperative effort to advise on other matters impinging upon custody, such as the status of child support, the home, and other assets. If progress is made, the Court may empower the expert to continue his or her efforts. In the event of a stalemate, the expert may submit a written report on the problems preventing resolution. The Court may then be in a better position to rule on the merits of the case.

In summary, the Pashman Committee has made extensive efforts to meet the problems of delay and acrimony in custody determinations by recommending:

- More extensive use of mental health experts;
- Dealing with custody and other issues separately;
- Limiting the course of these proceedings to three months.

However admirable its purpose, the problems of divorce and custody are inexorably entwined and cannot easily be separated. Three months is arbitrarily limiting. Time and patience is needed to ferret out the main issues that prevent accord, many of which are not recognized by either party to the dispute. A method is suggested whereby difficult cases may be mediated with the cooperation of both attorneys and judges. Further study of the above recommendations is warranted.

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Meeting with Judges Set

Second, our membership should be aware of an exciting meeting which will take place this month. For many years, it has been my hope that in a formalized way representatives of our Section might meet with representatives of the Matrimonial Judges Association. Although informal meetings between the bench and bar have occurred for years, and although members of the bench frequently attend our Section's sessions, there has never been a formal meeting in the past. Through the efforts of your Section's officers and the Hon. Harvey Sorkow of Bergen County, chairman of the New Jersey Matrimonial Judges Conference, such a session will take place shortly. In this regard, it is anticipated that Judges Sorkow, Long, Glickman, Serpentelli, Ferrelli, Farrell and Testa will be in attendance. The delegation from our Section will include Jeff Weinstein, Dave Wildstein, Barry Croland, Gary Skoloff, Ed Snyder, Tom Zampino, Don Gaydos, Dave Ansell and your chairman. I will be pleased to report on this important session in my next column.

Finally, I extend to all Section members my very best wishes for the new year. I hope as 1982 unfolds our Section will continue to grow, its program will continue to thrive and its basic goal of service to our membership will be fulfilled.

Mallory: Another Point of View by Richard H. Singer, Jr.

In the recently decided case of *Mallory v. Mallory,* 179 N.J. Super. 556 (1981), Judge Krafte held that proceeds in an Individual Retirement Account could be levied upon in order to satisfy a judgment for alimony and child support arrears.

The Equitable Distribution Subcommittee of the Family Law Section has been engaged in an exhaustive analysis of pensions and the problems they raise in family law. We have been fortunate to have working with us William M. Troyan and Rosemary Weiss, Pension Administrators and Actuaries. Mr. Troyan's office has prepared what they characterize as a response to the *Mallory* decision which raised some very interesting questions regarding that decision. The following article is reproduced with the permission of William M. Troyan Incorporated for the benefit of the members of the Family Law Section.

It is the hope of the Subcommittee members that we will be able to provide a continuing flow of information to the members of the Section on the subject of pensions. We are also most anxious for any input that any member of the Section would like to give us on the subject of pensions so that we can obtain the most comprehensive understanding of this complex area and all of the divergent issues in it for the benefit of all members of the Section.

A Response to the *Mallory* Decision

prepared by William M. Troyan Incorporated

In the *Mallory* case the court held that an I.R.A. corpus was within reach of a state court. Remember, this plan was not in pay status.

It should be recognized that to a degree the state courts are dealing with a new and complex issue when retirement plans and equitable distribution are involved. Nevertheless I believe the court's action was not within the scope of its authority. In support of my position some points are advanced which I believe merit review before we accept the *Mallory* case.

In its first footnote the court indicates it is dealing with a Code Section 408(a) I.R.A. Since it so limited the type of I.R.A. involved, are we to assume that the reasoning relates only to that specific form of I.R.A.? Were Individual Retirement Annuity Accounts established under Code Section 408(b) and Accounts Established by Employers and Certain Associations of Employers under Code Section 408(c) considered beyond the reach of the court? The issue is further clouded by the following words of the court:

> In the instant matter, we are confining ourselves to the narrow question as to whether or not we may permit attachment of the *corpus* of an I.R.A. account to satisfy a judgement for alimony and child support.

From the court's language it appears it intended to bring all forms of I.R.A. within its reach. I suggest this was the court's view since it did not again specify the type of I.R.A. involved. Further, its language was general when dealing with the corpus of an I.R.A.

The court was correct in looking to Congress for intent regarding the issues involved. Unfortunately it appears to have incorrectly interpreted the intent of Congress. In support of its interpretation of the intent of Congress the court recites Code Section 408(d)(6):

> The transfer of an individual's interest in an individual retirement account, individual retirement annuity, or retirement bond to his former spouse under a divorce decree or under a written instrument incident to such divorce is not to be considered a taxable transfer made by such individual notwithstanding any other provision of this Subtitle, and such interest at the time of the transfer is to be treated as an individual retirement account of such spouse, and not of such individual. Thereafter such account, annuity or bond for purposes of this Subtitle is to be treated as maintained for the benefit of such spouse.

At page 136 of Senate Report #93-383 the Senate discusses the essence of 408(d)(6). However, it is clear that they were dealing with voluntary transfers and were attempting to avoid the problems created by a Davis type transfer. At no point in the Committee discussion of Other Rules are *court ordered transfers* mentioned.

Interestingly on the same page of the Committee report, three paragraphs above the comment on Davis transfers the Committee stated, (when discussing an I.R.A. that invests in qualified retirement bonds):

> The bonds are to be issued in the name of the individual who purchases them for his retirement and are not transferable, under any circumstances, except to his executor in the event of his death, (or to a trustee for his benefit in the event he became incompetent to manage his own affairs). For example, the bonds could not be pledged for the payment of debts, and could not be assigned to a trustee in bankruptcy. *Also, the bonds could not be awarded to the individual's spouse as a result of a divorce settlement.* (Emphasis is mine.)

However, House Report #93-807 at page 135 provides a most lucid position on Congress' view of exclusive benefit and the antialienation of the I.R.A. corpus:

> Under the bill, the trust instrument of an employer- or union-established individual retirement account also is to provide that assets

Mallory *(continued)*

are to be held exclusively for the benefit of the participants or their beneficiaries. The exclusive benefit rule governing individual retirement accounts established by an employer or a union is the same rule that governs qualified plans and trust (sec. 401), and all of the requirements that must be met under the existing exclusive benefit rules also are to be met by these individual retirement accounts. For example, under the present exclusive benefit rule, the trust instrument must make it impossible for corpus or income to be used for, or diverted to, purposes other than for the exclusive benefit of the participants or their beneficiaries; this same rule is to apply to individual retirement accounts. Additionally, the exclusive benefit rule is to apply to individual retirement account investments in the same way as it applies to qualified plan investments.

Based on the above, the court's attempt to distinguish an I.R.A. from 401(a) plans, and to attack an I.R.A. corpus are in direct conflict with the expressed will of Congress.

Mallory did not, I believe, deal with a number of potential issues generated by its decision. Let me mention three:

1. Does *Mallory* assume that a Rollover I.R.A. is to be treated in the *Mallory* manner? I found no mention of this form of I.R.A. in the court's reasoning. The court appears to have been in error when it said:

   "The I.R.A. can also be distinguished from most other ERISA pension plans in one further respect. The only funds present in the I.R.A. are those of the settlor."

   I do not believe the court had in mind I.R.A. accounts permitted under Code Sections 408(d)(3)(A)(ii) and 409(b)(3)(C). These I.R.A. accounts actually represent employer contributions rolled over to a special account. Further they may in many instances be again rolled over, this time from the "conduit I.R.A." to another 401(a) corporate plan. The "conduit I.R.A." presents a unique problem. This I.R.A. can change its form. How secure is it from attack when it has been rerolled into another corporate 401(a) plan? Does it retain the taint of its prior status? Will the court assume it can reach these funds and still try to assign its corpus? To say the least, such a posture would at best be strained.
2. A second problem would be created by the death of the I.R.A. participant. Let us change some of the facts of the *Mallory* case. Assume that Mr. Mallory, still in arrears for child support and alimony:
   1. Remarries.
   2. He changes his beneficiary designation of his I.R.A. to his new wife.
   3. He then becomes subject to the order entered in this case.
   4. He dies.

   Who gets the corpus of the I.R.A.? As we read:

   Code Section 408(a), 408(a)(4), and 408(a)(7) it goes to his new wife.

   Does the trustee comply with explicit mandates of federal law or should the trustee be responsive to the order of the state court?
3. A third issue is the competence of a former spouse to bring an action under ERISA section 502. My understanding is that this action was brought subsequent to the final decree of divorce. I make the assumption that Randi S. Mallory, the former spouse of Louis P. Mallory, was no longer the beneficiary of his I.R.A. I further assume that plaintiff brought suit under ERISA section 502(a)(1)(B) which states:

   (a) A civil action may be brought
   (1) by a participant or beneficiary—
   (b) to recover benefits due him under the terms of his plan, to enforce his rights under the terms of his plan, or to clarify his rights to future benefits under the terms of the plan.

   Court footnote three indicates that "beneficiary" is extended to include former spouses and the issue of that union. Though the intent is noble, a reading of the preamble to ERISA (Title I, Subtitle A, section 2(a), 2(b) and 2(c) leads the writer to a different conclusion. Both the preamble and the congressional reports clearly indicate that the primary goal of ERISA is to guarantee retirement benefits and assure receipt to those who actually worked for the benefit. Toward that end ERISA section 3(8) clearly did not include non-designated former spouses.

   It should be noted that the preamble (ERISA section 2(b)) mentioned by the court indicated the participant and beneficiaries were to also be covered by the Reporting and Disclosure provisions of ERISA.

   Subtitle B—Regulatory Provisions
   Part I—Reporting and Disclosure
   Duty of Disclosure and Reporting

   revealed no language reflecting an inclusion of ex-wives.

   Hence, neither ERISA nor the Congressional Reports support the court's broad definition of "beneficiary."

The entire matter of I.R.A. and equitable distribution is further complicated by Economic Recovery Tax Act of 8/13/81. Effective 1/1/82 I.R.A. and 401(a) plans may under certain circumstances co-mingle assets. In a later article I will review the impact of ERTA on matrimonial actions.

Your comments on the above are welcome. Those wanting copies of portions of Committee Reports or Code and Act Sections mentioned, so state on your letterhead and send request to William M. Troyan Incorporated, 114 Maple Avenue, P.O. Box 638, Red Bank 07701.

Recent Cases

by Myra T. Peterson

ALIMONY—Consensual agreement providing for modification after three years because of supporting spouse's anticipated increased income will be modified only with reference to that standard of living reflected by the parties' joint incomes at the end of three years.

The parties were divorced in 1975 when the defendant-husband was just embarking on a career, hopefully lucrative, as an orthopedist. Because it was anticipated that the defendant's income would rise, the agreement between the parties provided that for three years the plaintiff-wife would receive support with small annual increases and a cost-of-living adjustment for those years. A further provision stated: "It is further understood that the support provided for in the third year, as outlined above, will continue thereafter until such time as the parties modify it by agreement or an application is made to the court for modification."

After the three-year period, the defendant was to provide the plaintiff with a statement of earnings every six months and copies of his federal income tax returns.

The plaintiff did not move for an increase in support until 1981, six years after the agreement was entered into.

The plaintiff noting that her modification application was not made under *Lepis v. Lepis,* 83 N.J. 139 (1980) but that she was instead asking only that the agreement be enforced, maintained that support should be modified and fixed in accordance with the parties' *present* income and the standard of living that income could sustain. The defendant maintained that to allow modification based upon his increased earnings alone would enable the plaintiff to live at a higher standard of living than enjoyed during the marriage.

The trial court rejected both contentions. Finding that the agreement established the plaintiff's right to make application for modification after three years, the court held that it was the standard of living sustainable at the end of the three-year period provided for in the agreement that would govern the plaintiff's modified support award.

The agreement, by its terms which provided that modification could be sought at a time specific, took the plaintiff's modification application out from under the *Lepis* umbrella. Said the court:

> A court of equity will not permit plaintiff to sit back and select that time period which finds the parties' economic ambience most beneficial to her, then make application and have that as her basis for establishment of the standard of living in which she is entitled to be maintained. It is clearly inequitable and unconscionable for this court to permit plaintiff to wait until defendant's income maximizes and to then fully participate in his future earnings and success, to which she marginally contributed.

A plenary hearing was ordered to determine the standard of living based on the parties' combined incomes at the end of the three-year period, and the defendant's "ability to obtain and advance in her employment opportunities in those years. The court noted that any *future* application for modification would be governed by *Lepis.*

[Comment: The court's decision was carefully reasoned and dealt equity to the parties. In Lepis, *the Supreme Court stated that as a prerequisite to modification, consideration must be given as to "whether the earlier agreement . . . provided for the present circumstances." 83 N.J. at 160. In* Petersen v. Petersen *the Supreme Court strengthened still further the* Lepis *rule that if an existing support agreement provided for future contingencies the contractual arrangement as to such future happenings should be respected. Although unnecessary to the result reached in* Petersen, *the* Petersen *Court deliberately raised its comments, as to the presumption of validity to be given to contractual arrangements that provide for future events, to a level above* obiter dictum. *The Court honed* Lepis *and specifically stated: 1) That there was to be a "predisposition in favor of [the] validity and enforceability" of a spousal agreement that provided for future contingences; 2) "[T]he weight which will be due such agreements will grow in direct proportion to the degree" that an agreement has "been genuinely tailored to all of the matrimonial concerns of the parties"; and 3) "[T]o the extent that the parties have developed comprehensive and particularized agreements responsive to their peculiar circumstances, such arrangements will be entitled to judicial deference.*

The trial court recognized that the agreement had, in fact, provided that modification would be appropriate at a time certain, three years after the divorce. The agreement was explicit; the parties should be bound by that specificity.

Presumably, if in the future, either party seeks modification under Lepis, *the standard of living sustainable three years after the divorce, not the standard of living during the marriage, would be the standard of living to which modified support would be molded.*

Importantly, the plaintiff's attempts at self-sufficiency were also to be considered when the modification application was addressed at a plenary hearing, in keeping with the Pashman Committee's recognition that a supported spouse's employment skills should be developed so as to enable that spouse to become self-supporting.]

Sterling v. Sterling, M-17606-73, (Bergen, Krafte, J.J.D.R.C., T/A).

Recent Cases *(continued)*

COUNSEL FEES—*Pendente lite* award of counsel fees against named and noticed corespondent inappropriate.

Plaintiff-husband moved for an award of counsel fees *pendente lite* against the named and noticed corespondent who had sought to obtain the right to intervene and file an answer. The court held that *pendente lite* counsel fee award was inappropriate.

The court noted that in *Robinson v. Robinson,* 13 N.J. Misc. 210 (Chan. 1932) and *Coor v. Coor,* 124 N.J. Super. 341 (App. Div. 1973) it had been held proper to award counsel against a corespondent who intervenes in a suit and therefore becomes a party, but that a *pendente lite* award "might work to prejudice the corespondent, by making the threat of fiscal sanction economically burdensome, if not prohibitive, for the corespondent to pursue his right to deny plaintiff's allegations." An award of fees and costs against a corespondent at final judgement, however, is not precluded.

[*Comment: In a matrimonial action a* pendente lite *award of counsel fees is appropriate so as to put matrimonial spouses-litigants on an equal footing to pursue their respective cases. In no other type of action in the state courts of New Jersey is an award of counsel fees prior to judgment permitted. There is no reason to permit a litigating spouse to be subsidized for fees* pendente lite *by a third party merely because that third party is a named or intervening party in a suit and merely because the action is a matrimonial action.]*

Averso v. Averso, 181 N.J. Super. 146 (Ch. Div., Bergen, Sorkow, J.S.C. 1981).

CUSTODY—Uniform Child Custody Jurisdiction Act allows New Jersey jurisdiction of custody dispute despite continuing jurisdiction in sister state when child resides with a parent in New Jersey for significant period of time and that parent alleges future harm will result if children are returned to non-resident parent.

The parties were divorced in Texas in 1977. The defendant-wife was awarded custody of the two children; the plaintiff-husband was accorded visitation rights. Pursuant to the visitation schedule, the children visited with the plaintiff at his residence in Indiana for four weeks in June, 1979. On the last day of visitation, he obtained an order for temporary custody from the Indiana Superior Court.

In September, 1979, the plaintiff was granted custody after a plenary hearing in Indiana. The defendant appealed.

In March or April, 1980, the plaintiff moved to New Jersey with the children as a result of relocation by his employer. He did not seek leave of any court for permission to move the children to New Jersey. Contemporaneous with the move, the Indiana Supreme Court reversed the Superior Court custody order on the grounds that Indiana lacked jurisdiction to modify the Texas custody decree.

In June, 1980, the plaintiff filed suit in New Jersey seeking custody alleging that the defendant was an alcoholic, who, with her new husband, had abused the children in the past and would abuse them in the future. The plaintiff contended that an emergency existed, that the defendant and her husband inflicted severe corporal punishment on the children, neglected their health, were unconcerned as to their education, and required them to cook their own meals. Psychological evaluations and a hospital record as to the defendant's alcoholism were annexed to the complaint.

The matter was considered by the court without a plenary hearing, in September, 1980, and a decision was rendered in May, 1981. The trial court, finding the plaintiff's allegations "broad," rejected the plaintiff's contention that there was need for emergent protection for the children and dismissed the plaintiff's complaint for lack of jurisdiction. The court held that the appropriate place to prove the plaintiff's allegations was Texas where the abuse allegedly occurred. Stating that he would sign a writ of habeas corpus brought by the defendant, the judge directed the plaintiff to bring the children to court for delivery to the defendant.

The plaintiff sought a stay and the appointment of a *guardian ad litem* from the Appellate Division and filed a notice of appeal of the trial court order. The stay was granted, the application for appointment of a *guardian ad litem* was denied and the appeal was accelerated.

On appeal, the Appellate Division held that the New Jersey court had, and should exercise, jurisdiction and conduct a plenary hearing "when children are residing in New Jersey with a parent, for a significant period of time, and that parent alleges that the children will be mistreated and irreparably harmed if they are returned to the non-resident parent . . . "

The court found such authority in the Uniform Child Custody Jurisdiction Act, N.J.S.A. 2A:31(a) (2) and (3):

> (2) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or
>
> (3) The child is physically present in this state and . . . (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected . . . .

The court distinguished the situation where a parent's behavior is reprehensible as when a child is abducted to New Jersey but in *obiter dictum*

stated that even where a litigant's conduct *is* reprehensible or a litigant has brought a child into New Jersey in violation of another state's order, if a child will be harmed should he or she be returned to the non-resident parent, New Jersey should not abdicate its parens patriae duty and should exercise jurisdiction.

The lower court order was reversed and the case remanded.

[Comment: By the time the trial court considered the matter, the children had been with their father in New Jersey for six months; by the time its decision was rendered they had been in New Jersey for over a year; by the time the Appellate Division heard the case, the children had been in New Jersey for one year and one half. The Appellate Division did not state whether or not the children's continued residence in New Jersey until the appellate decision had impacted upon the case. While six months or one year or eighteen months may constitute the "significant period of time" the Appellate Division gave as a prerequisite for jurisdiction (it must be remembered that the Indiana Supreme Court had held that Texas had continuing jurisdiction), if the plaintiff had filed suit immediately upon his arrival in New Jersey and custody was decided within three months after issue was joined following the Pashman Committee Report Recommendation (II) (A) (2), is the "significant period of time" requirement violated? If a non-custodial parent moves with his or her children to New Jersey for a legitimate reason (here the father was transferred to "the Philadelphia area") for less than a "significant period of time," and it is necessary to protect the children from mistreatment or abuse, should not New Jersey exercise jurisdiction pursuant to N.J.S.A. 2A:34-31(a) (3) and New Jersey's parens patriae duty?]

Marcrum v. Marcrum, A-4162-80, Decided November 5, 1981 (Michels, McElroy, J. H. Coleman, J.J.A.D.)

CUSTODY—Even if child would benefit from joint physical custody, if there is initial custody determination of sole custody, parent seeking custody modification must show change of circumstance warranting modification.

The parties had one child, Salvatore, born in 1961, seven years after the marriage. Shortly after Salvatore's birth, the parties separated. Salvatore remained with his mother. In 1974 a separation agreement providing that the defendant-wife would have custody of Salvatore with the plaintiff having visitation on Sundays and for one month each year was executed. That agreement was incorporated into a 1974 judgement of divorce.

In March, 1979, the plaintiff applied to the court to transfer sole custody of the child to him and reduce the amount of support he was required to pay. He claimed that the defendant had neglected and abused the child and that his own circumstances had changed; he had remarried. After a plenary hearing and an interview with the child *in camera,* the court, while rejecting the plaintiff's contention that the defendant was an unfit parent, ordered alternating physical custody (alternate weekends and alternate Tuesdays through Thursdays with the plaintiff) and modified the support the plaintiff was to pay in light of this change. The defendant appealed.

The Appellate Division reversed. (It should be noted that there was no appellate brief filed on behalf of the plaintiff-father, nor was his cause argued.)

The Appellate Division recognized the Supreme Court's approval of joint custody in *Beck v. Beck,* 86 N.J. 480 (1981). The court, however, relying upon a footnote in *Beck,* 86 N.J. at 496, *n. 8,* and citing *Sheehan v. Sheehan,* 51 N.J. Super. 276 (App. Div. 1958), held, *inter alia,* that "even though the relationship between the child and both of his parents may be such that it could reasonably be concluded that the child would benefit from joint custody, the party seeking modification of the initial custody determination must show a change of circumstances warranting modification."

The court held that Salvatore's relationship with his mother had been stable and happy, that Salvatore was well adjusted, that Salvatore did not have the type of relationship with his father "essential" to joint custody *(in camera* Salvatore had stated that he did not wish to stay for longer periods with his father), and that the father's change in marital status or living arrangements did not constitute the change of circumstances necessary for a modification of custody. The court added that even if such a change of circumstance had been shown, the *Beck* standards had not been met. The proofs did not show that "the child recognize[d] both parents as sources of security and love and wish[ed] to continue both relationships," the parents did not "exhibit a potential for cooperation in matters of child raising," and Salvatore did not wish the change. The court further voiced disapproval of the ordered "constant shuffling of Salvatore between his father and his mother every few days, week in and week out . . ."; it would be disruptive of "the stability essential to Salvatore's emotional well being and development."

[Comment: The Beck *children, then ages 8 and 10,* in camera *had stated that they did not want to live with their father (as did Salvatore) and* Beck *permits joint custody even when parents are hostile to each other, although there must be a potential for cooperation in child rearing, 86 N.J. at 498. During the* Beck *plenary hearing, Dr. Judith Greif testified that emotional stability results from emotional rootedness with two parents and not geographical rootedness in one home. Additionally literature on joint custody abounds with creative alternating living arrangements including the "constant shuffling" disapproved by the Appellate Division (although "constant shuffling" probably requires parents more cooperative and supportive of each other than Salvatore's as there need be constant parental contact and*

cooperation). The appellate court—as to the above factors—substituted its judgment as to the best interests of Salvatore for that of the trial court —a substitution the Beck *Court specifically disapproved. 86 N.J. at 496. It thus can be argued that this case rests upon the* Beck *footnote and* Sheehan *as to the showing of changed circumstances necessary for a modification of an initial custody determination.]*

Mastropole v. Mastropole, 181 N.J. Super. 130 (App. Div., Michels, McElroy, J. H. Coleman, J.J.A.D.)

ESTATES—A party who has a "live-in" relationship with another without the benefit of marriage may not recover under the Wrongful Death Act for pecuniary loss sustained by reason of the partner's accidental death.

The "live-in" partner had resided with the decedent for seven years and they intended to marry. After his death, the "live-in" partner sued for damages as if she were a "surviving spouse" under N.J.S.A. 3A:2A-34 of the intestacy statute.

The Wrongful Death Act, N.J.S.A. 2A:31-4, provides that the amount recovered under that Act "shall be for the exclusive benefit of the persons entitled to take any intestate personal property of the decedent."

The court rejected the plaintiff's claim, finding that *Kozlowski v. Kozlowski,* 80 N.J. 378 (1974) and the "palimony" cases in other states were not determinative as they were based on contractual grounds as opposed to a residential arrangement or the financial dependency of one cohabitant, and that *Bullock v. United States,* 487 F. Supp. 1078 (1980) wherein a cohabitant recovered for loss of consortium resulting from the other cohabitant's injury was also not determinative. Where "the right of consortium is judge-made law" and could therefore be expanded, "[t]he law of intestacy is . . . statutorily created and is not subject to judicial amendment."

The trial court noted that "consensual sexual conduct outside of the family tradition has not found ready acceptance by the legislature in areas where the stability and responsibility of family life may be affected" and found it significant that "despite the attraction and convenience of live-in arrangements to a segment of the population," N.J.S.A. 3A:2A-34 (making provision for surviving spouses to inherit an intestate share of a decedent's property) did not provide for unmarried cohabitants. As significant to the court was the fact that "the legislature has condemned 'common law' marriages as 'absolutely void,' N.J.S.A. 37:1-10." Said the court: "The preservation of familial law is so essential that where questions of inheritance, property, . . . are involved, an adherence to conventional doctrine is demanded."

Summary judgment against the plaintiff was granted.

[Comment: Compare this result with Dawson v. Hatfield Wire and Cable Co., *59 N.J. 190 (1971), a worker's compensation case, wherein the Supreme Court held that the petitioner qualified as a "wife" under N.J.S.A. 34:15-13(f), where the employee-"husband" had never been legally divorced from his former wife but had lived with the petitioner as man and wife for an extended period of years after a ceremonial marriage, the petitioner was economically dependent upon the employee and there were no other claims against the employer. The* Dawson *Court stated: "She thought she was a wife, she fulfilled the role of wife. . . . The purpose of the statute will obviously be advanced by recognizing petitioner as coming within the favor of this remedial legislation. The test of the relationship of husband and wife should not be quite the same in the context of this type of law, designed to supply a social need and to remedy a social evil, as in the area of familial law where questions of property, inheritance, legitimacy of offspring and the like rightly demand a more rigid adherence to conventional doctrine." (In* State v. Gosnell, *106 N.J. Super. 279, 284 (App. Div. 1969), the court noted that "[t]he Death Act is not construed with the liberality of the Workmen's Compensation Act. . . .")*

The court's interpretation as to legislative intent of the Wrongful Death Act and its supremacy over case law cannot be faulted. The practitioner who handles cohabitation contracts should be alert to the necessity of including a life insurance provision where one cohabitant may be dependent upon the other for financial support.]

Cassano v. Durham, L-39317-79 (Law Div., Passaic, Schwartz, J.S.C., Decided May 29, 1981.)

PENSIONS—Vested but unmatured pension plans subject to equitable distribution.

In *Kikkert v. Kikkert,* 177 N.J. Super. 471 (App. Div. 1981), the Appellate Division, Judges Fritz, Polow, and Joelson, disapproved of Judge Griffin's reasoning in *Mueller v. Mueller,* 166 N.J. Super 557 (Ch. Div. 1979), approved the result in *Weir v. Weir,* 173 N.J. Super 130 (Ch. Div. 1980), and ruled that a vested but unmatured pension plan was subject to equitable distribution. The Supreme Court affirmed *o.b.*

In *Kikkert,* the plaintiff-husband was 49 years old at the time of the filing of the complaint, was vested in a pension plan but was not entitled to receive benefits until 1990 when he would reach 60 years of age. He would be entitled to benefits whether or not he continued at his employment but if he failed to survive until age 60, no benefits would be available except under certain limited circumstances. The trial court, relying upon *Mueller, (Weir* had not yet been published), held that the pension was not an includible asset and the Appellate Division reversed.

The Appellate Division, noting the *Stern v. Stern,* 66 N.J. 340 (1975) concept that inquiry as to includibility should properly be focused on "whether rights or benefits were 'acquired' by the parties or either of them during the marriage, rather than on whether they were 'vested'," found

Recent Cases *(continued)*

pension benefits to be a "deferred [form] of compensation earned during coverture" distributable "to the extent" such benefits were "generated by the mutual effort of the parties." Equitable considerations require inclusion of such benefits for distribution where an employee has actually qualified for benefits during the marriage and the other spouse was deprived of enjoyment of additional income—whether or not the employee contributed to the cost of the pension plan. "Each spouse had the same expectation of future enjoyment with the knowledge that the pensioner need only survive to receive it."

The method of distribution would hinge on the ability to establish present value of the pension and the availability of other assets for distribution. The preferred disposition as to a pension should be the setting of a present value of the pension and immediate distribution of the pension and the other distributable assets. If the present value cannot be established and/or there are no other assets to distribute, a fixed percentage of the non-employee spouse's share should be set with receipt by the non-employee spouse to await the time the pension monies are available.

The Supreme Court affirmed 7-0 with Justice Pashman, in a lengthy concurring opinion, explaining the reasons for his dissent in *Kruger v. Kruger,* 73 N.J. 464 (1977) (a case dealing with federal military retirement and disability pay) and his concurrence in *Kikkert,* and stating that, in part, his dissent in *Kruger* was based upon too "narrow [a] reading" of the equitable distribution statute.

[Comment: Kikkert *unmuddies the muddy waters surrounding distribution of vested pension plans but does not solve the practitioner's problems. The broad language of* Kikkert *cannot substitute for a careful reading of the vesting conditions of a pension plan before argument is made as to the includibility or nonincludibility of the plan in equitable distribution.*

Additionally, the non-employee spouse's receipt of a pension, if it must await receipt of the pension monies by the employee spouse because of the nonavailability of other distributable assets, will occur at a time when the supporting employer spouse may make a Lepis *application for modification of support since his or her income will be lower upon retirement. The dependent, non-employee's receipt of the share of the plan that would await the pension monies being available for distribution will impact upon the amount of support a dependent spouse would receive should a* Lepis *modification occur. Thus, the percentage certain of the pension the dependent spouse should receive in equitable distribution will negatively impact upon the support he or she is to receive and in many cases, the percentage to be received in equitable distribution may be substituted for support. Thus, a non-employee spouse's future receipt of a percentage of a pension plan may be, in effect, a nullity since it may be, at the time of receipt, both equitable distribution and support.]*

Kikkert v. Kikkert, A-23 (Supreme Court, September Term, 1981).

In Memoriam

by Jeffrey P. Weinstein

Robert J. Citrino, Esq. was my friend. That did not make Bob unique. Robert J. Citrino was a strong, able, articulate and compelling adversary. That did not make Bob unique. Robert J. Citrino died a few days before Christmas, 1981, while giving Christmas presents to the children of Nutley. Bob was not unique simply because hundreds and hundreds of people attended his funeral, including the governor, judges, legislators, the attorney general and other members of the executive branch of our state government. Robert J. Citrino was not unique merely because he was "Mr. Republican in New Jersey" and was loved by Democrats throughout our state. Robert J. Citrino was unique because he was not a man who was afraid to love and because he was a man who gave of himself.

Though there may be a void on the third floor of the Hall of Records Building in Newark, as I walk down the hall on my way to appear before either Judge Strelecki or Judge Glickman because I will not hear Bobby's voice yell, "Hey, how the . . . are you?" the corridors, at least for me, will become even more special as I will think of Bobby and his penchant for seeking justice, for doing right and for caring. Bobby gave to us more than most of us could give to him. Bobby's giving was not enough for him. Though no death can be just, Bobby's death was so terribly unjust that for me it once again brought to reality that as attorneys we must give of ourselves to make this a more just world.

Though no death can be considered timely, Bobby's death was particularly untimely, yet I am sure Bobby could not or would not tolerate those words. There is no more joyful time of the year than Christmas to many of us. Now, Christmas will have a new and special meaning to me. Now, Christmas will be a time of giving, as Bobby gave to us. In my adult world, Robert J. Citrino epitomized my childhood Santa Claus. He gave us a legacy of laughter and good will to all. We will all miss him but we are all better people because of him. That is the way he would want it to be and that is the way it should be.

The New Jersey Institute for Continuing Legal Education in cooperation with the Family Law Section of the New Jersey State Bar Association and the New Jersey Society of Certified Public Accountants is pleased to announce a full-day seminar on

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Professor Sander's presentation will be supplemented by one half-hour presentations from Hon. Virginia S. Long, Raymond Silverstein, CPA, and Thomas S. Forkin, Esq. They will, respectively, provide their views on judicial responsibilities with respect to taxes incident to divorce and separation, the role of the CPA in such cases and a practical application of the various tax ramifications for matrimonial attorneys.

Following Mr. Forkin's presentation the remainder of the afternoon session will be devoted to smaller group workshops for more personal discussions of the topics covered by all of the speakers. Each workshop will be hosted by an attorney and a Certified Public Accountant.

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Workshop Leaders in addition to the lecturers:

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J.H. Cohn & Company
(Newark, NJ)

HOWARD A. GOLDBERG, ESQ.
Horn, Kaplan, Goldberg & Gorny
(Atlantic City, NJ)

IRA A. LEVY, ESQ.
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STANTON MELTZER, CPA
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Skoloff & Wolfe
(Newark, NJ)

MELVIN J. WALLERSTEIN, ESQ.
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Tuition: Tuition is $95, including luncheon. For lawyers admitted after January 1, 1979, tuition is $65.

Special Registration Notice: Because seating is limited, early registration is encouraged. It is anticipated that door registrations will not be permitted.

Materials: All full registrants will receive a program book containing lecture outlines and a treatise by Professor Sander on TAX ASPECTS OF DIVORCE.

ICLE REGISTRATION PROCEDURE

REGISTRATION: To register for any ICLE course, indicate program and date and mail with your check for the appropriate fee to ICLE, 15 Washington Street, Newark, New Jersey 07102-3105. Please mark your pocket and desk calendar with the program date, hour and site. You will not receive an admission ticket. You will be admitted by having your name checked on a prepared registration list. Should you wish a receipt other than your cancelled check, please make that request when registering and a receipt will be waiting for you at the program. While ICLE encourages door registrations, programs are occasionally closed or postponed. To avoid a wasted trip, please call on the previous business day to make certain that the program is meeting as announced.

CANCELLATION: Refunds will be issued to all pre-registrants whose request reaches ICLE at least 48 hours before the start of the program. Refunds will be subject only to the customary $5 processing fee. Pre-registrants who miss programs without a timely cancellation request will receive full credit for nonrefundable payments. This credit may be used for pre-registration for future ICLE program (not for door registration) or for the purchase of ICLE publications. For further information, please call Marge West, ICLE Program Administrator, at (201) 648-5571. THE TAPING OF ICLE SEMINARS IS NOT PERMITTED.

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Mail to: Institute for Continuing Legal Education
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Newark, NJ 07102-3105

Enclosed is a check for $_____ payable to the Institute for Continuing Legal Education. Please enroll me (and my associates listed on the separate sheet attached) in Tax Aspects of Divorce and Separation at Woodbridge on February 27.

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Legislative Report

by Jeffrey Weinstein

On Monday, January 4, 1982 former Governor Brendan Byrne vetoed S-1020, dealing with rehabilitative alimony. The bill, in a last-minute rush, had passed both the Senate and Assembly. Our Section was opposed to this legislation and voiced its opposition. The Section Executive Committee unanimously endorsed a resolution calling for its veto. Letters were transmitted to former Governor Byrne and to his legislative counsel by individual members, asking that the bill be vetoed. Our efforts were successful.

It is important that the committees established by our chairman, Lee M. Hymerling, become aware of the legislative process so we can have significant impact, not only on pending bills but also on bills which we may propose for legislation, if needed.

I was pleased to learn that Governor Thomas Kean appointed W. Cary Edwards, Esq., as his counsel. Mr. Edwards was an extremely able and articulate assemblyman. He is a competent practitioner who is industrious and energetic. I wish Cary the very best in his new position.

During the Byrne Administration, there was a great deal of proposed legislation which required Section attention. Some of the bills will be reintroduced shortly in the new Legislature under different bill numbers. I will report on them in my next legislative column.

It is clear that we must not be afraid to attempt to have impact on our Legislature for the creation of laws. As attorneys we are not afraid to change the law in a courtroom. As attorneys we should not be afraid to change the law, where appropriate, in the Legislature. Obviously, other interest groups have demonstrated their desire to amend many of the statutes and restate other statutes which deal with matrimonial law.

If there is a need for change in matrimonial law, we should be in the forefront and not simply react. Our input is essential not only to the matrimonial practitioner but also to the public. I would urge each and every one of you to review pending bills and correspond with David M. Wildstein, Esq., our legislative coordinator; any of the substantive Family Law Section committee chairmen; or any of the Family Law Section officers.

(continued from page 69)

Footnotes

1. 7 *Family Law Reporter* 2669, September 1, 1981.
2. See *The Federal Rules of Evidence*, Rule 701 Opinion Testimony by Law Witnesses, which states:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue.

and see Rule 703 Basis of Opinion Testimony by Experts which states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.