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CHAIR'S COLUMN

Will Palimony Go the Way of the Siberian Tiger?

by Charles F. Vuotto Jr.

There may be fewer than 200 Siberian tigers in the wild. If the proposed amendment to the Statute of Frauds is enacted, claims for palimony will be as scarce as these majestic beasts.

AMENDMENT TO STATUTE OF FRAUDS

On March 16, 2009, the New Jersey Senate passed S-2091, which would amend N.J.S.A. 25:1-5 to prohibit the enforcement of 'palimony' agreements unless such agreement is made in writing. The NJSBA has opposed S-2091 since the proposed legislation was first drafted in 2004. Instead of the language contained in S-2091, the Family Law Section Executive Committee has drafted a comprehensive palimony statute. The proposed New Jersey Palimony Statute incorporates many of the principles established through New Jersey decisional law, with revisions as deemed appropriate by the executive committee (but only after much debate).

To a large degree, the Senate bill was a reaction to the decision in *Devaney v. L'Esperance*[1] wherein the New Jersey Supreme Court dealt with the question of whether cohabitation was a necessary element in every palimony claim. The Court ultimately held that cohabitation was not an element, but rather a factor to be considered. The Court stated that a marital-type relationship is essential to any palimony claim; however, cohabitation is not essential to a determination of a marital-type relationship because today there are married couples who may be separated by employment, military service, or educational opportunities.

WHY THE AMENDMENT TO STATUTE OF FRAUDS IS WRONG

The executive committee believes the proposed statute disproportionately prejudices the economically inferior partner in a long-term relationship akin to marriage, who has become dependent on the economically superior partner.

PROPOSED PALIMONY STATUTE

Because of the potential for frivolous claims in relationships not memorialized by the ceremony of marriage, there is a logical basis to require that a promise to support be in writing in order to prove that such a promise was actually made and what its terms were. However, as stated in the Family Law Section's initial position opposing the amendment to the Statute of Frauds, such a requirement is fraught with potential harm and possible inequity to a dependent person who has entered into a committed relationship to his or her detriment. Moreover, when a promise for support has been made, equity and fairness require that such a promise be enforceable irrespective of whether the promise was made in writing. To impose a requirement that such promises be made in writing places an undue burden upon the dependent party who has relied, to his or her detriment, on the promise, and exposes that person to the possibility of becoming a public charge.

However, greater safeguards are required beyond that which the law currently provides. As such, the Family Law Section's proposed palimony statute does not require the agreement to be in writing. However, the proposed statute provides for a rebuttable presumption

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that there can be no palimony cause of action without cohabitation. The proposed statute will incorporate the existing law with certain modifications necessary to protect all parties engaged in such relationships.

PROPOSED NEW JERSEY PALIMONY STATUTE

a. Definition: Palimony is defined as a financial award made pursuant to the provisions of this Act.
b. The Legislature makes the following declarations regarding palimony claims:
   1. Enforcement of specific agreements, whether express or implied, between unmarried or non-civil-union partners in a committed relationship, regardless of whether the couples are same-sex couples or heterosexual couples, serves the public policy of this State.
   2. The formation of a marital-type or civil-union-type relationship between unmarried or non-civil-union partners may, legitimately and enforceably, rest upon a promise by one to support the other.
   3. Agreements between unmarried or non-civil union partners are intensely personal rather than transactional in the customary business sense. As such, special considerations must be taken into account to determine whether such a contract has been entered into and what its terms are.
   4. Valid agreements between unmarried or non-civil union partners in a marital-type or civil-union-type relationship, which do not rest exclusively on meretricious consideration, should be enforced in the courts of this State.
   5. It is in the interest of this State to enforce a promise for financial support made between partners in a committed, marital-type or civil-union-type relationship.
   6. In the absence of recognition of palimony claims, the dependent partner in these committed relationships may be left without a means of adequate support.
   7. It serves the public's interest that all evidence required by this Act be proven by a preponderance of the evidence.
c. A valid palimony agreement must include the following elements, which must be proven by a preponderance of the evidence:
   1. A promise to support. Which may be oral, express or implied;
   2. The formation of a Marital-type or Civil-Union-type Relationship. Which shall be defined as the undertaking of a way of life in which two people commit to each other, foregoing other liaisons and opportunities, doing for each other whatever each is capable of doing, providing companionship, fulfilling each other's needs, financial, emotional, physical, and social, as best as they are able;
   3. Cohabitation. It shall be a rebuttable presumption that there can be no palimony cause of action without cohabitation; and
   4. Valid consideration. Which shall be real and substantial and not include meretricious consideration.
d. In determining whether a valid agreement exists, the court shall consider the following factors, which must be proven by a preponderance of the evidence, in determining whether (c)(1) through (c)(4) have been satisfied:
   1. Whether the parties' relationship was serious and lasting;
   2. Whether the parties established a common residence;
   3. Whether the surrounding circumstances are indicative of a promise;
   4. Whether the parties held themselves out as being in a committed relationship;
   5. Whether there was a recognition of the relationship by the community;
   6. Whether there was intimate or romantic involvement;
   7. The duration of the relationship;
   8. Whether the parties shared joint assets or liabilities;
   9. Whether there were joint contributions to household expenses;
   10. Whether the promisee made non-monetary contributions to the household;
   11. Whether the promisee detrimentally relied upon the promise to support;
   12. Whether the parties assumed parental responsibilities together;
   13. Whether the promisee ended the relationship and if so, under what circumstances; and
   14. Any other relevant evidence.
e. Upon a finding of a valid palimony agreement, the court may grant the following relief:
   1. Damages (including but not limited to a lump sum payment or periodic payments).
   2. Specific performance based upon the parties' agreement.
   3. A court may not award spousal support or order equitable distribution of property between individuals who are not married to one another except as expressly permitted in accordance with this Act. However, nothing in this Act shall preclude a palimony claimant from also asserting claims based in law or equity as otherwise afforded in the law. Equitable claims can include, but not be limited to, implied contract, quantum meruit, unjust enrichment, resulting trust, constructive trust, and joint venture.
   4. The financial circumstances

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"The Sun Also Rises"

A Challenge to the New Jersey Family Bar

by T. Sandberg Durst

As many will note, the title of this piece is taken from one of the most influential novels of the 20th century. It is, therefore, a fitting title for a piece about one of the most influential members of the New Jersey family law bar.

In proclaiming that the sun also rises, Ernest Hemingway also points out the poignant reality that the sun must also set. As of December 2009, a bright sun that has cast its glow over the practice of family law in New Jersey for almost 40 years has set. Robert J. Durst II has retired from the practice of law. As his son, I am glad to see him take this step while he can still enjoy his retirement. As a member of the New Jersey family law bar, I must confess to the sense of loss I feel as a result of his retirement.

Reciting the list of accomplishments, awards, and accolades he has garnered throughout his career would take too long, and would serve to detract from his true legacy. While he was honored to receive the Tischler Award and was proud of his repeated designation as a "Super Lawyer," the innumerable awards meant less to him than the contributions he made to the practice of family law. His greatest rewards came in the form of sharpening the skills of new attorneys, developing the body of substantive law and promoting professionalism and competency among members of the bar by way of his frequent lectures, his evidence seminars, articles and the annual Boardwalk seminar. Chances are that anyone reading this has heard him speak, and has taken something away that has benefitted their practice.

In taking his awards with him, what does he leave behind? If you speak to attorneys who have worked for him, the adversaries who have worked against him, the judges he has appeared before, and most importantly, the clients he has served, the answer becomes clear.

From the members of his department he demanded a commitment to the practice. He taught me to be a zealous advocate while remaining intellectually honest. He instilled a belief that sound representation often required that the client be given a reality check: All expectations cannot be met. In our roles as attorneys, he said, we championed the integrity of the court system, our firm, our clients and ourselves. Working in a manner that damages the integrity of any facet of the system was simply wrong, and the cost for doing so too great. When working with him, our opinions on strategy were given fair consideration. He gave his associates authority to actively manage files and interact with clients, and in doing so provided tremendous learning opportunities.

I have had the good fortune to work with many of his adversaries. Many of you have relayed to me countless anecdotes and war stories of working against him. He was tenacious, well-prepared and fair. A phone call from an attorney seeking to pick his brain never went unanswered. Young lawyers were given speaking opportunities on the seminars he moderated. He recognized that while the system may be adversarial, much could be gained by being collegial and respectful of colleagues. He never sought to embarrass or demean other attorneys, even when their conduct or legal arguments would have made it easy to do so.

Judges appreciated his candor. There was never a concern that he would be unprepared, or that his positions would not be legally sound. Deadlines were met. Rules were complied with. He argued his cases on the merits. He trained family part law clerks through his boot camp program.

His clients appreciated the attention he gave to their matters and the genuine concern he exhibited for their families. Those who bought in to his philosophy that divorce was not about revenge, and that there could be and would be no clear-cut winner, were able to survive the process and go on to lead healthy lives. I know this because former clients would frequently keep in touch with him. Several have told me of what a positive experience it was to work with him.

The title of the Hemingway novel also presents a challenge to those of us who continue to roll up our sleeves. As one sun sets, we must also rise up and continue the commitments to clients, adversaries and the system as a whole. If we allow darkness to fall upon the example he has set, we do so at our own

peril. The practice of law changed as a result of my father's influence. It will undoubtedly change again due to his absence. Whether it will be a positive or negative change remains to be seen, but the answer lies with us. I will take the lessons learned and continue to incorporate them into my practice. I hope you do the same. Following his example will not only make you a better lawyer, but also a better person. ■

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Chair's Column

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of the obligor shall be considered in contemplating the award of damages.

5. It is contemplated that the award shall not be taxable to the obligee or deductible by the obligor, but if a contrary result occurs due to tax law, that result must be taken into account in calculating the award.

f. Causes of action seeking palimony shall be heard by the Family Part and shall be subject to an award of counsel fees.

g. Any causes of action seeking relief under this statute on or after the effective date of the legislation shall not be valid unless it meets the requirements set forth above in subsection (c).

ANNOTATIONS

Specific Performance

If there is an express promise to provide one partner with a home, specific performance is available in a claim for palimony. *Crowe v. De Gioia*, 203 N.J. Super. 22 (App. Div. 1985).

NJSBA LOBBYING EFFORTS

The New Jersey State Bar Association Board of Trustees, at its October 2009 meeting, voted overwhelmingly to endorse the section's efforts to develop and present an alternative to Senate Bill 2091. During the course of the discussion, the board expressed its deep appreciation to the section for not only its quick turn around, but the quality of the work presented. The NJSBA is now working with its lobbying firm, Public Strategies Impact, to assist us in advancing the bill.

Those who have been moved by this proposed bill and its potential impact should consider what action is necessary to assure that justice is done. ■

ENDNOTE

1. 195 N.J. 247 (2008).

Important Issues Created by the Revised Rule 1:38 for Family Law Practitioners

by Derek M. Freed

When amended Rule 1:38 became effective on Sept. 1, 2009, it brought with it the presumption that all court records would be open to public review and copying, with only very specific, narrowly construed exceptions. It also created a new set of hurdles for family law practitioners. This article examines revised Rule 1:38 and its interplay with other family court rules and practices to alert practitioners to the unique new issues they face when dealing with confidential materials.

Is the material that I am submitting to the court subject to public review, or should it be designated as confidential?

The first decision an attorney must make about a "court record"[1] is whether the document is exempt from public review. To further a policy of openness, the rule creates a clear presumption that any document submitted to the court will be subject to public review and copying. However, there are limits.

Rule 1:38-3 excludes certain court records from public access, but it provides little explicit guidance for the matrimonial practitioner, because the exclusion is limited to "records required to be kept confidential by statute, rule, or prior case law consistent with this rule, unless otherwise ordered by a court." Thus, it is important to be well-versed with the applicable statutes, rules, and prior cases that discuss the confidential nature of certain documents.

Rule 1:38-3(d) does provide that certain commonly filed documents in family matters are confidential, and therefore excluded from public access. This list includes, among other items: family case information statements required by Rule 5:5-2, including all attachments; confidential litigant information sheets submitted pursuant to Rule 5:4-2(g); medical reports and records; custody/parenting time evaluations; certain domestic violence records and reports; certain Division of Youth and Family Services records; paternity and adoption records and reports; and records of hearings on the welfare or status of a child, to the extent provided under Rule 5:3-2. Also, records that are "impounded," sealed pursuant to Rule 1:38-11, or subject to a protective order under Rule 4:10-3 are exempt from public review. Finally, Rule 1:38-5 maintains the confidentiality of certain matters involving attorney ethics, discipline, and fee arbitration.

Are there any "confidential personal identifiers" in my court record?

Once the attorney determines the record is open to the public, the inquiry does not end there. The attorney must then remove or redact "confidential personal identifiers" from "any document or pleading submitted to the court unless otherwise required by statute, rule, administrative directive, or court order."[2]

Rule 1:38-7(a) defines six confidential personal identifiers (CPIs): Social Security numbers, driver's license numbers, license plate numbers, insurance policy numbers, and the numbers of active financial accounts[3] and credit cards. The parties bear the significant burden of redacting CPIs from documents they file with the court.[4] To reinforce the obligation and encourage compliance, the rule mandates that in every matter in which a case information statement is required, the parties *must* certify in their case information statement that "*all* confidential personal identifiers have been redacted and that *subsequent papers submitted to the court will not contain confidential personal identifiers*...." (Emphasis added).[5]

However, if CPIs must be included in a document or pleading by "statute, rule, or court order" (that is, it cannot be redacted), then, under Rule 1:38-7(e), the CPIs must be redacted before public inspection is permitted. This immediately raises two questions: When does that redaction occur, and who ensures that it has been completed?

For example, under Rule 5:4-2(f), each matrimonial litigant must file a certification of insurance that includes insurance policy numbers. Because a court rule requires inclusion of those CPIs, they should not be redacted from the document that is submitted to the court. However, these same CPIs must be redacted prior to public inspection. Will the document be redacted as a matter of course by court personnel, or will the document remain unredacted until someone requests access under Rule 1:38? Also, when public inspection is sought, will court staff notify the parties so they can be proactive to make sure redaction has occurred?

Another example of the difficulty surrounding this rule involves a non-dissipation order. Some banks require the identification of account numbers in order to effectuate a restraint upon accounts. When future transfers from the 'frozen' account are required, those banks will require that the account number be contained in the order directing the release. Thus, the order will not achieve its purpose without the inclusion of a CPI. Will the order in the court's file be redacted? If so, when? Will the court retain a non-redacted, 'impounded' copy of the order in the event there is a dispute with the financial institution in the future? If the matter will be resolved by consent order, must counsel ask the court for permission to violate the express terms of Rule 1:38 before submitting the form of order? All of these questions are unresolved.

Even when counsel represents a client who is not a party to the litigation, the rule adds a layer of complexities. If a document is "improperly submitted" to the court, a party or "interested person" may, on notice to the parties, request that the court "remove" the document from the court file. Under Rule 1:38-8, the person seeking removal bears the burden of proving that it was improperly submitted. A document is "deemed" to have been improperly submitted "if the person who submitted the document had no legitimate basis in rule or law for doing so and if the document is not an evidentiary exhibit or part of a motion, brief, or other pleading." It is not clear what will occur when a document was otherwise 'properly submitted' but the person submitting it failed to redact CPIs. Can the 'interested person' demand that, at a minimum, the CPIs relating to that person be deleted?

ADDITIONAL ISSUES FOR FAMILY LAW PRACTITIONERS

There are many other issues for the bench and the bar to consider. For example, business valuations are not confidential, and are therefore subject to public review and copying. Counsel would need to work in tandem and with the court to ensure that all CPIs are redacted from the report and not included in any testimony, argument, or oral decisions on the matter because the official record is a public document. Anyone can order a copy of the transcript, which could be brimming with CPIs.

Two orders also pose specific problems with compliance with Rule 1:38: qualified domestic relations orders (QDROs) and qualified medical child support orders (QMCSOs). The retirement or health insurance plan at issue will require Social Security numbers, and QDROs specifying a transfer of funds between accounts obviously must set forth the account numbers. Thus, for a QDRO or QMCSO to serve its purpose, it must include CPIs. As a practical matter, then, what do attorneys do to ensure both an effective order and compliance with Rule 1:38-8? Should they redact the court's official copy and include an addendum indicating that the official copy has been redacted, but that the parties have unredacted copies? If so, and if the contents of the QDRO are questioned in the future, what will serve as the 'control' document?

Marital settlement agreements (submitted to the court as a part of a post-judgment application) also present numerous problems. Counsel will need to carefully review the agreements to ensure that all CPIs are removed.

Motions for more specific discovery will need to be carefully reviewed and redacted. Certifications filed in support of discovery motions (*e.g.*, motions to quash, to compel discovery, or for protective orders) must be carefully drafted to avoid the disclosure of CPIs. The exhibits to these motions must also be redacted. If attached to a pleading, subpoenas will also need to be redacted.

What happens when a confidential court record is appended to a non-confidential court record? For example, Rule 5:5-4(a) requires that a party append all prior case information statements (confidential documents) to a motion to modify an alimony or child support award (a non-confidential document). Various rules provide for the confidentiality of a case information statement, including Rule 1:38-3(d)(1), so that redaction of CPIs is not required when the statement is first filed. This includes a case information statement, which is attached to a certification or other pleading.

However, it requires the court staff to remove that document from the pleading before it can be viewed by third parties. Litigants should not expect over-burdened family court staff to review all exhibits to determine whether a motion that is otherwise subject to public access includes, as part of its appendix, a document that was and should remain confidential,[6] unless they are provided clear, detailed, and uniform guidance.

Again, in the context of records that contain CPIs because a rule or other law required them, Rule 1:38-7(e) requires that the CPIs be redacted before public inspection is permitted. Presumably, policies are being developed to ensure court staff are trained to deal with this situation, as they were with respect to Rule 5:4-2(g) (requiring submission of confidential litigant information sheet and providing that Administrative Office of the Courts "shall develop and implement procedures to maintain the Confidential Litigant Information Sheet as a confidential document rather than a public record"). As court personnel are trained to ensure both that confidential documents are excluded from public access, and that the appropriate redaction takes place when the document is open to public access, cautious practitioners may wish to take their own proactive measures. Such steps may include submitting confidential attachments with a

stamp marked "confidential," or submitting them in separate, sealed envelopes marked "confidential."

The same issues will arise when counsel serves a defaulting party with a notice for equitable distribution pursuant to Rule 5:5-10. The notice must contain "a statement of the value of each asset and the amount of each debt sought to be distributed and a proposal for distribution...." The party must also attach a copy of their "filed Case Information Statement" to the notice.

Thus, a two-layered problem is created. The issue of attaching a confidential document (*i.e.*, a case information statement) to a public document was discussed above. However, in this case the notice would have to obtain enough information to describe and identify an asset. This may include a CPI. If the order will need to be served directly upon a banking institution, the practitioner will need to determine in advance whether the last four digits of the account number will suffice to effectuate the distribution of the account. Similarly, if a life insurance policy is addressed, the practitioner will need to speak to the company in advance to see what information is needed in the notice/order. If a CPI must be included in its entirety, the practitioner must coordinate with the court in an effort to determine how to proceed.

Another issue that has arisen deals with a common practice in matrimonial matters: a party resuming their maiden name as a result of the entry of a judgment for divorce. Within the judgment, courts seem to be requesting, at a minimum, the party's birth date and the last four digits of their Social Security number. However, a Social Security order is a CPI. It is unclear if limiting the Social Security number to the last four digits is appropriate, as the rule only provides that the last four digits of financial accounts can be provided, and then only if it cannot otherwise be identified. Thus, a practice needs to be developed to allow for parties to uniformly address this matter.

Appellate practice also raises issues. Will attorneys need to redact documents within the appendix submitted in support of their appeal? Alternatively, if appendices are filled with CPIs (for example, in the case information statements, QDROs, etc.), may attorneys designate them as being "appendices with confidential documents" and request that they be "impounded" in their totality?[7]

Because amended Rule 1:38 is in its infancy, it will take time to resolve these issues. However, it is imperative that the family law practitioner stay abreast of them, as the issues will arise in their daily practice. ■

ENDNOTES

1. Rule 1:38 defines "court record" expansively. A court record encompasses the volumes of documents processed through the court system except: (1) information gathered, maintained or stored by a governmental agency or other entity to which the court has access but which is not part of the court record as defined by this rule; and (2) un-filed discovery materials in any action.
2. R. 1:38-7(b).
3. The last four digits of an active financial account may be used if the account is the subject of litigation and cannot otherwise be identified.
4. R. 1:38-7(c)(1).
5. Although the certification places the burden on the parties and does not place a specific obligation upon counsel (who do not execute the family part CIS), the burden upon counsel is implicit.
6. In the *Report of the Supreme Court Special Committee on Public Access* (Nov. 2007), at 60, available at www.judiciary.state.nj.us/publicaccess/publicaccess.pdf, the same concern was recognized in another context (improperly submitted documents): "[T]he reality is that in many circumstances court staff are unable to reliably identify erroneously or inadvertently submitted material.... [T]he vast volume of court filings...makes impossible the task of analyzing every filing."
7. At the time of the writing of this article, the Appellate Division had advised that it will be issuing instructions to the bar to submit all confidential documents in a separate appendix titled "Appendix of Confidential Documents Pursuant to Rule 1:38," which should resolve this issue.

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Spousal Fiduciary Responsibilities

by Frank Louis

The concept that spouses have a generalized fiduciary responsibility to each other, while arguably implicit in our law, is one that over time should be part of our day-to-day practice.

The concept, in and of itself, may not be unique, but its formulation into broadly based legal and jurisprudential theory with wide-ranging applicability is new. This article is not intended to be the final word on the issue; rather, it is the first word of what may ultimately be a long speech. If accepted, the concept of spousal responsibility will be wide ranging, and only time and the myriad of factual circumstances presented by cases will define the scope of the duty.

Before the concept can be used, it must be identified, explained, and understood. This is not a new creation or concept. As this article will illustrate, responsibilities spouses have to each other are deeply embedded in our law, predicated on sound and salutary concepts of public policy. Since family law principles emanate primarily from policy considerations, it is appropriate to begin the analysis with the linkage between policy and law.

THE LINKAGE BETWEEN THE DEVELOPMENT OF THE LAW AND PUBLIC POLICY

Development of legal principles does not only take place by examining precedent; to a significant degree, law generally, and certainly family law, develops in response to what courts believe to be sound public policy. There is perhaps no area of the law that is more sensitive to the relationship between law and public policy than family law. In family law, the relationship between legal principles and society's interests and concerns is at least in part a reflection of the role spouses play and the vital interest society has in those roles. Society's interest in parents, children and the institution of marriage cannot be overstated; that interest has always been and should be reflected in how the law develops.

In every divorce, the state has a legitimate interest in how issues are resolved; that interest must be reflected in how new issues are resolved. While there is a strong interest in permitting parties to freely contract, society, through the instrumentality of the courts, will not allow parents to waive child support or to unilaterally terminate parental rights, emphasizing that when policies conflict the state's interest prevails. There is no better evidence of the societal impact on the development of divorce law than the longstanding principle that courts are only empowered to enforce spousal support agreements that are found to be fair and equitable.[1] That is a distinctly different standard than utilized in non-matrimonial settings, where concepts of free enterprise only allow the state to intervene if the contract is either unconscionable or void as contrary to public policy.[2]

This differentiation in legal standards is warranted by disparate policy considerations. It highlights the importance of fairness in divorce and focuses the court's analysis on whether the state's interest in assuring parties treat each other fairly when their marriage ends is advanced by recognizing existence of a spousal fiduciary responsibility.[3] Thus, in context, the issue is whether imposing such responsibilities advances policy; if it is good policy then it should be good law.

There is a well-defined jurisprudential basis for resolution of unique judicial issues. The one consistent strain in development of law in New Jersey, is that our law evolves in response to what courts perceive to be sound public policy. The genesis of this developmental principle might well have been Oliver Wendell Holmes' landmark work *The Common Law*, where he linked public policy and development of the law.[4] According to Holmes, the law was constantly evolving in response to the developing social and economic environment. Recognizing this, he noted in a now-famous observation the "life of the law has not been logic: it has been experience." This flexible view of legal principles being responsive to changing social economic climates and mores is the perfect prism through which to view the development of family law principles. Yet, it is not only in family law that Holmes' view of the law has predominated. New Jersey has always found a relationship between public policy, concepts of justice and development of new legal principles.

EXAMPLES OF POLICY DICTATING THE RESULT

An excellent example is *Falcone*, which involved a doctor's admission to a county medical society.[5] Justice Jacobs went back to Holmes, emphasizing, "the vital part played by public policy considerations in the never ending growth and development of a common law."[6] Holmes had noted, and it was cited by Justice Jacobs, that:

> every important principle which is developed by litigation *is in fact and at bottom* the result of more or less definitively or definitely understood views of public policy.[7]

In his analysis, Justice Jacobs concluded the "dominant factor" in development of our common law is the "common law principles," which "soundly serve the public welfare and the true interest of justice."[8]

In recent years, our Supreme Court has followed Holmes' linkage of public policy and the development of law. In *Shackil*[9] the Supreme Court rejected the market share liability theory advanced by certain plaintiffs concerning childhood vaccinations, reasoning it would frustrate the public policy of development of safer vaccines. Similarly, in *Kelly*,[10] the Court, to reduce the number of drunken drivers, concluded imposing social host liability would advance that salutary public policy. *Kelly* relied on the famous *Palsgraff*,[11] for the proposition that in determining whether a duty of reasonable care existed, the answer depended upon "an analysis of public policy."[12]

Further support for the proposition that unique legal questions are determined on public policy considerations can be found in cases decided by our Supreme Court in matrimonial law. In *Kinsella*,[13] the Court found the doctor/client privilege was not absolute:

> *considerations of public policy* and concern for proper judicial administration have led the legislature and the courts to fashion limited exceptions to the privilege. These exceptions attempt to limit the privilege to the purposes for which it exists.[14] [emphasis added]

Justice Stein later noted courts should be mindful of the public policy considerations behind the psychologist/patient privilege concluding, in some respects, it was even more compelling than the attorney/client privilege.[15] Such reasoning reveals how courts, in determining unique legal issues, mirror Holmes' perceptive reasoning and decide issues on public policy considerations. Then, by analyzing new legal issues in context of policy, their resolution will more likely than not be consistent with the legislative intent memorialized by the statute. Parties should be required to show *why* their position *advances*, and does not *reject* the policies embodied in N.J.S.A. 2A:34-23.1 and N.J.S.A. 2A:34-23.

Another example of law following policy was the Appellate Division's rejection, on policy grounds, of permitting a position taken at a settlement conference to satisfy the "further acts" requirement of a malicious abuse of process claim.[16]

EXAMPLES IN FAMILY LAW

A good example of policy predominating in an equitable distribution context is *Goldman*, where Judge Glickman was confronted with a unique situation involving "special circumstances."[17] In resolving the distributability of a car dealership that had significant value as of the valuation date but virtually none at trial, he not only analyzed the issue in the context of the existing law but the public policy considerations. He reached this result by implementing the policy reflected by N.J.S.A. 2A:34-.23.1.

As the Appellate Division noted in affirming his decision:

> ...the Trial Court here correctly recognized that he was confronted with the unique situation and that application of a rigid categorical analysis would have only *hindered him in fulfilling his ultimate obligation to effectuate a distribution of marital assets which overall was equitable to both parties.*[18] (emphasis added)

There is no greater evidence of the primacy of policy in family law than in examining the instances where courts have addressed conflicts between accounting principles and the family law principles and issues. Both legislatively and judicially, it has been recognized that abstract, but nonetheless legitimate and market-based accounting principles, must nevertheless give way when they conflict with implementing the broader divorce-related policy considerations.

For example, it is a general accounting principle that when assets are sold, a taxable event occurs, creating a liability for payment of capital gains taxes by the selling party. Yet, that broad-based principle was *not* applied to divorces. The policy determination was made that it was inappropriate to tax people who are "selling" assets to each other "incident to a divorce." To implement this societal determination that spouses should not be taxed when they divide their assets in a divorce, Section 1041 of the Internal Revenue Code was adopted. That provision provides that "sales," denominated as "transfers," between spouses are not taxable events so long as they are "incident to a divorce." This emphasized the principle that as long as the sale or transfer between spouses was related to (or incident to) divorce, public policy considerations precluded treating such transactions as taxable events. Thus, if a transaction between former spouses occurs, even if it is the byproduct of a divorce, but nonetheless was not "incident to the divorce" the safe harbor provisions of Section 1041 do not apply.

Certain time limits were established that were quite liberal, to distinguish between transactions "incident to" and those that might merely occur between former spouses. If the transfer occurs within six years it is presumed to be "incident to."[19] If the transfer is more than six years after the divorce, it is *presumed* not to be related to the cessation of the marriage.

This policy determination was further illustrated by the Deficit Reduction Act of 1984, where Congress overruled the 1962 Supreme Court decision in the *United States v. Davis*.[20] *Davis* held that transfers

of property from one spouse to another incident to a divorce required recognition of gain or loss. By enacting Section 1041 of the Internal Revenue Code as part of the 1984 amendments, Congress made clear that for income tax purposes, no gain or loss will be recognized by the parties when there was a transfer of properties "incident to a divorce."

The policy determination to provide spouses special treatment is also exemplified by gift law, which is philosophically related to the Section 1041 transfers; in each instance, spouses may make unlimited gifts to each other without gift tax consequences. Even children are not treated so liberally, since parental gifts are subject to gift tax rules. Only spouses have the unrestricted freedom to do as they please, a determination flowing from the status of marriage as a fundamental societal institution.

Another illustration of divorce law trumping accounting principles was the provision in the regulations relating to Section 71 of the Internal Revenue Code (IRC) permitting parties to designate otherwise taxable income, *i.e.* alimony, as *non-taxable* income. As with divorce-related property transfers, the determination was made that in transactions involving spouses, there was no public policy reason to have a bright line rule that alimony must be deductible by the payor and includable in the recipient's income.

This distinction is particularly significant; it emphasizes that divorce-related transactions have traditionally been treated differently than other accounting transactions. For example, even if a person was an employee of a charitable organization, (*e.g.* Mother Theresa) regardless of the societal benefits of the employer, the employee must report their salary as part of their gross taxable income. Only if people marry do they have the right to designate income as tax-free income.[21]

A related, but different, area is child support income. It is an obvious policy determination to designate that cash flow to be tax free.

In fact, the alimony deduction itself is yet another example of policy dictating law. Until 1942, alimony was neither taxable to the recipient nor deductible by the payor.[22] In that year, to relieve the financial hardship imposed on the payor of paying alimony with after-tax income, Congress amended the Revenue Act to provide for deductibility. This provision was ultimately embodied in IRC Sec. 71 (215). Policy, and the fairness it reflected, dictated the result.

Similarly, there is a substantial difference when addressing depreciation. For tax purposes, commercial real estate investment may have its book value decreased when the asset is depreciated. Depreciation reduces book value. Yet, in a divorce case, where the goal is to fairly compensate spouses who acquire assets during a marriage, the *depreciated* value is not binding; rather, it is the *actual* value. Thus, the same asset may, for tax purposes, have its value decreased; yet, for marital purposes, its value increases, once again linking the policy implicit in N.J.S.A. 2A:34-23.1 with a result directly contrary to the result when applying strict accounting principles.

Yet, the best evidence of divorce policy trumping all else is *Brown*,[23] where the Court rejected an otherwise valid marketability discount since the "theoretical divorce sale" did not affect the value of the asset to the owners.

Since the business was "to continue under the same ownership," there was no reason to consider economic principles affecting value linked to a sale that was not going to occur.[24] The policy of N.J.S.A. 2A:34-23.1 had to be implemented, and a marketability discount predicated on the difficulties in selling an asset really had nothing to do with the Brown's divorce when the asset was *not* being sold.

THE IMPACT OF *MILLER*

With this framework established for development of legal principles, can it seriously be argued that establishing a broadly based spousal fiduciary responsibility, designed to implement the policies implicit in N.J.S.A. 2A:34-23 and 2A:34-23.1, is neither good law nor sound policy? Such a concept would emphasize the importance of marriage as an institution, the *Miller* imperative that parties at the end of their marriage be fair to each other while simultaneously providing a theoretical legal framework for courts to decide issues defining spousal obligations. Such an approach would further the fundamental policy underlying almost all family law principles, but best expressed by the Supreme Court in *Miller*.[25]

Miller involved the issue of whether and how the Court should impute income to assets. In reaching the conclusion that in evaluating an ability to pay, spousal decisions regarding how assets were invested should not be determinative. The Court found the decision to invest money in a non-income-generating asset, regardless of how economically reasonable, may well have support consequences.

In ruling there was "no functional difference between imputing income to the supporting spouse earned from employment as opposed to income that could be earned from investments," the Court noted the supporting spouse was "required to earn more" from an asset or risk having more income imputed to him or her. That decision emanated from the Court's overall policy view, fundamental to our practice—that at the end of a divorce, spouses have a responsibility to be fair to each other. The *Miller* Court utilized different language but the goal is the same—to assure fairness in divorce.[26] There is no more important principle in family part practice than this basic concept; it provides the prism through which *all* issues must be analyzed.

What the Court was essentially saying when they determined it was fair to impute interest income from an otherwise non-income-pro-

ducing asset was that legal principles were bottomed on the necessity for spouses to act reasonably, since the failure to do so violated the duties and responsibilities married people have to each other. There are repetitive examples of courts imposing duties and responsibilities on spouses, but never as part of an overall conceptual legal framework establishing a spousal fiduciary responsibility. That is the principle this article seeks to create. It is sound policy to do so, since it is bottomed on the principles of fairness, and furthers the statutory goals. The ramifications of the principle may broadly impact the practice; establishing a duty and responsibility between spouses provides the analytical framework for a court to assure upon divorce spouses treat each other fairly.[27]

Establishment of a broadly based spousal fiduciary responsibility will unify disparate legal principles into a coherent legal theory that will create fairer and more consistent results, increase the integrity of the system and citizens' respect and faith in our legal system. Importantly, it will confirm the importance of marriage as a fundamental bedrock institution from which many of our societal values flow. This article will initially address the concept of whether spouses do and should have responsibilities to each other, what the extent of those responsibilities should be and then analyze how it can practically be utilized.

THE HISTORICAL ANALYSIS OF SPOUSAL RESPONSIBILITY

Long before establishment of the family court and the 1971 amendments that brought family law practice into the modern era, it was unquestioned that spouses had duties to each other, although it is fascinating to read some of the older cases that define what that duty was. As noted, there is no better example of the linkage of law and public policy than a review of how the concept of spousal duty has been altered over time to reflect changing societal values. In Holmes' terms, the law changed as our common experiences did. As late as 1955, our courts were emphasizing it was "the duty of a Wife to live with her husband at his home and to give him her services and society."[28] In another 1955 case, the Appellate Division noted not only is it the wife's duty to "live with her husband" and give him "her society, companionship and services" but if she left, she did so "at her peril," since "a departure by a Wife," without the husband having committed a matrimonial offense, would "deprive her of any right to support."[29]

Duty, therefore, while present, may change as times and public policies change. In a recent opinion, Justice Virginia Long recognized the relationship between duty (and hence the development of legal principles) and public policy, which has always been a foundational principle in development of our jurisprudence. In *Tigh*,[30] she emphasized establishment of duty was a fact-sensitive inquiry that turned on whether its imposition "satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy."[31] The concept of duty and its linkage to public policy is graphically illustrated by the case we all studied in law school involving torts,[32] where duty led to creation of legal obligations, which was specifically mentioned in *Kelly*.[33] Simply put, if duty exists there is a correlative obligation or responsibility created.

Tigh's comment "whether a duty exists is ultimately a question of fairness," and Justice Long's observation, well-rooted in precedent, not only provided inspiration for this article but its jurisprudential support. While no one today would argue a wife has a 'duty' to remain with her husband, it is equally true that no one would argue spouses do not have duties to each other. In *Patel*,[34] a trial court succinctly noted marriage is both a legal and social institution, contractual in nature, creating both "rights and duties," which attach to both parties. If anything, our changing values emphasize the mutuality of duties and obligations. While the definition of duty may change, its existence as a constant between spouses does not.

While no one would argue a wife has a 'duty' to reside with her husband, the obligation to pay support, while statutory in nature, has been recognized as a longstanding spousal responsibility, the extent of which has been subject to modification as policy considerations change.

In *Bonnano*,[35] the Supreme Court characterized the duty of a husband to support his wife as his "primary obligation" arising out of the marriage, which existed "by reason of public policy." In *Thiel*,[36] the Court relied on *Bonnano* in making the same observation, emphasizing the linkage between support and policy considerations, further noting support is "one of the highest obligations in our social order."

Thiel further illustrated the linkage between support and policy by noting the "public's concern" with the "duty" was evidenced by the fact support was not dischargeable in bankruptcy.[37] Yet, as public policy changed so did the definition, but not the existence, of duty. For example, after the United States Supreme Court decided *Orr*,[38] which invalidated a statute that required only husbands to pay alimony, did Justice Morris Pashman make it abundantly clear in New Jersey the duty to pay support was unrelated to gender?

As Justice Pashman noted:

> A closer look should also be taken at the supported spouse's ability to contribute to his or her own maintenance, both at the time of the original judgment and on applications for modification. The fact that our State's alimony and support statute is phrased without reference to gender, N.J.S.A. 2A:34-23, will accomplish little if judicial decision making continues to employ sexist stereotypes. The

> extent of actual economic dependency, not one's status as a wife, must determine the duration of support as well as it's amount.[39]

That spouses have 'duties' to each other, particularly in providing disclosure, cannot be open to debate. That duty has been codified by Rule 5:5-1(c), set forth below:

> (c) Amendments: The *parties are under continuing duty in all cases* to inform the Court of any material changes in the information supplied on the case Information Statement. All amendments to the stamen shall be filed with the court no later than twenty days before the final hearing. (emphasis added)

'Duty' compelling pre-trial disclosure imposes a fiduciary obligation on parties to provide information not only for trial, but for settlement. In promulgating the case information statement (CIS) rule (the very document that provides financial disclosure) the Supreme Court made a clear policy statement about the importance of ongoing disclosure noting parties were "under continuing duty" to inform the court "of any material changes" to the CIS.[40]

The Court's use of the term "duty" was not inadvertent; it was purposeful and established a *duty* on a spouse to disclose information.

Perhaps the best evidence the law should engraft a generalized duty between spouses is the fact that the Supreme Court has already found in the case information statement context such a duty already exists. Since spousal duties emanate from the melding of the importance of marriage as a societal institution with the obligation spouses have to be fair to each other when the marriage ends. A broad-based extension is not only fair but further a fundamental and salutary policy imperative. That the Supreme Court imposed that duty on spouses is the best evidence the hypothesis of this article is correct.

The existence of spousal duties is evident from a review both of the statutory framework and decisional law. The initial duty emanating out of a marriage is fidelity, which when broken creates a legal consequence authorizing one spouse to obtain a divorce. N.J.S.A. 2A:34-23 is a legislative reaffirmation of societal values that gave courts authority to require spouses in superior financial positions to provide alimony and child support to an economically dependent spouse. The extent of that responsibility, and the differentiation between what constitutes a permanent or a limited duration case, is reflective of policy—a point emphasized not only by the limited duration alimony statute, and the Divorce Study Commission Report, but also by Judge Philip Carchman's discussion in *Cox*.[41]

Emphasizing the view that marriage is a shared enterprise, N.J.S.A. 2A:34-23.1 reflects the societal determination that assets are to be divided between parties. Spouses who "acquire" items of value during the marriage (assets) have the responsibility to assure those assets are fairly allocated between the spouses based on legitimate economic considerations.[42] Thus, it is beyond dispute that spouses have economic duties and responsibilities to each other, which emanate from essential societal determinations predicated on the role of marriage as a dominant societal institution and the belief that at the end of this important relationship, spouses must deal with each other fairly.[43]

Duty implies responsibilities. No one would seriously argue that spouses do not have responsibilities to each other. What better example of the responsibility spouses have to each other to be fair than a legal principle that a court will simply not enforce a spousal support agreement that is unfair.[44] What other aspect of law conditions enforcement of a contract on abstract concepts of fairness? Certainly in the commercial setting, fairness is not the prerequisite for enforceability; as long as a contract is not unconscionable, it will be enforced. The linkage between the enforceability of spousal agreements and policy has strong roots in New Jersey law. Historically, contracts between a husband and wife were void at law and recognized in equity *only* "if they were just and fair."[45]

Earlier law also demonstrated that policy considerations always impacted the review of spousal transactions. The Supreme Court, in 1950, relied on such legal heavyweights as *Pomeroy* and *Story,* concluding "transactions between Husband and Wife, by reason of the confidential relationship, are closely scrutinized."[46] It was the nature of marriage and the responsibilities that spouses have to each other that warranted the "closely scrutinized" standard.

Marriage has been characterized by both our Supreme Court and the Appellate Division as having elements of a partnership. Thus, shouldn't the same duties apply between spouses as they do between partners? If anything, given the importance of marriage as a societal institution, imposition of reciprocal duties and responsibilities should logically be more important than in a commercial setting. For example, in *Cox*,[47] Judge Carchman defined marriage in a policy-driven context, noting alimony determinations had to recognize that marriage was "an adaptive economic and social partnership."[48] Similarly, in *Rothman v. Rothman*,[49] the Court, in the equitable distribution context, said marriage "was a joint undertaking that in many ways was akin to a partnership."[50] It is an elementary principle of partnership law that fiduciary responsibilities exist between partners—the breach of which creates a consequence.[51] Marriage is most certainly a partnership when discussing concepts of duty and responsibility.

Courts are entrusted with the responsibility to enforce spousal duties and responsibilities generally

emanating from legislative enactments. For example, courts have the obligation to enforce the parental obligation to pay support, the duty to pay alimony; they also have the obligation to fairly allocate assets acquired during the marriage to implement the legislative dictates of N.J.S.A. 2A: 34-23.1.

A related concept that is perhaps equally as important as the generalized spousal fiduciary responsibility, is the implication, predicated on public policy considerations, that every contract imposes on parties the duty of good faith and fair dealing in its performance and enforcement. The Supreme Court has emphasized this is an implied term of every contract.[52]

Logic, if not common sense, strongly suggests that if there is an obligation in every contract imposing a duty to engage in 'good faith dealing,' how can it seriously be argued that in a spousal setting, given the public policy considerations, that spouses cannot have, between themselves, duties and responsibilities to be recognized as a matter of law. Thus, can it seriously be disputed that spouses have responsibilities and duties to each other that emanate from the marital relationship, with the scope defined by broadly based public policy principles? Having, hopefully, established that spousal responsibility and duty exists, what is the practical impact of this concept on our day-to-day practice?

The essence of a spousal fiduciary responsibility is the obligation that spouses have to be fair to each other at the end of their marriage. That principle, and the recognition of a spousal duty, has been confirmed by the Appellate Division in *Moore*,[53] where duty trumped longstanding legal principles to the contrary, as well as any timing issues under Rule 4:50-1(f).

Joseph and Roberta Moore divorced in 1985 after 31 years of marriage. Mr. Moore was a tenured professor at Montclair State University. He continued to work even though he was 70. As a consequence of that decision, Mrs. Moore was unable to receive her distributive share of the pension.

The resolution of the case, in 1985, was fairly traditional. According to the opinion, when the parties divorced there were only two assets of "any significance"; the marital home, which had been appraised at $123,000, and Mr. Moore's pension. The home was distributed equally and there was an agreement regarding a deferred distribution of the pension. Mrs. Moore would be entitled to receive her share of her husband's pension when he "retires or otherwise leaves his present employment for whatever reason." He did not retire, nor did he leave Montclair State, which created the motion. Thus, under the bargained for agreement, Mrs. Moore had no remedy, and Rule 4:50-1(f) required her motion to be made within a reasonable period of time. It was *20* years since their agreement, and approximately *four* years after her ex-husband reached 65 before she filed.

When the agreement was signed, N.J.S.A. 18A:66-43(b) mandated retirement for Teachers Pension and Annuity Fund (TPAF) members at age 65. The Appellate Division found that the statute supported a "reasonable belief by the parties of a college professor in the TPAF could not work beyond 65."[54] Yet, the agreement was silent on this material issue, and the language of the agreement was directly contrary. Yet, by the time the motion was heard, TPAF no longer enforced the statutory provision because of a conflict with federal law: the Age Discrimination of Employment Act (ADEA),[55] which precludes mandatory retirement for most employees over the age of 40.

Since Mr. Moore had not retired, he was not in violation of the literal language of the agreement, as the appellate court confirmed. Yet, Mrs. Moore argued his voluntary decision to continue to work had the effect of precluding her receipt of the pension. Thus, she contended, it was unfair and contrary to her expectations when she entered the agreement. Simply put, all her arguments were based on what was fair.

The Appellate Division felt that Mr. Moore's voluntary decision to continue to work compelled the court of equity to intervene, but clearly the court needed some legal justification to do so. Since Mr. Moore was not in violation of the agreement, and there was nothing in the agreement itself that addressed the issue of the parties' expectations when Mr. Moore would retire, the court found justification from what it ultimately characterized as a breach of a "spousal duty." It relied on Justice Long's comment when she was on the Appellate Division in *Deegan*,[56] in the retirement context that the duty of self-fulfillment for a spouse who seeks to retire "must give way to *the pre-existing duty that runs between spouses who have been in a marriage which has failed*."[57] (emphasis added)

As always, Justice Long captured the essence of marriage, its role in society and how the law develops in response to these social and policy considerations. She perceptively recognized that people who marry have certain responsibilities created by their marriage and utilized the concept of duty to achieve a just result, emphasizing how policy leads to the development of legal principle. The Appellate Division in *Moore,* relying on the concept of duty, found Mr. Moore had not breached his agreement, but had breached the *duty* owed to his former spouse. Also, the court concluded in 2005 that a court had the power under Rule 4:50-1(f) to modify an equitable distribution provision agreed upon in 1985, 20 years later. Rule 4:50-2 provides a motion under Rule 4:50-1 must be made within a "reasonable period" of time and for reasons (a), (b) and (c), not more than one year after the judgment.

Thus, in *Moore*, the Appellate

Division, to come to a fair and just result, modified an equitable distribution provision 20 years after it was made, despite the prevailing wisdom that equitable distribution is not modifiable, and simultaneously allowed an allocation under Rule 4:50-1(f) 20 years later eviscerating the reasonable time requirement in the rule.

PRACTICAL IMPLICATIONS OF SPOUSAL FIDUCIARY RESPONSIBILITY

The practical implication of the concept exists in several general areas; first, in the disclosure spouses are required to make to each other; secondly, in arguments made to the court in litigation (or to an adversary as we attempt to resolve cases and), thirdly, and perhaps as importantly, in the manner in which property settlement agreements are prepared.

IS OVERSPENDING A BREACH OF A SPOUSAL FIDUCIARY RESPONSIBILITY?

The overspending issue, as with any discussion concerning the impact of spousal conduct on the ultimate result, must be viewed through the prism of policy and the obligations imposed on spouses by *Miller* to treat each other fairly upon divorce. In N.J.S.A. 2A:34-23.1(1), the Legislature determined that a spouse's "dissipation" of marital property was a factor to be considered in the fairness of asset distribution. In determining alimony, courts have addressed various types of dissipation or spending that should be chargeable solely to one spouse and not the other.

Overspending, defined as a pattern of expenditures inconsistent with the parties' then-existing financial circumstances, should result in a legal consequence. Overspending by a spouse breaches the spousal fiduciary responsibility. When a court finds overspending exists, fairness, public policy and the statutory scheme demand a consequence. To some degree, the responsibility not to overspend post-filing, may well be greater than prior to filing. Certainly, the argument is easier to make. Post-filing, the marital entity is burdened with additional costs creating different policy considerations in the pre- versus post-filing context. In most cases, the dependent spouse argues the level of spending is evidence of lifestyle; therefore, under *Crews*, maintaining that level should be the "goal" of any spousal order.[58]

This is one of the examples where good lawyering permits the other sides' purported strong argument to be turned around. In lieu of spending being used to justify an ongoing support order, that spending may, in turn, be argued to be evidence of breach of spousal responsibilities chargeable to the party who overspent.

The issue of the consequence of improper spending has been addressed by courts both in and out of New Jersey. Initially, the issue arose in determining whether debts, as well as assets, were to be equitably distributed. In *Pascarella*,[59] the Appellate Division critically commented upon a trial judge's failure to allocate $33,000 in what was characterized as "marital debt." Yet, it was not until *Monte*,[60] that a complete analysis of liabilities in a divorce case was addressed.

Monte recognized and affirmed the generalized fiduciary responsibility that spouses have to each other, and did so by devising a tripartite factorial analysis for courts to address in considering how to treat liabilities:

1. In effectuating distribution of assets, courts must consider both assets and liabilities;
2. If a debt is traceable to the acquisition of marital assets, it is generally deemed marital and should be allocated fairly between the parties;
3. If a marital debt was incurred for a purpose unrelated to the marriage, then the debt (or here the overspending) should be allocated to that person.[61]

The third standard is a reaffirmation of the concept of spousal fiduciary responsibility implicit in the cases, albeit not phrased as such. For example, expenditures not made for a marital purpose must, as a matter of policy, be treated differently than expenditures made for a marital purpose. An argument may be advanced this is true even where spending was for a *category* of expenses that may well be defined as marital, but where the *level* is excessive. The principle *Monte* established and the policy of our statutes, coupled with legitimate policy concerns, demands a consequence for marital overspending even if not characterized as a dissipation.

The Appellate Division in *Monte* reviewed several out-of-state cases, finding if debts were incurred for personal spousal expenses, as contrasted with a marital purpose, this constituted actionable dissipation.[62] In *Szesney*,[63] the court allocated substantial debt to the husband based on a finding that during the marriage the wife drastically reduced her expenditures but the husband improperly maintained, or even increased, his. The appellate court indicated the critical issue was whether the spouse used marital property for their own benefit or for a "purpose" unrelated to the marriage, thus mirroring *Monte*'s third category.

In *Stutz*,[64] imposing an economic consequence upon the wife by virtue of her spending was affirmed by the court of appeals. The trial court found "Joan dissipated the financial, business and emotional assets of the marriage by proliferate spending, casual indifference to the reality of the business world." The court found:

> Much of the evidence is dedicated to Joan's dissipation of the marital assets and her indifference to the consequences. When the business was sold in 1986, Max paid off approximately $29,250 in consumer debt, 85-90% of which Joan incurred. Finance

> charges on credit cards amount to nearly $6,000 in 1986. In 1986, Joan bounced 47 checks; overdraft charges totaled $564 in that year. In the first three months of 1987, before Joan left, she had 24 checks returned because of insufficient funds. Max discussed the implications of their extended personal financial circumstances on the business with Joan but she refused to curtail her spending. Max would deposit as much as $1,000 at a time without Joan's knowledge yet she would still overdraw. Seventy percent of her spending was on herself.[65]

Stutz stands for the salutary principle that unreasonable spending at levels inconsistent with the parties' financial circumstances constitutes a breach of a spousal obligation for which there should be an economic consequence. Such spending breaches the duty spouses have to each other to act reasonably; when they fail to do so there should be a consequence. It highlights the merging of sound public policy with concepts of personal responsibility. When a court implements the policy of a statute, while imposing upon individuals the consequences of their own voluntary acts, it merges two salutary concepts and reaches a result that is both factually and legally sound.

A good example of spending breaching the spousal fiduciary responsibility is *Siegel*,[66] where Judge Berman was confronted with the issue of excessive gambling expenditures by the husband. *Siegel* supports the concept of a spousal fiduciary responsibility, although not expressly phrased that way. In *Siegel*, the gambling occurred when the marriage was over, since, as Judge Berman noted, Mr. Siegel's gambling losses were incurred when the marriage was at a "terminal" level, but apparently prior to filing of a complaint.[67]

Thus, breaches of duty may occur before filing. Reliance on *Siegel* is not to equate gambling with excessive credit card expenses; rather it is to emphasize that *Siegel*, along with the other cases cited herein, establishes a broadly based spousal fiduciary responsibility that can be breached by excessive spending. Just as Mr. Siegel suffered a consequence for his unreasonable acts, the law should impose a consequence if spending is deemed to be unreasonable based on the then-existing facts. The result would be no different if a spouse made substantial expenditures for drugs or spent marital funds to pursue a romantic interest in a third party. These expenditures do not further the goals of the marital partnership.[68] The issue should not turn on the *nature* of the expenditures (*i.e.,* clothing vs. gambling), but whether on the facts of each individualized case the expenditures were neither reasonable nor appropriate given the underlying factual circumstances. This principle is exemplified not only by the policies involved, but the logic of the argument.

For example, acquisition of a car is clearly an expenditure for a marital purpose. Yet, if the automobile expenditure was for a Mercedes, and the expense could not be justified by the parties' then-existing financial circumstances, (as opposed to what once was) that would be unreasonable, and there should be a consequence. It should not be important whether the act is characterized as a dissipation; the important factor is whether the actions violated the generalized fiduciary responsibility spouses have to each other. Dissipation, a more pejorative term, may in practice (not law) require a higher standard than breach of a duty, and its use may be counterproductive. Similarly, acquiring furniture and furnishings is clearly a category of expenses encompassed within the broad context of what is a marital expense; yet, expenditures to refurnish an entire house during separation should also have a consequence, since it is unreasonable. A court should not countenance a spouse traveling excessively or buying jewelry, clothing, or spending on entertainment at levels that are inconsistent with income.

Thus, *what* was purchased should not be determinative, but whether given all the facts the expenditure breached the spousal duty to act reasonably and fairly. This properly establishes a legal principle that personal responsibility is not merely an ephemeral concept without meaning. Requiring people to be responsible for the consequences of their actions is not only good policy—it is good law.

In addition to *Siegel*, there are a series of out-of-state cases that treat gambling losses or debts as dissipation and chargeable against the spouse who incurred the obligation or caused the loss.[69]

There is an Illinois case that found that notwithstanding the husband's gambling, there should not be any economic adjustment where the court found the evidence was that the wife had "approved" the conduct.[70] There are a similar series of cases finding that expenditures on third parties with whom the spouse is involved will be considered.[71]

The classic dissipation case in New Jersey is *Kothari*.[72] *Kothari* involved an Indian couple where the husband regularly sent his parents substantial amounts of money, purportedly in satisfaction of cultural standards in Indian society. In *Kothari*, the parties were married in India but subsequently moved to New Jersey. The trial court determined the husband was accountable for money sent to his parents, finding these expenditures constituted dissipated assets under N.J.S.A. 2A:34-23.1(i).

While the appellate court noted the Legislature had not defined dissipation, Judge Antell noted, notwithstanding the absence of a legislative definition, "the concept is plastic one, suited to fit the demands of the individual case."[73]

The Appellate Division relied on an out-of-state case, which noted:

> Dissipation may be found where a *spouse uses marital property for his or*

> *her own benefit and for a purpose unrelated to the marriage* at a time when the marriage relationship was in serious jeopardy. Whether a given course of conduct constitutes dissipation within the meaning of the act depends upon the facts and circumstances of the particular case. Upon review, the trial court's determination regarding the dissipation of assets lies within the sole discretion of the trial court and will not be reversed absent an abuse of discretion (citations omitted) (emphasis added).[74]

Kothari also relied on an annotation: *Spouses' Dissipation of Marital Assets Prior to the Divorce as a Factor In Divorce Courts Determination of Property Division*,[75] where the following quote was found:

> When one party to a divorce proceeding spends marital funds extravagantly, or merely for his or her own benefit, that obviously diminishes the amount of property which is available for distribution by the divorce court. On the other hand, until such time as the parties are contemplating a divorce, they are generally vested with the authority to spend marital funds for their own enjoyment, such as movies, dinners, vacations, and the like. The question of dissipation of marital assets thus involves an attempt to accommodate these two conflicting interests in the marital estate.[76]

The annotation makes a distinction between pre- and post-filing, yet the issue is not appropriate for a bright line rule. It is too fact sensitive.[77]

In point of fact, the Appellate Division rejected a bright line rule when it refused to accept the husband's argument that dissipation "can only occur after the filing date of the Complaint".[78] According to the Appellate Division, the power to distribute assets *cannot be limited solely to marital property* in existence on the precise date the complaint for divorce is filed, clearly authorizing pre-complaint dissipation as a legitimate issue, which nonetheless raises difficult implementation issues. There clearly is a logical distinction between dissipation or breach of duty arguments when the marriage is in trouble, as opposed to dissipation claims that are several years old. On this point, *Kothari* is seemingly in accord with Judge Berman's analysis in *Siegel* where the gambling losses were incurred when the marriage was at a "terminal level," but before filing.[79]

An examination of the logic of *Kothari* is illustrative. The Appellate Division's finding there was a dissipation was predicated on their belief that since the expenditures were "not made to benefit the marital enterprise" they should not be chargeable to both parties but only one spouse.[80] Phrased another way, when Mr. Kothari spent marital funds not intended to benefit the marital partnership, he breached his fiduciary responsibility to that partnership by diverting assets. Implementation of the statutory language concerning dissipation was a reaffirmation that spouses have duties not only to each other, but to their joint enterprise, which, when breached, creates a legal consequence.

A summary of these cases suggests four factors to be examined: (1) the proximity of the expenditure to the parties' separation; (2) whether the expenditure was typical of expenditures made by the parties prior to the marital problems becoming evidence; (3) whether the expenditure benefitted the marital partnership or was for the benefit of one spouse to the exclusion of the other, and (4) the necessity for the expenditure.

Yet, it should be emphasized that an expenditure for relatives is not automatically a dissipation. For example, in another Illinois case an expenditure of $70,000 in marital funds for care for the husband's widowed mother was not found to be inappropriate, since similar funds had been spent for the mother's care years prior to the marital breakdown, emphasizing yet again the fact-sensitive nature of the question.[81]

Conversely, in a case the author rarely sees cited, but raising a fairly common circumstance, Judge, now Justice Long, confronted with a particularly disreputable litigant, concluded expenditures by Dr. McGee to his "pre-existing obligations to his former wife and children" were not the responsibilities of Mrs. McGee.[82] As a consequence, on the remand the trial court was required to consider the fact because the Appellate Division found that since Mrs. McGee was not required to contribute her assets(*i.e.* marital income) to the alimony and child support Dr. McGee was required to pay, such payments necessitated an "equitable consideration applicable to distribution." In other words, this ignored language in *McGee* stands for the arguable principle that in *every* second marriage where marital funds are utilized to pay support or deferred equitable distribution, that constitutes a factor warranting a more favorable allocation of assets to the other spouse. The obvious question is whether that is a broadly based statement applicable to all cases, or whether given the reprehensible conduct of Dr. McGee, it is fact sensitive or non-binding *dicta*.[83]

RESPONSIBILITY FOR THE CONSEQUENCES OF SPOUSAL ACTS

The concept of responsibility for personal acts has been recognized by the family part, and reflects sound policy. For example, an individual who commits a crime and is incarcerated is not eligible to seek a reduction in their support obligation because our courts have found their wrongful act was voluntarily undertaken. In other words, a spouse or a parent will be held responsible for the consequences of their actions. For example, in *Halliwell*,[84] the Appellate Division addressed, in a modification context, the impact of supporting spouses voluntary conduct on the ongoing support obligation.[85] In the unpublished decision

of *Jaffe*,[86] the Appellate Division rejected a bright line rule regarding incarceration. In doing so, the court examined a series of New Jersey cases that, in each instance, addressed the impact of voluntary action on a future support obligation.[87] In each instance, a spouse's personal decisions had an economic, consequence, *i.e.* it impacted the support obligation.

IMPUTATION, UNDER-EMPLOYMENT AND SPOUSAL RESPONSIBILITY

The analysis commences with the well-developed body of law concerning spousal under-employment. The concept of under-employment is rooted in the gender-neutral statutory responsibility that courts consider the parties' earning capacity. This is memorialized not only by case law but by statute.[88]

Under-employment, or allocation of assets to a non-income-generating investment, constitutes a spousal decision for which the law approximately imposes a consequence.[89] In *Miller* itself, the Supreme Court found in a post-judgment modification motion a spouse could not invest their assets solely in growth stocks and then claim diminished income. *Miller* emphasized the responsibility spouses have to each other in the support context by noting courts have consistently held "assets may be considered in calculating an alimony award."[90] As our courts have emphasized, support orders are based not so much on the "actual income" of a spouse but rather their "potential to generate income."[91]

In *Stiffler*,[92] Judge Fischer found it appropriate to impose a consequence for a spousal decision to invest an inheritance in a home that did not produce income. In effect, the court said that it would not preclude a spouse from doing what they chose to do with their assets; yet, there would be a *consequence* if that decision breached the responsibility spouses have to each other. Similarly, when a spouse is not generating earnings to their true potential and capacity,"then an imputation of income based upon that potential is appropriate."[93] That failure to generate income may come from under-employment of an asset or the person's capacity. The law does not distinguish between either; both mandate consequences must nonetheless follow. Phrased otherwise, under-employment is a breach of the duty spouses have to each other.

It is important to deal with a spouse's employment, not in the context of merely arguing they are under employed or not using assets to their capacity. Rather, it may be more fruitful to phrase the issue that such actions constitute a breach of duty for which there is a judicially imposed consequence. The concept of consequences for personal decisions should be directly related to the establishment of spousal responsibilities; not simply because judges might well be sympathetic to an argument that people are responsible for the consequences of their decisions, but as a matter of both policy and presentation the argument has merit.

In a criminal law context, society imposes consequence for conduct that violates a legislatively established societal norm. In a family part action, spouses who act unreasonably and breach their duty to their spouse should also have a consequence imposed.

RETROACTIVE IMPUTATION UNDER *MALLAMO*

In the typical case, in addressing support and an unemployed spouse, courts, in their decisions, or lawyers in negotiating, 'impute' a reasonable level of income. By doing that, what both parties are saying in effect is "we recognize that in determining a fair level of support, the statutory factor of earning capacity must be considered." Once that principle is established, it has implications prospectively. If as of settlement both parties agree to impute (*i.e.* find it is reasonable the supported spouse generate income), why is that determination *only* effective at settlement? If the reasons for the obligation exist at the time of settlement, absent there being some change in facts from the filing date of the complaint, doesn't it logically follow that the obligation to work existed at an earlier point? If it exists at final hearing, didn't it exist as of filing? Why isn't the imputation applied retroactively?

There are two implications to this concept. First, if you represent the supporting spouse and can establish some imputation at trial (or at early settlement panel), why shouldn't there be some retroactive modification of support that was paid consistent with *Mallamo*? *Mallamo* stands for the singularly simple but nonetheless elegant principle that courts should ultimately do what is *right* and *fair,* once the facts have been determined.[94] If marital assets were used to maintain the household while the supported spouse did not work, whether you characterize that as a dissipation, an unreasonable expenditure, or one that is unnecessary, an argument exists there should be some equitable distribution adjustment keyed to the breach of duty by the support spouse. That duty flows from the finding established by execution of the agreement regarding *a* capability; thus, the failure to work *pendente lite* should have a consequence.

SPOUSAL RESPONSIBILITY AND POST-JUDGMENT MODIFICATION: PERFECT TOGETHER

Another example of the practical implications of the concept is the potential use in post-judgment litigation relating to the issue of employment of the dependent spouse that also may affect how agreements are negotiated and drafted in the future. Assume at the time of divorce the supporting spouse is 52 years of age and the supported spouse is 45 and has not worked during the marriage. Yet, in settlement, there is an impu-

tation the supported spouse could earn $17,500 a year doing a particular type of work. If in a post-judgment application to modify or terminate alimony upon reaching the age of 62 or 65 and the supported ex-spouse post-judgment chose not to work, is that choice breach of duty? Using the terminology of the new concept, the parties have, in effect, stipulated that the wife had an obligation to contribute to her own support by utilizing the imputation as of the time of the agreement. If she chose not to work post-judgment, may she, on the later application, argue she is now 58, has been out of the workplace for 20 years and is without marketable skills? Is it not a reasonable argument to assert the personal choice made post-judgment not to work (and increase her income) should not have a consequence? Her failure to work was a breach of her duty to her husband to reasonably implement her earning capacity, for which now (in the post-judgment application) she must bear the consequences.

In a recent case with these facts, that argument was coupled with a report from an employment expert finding that *had* the wife worked to the capacity established by the parties in their agreement, then at the time of the modification application her income would have been much higher and she would have a substantial benefit package. Her failure to do so was a personal choice; yet it was one that required a consequence, since her ex-husband is *not* a guarantor of her *post*-divorce choices.

USE IN AGREEMENTS: HOW SHOULD THESE PRINCIPLES BE REFLECTED IN AN AGREEMENT?

The principle raises the question whether agreements should be drafted differently with future modification motions in mind. Perhaps agreements should specifically confirm the fiduciary obligation to act reasonably in economic decisions, such as engaging in future employment.

POST-JUDGMENT DISCLOSURE OF MARITAL STATUS/EMANCIPATION

If spouses, and even ex-spouses, have fiduciary responsibilities to each other, that logically should create an obligation to make disclosure of material facts, such as a remarriage, cohabitation or when a child is emancipated. Separate and distinct from the obligation being imposed by law, it is a reasonable position to assert during negotiations that a property settlement agreement require spouses to disclose whether they have remarried or cohabit, thus triggering alimony termination or a support review if there is cohabitation. Similarly, it is reasonable to mandate contractually that when emancipation occurs, it be disclosed.

A substantial argument exists that even absent such provisions, nondisclosure might constitute actionable equitable fraud. It has not been the author's experience that parties negotiate for contractual disclosure of future events. Yet, there are motions made by parents to determine a child's emancipation, and to seek retroactive relief. Thus, proponents of such required disclosure should argue there is a systemic interest in such provisions. If all contracts have an element of good faith, shouldn't that, even independent from a generalized fiduciary responsibility, require a parent to disclose whether a child is emancipated or has dropped out of school, or any of the myriad of occurrences that implicate the fairness of continuing support?

If the principle is linked to sound public policy, is it not reasonable to have some self-regulating provision assuring the support paid is fair and in accordance with the law? Yet, if nothing else, the concept may affect how people negotiate.

NON-DISPARAGEMENT OF BUSINESS

The entire thrust of establishing a fair distributive scheme involving a business is to assure the non-titled spouse receives their fair share of the future economic benefits created by marital effort. Yet, post-divorce, an ex-spouse must have some obligation not to damage the business entity. The answer lies in a policy analysis. There are many cases where the future income stream of the business, for which the non-titled spouse has been compensated, could be affected by post-judgment actions of the non-titled spouse. These actions range from deliberate interference characterized by the non-titled spouse as "I have done nothing more than explain why we got divorced" or "don't I have the right of free speech," to direct economic interference.

There are substantial reasons to impose a spousal obligation not to diminish future cash flow. Arguably, such conduct only hurts the person because their equitable distribution or support may be effected. Yet, there are many cases where support has terminated or there is no additional equitable distribution payout. In those, and, in fact, in every case, it seems reasonable to impose upon the non-titled spouse the obligation not to affirmatively take action that would diminish or depreciate the value of the asset for which that spouse has already been paid. By insisting in negotiations that the non-titled spouse take no action that would harm the asset, the spousal fiduciary responsibility the author believes exists would be implemented. Whether this obligation is contractually imposed or is imposed by operation of law is of no consequence, since elements of fairness are involved; it is the principle not the vehicle that is critical.

Even if a property settlement agreement does not contain a specific contractual provision not to depreciate the value of an asset, there still is general law that a court may conclude such a provision is an implied covenant. The issue has been raised in a commercial setting where the policy considerations, if anything, are not as strong as they

are in the family part.

In Palisades Property,[95] addressing the rights arising out of a real estate transaction, the court noted:

> There is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract; in other words, in every contract there exists an implied covenant of good faith and fair dealing.[96]

What is of note is that the Supreme Court found such an implied covenant existed as a matter of contractual interpretation and not as a matter of policy. Thus, if anything, it should be easier to convince a court either to interpose such a provision in the litigated case or to imply one if it is not in an agreement because there is a dual basis for the imposition, general contract law and separate public policy considerations.[97]

The disparagement issue is easier to address than restrictive covenants that arise when both spouses worked in the business during the marriage. While clearly the business owner has a legitimate business interest in limiting direct competition, the non-titled spouse has a correlative right to maximize their earning capacity, particularly since interferences with freedom of contract and the opportunity to develop one's earning capacity are similarly based on sound principles of public policy. There are cases across the country addressing the issue. Yet, it is not the purpose of this article to review either those cases or the more generalized conflicting policy considerations. To the extent a matter involves the potential post-judgment competition, imposing an overlay of a fiduciary responsibility on discussions makes sense.

There was a recent Appellate Division opinion that found an employer's insistence on an employee signing a non-compete clause, given New Jersey's strong prohibition against restraints of trade and the right of people to engage in their chosen profession, may support a claim that such a demand is violative of the Conscientious Employees Protection Act (CEPA) or create a common law cause of action under *Pierce*.[98]

Interestingly, in that case, Judge Cuff, a former matrimonial judge, noted that restrictive covenants may not be enforceable if they are violative of public policy, relying on analogies in the medical field. Similar issues are raised with restrictive covenants involving lawyers. Thus, once again, we have a conflict between competing public policies.

Raising the issue itself during negotiations may well have value. In a commercial setting, there is the direct link between the value of the business and the limitations imposed on future competition by former business owners. A buyer concerned about maintaining the future cash flow that was the basis by which the purchase price was calculated will insist there not be competition by the former owner. If such a promise is not forthcoming, the purchase price will be reduced. Thus, if the departing spouse agrees not to compete that should reduce the distributive share.

Related to the concept of spousal responsibility is the contractual duty of good faith dealing. It seems reasonable and logical to suggest the spouse who is receiving a tax- and risk-free payment for compensation for their interest in the business may turn around and take actions that depreciate the value of that business. Everyone characterizes this as a breach of good faith dealing or a breach of a spousal fiduciary responsibility. The spousal acts are wrongful, contrary to the philosophy of N.J.S.A. 2A:34-23.1 in implementing a fair distributive scheme; as such the law should provide a remedy. In a litigated context, the appeal of the issue is enhanced, since it is far more difficult to defend a client's right to devalue a business in the future while simultaneously demanding, based on that same future value, a large payment. The combination of common sense and fundamental fairness strongly suggests the law preclude such future actions.

CONTACTING THE INTERNAL REVENUE SERVICE

We have all had cases where concern about the non-titled spouse contacting the Internal Revenue Service (IRS) is raised. It presents practical problems because it is difficult to draft a provision, the very language itself may well raise red flags.

Analyzing the issue, once again, from the standpoint of policy seemingly suggests that spouses should not take action either before or post-divorce to diminish the earning capacity of their spouse. In cases where there are children, there are obvious interests involved in assuring children's rights are not adversely affected by spousal actions.

If people are responsible for the consequences of their actions, it is not simply that a change in circumstance has occurred warranting modification of support, but potentially damages as well. The right to receive damages would be offset by a counter-veiling policy that suggests that tax avoiders may not claim foul when their illegal acts are disclosed. If the overall concept of spouses having responsibilities to each other has merit, then there is strong support for precluding the spouse who may well be an innocent spouse under the code from taking any adverse action.

If there is a need to include a provision in a property settlement agreement confirming spousal responsibility, in general terms to encompass the preclusion of a spouse going to the IRS without the concurrent risk of a red flag being raised, the following language is suggested:

> The parties recognize that they have a generalized fiduciary responsibility to each other which shall survive execu-

> tion of this Agreement. Neither party shall take any action that would adversely affect the other party's earning capacity since the parties acknowledge that such actions are contrary to the duties they have to each other and are contrary to the bargain they have made and its ability to be implemented in the future.

The extent of a spousal responsibility regarding non-disclosure of wrongful acts may well be subject to limitations otherwise imposed by law. This is a complex area. For example, CEPA[99] establishes a policy protecting employees from disclosure of information revealing a violation of law. As the Supreme Court emphasized in *Pierce*,[100] an employer's right to discharge an employee carries a correlative duty not to discharge an employee who declines to perform an act that would violate a clear mandate of public policy. In many instances, spouses who are no longer employed in a business were, in fact, employees. Yet, even if they are not, CEPA expresses a policy that fosters disclosure of illegality which runs directly contrary to the spousal concept of duty. How that conflict would be resolved is difficult to predict since it inevitably is a fact sensitive analysis.

SPOUSAL RESPONSIBILITIES AND POST-FILING USE OF FUNDS TO PRESERVE ASSETS

An example of how spousal responsibilities can be utilized is *Goldman*,[101] best known for the valuation date issue. The facts were unique. Mr. Goldman was restrained, pursuant to a *pendente lite* order, from dissipating marital assets, but was simultaneously permitted to operate his business in the "ordinary course." To preserve the business, he used approximately $400,000 of marital funds that were subject to the restraint. There was not a stipulation Mr. Goldman acted in good faith, and it was clear he violated the order. Yet, there was a stipulation use of the marital funds was not in "bad faith." Judge Glickman concluded Mr. Goldman had made a good faith effort to preserve a marital asset, and that the transfer of funds from one marital asset to another should not result in a charge to him.[102]

The Appellate Division, affirmed but with cautionary comments that their ruling was not to be construed as permission for one spouse to use marital funds "as venture capital with impunity."[103] Confronted with the stipulation there was no bad faith that Mr. Goldman's judgments were "unreasonable" business judgments, or even that the business had failed because of his "poor business judgment or mis-management," Judge Glickman's ruling was affirmed. Viewed from the perspective of fiduciary responsibilities all Mr. Goldman arguably did was fulfill his obligation to preserve a marital asset. Since he had not acted in "bad faith," and his business judgments were reasonable, there was no adverse economic consequence to him, even though there was a loss to his wife and he acted in direct violation of an order.

While certainly his state of mind was a relevant factor, *Goldman* stands for the proposition that reasonable post-filing business judgments utilizing marital assets do not violate any duty or responsibility to their spouses, even if the asset is ultimately lost. Yet, doesn't an argument exist that if spouses have responsibilities to each other shouldn't that encompass a duty to *notify* the spouse of an *intention* to use marital funds? Shouldn't the law differentiate between disclosure of the intention to use and actual use of funds? Shouldn't the duty to disclose be paramount?

Both the trial court and the Appellate Division analyzed the issue in terms of "good and bad faith"; yet, that does not address the responsibility spouses have to each other to make disclosure. If both parties have a right to the funds, it would seem an argument exists to impose a duty to at least confer before marital funds are used. The fact that an order was in existence should, if anything, heighten that duty. Thus, the concept of responsibilities permits counsel in *Goldman* situations to take a new approach that might lead to a different result. Breach of duty is different than either good or bad faith, particularly when it results in loss of assets without even being advised funds in which one has an interest are being used.

A related issue *Goldman* raises is the spousal obligation to deal with a business subject to equitable distribution when financial problems arise post-filing. The prudent and perhaps safer course for the business owner is to at least disclose the intention of utilizing funds to provide the other party with the opportunity to go to court to seek an order. This also has tactical advantages for the business owner; a spousal refusal to authorize use of money to maintain or preserve a business is arguable violative of N.J.S.A. 2A:34-23.1(i), which directs courts to consider the "contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation" of marital property. The statutory factors are to be applied at final hearing, and clearly implicate post-filing acts.

As the statute itself imposes responsibilities on the part of the parties to preserve, maintain and not dissipate assets, placing the non-titled spouse on the horns of a dilemma may well be tactically wise. If the non-titled spouse refuses to be of assistance, the argument that the final hearing value be utilized is enhanced. Claims can also be advanced that the loss of value (if quantifiable) should be chargeable to that spouse, or should clearly affect the allocable percentage received. If the spouse agrees to utilize funds after consultation and with agreement, not only has the business owner received the money, but they have acted in a fashion to insulate themselves from judicial criticism. The risk is that the spouse and the court could say no,

and as a consequence the business would then be lost or devalued. From the client's perspective, enhancement of one's legal position may not be sufficient solace.

THE RELATIONSHIP BETWEEN SPOUSAL FIDUCIARY REPONSIBILITY AND ASSETS IN A *PENDENTE LITE* SETTING

As argued, there should be a consequence to dissipation of marital assets, and there should also be a consequence for spousal decisions. In many cases, those two principles coalesce in addressing the status of assets *pendente lite*. For example, assume that given the emancipation of the children or the general facts of the case, it is apparent the marital home would be sold at final hearing. We are all aware of the limited ability of a court to sell assets *pendente lite* because of the flawed reasoning in *Grange*,[104] notwithstanding the well-reasoned trial level decision of *Pelow*.[105]

If there is no effective mechanism to compel sale of an asset *pendente lite*, does a spouse have an *obligation* to avoid dissipation or to preserve assets, to consent to a sale of assets *pendente lite* upon demand. If not, should there be a consequence?

Such a written demand for the sale of assets is predicated upon the spouse's obligation to act reasonably, and to also be responsible for the consequences of their actions. The failure to sell a home after demand, followed by a loss in value, should trigger an equitable distribution adjustment. Converse, what happens if the asset increases but does not decrease in value?

The dissipation claim is really in three parts; first, there is the potential loss of the equity in the asset. Secondly, there is the expenditure of marital funds to maintain the asset and, finally, the loss of the investment return on the equity which particularly applies in larger cases where homes have significant equity and such equity is not invested since the property is not sold.

Similarly, in the higher net worth cases, assume there are risky assets in the market that have appreciated or, alternatively, that the risk is created by an overweighting of one class of investments as opposed to broadly based diversification. Should a letter be sent demanding a restructuring of a portfolio to preserve a claim that if the assets decrease in value there should be a consequence for the personal decision made by one spouse not to diversify or sell? Spouses certainly have a right to make decisions relating to their assets; but, a compelling argument exists there are consequences to such personal decisions.

DEFERRED DISTRIBUTION OF STOCK OPTIONS

It is frequently the case that stock options are divided on an if, as and when basis, secured by a constructive trust. Similar issues may arise with restricted stock units or other complex employment benefits for highly compensated individuals. If there is an ongoing economic sharing of asset ownership, there logically should be an obligation imposed on the titled spouse, who frequently is in a position to have material information regarding the value of the underlying asset, to disclose information that might be relevant on the decision to sell. Yet, there may be issues of considerations or leverage in owning the asset with one's employer, that might suggest the titled spouse may not want to sell.

It may simply be an economic judgment, but shouldn't there be an obligation to disclose material information that bears on the decision when there is some form of joint ownership to sell? Directly or by implication, deferred distribution of assets establishing any form of joint ownership extends at least a form of the marital partnership post-divorce. That extension should logically result in establishment of fiduciary obligations to disclose material information. This obligation should be memorialized either in the property settlement agreement or the implementing agreement concerning the ongoing ownership.

SPOUSAL RESPONSIBILITIES IN A DISCOVERY CONTEXT

One of the primary areas where the principle of duty seemingly applies is in the context of discovery, where there are two conflicting policy considerations. The first is that in an adversarial system, it is not the obligation of one spouse to educate their adversary. Rather, it is the responsibility of the adversary to ask pointed questions and obtain information.

While certainly the family part practice is adversarial, the ultimate issue is whether defining discovery only in adversarial terms advances the policies sought to be advanced by a comprehensive body of law. Moreover, there are substantial differences between commercial contracts and spousal agreements. A spousal support agreement is only enforceable to the extent it is fair and equitable, which raises the fascinating question of whether nondisclosure of material information that renders an agreement unfair permits it to be modified absent a misrepresentation. In other words, may a spouse not disclose information that bears on the ultimate fairness of the agreement if that information was not specifically requested?

An analogy may be drawn from equitable distribution.

In *Hipsley*,[106] the court was confronted with the situation where an asset was omitted and not distributed between the parties. In *Hipsley*, the husband argued that an asset that had not been addressed by the parties as being a distributable asset was not distributable because of an overall release provision in the agreement. The court, relying on *Smith*,[107] found that a property settlement agreement will be enforceable, but only to the extent it was found to be "fair and equitable." Since the asset in question had not been considered by the agreement, it

would neither be fair nor equitable to construe the general release provision as constituting a waiver.

The *Hipsley* doctrine is well-rooted in our law, and emphasizes that courts are not in the business of enforcing unfair agreements, placing, therefore, from a systemic point of view, an emphasis on assuring before an agreement is incorporated in a final judgment that at least the parties themselves believe the agreement to be fair and equitable. Thus, the legal framework is fundamentally different than in a commercial setting, and undermines the argument that disclosure is to be measured by adversarial standards as opposed to the *Hipsley, Smith, Lepis* standards of fairness as defining enforceability.

The fact that a case information statement, which requires full and complete disclosure of income, assets and liabilities, is a requirement to be filed in a contested case confirms the systemic interest in assuring that full and complete disclosure is made, since only with such disclosure can parties make informed decisions regarding what they, themselves, consider to be fair and equitable.

If the law imposes a duty on the parties to complete a case information statement, and if the law will only enforce an agreement that captures all assets, it logically follows that spouses have duties to make disclosure, and that duty emanates not only in broadly based systemic concerns but in the nature of marriage and in the broadly based *Miller* principle of assuring that people upon divorce treat each other fairly. Therefore, it is reasonable to assert that spouses have a fiduciary responsibility to make disclosures that are adequate for people to make an informed decision.

Hipsley clearly encompasses assets, but there are other elements of economic value that are not necessarily disclosed, for example, losses and positive AAA accounts in Sub-Chapter S Corps. It is not determinative that what was not disclosed may not be deemed an asset; rather, the standard should be had there been disclosure, would it have affected the negotiating process to the extent that the agreement was rendered unfair and inequitable as a consequence of non-disclosure.

If the law imposes duties upon people to conform their conduct to an acceptable norm, then imposing a fiduciary duty upon spouses to make disclosure of *material* financial information seems to be good policy. Yet, even more than that, it seems to capture the essential nature of the marital relationship and establish a legal framework that emphasizes the importance of marriage as an institution and confirms the *Miller* policy that spouses must be fair to each other when they divorce. If a court can only enforce a fair spousal support agreement, shouldn't the law implement that policy by requiring information bearing on fairness be disclosed? The goal is fairness; the law should mandate conduct designed to achieve—not thwart—that goal.

There are other areas of disclosure where a duty should exist. For example, if the dependency exemption as it frequently is, is allocated to the supporting spouse if that exemption can no longer be utilized because it is phased out as a consequence of that parent's income, shouldn't there be an obligation to disclose? A practice point is to not only include that obligation, which ironically provides informal yet accurate disclosure at least regarding the level of the supporting spouse's adjusted income.

DISCLOSURE OF CONTINGENT LIABILITIES: TAX AND ENVIRONMENTAL

Issues of contingent liabilities, including possible environmental problems, directly implicate concepts of spousal duty and responsibility. Almost all lawyers have form interrogatories, but rarely do they address potential environmental issues. Importantly, such issues are not necessarily limited to commercial property. Oil tank questions and their associated costs may well be significant; yet, rarely is there a disclosure or discussion in agreements concerning such issues. In a commercial setting there are representations made regarding potential environmental problems when property transfers are made, but it is not the normal practice to have a separate contract for the transfer of property that is generally implemented pursuant to the provisions of a property settlement agreement.

Yet, how many agreements address environmental issues? If spouses have duties and responsibilities to each other, shouldn't that encompass disclosure of facts that reasonably might affect the value of assets being transferred, or even the decision to accept such assets? Pursuant to both N.J.S.A. 46:3C-2 and N.J.A.C. 11:5-1.23(c)(2), there has been imposed upon sellers the responsibility to disclose material facts relating to offsite conditions that may affect the value of real estate.

Could it possibly be the law that commercial parties have a greater duty to make disclosure of material information bearing on the fairness of an agreement than spouses do in dissolving this most personal of relationships? If commercial parties have this responsibility, then certainly an argument exists that spouses should as well. Oil tanks immediately come to mind, but potential contingent liabilities may exist in many different contexts—environmental or other assets. For example, does the financially sophisticated spouse have an obligation to disclose the risk of theoretical taxes and assets being transferred?

In implementing stock transfers of securities acquired at different times there is a different value of the asset being transferred depending upon basis. For example, if there are 200 shares of SunMicro System (Sun) in a security account and the first 100 purchased when Sun was at 70 and the other when Sun reached three, there is a potential gain in one and a substantial loss in the other. Losses, however, have value, yet there is nothing on a case information statement that requires

disclosure of tax basis information. Should the law impose a responsibility as part of the negotiating process to point this out, or is it truly an adversarial system and transferee beware?

This article is not intended to answer the question, only to raise it and elevate the practice generally, to be cognizant of the impact of tax considerations. An argument clearly exists that in a system based on fairness, disclosure is required, since to do otherwise breaches the responsibility spouses have to each other.

A more likely occurrence in the simple case is potential credit card obligations in the future. There are many credit cards taken out during a marriage, which are guaranteed by one spouse. There are many instances post-divorce where years later the spouse who guaranteed the card is presented with a bill reflecting unpaid charges made by the person in whose name the card is in. Is there a duty to disclose such information at the time the agreement is being executed?

Such a risk explains the desirability of having a generalized provision in a property settlement agreement that relates to each parties' fiduciary responsibilities to permit an argument being made that the failure to disclose is not only a breach of duty, but might constitute a fraud, hence, making the obligation potentially non-dischargeable in bankruptcy.

In a related context, ironically one that took place prior to marriage, the Appellate Division emphasized in *Chrysomalis*,[108] that a prenuptial agreement may be invalidated when one party fails to disclose to the other facts they are aware of that they believe, as of the execution of the agreement, might provide a basis for its later invalidation. Whether that is based on the concept of contracts having a good faith provision or breach of a duty, it emphasizes in the family part courts have recognized the importance of full disclosure. The fact that this estoppels-based principle takes place even before a marriage only heightens the argument that spouses have responsibilities to each other when married that transcend contractual responsibilities people have in a commercial setting.

CHILDREN AND SPOUSAL DUTIES

Most of this article will address economic issues; however, there is perhaps no more fertile area for utilization of spousal responsibilities than in issues relating to children. We routinely advise spouses they have a responsibility not to interfere or adversely affect a child's relationship with the other parent. This principle has been recognized in law;[109] yet, in this difficult area perhaps the parent whose rights have allegedly been affected might be able to construct a more persuasive claim predicated on a breach of duty.

As the Appellate Division noted in *Wilke,* since the law favors visitation and protects against "thwarting of effective visitation rights,"[110] it logically follows that a parent should have a correlative affirmative duty to encourage parenting time. Clearly, it is the policy of this state to encourage meaningful parent/child contact. Phrasing the issue in the negative, *i.e.* what a parent should not do, does not advance that goal as much as imposing an affirmative obligation on the custodial parent. These are arguments that are routinely made in cases but phrasing the issue in the context of duty and responsibility and public policy may result in stronger and more effective language and subsequent enforcement than what routinely occurs now.

The concept of spousal and parental responsibility permits removal questions to be argued from a different standpoint. If spouses and parents have responsibilities to each other can it not be argued encompassed within that overall duty is the obligation not to take any action that would interfere with the ongoing parental relationship? While by *Baures* broad reasoning may bar such a claim, if *Baures* is to be limited, then perhaps one approach might be to argue that encompassed within the overall duty is the obligation not to move out-of-state if a move would adversely impact the parent/child relationship. ■

ENDNOTES

1. *Lepis v. Lepis*, 83 N.J. 139, 149 (1980).
2. *See Vasquez v. Glassboro Service Ass'n Inc.,* 83 N.J. 86 (1980); *Henningsen v. Bloomfield Motors*, 32 N.J. 358 (1960); *Int'l Tracers of America v. Rinier*, 139 N.J. Super. 573 (App. Div. 1976).
3. *See Miller v. Miller*, 160 N.J. 410, 418 (1999).
4. Holmes, Oliver Wendell, *The Common Law* (1881).
5. *Falcone v. Middlesex Co. Medical Society*, 34 N.J. 582 (1961).
6. *Falcone*, at 589.
7. Holmes, *The Common Law*, 35 (1881) *cited in Falcone* at 589.
8. *Citing Collopy v. Newark Eye and Ear Infirmary*, 27 N.J. 29 (1959); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358 (1960); Cardozo, *The Nature of the Judicial Process*, 10 (1921); *Columbia Broadcast Syst. v. Melody Recordings*, 134 N.J. Super. 368, 382 (App. Div. 1975); *State v. Hand*, 101 N.J. Super. 43, 54 (Cty. Ct. 1968).
9. *Shackil v. Lederle Laboratories*, 116 N.J. 155, 177 (1989).
10. *Kelly v. Gwinnell*, 96 N.J. 538, 545 (1984).
11. *Palsgraff v. Long Island R.R. Co.,* 248 N.Y. 399 (1928).
12. *Kelly*, at 544.
13. *Kinsella v. Kinsella*, 150 N.J. 276 (1997).
14. *Id.*, at 298.
15. *Id.*, at 329-330.
16. *Baglini v. Lauletta*, 338 N.J. Super. 282, 296 (App. Div. 2001).
17. *Goldman v. Goldman*, 248 N.J. Super. 10 (1991) *aff'd.* 275 N.J. Super. 452 (App. Div. 1994).
18. *Id.*, at 457.
19. *See* TEMP. TREAS. REG. SEC-

TION 1.1041-1T; Q/A 7.

20. *United States v. Davis*, 370 U.S. 64 (1962).
21. *See* Reg. 1.71(T) Q8.
22. *Gould v. Gould*, 245 U.S. 151 (1917).
23. *Brown v. Brown*, 348 N.J. Super. 466, 489 (App. Div. 2002).
24. *Id.,* at 488.
25. *Miller v. Miller*, 160 N.J. 410, 418 (1999).
26. *Id.*, at 418.
27. *See Miller*, at 418.
28. *Eldredge v. Eldredge*, 38 N.J. Super. 509, 511 (Ch. Div. 1955); *Taylor v. Taylor*, 73 N.J.Eq. 745, 750 (E&A 1908).
29. *Nashman v. Nashman*, 33 N.J. Super. 602, 605 (App. Div. 1955), *See also O'Brien v. O'Brien,* 103 N.J. Eq. 214 (Ch. Div. 1928) *aff'd* 105 N.J.Eq. 250 (E&A, 1929).
30. *Tigh v. Peterson*, 175 N.J. 240 (2002).
31. *See Tigh*, at 242 *citing Goldberg v. Housing Authority*, 38 N.J. 578, 583 (1962). *See also Hopkins v. Fox and Lazo Realtors*, 132 N.J. 426, 439 (1993); *Weinberg v. Dinger*, 106 N.J. 469, 484 (1987).
32. *Palsgraf v. Long Island R.R Co*., 248 N.Y. 339, 162 N.E. (1928), *cited in Hopkins*, at 438
33. *Kelly,* at 544.
34. *Patel v. Navitlal,* 265 N.J.Super. 402, 407 (Ch. Div. 1992).
35. *Bonnano v. Bonnano*, 4 N.J. 268, 273 (1950).
36. *Thiel v. Thiel,* 41 N.J. 446, 449 (1964).
37. *Id*., at 449.
38. *Orr v. Orr*, 440 U.S. 268, 99 S. Ct. 1102 (1979).
39. *Lepis*, at 155.
40. *See* Rule 5:5-2(c)
41. *Cox v. Cox*, 335 N.J. Super. 465 (App. Div. 2000).
42. *Chalmers v. Chalmers*, 65 N.J. 186 (1974) emphasizes a critical point generally ignored in day to day practice. The Supreme Court in *Chalmers* noted in rejecting fault as a factor to be considered in equitable distribution that in implementing the legislatively dictated policy of N.J.S.A. 2A:34-23, all the Court was doing was merely allocating between spouses what already belonged to them. *Chalmers* at 194.
43. *Miller*, at 418.
44. *Lepis*, at 148-149.
45. *Wolff v. Wolff*, 134 N.J. Eq. 8 (Ct. of Ch. 1943); *See also Ward v. McLellan*, 117 N.J. Eq. 475; *Paul v. Otterson*, 52 N.J. Eq. 522.
46. *Van Inwegen v. Van Inwegen*, 4 N.J. 46, 51 (1950) *citing* 3 Pomeroy 5th Ed., p. 853, Sec. 962(B); 3 Story, Eq. Juris. 14th Ed. (1918), p. 425, Sec. 1825.
47. *Cox*, at 479.
48. *Id.*
49. 65 N.J. 219, 229 (1979).
50. *cf. Patel*, at 407.
51. *Stark v. Rheingold*, 18 N.J. 251, 261 (1955); *Hansen v. Javit Schek*, 57 N.J. Super. 418, 422 (App. Div. 1959).
52. *Sons of Fund, Inc. v. Bordon, Inc.,* 148 N.J. 396, 420 (1997); *Pickett v. Lloyds*, 131 N.J. 457, 467 (1993); *Onderdonk v. Presbyterian Homes*, 85 N.J. 171, 182 (1981); *Bak-A-Lum Corp. v. Alcoa Bldg. Prods. Inc.*, 69 N.J. 123, 129-30 (1976).
53. *Moore v. Moore*, 376 N.J. Super. 246 (App.Div.2005).
54. *Moore*, at 248.
55. 29 U.S.C.A. Section 621, 2634.
56. *Deegan v. Deegan*, 254 N.J. Super. 350, 359 (App. Div. 1992).
57. *Deegan,* at 359.
58. *Crews v. Crews*, 164 N.J. 11 (2000).
59. *Pascarella v. Pascarella*, 165 N.J. Super. 558, 563 (App. Div. 1979).
60. *Monte v. Monte*, 212 N.J. Super. 557 (App. Div. 1986).
61. *Monte*, at 566-568.
62. *See Klingberg v. Klingberg*, 68 Ill. App. Div. 3rd 513 (1979) and *In re: Marriage Of Sevon*, 17 Ill. App. Div. 3rd 317 (1983), *cited in Monte*, at 568.
63. *Szesney v. Szesney*, 557 N.E.2d 222 (Ill.App.Ct.1990).
64. *Stutz v. Stutz*, 556 N.E.2d 1346 (Indiana Ct. of Appeals).
65. *Id*.
66. *Siegel v. Siegel*, 241 N.J. Super. 12 (Ch. Div. 1990).
67. *Siegel*, at 13-14.
68. *See Monte*, at 566.
69. *See Kozlowski v. Kozlowski*, 633 N.Y.Sd. 523 (Sup. Ct. 1995); *In re Marriage Hagshenas*, 600 N.E.2d. 437 (App. Ct. Ill. 1992); *Reaney v. Reaney,* 505 S.W.2d. 338 (Tex.App.1974); *Lindsey v. Lindsey*, 15 Ariz. 322 (Ariz.App. 1977).
70. *Dunseth v. Dunseth*, 260 Ill. App. 3d. 816 (App. Ct. Ill. 1994).
71. *Mika v. Mika*, 728 S.W.2d. 280 (Mo. App. 1987); *Simpson v. Simpson*, 679 S.W. 2d. 39 (Tex. App. 1984); *Neely v. Neely*, 115 Ariz. App. 47 (1977); *In re Marriage of Sedloc*, 69 Wash. App. 484 (Wash. App. 1993).
72. *Kothari v. Kothari*, 255 N.J. Super. 500, 506 (App. Div. 1992).
73. *Id*., at 506.
74. *Head v. Head*, 168 Ill. App. 3d, 697, 523 N.E.2d 17, 20-21 (Ill. 1st Dist. 1988).
75. *Spouses' Dissipation Of Marital Assets Prior To The Divorce As A Factor In Divorce Courts Determination Of Property Division*, 41 A.L.I. 4th 416, 419, n. 1 (1985).
76. *Cited in Kothari*, at 506.
77. *See Siegel*, at 13-14.The issue of asset dissipation was the subject of an excellent article by John J. Trombadore and Jerry S. D'Aniello which the author has used as a resource. 1996 Family Law Symposium
78. *Kothari*, at 510.
79. *Siegel*, at 13-14.
80. *Kothari*, at 509.
81. *In Marriage of Aud*, 142 Ill. App. 3d. 320.
82. *McGee v. McGee*, 277 N.J. Super. 1, 12 (App. Div. 1994).
83. *See McGee, supra*.
84. *Halliwell v. Halliwell*, 326 N.J. Super. 442 (App. Div. 1999)
85. *cf. Kuron v. Hamilton*, 331 N.J. Super. 561 (App. Div. 2000).
86. *Jaffe v. Jaffe*, A-1305-02TS

(10/29/03).

87. *See generally Bencivenga v. Bencivenga*, 254 N.J. Super. 328, 331 (App. Div. 1992)(holding a parent who voluntarily leaves gainful employment does not foreclose inquiry into the responsibility of a parent to pay support and the requirement of imputing income to the obligor); *Lynne v. Lynne*, 165 N.J. Super. 328, 341 (App. Div. 1979, *cert.den*. 81 N.J. 52 (1979). (A physician leaving his practice in good faith to pursue a teaching position in a medical school creating a reduction in income was not ground to reduce child support); *Arribi v. Arribi*, 186 N.J. Super. 116, 118 (Ch. Div. 1982) (a court refused to reduce the obligation of an under-employed obligor when the obligor chose to passively wait for employment in their field).
88. *See* N.J.S.A. 2A:34-23(5); *Lepis*, at 155.
89. *See generally Miller v. Miller*, 160 N.J. 408, 423 (1999) and *Stiffler v. Stiffler*, 304 N.J.Super. 96 (Ch.Div.1997) *cf. Bonnano v. Bonnano*, 4 N.J. 268, 275 (1958) ("diligent attention to ...business" is required).
90. *Miller,* at 422, *citing Innes v. Innes*, 117 N.J. 496, 503 (1990).
91. *Mahoney v. Mahoney*, 91 N.J. 488, 505 (1982).
92. *Stiffler v. Stiffler*, 304 N.J. Super. 96, 101 (Ch. Div. 1997).
93. *Stiffler,* at 101. *See also Arribi v. Arribi*, 186 N.J. Super. 116, 118 (Ch. Div. 1982).
94. *See Mallamo v. Mallamo*, 280 N.J. 58 (App. Div. 1995).
95. *Palisades Property, Inc. v. Brunetti*, 44 N.J. 117 (1965).
96. *Palisades Property at 130, citing* 5 Williston On Contract, Section 670, pp.159-160 (3rd Ed. 1961).
97. *See also Marini v. Ireland*, 56 N.J. 130, 143 (1970) where the Court noted: "In determining under contract law which covenants are to be implied, the object which the parties had in view and intended to be accomplished is of primary importance." *See also Association Group Life, Inc. v. Catholic War Vets of U.S.*, 61 N.J. 150, 153 (1972).
98. *See MAW v. ADB Clinical Communications*, 359 N.J. Super. 420, 437 (App. Div. 2003).
99. N.J.S.A. 34:19-1-19-8.
100. *Pierce v. Ortho, Pharmaceutical Corp.,* 84 N.J. 58, 72 (1980).
101. *Goldman v. Goldman,* 248 N.J. Super. 10 (Ch. Div. 1991) *aff'd* 275 N.J. Super. 452 (App. Div. 1994).
102. *Goldman*, at 18.
103. *Goldman*, at 475.
104. *Grange v. Grange*, 160 N.J. Super. 153 (App. Div. 1978).
105. *Pelow v. Pelow*, 300 N.J. Super. 634 (Ch. Div. 1996).
106. *Hipsley v. Hipsley*, 161 N.J. Super. 119 (1978).
107. *Smith v. Smith*, 72 N.J. 350, 358 (1997).
108. *Chrysomalis v. Chrysomalis*, 260 N.J. Super. 50 (App. Div. 1992).
109. *Wilke v. Culp*, 196 N.J. Super. 487, 497 (App. Div. 1984).
110. *Wilke*, at 496.

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