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## Chair's Column

# Stop and Smell the Roses

*by Jeralyn L. Lawrence*

*(Editor's Note: This column was written in August, but was delayed in publication due to the enactment of the alimony and collaborative law statutes. As a result, prior columns were devoted to those topics.)*

Hello to my fellow family lawyers.

I write this column as I sit peacefully on the beach in Belmar, on a gorgeous sunny Sunday summer afternoon. The sky is a majestic blue, and the water is as clear as a Caribbean sea. There is a steady, refreshing ocean breeze that reminds me of how borderless and unburdened these elements before my eyes truly are. If only we, as family lawyers, could have the fortune and freedom to be so uninterrupted.

Yet, somehow work has followed me to this magnificent place of tranquility, as I realize I still have not written this column. So, I sit and ponder what to write about. It is not long before my mind is distracted yet again. I turn to Facebook for my daily fill on my friends, their families, and what everyone else is doing to enjoy this beautiful day. Then it strikes me—the topic of my column.

As I rummage through posts and posts of my colleagues, venting about how much they are dreading returning from vacation, it seems the consensus is that no one is looking forward to coming back to the practice of family law. Some even go so far as to question the value in ever attending a single convention or going on vacation again, citing how challenging and difficult it is to come back to reality after such a hiatus. They return from vacation truly questioning their career choice, as if the few days away from the office provided them with the full clarity and certainty to know they should have been a veterinarian; or an event planner; or an unpaid, nomadic world traveler with nothing of value but a camera and a perpetual state

of serenity. Only a family lawyer knows the stress of the daily rigors in our profession, and only a family lawyer knows the weight of that burden lifting at 5 p.m. on the day before vacation. The overall response of my Facebook colleagues was disdain in having to return to the profession we have crafted our adult lives around, and the hope that one day they will be able to change career paths to something supposedly more rewarding and less challenging to return to after vacation.

Reading these posts troubled me. Not because I think being a family lawyer is the greatest job in the world, and not because I graciously welcome the stress inherent in this profession, but because I really love being a family lawyer. I enjoy my job to the fullest, and not for a single day have I regretted the path of my professional career. It leaves me wondering, am I alone? Why is it that so many of my colleagues feel differently? Am I missing something?

I suspect there are many reasons why some of my colleagues question their career choice. I think one of the most prevalent reasons for this lack of desire to return to family law is the tedious task of returning to difficult colleagues or a difficult adversary. One case, one experience, one motion, one trial, one *anything* with a difficult colleague can change the way you perceive the comradery in this profession. It can change you and the way you practice, and although it might positively impact your work ethic on occasion, it may also leave you disappointed, unfulfilled, discouraged, and scouring the Internet for a good camera and a one-way airplane ticket.

One of my platforms as chair of the section this year is to try to increase professionalism. During my speech at my swearing in this past May, I dealt out a challenge. I challenged every family lawyer to think about what kind of adversary they are, and what kind of colleague they are. What kind are you? What do your colleagues say about you? What does the Judiciary say about you? How would the staff members at the courthouse weigh in on your disposition? What is your overall reputation? What are you best known for? What are you proud of? How would your colleagues describe you as an adversary or colleague on a case?

It is fair to say that we have all had bad days or made bad decisions in our careers, but that does not define us as bad people with bad intent. Recognizing you have repeated bad days or take your stress out on others, or that your reputation has some negative aspects, should trigger you to assess why you do certain things, or how your reputation evolved. I know when I have had a bad day often the source of my grumpiness is the fact that there is too much to do and not enough time to do it, and I do not have the help I need to get everything done. So, ask yourself this question: Are you understaffed? Whether at home or at the office, do you just not have the help to ease some of the stress of an innately stressful profession? Who is on your team and supports your path? Who do you surround yourself with to assist you throughout the day? These people are an integral part of your daily life, so it is critical to surround yourself with individuals you trust, work well with, benefit from, and appreciate. Your support staff, your nanny, your children's preschool teacher, are all individuals who can make or break your ability to bear daily stresses, and you are not being fair to yourself if you make sacrifices in any of those areas. Your team is only as strong as its weakest link. To maintain a less stressful and happier life, both professionally and personally, it is essential to have a team with no weak links.

Another key to happiness and less stress for me often revolves around who my adversary, my colleague, my mediator or my arbitrator is in a case. I urge you to mentally revisit your favorite case and refresh your memory as to why it was your favorite. Was it because your colleague and you had a good working relationship? Was it because the mediator was incredible and very helpful? If so, focus on finding ways to have more cases with a particular colleague or mediator with whom you have had an enjoyable experience. Network and refer to those professionals you want to have cases with, and those cases will likely come back to you. Ultimately, you will be able to enjoy your caseload more, and likely be happier in the process.

Another way to minimize the stress and maximize the pleasure is planning lunch with friends during the week. Years ago, a colleague told me that having lunch with friends was an important part of her work-life balance, no matter how busy or swamped she felt. Having three small kids and rushing to get into and out of the office, I thought she was nuts! Who has time to meet friends at a restaurant for lunch? Who has time for lunch in general?? Now, I have bought into the 'lunch with friends' concept, and it is something I need, look forward to and have used to rely on to find my work-life balance. I find that my most enjoyable weeks are those that include a lunch outing with friends.

Another way to make this practice enjoyable is to vacation. In my experience, I know that taking a few days away from my office gives me the break I need to refresh

and recharge my battery. Granted, work has a way of following me no matter where I go, and I, like you, am inundated with emails 24 hours a day, seven days a week. However, everybody deserves to take a vacation, even family lawyers. It is your personal preference if you are willing to take calls or address emails after work hours, on weekends, or on vacation, but please remember to make the most of your time away from the office. Often, it is necessary to make yourself available during these times, but it also leads to never truly 'getting away.' Granted, this line of work can demand your attention on a whim, and certain exceptions can and should be made, but bear in mind they also have the potential to add more stress to your daily life. If this is happening more often than not, perhaps you should take some time to consider appropriate boundaries for your work life and your sanity.

I understand we are in a competitive business. Some of our competitors have changed our practice, and I question if it is for the better. Some offer evening consultations, and even consultations on weekends and holidays. Some even offer free consultations. The *most important* time we spend with a client, some are offering for free. Some have made a business decision that the quantity of cases outweighs the quality of cases. Some are working more for a lot less, and this, I suspect, is the reason why so many of my colleagues are left doubting their career choice. The impact of what is occurring is as vivid to my eyes as the ocean, sun and sand before me.

In our competition, we may have lost sight of living in the moment. Instead of being aware of our successes and achievements, we fixate on how we measure up to our competitors. The result is that we suffer the loss of awareness, something imperative to our happiness, success and health. In my swearing-in speech, I was going to suggest that everyone make an effort to take as much time off as possible in August, and refrain from or limit emails to one another altogether. I deleted these comments from my final speech, as they seemed petty or trite. Perhaps they are, but I have come to realize that maybe the subject is worth a mention, at least for this column. I remain convinced that we make our jobs hard. We make our colleagues' jobs harder in the process, often unnecessarily so.

I have heard that in the good old days the courts were closed in August. I am not sure who or what changed that, but I believe we, ourselves, should assure that August is a recuperative and enjoyable month for our practice. If we made an effort to make August a slower month—a month where we can regroup, recharge and refrain from unnecessary motion practice and meaningless letter-writing campaigns—maybe we could transform this practice into a more enjoyable experience.

In addition, if throughout the year we committed ourselves to limiting our emails and quit treating them as if they were an instant messenger, we would find ourselves a lot less stressed, and the pressure of being 'on' for 24 hours a day would subside. What happened to the days of mailing letters, with no fax machines and PDFs? Just good ol' snail mail. It was a time when you were forced to wait for a response to your mailed letter, no rush or haste about it. Sometimes I wonder what it must have been like to practice during the time of typewriters, carbon paper and mail. It must have been *heaven*! Now, we all have iPhones, iPads and every iProduct distracting us from ourselves. I know I am not alone in this belief.

I certainly do not have all the answers, and have likely raised more questions than solutions, but if it starts you thinking about your level of stress and displeasure, maybe it will also open a doorway to the solution. Instead of obsessing about what you could have been, embrace the profession you are fortunate enough to be in. Our job is noble, rewarding, incredibly important, and one that few are able to take on. Focus on how you practice and who you practice with. Contemplate your source of stress and slightly alter those aspects of your life so you find happiness in this profession, and you return from vacation with slightly less dread.

Most importantly, resist the impulse to get lost in external stimuli. When we are standing in court, we can only imagine what it would be like to dig our toes into the sand at the beach. When we are on vacation, we lose sleep worrying about the piles of work overtaking our desks in our absence. Live in the moment, because we can really treat our colleagues with appreciation and commitment only when we appreciate ourselves and value our own time. I need to adhere to every bit of that advice, so I am putting down my pen and signing off from the beach.

# Inside this issue



*The opinions of the various authors contained within this issue should not be viewed as those of the New Jersey Family Lawyer or the New Jersey State Bar Association.*

## Editor-in-Chief's Column

# Resolving Disputes Regarding Preschool Attendance

*by Charles F. Vuotto Jr.*

The Honorable Lawrence R. Jones, J.S.C., has issued yet another insightful decision in the case of *Madison v. Davis*,[1] concerning a legal issue of first impression regarding the rights and obligations of divorced parents when their child attends preschool. Recognizing there is no existing law directly on point, Judge Jones drew from prior case law, including *Beck v. Beck,*[2] *Pascale v. Pascale*[3] and other cases to create a logical and equitable way to address the parties' preschool dilemma.[4] Judge Jones instructs that the parties should address such decisions with the following process:

First: "when a pre-school program is being used in substantial part to fill a need for work-related day care," the primary residential custodian "has the initial right under *Pascale* to select the proposed pre-school program for a child, or to transfer a child from one program to another."[5]

Second:

> the residential custodian's authority on this issue is not absolute and unlimited. Rather, a caveat to [the residential custodian's] right to select a pre-school program which substantially meets legitimate work-related day-care needs is that the choice must be *reasonable*. Reasonableness includes consideration not only of cost but of other factors as well, such as location and accessibility, hours and dates of operation, curriculum, and ancillary services (transportation, lunches, etc.). For example, if [the residential custodian] seeks to move a child from an existing pre-school to another pre-school which substantially increases the cost to the non-custodial parent or the travel time of the non-custodial parent, then such selection may potentially be deemed unreasonable and contrary to the child's best interests, under the totality of the circumstances.[6]

Third:

> absent a restraining order or other court order keeping information regarding the pre-school confidential...the residential custodian[ ] has an obligation to supply...the non-custodial parent[ ] with notice of any proposed change in a reasonably timely fashion.[7]

Fourth:

> pursuant to *Beck*,...a joint legal custodian [ ] has a right to investigate and evaluate information about a new proposed pre-school.[8] Therefore, the non-custodial parent (even as a joint legal custodian) "does not have the right" to "unilaterally and arbitrarily block or veto" the residential custodian's "decision on a pre-school or any other child care provider by simply refusing or failing to consent." *Rather, if [the non-custodial parent] believes [the residential custodian's] selection of pre-school or day care provider is unreasonable and contrary to the child's best interests, and if he [or she] wishes for the court to review same, then [the non-custodial parent] may exercise his [or her] rights under* Beck *by filing a motion with the court, in which the non-custodial parent carries the burden of proof of convincing the court, by a preponderance of the evidence, that the custodial parent's selection or change of the child's pre-school or child care provider is unreasonable and contrary to the child's health, education, general welfare and best interests.*[9]

Fifth:

> if the non-custodial parent is challenging the reasonableness of [the residential custodian's] choice of pre-school, merely complain-

ing about the choice is not enough. Rather, the [non-custodial] parent must demonstrate that there is a specific, more reasonable alternate plan available for providing work-related day care for the child.[10]

Sixth:

> if the court finds that the selected pre-school selected by the custodial parent is unreasonable, the court may override the custodial parent's decision and order different day care arrangements including placement at a different pre-school. Alternatively, if the court finds the custodial parent's choice of pre-school day care plan is in fact reasonable, the court may approve same and may order both parties to contribute to same in the same manner as the cost of any other reasonable day care expense.[11]

Seventh:

> if the court finds that either party is acting unreasonably on the issue, counsel fees and/or other financial sanctions may be issued by the court in its discretion.[12]

"This seven-step analysis respects both parties' parental rights, and further blends and incorporates significant principles of both *Beck* and *Pascale* into[ ] the process," which maintains a "steady focus upon parental reasonableness and the best interest[s] of the child."[13]

As an aside, this case also explains that "the fact that pre-school tuition may include hours which are not 100 percent work-related in nature" does not indicate that the "non-custodial parent is entitled to a pro rata refund or rebate from the custodial parent for every hour or minute of pre-school falling outside of working hours, if the child's attendance or non-attendance during these hours does not affect the overall cost."[14]

> A minute-by-minute audit and accounting of incidental time in a pre-school day is not required. The more material inquiry is whether the totality of the pre-school program is related in substantial part to the unavailability of the child's parents due to work schedules, and whether the cost for the child to have a guaranteed, reserved seat in the class is reasonable under the totality of the circumstances. If the evidence reflects that the custodial parent has selected a pre-school program which involves substantial cost for time not required for work-related day care, then the court may consider this factor as relevant in determining the overall reasonableness of the expense, and whether the non-custodial parent should fairly receive some type of equitable reduction in his or her mandatory obligation to contribute to the cost of pre-school tuition.[15]
>
> Another important point in this case is that there may be occasions when [the non-custodial parent] has available time to spend with the child on days when the child is otherwise scheduled to attend pre-school for work-related day care purposes. Generally, such additional parent/child time is worthy of encouragement, and may take priority over the child's pre-school time, unless perhaps there is a very special event at the pre-school that day, such as a class party or a guest presenter. So long as the non-custodial parent provides reasonable advance notice to the primary residential custodian and school, and so long as the request for occasional extra time is reasonable and there are no other existing court-ordered restrictions on the non-custodial parent's ability to see the child (such as suspended or supervised parenting time), additional parenting opportunities should generally be supported when a working parent can arrange his or her schedule to reasonably accommodate same.[16]

However, this type of an arrangement is "generally applicable for pre-school only. When the child starts attending school between grades K-12, a parent generally should not pull a child out of class during school hours except on rare occasions, such as necessary medical appointments or other special circumstances reasonably warranting and justifying same."[17] In the event that a parent, on occasion, "take[s] a child out of pre-school for extra parenting time, and the pre-school charges a flat tuition rate, the fact that the non-custodial parent elects to exercise previously uncontemplated parenting time on a scheduled work day does not reduce that parent's obligation to pay the same contribution towards tuition."[18]

This decision also emphasized the need for parties to work assiduously to improve their co-parenting and communication skills. The court stated, "[w]hen parties are joint legal custodians, public policy generally encourages communication, cooperation, and hopefully a harmonious consistency in parental judgment. *See Beck, supra*, 86 N.J. at 488; *Grover v. Terlaje*, 379 N.J. Super., 400, 406 (App. Div. 2005)."[19]

> While the parties always technically retain the right to repeatedly return to court over newly arising issues, what they truly need for their child's sake, as well as their own, is to commence participation in professional co-parenting counseling, and mutually work in a constructive and pro-active manner on improving their long-term ability to communicate and cooperate with each other as effective joint legal custodians.[20]

Where this is not occurring and "one or both parties decline to voluntarily attend professional co-parenting counseling, the court maintains the discretion, and right, to *require* both parties to attend co-parenting counseling with each other under the direction of an appointed professional therapist for a designated period of time."[21]

> Hence, if [ ] parties do return to court in the future and continue to demonstrate a chronic inability to effectively function as co-parents, the court may on its own motion, *sua sponte*, enter an order compelling the parties to attend mandatory co-parenting counseling, even over objection, at parental cost and in the court's discretion.[22]

Therefore, in the event "two joint legal custodians have ongoing difficulties in meeting this very basic component of their roles," the court "may order, among other relief, co-parenting counseling as a condition of ongoing joint legal custody consistent with its *parens patriae* jurisdiction and the court's own obligation to protect the best interests of the child."[23]

*The author would like to give special thanks to Ashley N. Richardson, Esq., associate with Tonneman, Vuotto, Enis & White, LLC, for her assistance with this article.*

## Endnotes

1. *Madison v. Davis*, FM-15-1152-13-N (Ch. Div. June 18, 2014) (fastcase), was approved for publication on Oct. 9, 2014. It is important to note that an unpublished trial court opinion "shall not constitute precedent or be binding upon any court . . ." R. 1:36-3. "Although an unpublished opinion does not have precedential authority, it may nevertheless constitute secondary authority." Pressler and Verniero, Current N.J. Court Rules, Comment 2, R. 1:36-3, (Gann). Indeed, persuasive, unpublished opinions may be cited to by counsel so long as "the court and all other parties are served with a copy of the opinion and of all contrary unpublished opinions known to counsel." R. 1:36-3.
2. *Beck*, 86 N.J. 480 (1981), "provides significant legal support for the rights of a non-custodial parent to serve as a joint legal custodian and to participate in important child-rearing decisions." *Madison*, FM-15-1152-13-N at 6.
3. *Pascale*, 140 N.J. 583 (1995), "provides significant legal support for the rights of a primary residential custodian to exercise parental discretion and authority on many child-rearing issues without having to first secure pre-approval and consent of the non-custodial parent." *Madison*, FM-15-1152-13-N at 6.
4. *Madison*, FM-15-1152-13-N at 6-11.
5. *Id*. at 12.
6. *Id*. at 13.
7. *Id*.
8. *Id*.

9. *Id*. at 13-14.
10. *Id*. at 14.
11. *Id*.
12. *Id*.
13. *Id*.
14. *Id*. at 15-16.
15. *Id*. at 16.
16. *Id*. at 16-17.
17. *Id*. at 17.
18. *Id*. at 17-18.
19. *Id*. at 18-19.
20. *Id*. at 20.
21. *Id*.
22. *Id*. (emphasis added).
23. *Id*. at 20-21 (emphasis added).

Executive Editor's Column

# Delays in Decision Making Destroys Confidence in the Judicial System

*by Ronald G. Lieberman*

Occasionally, situations come to mind that should serve to remind practitioners and judges that our Judiciary exists to meet the needs of the public rather than the needs of lawyers, judges, and other court staff. This situation recently occurred in New Jersey. Reference is made to an unpublished Appellate Division decision that was decided on Oct. 2, 2014, after having been argued on Oct. 9, 2013.[1] It is hard to imagine just how the litigants in that matter were able to function during that almost year-long delay. That delay from the Appellate Division gives rise to this column.

The author believes that our Judiciary is the hardest working and most conscientious one in the country. New Jersey has done an admirable job reducing backlog in the Family Division so far this year.[2] This reduced backlog arrived at the same time as a steadily declining caseload per judge, which should allow trial and appellate judges to address each matter in a timely fashion.[3] But, the length of time it takes a trial judge or an appellate panel to render its decision remains vexing. It is hard to imagine any single administrative change in our justice system of more direct and immediate benefit to litigants than requiring a trial judge or an appellate panel to have a set time for rendering decisions following a contested matter. Attorneys and self-represented litigants must adhere to court rules setting forth the time period for the submission of pleadings and filed papers, and both a trial judge and an appellate panel provide their own timeframes in scheduling orders. But, at present, no court rules exist setting forth a time period within which a trial judge or appellate panel must render a decision after the conclusion of a contested matter. Without such rules, each judge is left to his or her own time schedule to render a decision following a contested hearing.

## Effects of Delays in Rulings at the Appellate Level

An appellate panel's delay in deciding an appeal after the appeal has been submitted creates a Catch-22 situation. Practitioners know that when an order is up on appeal there are restrictions on the ability of a trial judge to address certain issues because supervision and control of the proceedings resides at the appellate level the moment an appeal has been taken from a trial court order.[4] A trial judge has jurisdiction on enforcement of an order but nothing else unless the Appellate Division allows it to act.[5] So, while an appeal is pending, the appellant is in limbo: The litigant cannot seek relief at the trial court from the order being appealed; however, he or she remains subject to enforcement of it, which may include payment obligations the litigant believes he or she cannot afford.

## Effects of Delays in Ruling at the Trial Court Level

The situation of delays at the trial court level, commencing from the conclusion of a contested matter to the time a final decision is rendered, creates a cascade of problems distinct from those caused by delays in receiving rulings from an appellate panel. At the trial court level, facts are constantly in flux. Once the ruling is received, changed circumstances may then exist, which would cause an almost-immediate return to court. The children grow older and their needs change. Bills may go unpaid. Homes are not sold and the 'selling season' between the spring and summer seasons is lost. Assets that are supposed to be frozen may wrongfully be accessed. In relocation cases, parents do not know if they are able to move with the children or whether they need to remain in state. The trial attorney cannot answer a client's question of when a decision will be rendered, putting the attorney in the impossible position of 'hound-

ing' a judge's staff for an answer on timing, at the risk of alienating the very judge the attorney is pressuring for a result. Of course, from the point of view of a judge, bench notes created contemporaneously with trial testimony may become unclear in meaning as time passes without a decision being rendered, and memories fade. In short, nothing good comes from a delay in decision making from the standpoint of everyone involved.

These delays are nothing new, unfortunately. Back in 1998, the Supreme Court Special Committee on Matrimonial Litigation addressed this issue by way of Recommendation 38, stating as follows:

> The public hearings raised serious concerns about the time between the completion of a trial or plenary hearing and the issuance of an opinion by the court. Both lawyers and litigants complained that, in some cases, the period between the submission of documents or the end of testimony and the final decision by the court exceeded one year. They represented that when the decision by the Court is delayed that they and their clients are invariably prejudiced. The Committee recognized the validity of the old adage that "justice delayed is justice denied" and further was mindful that neither the judicial system nor litigants are well served by protracted delays between the trial of matters or their submission to the Court by motions and their adjudication. This is particularly true in the Family Part. The Committee recognized that many, if not most, of the judges issue their oral or written opinions in a timely fashion. Nonetheless, the Committee has concluded that a better effort can be made to shorten the time between hearing or trial and decision. The Committee refers this important topic for consideration to the Conference of Presiding Family Part Judges, the Family Division Practice Committee and to the Assignment Judges of the various vicinages. To the greatest extent possible, reserved decisions should be discouraged and decisions, when reserved, should be monitored.[6]

In 1999, the Conference of Family Division Presiding Judges responded in its own report, stating as follows:

> The Conference recognizes the public's need for finality of a matter and that reserved decisions or delayed decisions are not beneficial to the perception of the Family Court. It is agreed that greater efforts should be made for judicial decisions to be rendered more promptly. Self-monitoring, as proposed in the recommendation, will ensure that litigants know that the process is not open-ended causing as much anxiety and concern as the divorce process itself. The goal is for the judge's decision to be given to the parties 60 days from the last trial date. The Conference believes that the self set date by the court at the time the trial closes is the best practice to be followed for all judges and methods were discussed that would cause the Court to gather fact finding information during the trial so that a portion of the opinion writing is completed at the time the trial ends. A judge, for example, at the end of each day may dictate a summary of testimony as to the factors for decision making, such as equitable distribution or alimony for inclusion in the subsequent opinion. It is recommended that each judge have the written criteria set forth in the statute on the bench at the time of the trial to be included in his or her written determination. This should also cause a lessening of cases being remanded because of lack of finding of fact by the court. It is suggested for implementation review that the number of reserved decisions that are given to the Assignment Judges, be given individually to the Presiding Judges for monitoring in each vicinage. There should also be a reporting practice that when a judge concludes a trial, a date is then fixed for a decision to be presented. This would be done in writing to the Presiding Judge.

## Proposed Resolutions

Even one delay at any level erodes the public's confidence in our Judiciary. The problem of delays in decision making is not the product of slow judging. Judges adhere to best practices, which recognize the public's need and

desire for cases not to be warehoused. The delays in decision making exist from when a contested matter has concluded, through the time when research staff and the judges are available to start working on a case, and ultimately when a judge renders his or her findings of fact and conclusions of law.

Blame for those delays is shared by many actors, including overworked court reporters, understaffed trial courts, budget-minded legislators, dilatory appellate lawyers and, in some instances, outdated court rules.

At the very heart of every case are the human beings who came to court for justice. In the family law practice area, those individuals include clients struggling with the dissolution of a marriage or seeking resolution on issues involving children or people worried about any other aspect of their futures. Delays in decision making cause those individuals to wait too long for a court to determine how the rest of their lives, both financial and custodial, will play out, and certainly risk even the fairest result being viewed as the product of judicial indifference to the litigants.

The system of justice rests on confidence; however, that foundation of confidence can be shaken to its core with these delays in decision making. Our Judiciary cannot solve the problem alone. They need the assistance of lawyers and legislators. When it takes the judicial system longer to decide a case than people believe reasonable, or possibly even longer than the underlying litigation has been pending, a search for solutions is absolutely necessary. It is imperative that the Supreme Court Family Practice Committee, the Family Law Section of the New Jersey State Bar Association, and the Conference of Family Part Presiding Judges all work together with the Administrative Office of the Courts to reach a resolution.

What can that resolution look like? Three steps seem to be in order. The first step would be to increase judicial capacity, meaning increasing the number of superior court judges and their staff. That step will require increased funding by the Legislature, not a sure thing by any measure. The next step would be the formulation of court rules governing the time periods for both trial judges and appellate panels to render decisions. In so doing, litigants and attorneys alike will know when to expect a ruling and can factor that defined time period into their presentations at the contested hearings. This step requires a 'buy in' by the Family Practice Committee and the Supreme Court in acknowledging that a problem exists and that time periods are needed. The final step would be to mandate continuous trial dates in the family part, a goal that has been often discussed but rarely, if ever, achieved. This final step would be based on a recognition that no one benefits from the current trial system of 'a date here, an hour there,' which leads to larger legal bills, frustrated litigants, and the all-too-human imperfect memories by a judge.

The situation is such that results are needed to ensure that justice delayed will no longer be justice denied. The people who look to our system of justice for resolutions deserve nothing less. ■

## Endnotes

1. *Hertzoff v. Hertzoff*, A-1600-12T3.
2. Administrative Office of the Courts, Court Management Statistics, July 2014-Aug., 2014; Superior Court Case Load Reference Guide 2010 through 2014.
3. Administrative Office of the Courts, Court Management Statistics, July 2014-Aug., 2014; Superior Court Case Loan Reference Guide 2010 through 2014.
4. R. 2:9-1(a).
5. *Kiernan v. Kiernan*, 355 N.J. Super. 89, 91-92 (App. Div. 2002).
6. Final Report of Supreme Court Special Committee on Matrimonial Litigation (Final Report), at 64-65 (Feb. 4, 1998).

# Justice Robert L. Clifford—*In Memoriam*

*by Heather C. Keith*

Justice Robert L. Clifford passed away late last November, just shy of his 90th birthday. He served over 21 years on the New Jersey Supreme Court, many of those on the nationally renowned and revered Wilentz Court. Only two other justices—Nathan L. Jacobs and Alan Handler—served longer. Justice Clifford leaves behind a legacy of clear, concise opinions to which members of the bench and bar owe a debt of gratitude.

After serving aboard a Navy ship in World War II, Clifford graduated from Lehigh University in 1947 and Duke University School of Law in 1950. He began his legal career clerking for New Jersey Supreme Court Justice William A. Wachenfeld. After a varied 20-year career as a civil and criminal trial lawyer in private practice, Clifford joined then-Governor William Cahill's cabinet as commissioner of banking and insurance and of the (now-defunct) institutions and agencies.

In 1973, Cahill nominated Clifford to the Supreme Court. Justice Clifford served under Chief Justices Pierre Garvin, Richard J. Hughes and Robert N. Wilentz until he reached the mandatory retirement age of 70. He wrote 187 majority, 201 dissenting, and 89 concurring opinions. Justice Clifford addressed nearly every type of case during his lengthy tenure, from sidewalk liability to a cigarette manufacturer's failure to warn, and from capital punishment to the effect of "surrogacy for pay" on public policy.

He was the Court's unofficial grammarian, arduously sculpting his colleagues' opinions with his ever-present red pencil and his copy of Strunk & White never out of reach. In the Wilentz Court, Justice Clifford sought to create a framework of clearly written and predictive law, which he believed to be a fundamental tenet of jurisprudence.

Combining his wicked humor with his taste for clear language, Clifford once opined that "[i]f lawyers and judges would just learn to talk the way regular folks do, we would avoid a good many problems. Like, for instance, this case."[1] A thoughtful jurist, Justice Clifford stated in an early concurrence that "society has yet to achieve agreement on what it is our courts are expected to do."[2] Four short years later, Justice Clifford penned *Beck v. Beck*, a seminal opinion in family law.

In his majority opinion in *Beck*, with which all family law practitioners are familiar today, Justice Clifford opened the door to normalizing joint legal and physical custody and provided a roadmap for trial courts in the limited class of cases in which joint custody would prove acceptable.[3] Justice Clifford acknowledged the assumption that children in a unified family setting develop attachments to both parents, and that the severance of either attachment is contrary to the child's best interest. Also acknowledging the potential detrimental effects that certain non-intact families would experience in maintaining these ties, Justice Clifford's opinion endorsed joint custody as an alternative to sole custody in some matrimonial cases.

Justice's Clifford's focus on the best interests of the children as a guiding principle in our jurisprudence found early resonance in his dissent in *Mimkon v. Ford*, a grandparent visitation case in which a four-year-old child, deprived of her birth mother through death and having gained an adoptive mother through remarriage of her father, was caught in a legal battle between her new parents and maternal grandparents who sought visitation against her parents' wishes. In a heartfelt dissent, Clifford wrote:

> [W]here the surviving parent remarries and the new spouse adopts the infant, thereby establishing a new family relation for the child…the duty and right to determine how the child shall be raised rest with the parents. A court may not interfere merely because it possesses a different conception as to how to rear the child or what social relationships should be fostered or maintained.
>
> I would conclude that upon the adoption of Jill by defendant Donald Ford's second wife, Adele, the infant thereupon had two "parents" in every significant sense of the word.…

> A holding which does not recognize that at the time of this suit Jill had two parents not only ignores or stretches the language of [N.J.S.A. 9:2-7.1] but, more distressingly, relegates an adopting parent to "second-class" status. … Any other perception of the relationship strains the cohesion binding husband and wife with their child. Their decisions as to how they choose to raise that child should not be tampered with by so tenuous an interpretation of the statute as to transform it into an invitation for a court's intrusion in the circumstances presented here.
>
> …Remarriage and adoption are wholesome steps toward reunification of a family unit broken by the unhappy event of death.…Given the objection to visitation—be it well-taken or otherwise—I forsee continued acrimony between the parties and a tug-of-war with Jill in the middle.[4]

Justice Clifford was not reluctant to use the child's best interests as a polestar. Nor was he afraid to be iconoclastic. He was passionate. He also had a lighter side, which showed in his dissent in *Ziegelheim v. Apollo*, a divorce malpractice case:

> That both parties had experts' reports in their hip pockets and that the trial court may have been aware of those reports is of no moment. Plaintiff did not even mark her expert's report for identification, never mind in evidence. In fact, the report is before us only because plaintiff's attorney included it—wholly improperly, without leave of court—in the record submitted to the Appellate Division. To declare, as the Court does…that "[t]he status of the reports is unclear" and that both parties "produced expert reports at the trial level" is to take with the record liberties that can be characterized generously only as "unwarranted." In the pithy expression of Alfred E. Smith, commenting in 1936 on Franklin D. Roosevelt's presidency, "baloney" is what it is (as in: "No matter how you slice it, it's still baloney." Gorton Carruth & Eugene Ehrlich, *The Harper Book of American Quotations* §187.136 (1988). (That Gov. Smith's position did not represent the majority view either has not escaped my attention.) And while I am still in this now-meandering parenthesis, I think the occasional resort to slang in our judicial opinions does not sully them, for slang, according to no less a literary figure than Carl Sandburg, is "a language that rolls up its sleeves, spits on its hands and goes to work." Laurence J. Peter, *Peter's Quotations, Ideas for Our Time* 284 (1987)). To suggest, as the Court does,…that the trial court "did not examine the report closely" is to ascend to new heights of flummery. The trial court never even saw the report, much less "examined" it. And so plaintiff's submissions of proof were simply not sufficient to withstand defendant's motion for summary judgment.[5]

Never one to avoid public policy issues, in 2010 Justice Clifford joined with seven other retired justices in urging Governor Chris Christie reconsider his unprecedented decision not to reappoint Justice John Wallace Jr. because of its harmful effect on judicial independence.

No piece on Justice Clifford would be complete without an exposition on his annoyance with footnotes. In a 1993 decision, Justice Clifford deplored the need to "drop the eyes" from the text to the footnote, "and then to return, without skipping a beat, to the point of departure on the upper part of the page. The whole irritating process points up the soundness of John Barrymore's observation that '[reading footnotes is] like having to run downstairs to answer the doorbell during the first night of the honeymoon.'"[6]

Apologies, of course, to our readers for any similar *interruptae* contained in this memorial.

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## Endnotes

1. *State v. Valentin*, 105 N.J. 14 (1987) (J. Clifford, dissenting).
2. *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 633 (1977) (Clifford, J., concurring).
3. *Beck v. Beck*, 86 N.J. 480 (1981).
4. *Mimkon v. Ford*, 66 N.J. 426, 440-441 (1975) (internal citations omitted) (Clifford, J., dissenting); *see also Small v. Rockfeld*, 66 N.J. 231 (1974) (Clifford, J., dissenting) (foreseeing acrimony resulting from allowing the maternal grandmother and *administratrix ad prosequendum's* claim for money damages against a boy's father for wrongful death of the boy's mother, leading to a breakdown in family relations that would be inimical to the child's best interests).
5. *Ziegelheim v. Apollo*, 128 N.J. 250, 268 (1992) (Clifford, J., dissenting).
6. *In Re Opinion 662 of the Advisory Committee on Professional Ethics*, 133 N.J. 22, 32 (1993).

# Savings Component Awards: Analyzing the Change of Circumstance Argument

*by David A. Beaver*

The old adage "a penny saved, is a penny earned" always comes to mind when the issue of whether the recipient of alimony should receive an additional budget line item compromised solely of a 'savings' component is raised. In some cases, there are no pennies to be saved post-divorce, especially if the parties have lived above their means. In other cases, there are an abundance of pennies to be saved. However, to safeguard against a windfall to the supported spouse, an in-depth analysis is required of marital savings distributed through equitable distribution as compared to savings awarded as alimony.

In budgets both small and large, the issue of whether a savings component is appropriate always seems to be a point of contention, even if the parties did not historically save during the marriage. Often, when litigants that are likely to receive alimony hear the words 'change of circumstance,' they naturally become very concerned with an unforeseen circumstance (such as costly future healthcare issues) or a modification/termination of alimony. In recognition of protecting the supported spouse from both foreseeable and unforeseeable changes of circumstance, New Jersey courts have held that a savings component may be appropriate to include in an alimony award to achieve two rather distinct yet straightforward objectives.[1]

The first objective when awarding a savings component would be to protect the supported spouse against the abrupt termination of alimony based upon the payor's death.[2] However, with the incorporation of required life insurance coverage to secure a payor's alimony obligation through a final judgment of divorce and/or marital settlement agreement, the first objective is easily obtained without the inclusion of additional alimony via a savings component.[3] The second and more common (and therefore frequently litigated) objective is to ensure against the possibility alimony could later be modified due to an unforeseen change of circumstance that is not connected with the death of the payor.[4]

As the nation is slowly turning the corner from the economic downturn that has impacted many clients over the past several years, it is likely the number of cases that will involve a potential savings component claim within an alimony award (for those litigants with an abundance of pennies) is likely to substantially increase. These cases involve parties that have excess disposable income after all of their identified 'needs' (*i.e.*, pursuant to their case information statement) have been satisfied.

While surely not an exhaustive list, below are three important factors to consider when facing a case that involves a potential savings component claim, to ensure: 1) that a supported spouse is protected from a potential change of circumstance; and 2) that a payor spouse is protected from his or her ex-spouse receiving a financial windfall.

## Factor One: Likelihood the Supported Spouse Will Be Able to Continue Acquiring Assets Post-Judgment

With the perceived need to save for a rainy day to safeguard against a potential future change of circumstance that could serve as a basis to modify alimony, it is critical to examine both the level and composition of assets the supported spouse will receive through equitable distribution. In terms of asset composition, depending on the age of the supported spouse at the time of the divorce, it is necessary to classify the level of retirement versus non-retirement assets that will be acquired through equitable distribution.

If a majority of the assets the supported spouse receives through equitable distribution are traditional retirement accounts, but he or she is years away from the period in which he or she can access retirement accounts without penalty,[5] it may not be appropriate to consider income generated from those assets and/or the value of retirement accounts. In contrast, if: 1) the support spouse was awarded a substantial level of non-retirement assets such as cash, brokerage and/or other similar assets that

can be accessed immediately and without penalty; and/or 2) if the supported spouse receiving notable retirement assets is over the age of 59 1/2, it is necessary to review the income available to this spouse generating from these investments.

When determining alimony awards, take into consideration the amount of income earned by the payor spouse, the earnings (imputed or realized) of the supported spouse and the unearned income of the supported spouse (*i.e.*, return on assets acquired through equitable distribution). Therefore, the potential income generated from investments received by a supported spouse through equitable distribution is certainly relevant to the savings component discussion. For example, should a supported spouse receive, through equitable distribution, $2,000,000 in investment assets, applying a conservative five-year corporate AAA bond yield[6] of 4.18 percent[7] would result in this individual realizing gross unearned income in the amount of approximately $83,600 per year. After consideration of the requisite tax rate,[8] the supported spouse would effectively retain approximately $71,000 of net investment income per year.

Even if a percentage of the net investment earnings were utilized to meet the former marital lifestyle, it is likely a significant amount of annual net investment income would remain. As the principal investment balance need not be depleted, the residual investment income would enable the supported spouse to accumulate additional assets, thereby protecting him or herself against a potential future unforeseen change of circumstance. With the ability to accumulate assets, the supported spouse's need for a savings component in the alimony award would arguably be severely mitigated.

A supported spouse may also have the opportunity to acquire additional assets to safeguard against the potential future rainy day by increasing his or her level of earned income. In savings component cases, it is not unusual for the supported spouse to have limited, if any, earned income. Rather than fighting over a non-achievable income imputation level, consideration should be given to imputing a level of gross yearly earned income around minimum wage and inserting a clause into the marital settlement agreement identifying that any additional earnings of the supported spouse would not be identified as a change of circumstance that would warrant a reduction in alimony.

While not always the case, it may also be likely the supported spouse maintains parent of primary residence responsibilities. With the maturation of the children, the supported spouse's ability to pursue employment opportunities should often be enhanced. The increased earnings from this employment would allow the supported spouse to accumulate additional assets that, in turn, would offer another mechanism to protect against a future change of circumstance.

## Factor Two: Reasonable and Anticipated Healthcare Needs of the Supported Spouse

In discussing the appropriateness of a savings component in the budget of a supported spouse, the author often encounters the argument that a supported spouse requires a savings component built into his or her alimony award to protect against a change of circumstance associated with future healthcare expenses.

When this argument is advanced, the potential inclusion of a case information statement budget line entry, supported by legitimate proofs, for the supported spouse to obtain a reputable long-term healthcare insurance plan is an effective way to resolve the issue. With the inclusion of this line item in the supported spouse's budget, the payor spouse will gain some assurance he or she is not blindly paying an arbitrary amount of additional support toward future healthcare costs. On the other hand, the supported spouse is protected, as he or she has secured identified coverage to prevent and/or mitigate potential future healthcare costs that, if substantial, could lead to the depletion of his or her individual assets.

## Factor Three: Likelihood the Payor Spouse Would Be Successful in a Future Change of Circumstance Application

A supported spouse often argues that it is inequitable for the payor spouse to exist in a post-divorce environment while retaining the majority of the future disposable income.[9] This argument fails to acknowledge that the recognized marital partnership ends with the filing of the complaint for divorce,[10] and that with the marital partnership dissolved, a payor spouse's future earnings are not recognized as an asset subject to equitable distribution.[11]

In circumstances where a payor spouse will retain disposable income after his or her alimony obligations are fully satisfied, there is a strong likelihood that the payor spouse will also be able to continue to accumulate significant assets through the investment of his or her residual post-divorce income. As courts are required to look to the utilization of all assets available to a payor spouse in

modification applications,[12] the payor spouse's superior post-divorce economic position in this circumstance is, in essence, a *de facto* insurance policy against the likelihood that a future change of circumstance application seeking a downward modification of alimony would be granted. As post-divorce income and assets continue to accumulate, these payor spouses effectively become 'change of circumstance proof,' thus the incorporation of an additional savings component into an alimony award is nothing short of a financial windfall to the supported spouse.

## Conclusion

The author is reminded by the words of the Appellate Division in *Aronson v. Aronson* that when establishing an alimony award the court should be guided by the principle that alimony is "neither a punishment for the payor, nor a reward for the payee."[13] In *Aronson*, the court further commented that an alimony award should not be a windfall for either party.[14]

In order to avoid the scenario in which either party would receive an economic windfall when setting an alimony award, practitioners must look further than the historical savings pattern during the marriage. While far from a complete list of factors to consider, at a minimum it is necessary to review the three factors outlined above prior to advising a client on the appropriateness of a savings component within an alimony award.

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## Endnotes

1. For a detailed discussion on New Jersey's case law regarding savings components, *see* John P. Paone Jr.'s article Defining Savings in an Alimony Award, *New Jersey Family Lawyer*, (Nov. 2010), Vol. 31, Issue 3.
2. *Davis v. Davis,* 184 N.J. Super. 430, 436 (App. Div. 1982), *quoting Khalaf v Khalaf*, 58 N.J. 63, 70 (1971); *Capodanno v. Capodanno*, 58 N.J. 113, 120 (1971); *Martindell v. Martindell*, 21 N.J. 341, 353-354 (1956).
3. *Id*.
4. *Id*.
5. Generally, the amounts an individual withdraws from an IRA or retirement plan before reaching age 59½ are called 'early' or 'premature' distributions. Individuals must pay an additional 10 percent early withdrawal tax and report the amount to the IRS for any early distributions, unless an exception applies. For identifications of such exceptions, *see* http://www.irs.gov/Retirement-Plans/Plan-Participant,-Employee/Retirement-Topics---Tax-on-Early-Distributions.
6. Consistent with the New Jersey Supreme Court's approach in *Miller v. Miller*, 160 N.J. 408 (1999).
7. Moody's AAA Corporate Seasoned Bond yield as of Aug. 1, 2014.
8. A 15 percent long-term capital gains tax applied to this scenario.
9. Income available after the needs of both the payor and supported spouse's expenses are satisfied.
10. *See Rothman v. Rothman,* 65 N.J. 219, 229 (1975).
11. *See Stern v. Stern*, 66 N.J. 340, 345 (1975).
12. *See Donnelly v. Donnelly*, 405 N.J. Super. 117, 130 (App. Div. 2009).
13. *Aronson v. Aronson*, 245 N.J. Super. 354, 364 (App. Div. 1991).
14. *Id*.

# Changed Circumstances? The Impact of Increased or Decreased Parental Availability Post-Judgment on Parenting Time Arrangements

*by William W. Goodwin and Diana N. Fredericks*

What is the standard for modifying a parenting time arrangement post-divorce? When will a plenary hearing be ordered or dispensed with? Under what circumstances will the Appellate Division reverse and remand a trial court's decision not to modify parenting time, and without even ordering a plenary hearing? What is the impact, if any, of an increase or decrease in one parent's availability to care for the children post-divorce on an application to modify parenting time? Who has priority, in terms of caring for children, between one parent and a third-party caregiver substituting for the other parent during that parent's parenting time? What can or should practitioners do in drafting a marital settlement agreement (MSA) to address this potential eventuality? What impact does specific language in an MSA have in terms of determining whether or not changed circumstances exist in these cases? Does the concept of 'reasonable foreseeability' have a place in this analysis?

These questions, among others, were triggered after reading the recent unreported decision *Fasano v. Scales*.[1]

In *Fasano*, the parties were married in May 2000 and had two children. While the children's dates of birth are not provided, it appears their daughter was born in 2001 and their son in 2002.[2] The parties were divorced in 2010. They executed a property settlement agreement (PSA) on Sept. 1, 2010, when the children were approximately nine and eight years of age.

In their PSA, the parties agreed to joint legal custody and a shared parenting schedule. Specifically, on a bi-weekly basis, the mother had the children for eight nights and the father had them for six nights. The father also had parenting time one of the evenings the mother had the children overnight. As a consequence, each parent had some parenting time with the children on seven days out of every 14-day "cycle."[3] Their PSA did not prohibit the use of third-party child care providers, nor did the PSA include a clause requiring either parent to offer parenting time to the other before leaving the children with a third party. (This is often referred to as the right of first refusal.)

In Feb. 2011, the mother remarried a man who worked in Iowa, and she enrolled in an educational program in Iowa. She attended classes there, but commuted to New Jersey to facilitate the parenting schedule, which had not changed. The mother obtained an advanced legal degree in May 2012.

In Nov. 2012, the mother filed a motion to modify parenting time. She alleged the following changed circumstances:

1. Having completed her educational program, the mother asserted she now had more time to spend with the children; and
2. The father used a nanny to pick up the children after school and care for them until he returned from work, and to provide care for the children in the morning, including bringing them to school, after he left for work.[4]

In her application, the mother sought an order compelling the father to pick up the children at the inception of his parenting time or to allow the mother to do so, to drop the children off at her home on his way to work in the morning, and to grant her a "right of first refusal" in the event he needed child care during his parenting time for more than two and a half hours.

The trial court denied the application based upon the papers submitted, and after having heard oral argument. The court concluded the use of third-party caregivers is a "foreseeable part of parenting," and that there was no competent evidence that having a nanny care for the children during relatively short periods of time was contrary to their best interest.

The mother filed a motion for reconsideration, which was denied. In its decision, the trial court amplified and augmented its prior reasons. For example, the court observed the parties themselves had used a third party to care for the children while they were married. Moreover, the court cited to language in the PSA acknowledging the parties had "considered and carefully weighed all of the potential life changes that may occur…during the upcoming approximately ten year period until their son…graduates high school." Thus, the court introduced a concept of foreseeability that precluded a finding of changed circumstances.

The trial court also concluded that a parent's choice to retain the use of a childcare provider during his or her parenting time was a "routine or day-to-day decision" and, therefore, did not trigger a responsibility on the part of one party to consult with the other parent in advance.

Finally, the court observed that the PSA in question did not include a right of first refusal provision and, therefore, the court was not going to insert one after the fact.

The court directed the parties to mediate the issues, and permitted either party to request a plenary hearing in the event mediation was unsuccessful. Later that year, after mediation failed to result in an agreement, the mother filed an application for a plenary hearing. The trial court denied the application, finding "no need for a plenary hearing under the circumstances presented."[5] The wife appealed.

The Appellate Division affirmed "substantially for the reasons expressed by [the trial court]." In affirming the trial court decision, the Appellate Division set forth the limited scope of its review. Specifically, the appellate judges acknowledged they owe "substantial deference" to the family part's findings of fact, and that here they could not "conclude that a clear mistake was made by the Judge."

The appellate court also used the decision to remind us that "a party who seeks modification of a judgment that incorporates a PSA regarding parenting time must meet the burden of showing changed circumstance *and* that the agreement is no longer in the best interests of the child."[6] The court emphasized the analysis is 'two-fold and sequential."[7]

The court made two additional observations in support of its affirmance:

1. The mother's early completion of her educational program was not a change of circumstances because the parties had contemplated her participation in the program at the time they executed their PSA (*i.e.*, it was foreseeable); and
2. The children were apparently excellent students and, by all accounts, were doing well in school.

In *Hand v. Hand*,[8] the appellate court also agreed that a plenary hearing was unnecessary, as there was no genuine and substantial factual dispute regarding the welfare of the children. In the *Hand* case, the mother filed a post-judgment application to change custody of the two sons, who were then approximately 13 and 11. The parties divorced in late 2001, when the boys were eight and six years of age. As part of their divorce, the parties agreed to a parenting plan under which the boys resided with their father and the mother was entitled to parenting time on weekends, some holidays, and certain weeks during the summer.

In support of her application, the mother asserted the father was an alcoholic who drank on a daily basis and frequented bars. She further certified there were many times the boys were left to care for themselves while their father engaged in social activities. In further support of her application, the mother alleged the father might be physically abusing the boys.

Unbeknownst to the father, the mother had taken the boys to a licensed clinical social worker. The social worker met with the children on three occasions. The therapist did not speak to the father, his live-in girlfriend, the children's teachers or any other collateral sources.

The therapist prepared a report, which the mother submitted with her moving papers. In essence, the therapist reported what the boys told her about their father yelling at them and striking them with an open hand on their back or buttocks if they did not listen to him. She also reported the boys expressed they would be better off living with their mother, and that their "unhappiness with their living situation with the natural father appears to be largely connected to his abuse of alcohol and resulting behaviors and actions."

In denying the mother's application, the trial court concluded she had not set forth a *prima facie* case justifying further action, including a plenary hearing. In fact, the court was impressed by how well the boys were doing in school, among other factors.[9]

In affirming the trial court opinion, the Appellate Division was equally unimpressed with the mother's allegations, describing them as "completely unsubstantiated" and "conclusory."[10]

In view of the *Fasano* case and the opinion in *Hand*, what are the lessons to be learned and how can they assist practitioners in guiding their clients? Let's face it, no client is happy reengaging in the litigation process to seek a modification of custody or parenting time, only to be shot down at oral argument without even the opportunity for a plenary hearing. That client will feel misled by his or her attorney, which can only lead to a damaged professional relationship.

Accordingly, it is important to be mindful of the following:

1. Courts encourage settlements, protect settlement agreements, and are loath to modify the terms of a settlement, even regarding custody and parenting time, without some compelling reason to do so.
2. It bears repeating there is no chance of success unless one can establish *both* changed circumstances *and* that the agreement no longer serves the best interests of the children.
3. The occurrence of an event predicted within an MSA, or reasonably foreseeable based upon the circumstances existing at the time the MSA is executed, is not a changed circumstance.
4. When evaluating the impact of a change upon the best interests of the children, the court will focus upon harm to the children. If the children are honor students, have healthy peer and other social relationships, are not using drugs or alcohol, and are maintaining good health, the fact that one might argue the children will be even better off with a different parenting schedule does not appear to impress the courts.
5. Unless there are genuine and substantial factual issues in dispute regarding the welfare of the children, the result will be a final decision and not a plenary hearing.
6. Unless the trial court's conclusions after reading the papers and entertaining oral argument are very wide of the mark, or unless the court misapplied the law, an appeal will be for naught and an already unhappy client will be even more upset.

Aside from all this, *Fasano* raises a separate substantive issue, namely the issue of using third-party caregivers in lieu of the other parent. While the arrangement in *Fasano* did not faze the trial court, nor did it alarm the appellate court sufficiently to cause a reversal or remand, one cannot lose sight of the fact that N.J.S.A. 9:2-4c mandates the court consider a series of factors, several of which are implicated, at least indirectly, under these circumstances:

4. The interaction…of the child with its parents;
14. The extent…of the time spent with the child…subsequent to the separation; and
15. The parents' employment responsibilities.

Family law cases in particular are decided based upon their peculiar facts. Cases are like snowflakes; no two are exactly alike. It is certainly plausible that were the facts in *Fasano* changed, the results may be different.

For example, suppose that during the marriage the mother worked part time and the children were in childcare while she worked, but not for more than four hours per day. The children were two and three years of age when the parties divorced. Two years later, the mother remarries, leaves her employment, and becomes a full-time homemaker. Because of his work schedule, the father hires a nanny who stays at home with the now four- and five-year-old children all day while he works. As in *Fasano,* the parties reside on the same street and they agreed to the same parenting schedule as the Fasanos did in their PSA. While there are some parallels between this fact pattern and that in *Fasano,* it would be more troubling to receive the same decision knowing that a nanny stayed with the children the entire day while the children's mother was at home at the same time, all day, living down the street.

As is almost always the case, the best lawyering can be done in the negotiating and drafting stages of representation, pre-divorce. A carefully drafted MSA or *pendente lite* consent order may save substantial litigation expense, and an unhappy client, down the road. Many practitioners include a narrative statement in the support sections of their agreements, most commonly in the alimony portion, generally consisting of a factual recitation of the 'baseline circumstances' undergirding the amount and duration of the alimony agreed upon. This usually includes such facts as the ages and health status of the parties; their educational backgrounds; their current and past employment arrangements; their current incomes and some representation, usually accompanied by facts and figures, regarding the marital lifestyle. This is done to protect clients, and ultimately the practitioners, in the event of a post-judgment application seeking a modification based upon an allegation of changed circumstances.

But how many practitioners include the same type of narrative statement, accompanied by baseline circumstances, in the custody and parenting time sections of agreements? Perhaps it is time to rethink this practice (or a lack thereof) and include a statement of the facts and circumstances that supported the consensual parenting plan in the first place. For example, such baseline facts as the parties' current and anticipated residential locations and their proximity to one another, the children's current school district, the parents' living arrangements (*e.g.*, whether they are living with third parties, whether they rent or own, whether they have a backyard, how many bedrooms do they have, and the like), the parties' hours of employment, work schedules, and time spent commuting could easily be incorporated into an agreement, thereby making it easier for the parties to prove or defend a significant change in circumstances post-divorce.

As explained above, the courts are reluctant to modify agreed-upon parenting time and custody agreements. In the end, thoughtful negotiation and careful drafting using the above practice tips will serve clients most effectively.

Finally, there are no good reasons to fail to address the issue of third-party caretakers in an MSA. If the parties currently use a nanny, an *au pair*, or some form of childcare, and/or anticipate doing so in the future, those facts should be set forth. Moreover, although it is often an unpleasant discussion, the issue of a right of first refusal should be addressed, and either explicitly included or excluded in the MSA. If included, the parameters (*e.g.*, is it overnight or just for a few hours? Is there an exception for grandparents, aunts and uncles or no exceptions at all?) should be clear and explicit so practitioners can effectively advocate for clients and avoid unnecessary post-judgment litigation. ■

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## Endnotes

1. A-0798-13T1, 2014 WL 2208604 (N.J. Super. Ct. App. Div. May 29, 2014).
2. *Fasano*, 2014 WL 2208604 at 1.
3. *Fasano*, 2014 WL 2208604 at 1.
4. *Fasano*, 2014 WL 2208604 at 1.
5. *Fasano*, 2014 WL 2208604 at 2.
6. *Fasano*, 2014 WL 2208604 at 2.
7. *Fasano*, 2014 WL 2208604 at 2.
8. 391 N.J. Super. 102 (App. Div. 2007).
9. *Hand,* 391 N.J. Super. at 275.
10. *Hand,* 391 N.J. Super. at 276.

# Collecting on Judgments Entered Against a Corporate Shareholder Member in a Divorce

*by Rawan Hmoud*

Practically every matrimonial practitioner has faced dealing with, in one form or another, a shareholder interest in a closely held corporate body. Be it the valuation and distribution of the interest in the spirit of equitable distribution or the calculation of cash flow for purposes of ascertaining financial support, dealing with corporate entities in matrimonial matters can be problematic.

Matters are made worse when the corporate body is co-owned by a family member of the shareholder spouse. This movie has played out before (*i.e., Brown v. Brown*).[1] Now layer the already inherent complexities by interjecting a pass-through marital business entity subject to equitable distribution and traceable dissipation of business and marital funds. The result: A collector's nightmare.

When faced with mounting judgments incurred by the dissipating spouse (and corporate partner) and a judgment-proof shareholder interest in a business co-owned by a family member, what is a practitioner to do to protect the 'innocent' spouse? The business law controlling the obligations of both spouses to the marital business, and the family court's power to design an equitable distribution scheme of marital assets and liabilities present a dichotomy.

Luckily, in a court of equity, justice can be restored. The matrimonial practitioner should employ the following three-step process: 1) seek an equitable distribution scheme that shifts liabilities incurred as a result of dissipation onto the dissipating spouse and compensates the innocent spouse with unencumbered assets; 2) obtain judgments against the dissipating spouse to secure against the liabilities; and 3) secure the judgments obtained by the innocent spouse against the shareholder interest of the dissipating spouse through the use of a *lis pendens* and a constructive trust.

## The Fact Pattern

For purposes of this discussion, the facts are as follows: The husband and wife co-own a pass-through S-corporation (business M) and have personally guaranteed certain business-related liabilities, but not all. The husband also co-owns a business (business F) with his relative, wherein his 50 percent shareholder interest is a marital asset. The husband, who is the managing partner of business M, unbeknownst to the wife and without her consent, begins to divert business funds and consequently incurs significant liabilities that are then reduced to judgments recorded against marital assets subject to equitable distribution. Meanwhile, business F owns real estate that is unencumbered and valued in the millions.

## Step One: The Court's Power to Design an Equitable Distribution Scheme

The first step of the three-step approach is to obtain an equitable distribution scheme that recognizes the dissipation of assets, the effect of the dissipation on the marital estate as a whole, and the need to shift the resulting liabilities onto the dissipating spouse. The tools and the case law to achieve the first step have been bestowed upon the family court for decades.

The equitable distribution statute empowers the court to allocate marital assets between spouses, regardless of the titled ownership.[2] The phrase 'equitable distribution' requires that the matrimonial judge apportion the marital assets in a manner just to the parties under the circumstances.[3] Moreover, "[e]quitable distribution is not simply a matter of mechanical division of marital assets."[4] "The word 'equitable' itself implies the weighing of the many considerations and circumstances that are presented in each case."[5] Moreover, in *Painter* the Supreme Court cautioned that "any disposition of property in fraud of the other spouse could be promptly made the subject of appropriate judicial action."[6]

Further, "it is the strong public policy of New Jersey that a person should not be permitted to profit as a result of his wrongdoing."[7] This doctrine, "so essential to the observance of morality and justice has been universally recognized in the laws of civilized communities for

centuries and is old as equity. Its sentiment is ageless."[8]

These basic tools permit the trial judge to fashion an equitable distribution scheme that compensates the innocent spouse for the dissipating spouse's wrongdoing. In doing so, the trial judge may award unencumbered marital assets to the innocent spouse. Thereafter, the trial judge must deal with the liabilities and judgments resulting from the dissipating spouse's wrongful conduct.

## Step Two: Shifting Liabilities and Obtaining Judgments in Favor of the Innocent Spouse

In addition to the trial court's power to award the innocent spouse unencumbered assets, the court must also shift the liabilities to the dissipating spouse. This shift of liabilities necessarily involves the rights of creditors. There are limits to the court's equitable power to discharge one spouse from 'marital' liabilities. It is extremely important for the practitioner representing the innocent spouse to establish when the liabilities were incurred and whether the innocent spouse consented to the liabilities.

Prior to the enactment of N.J.S.A. 46:3-17.4, a mortgage lien on a debtor spouse's interest survived the equitable distribution of property to a non-debtor spouse when the property was held in a tenancy by the entirety.[9] This made protecting the innocent spouse against claims by creditors of the dissipating spouse extremely difficult. However, N.J.S.A. 46:3-17.4 specifically states that "neither spouse may sever, alienate, or otherwise affect their interest in the tenancy by entirety during the marriage or upon separation without the written consent of both spouses." Where no such consent was made by the innocent spouse to the underlying liabilities that ultimately resulted in the entry of judgments and liens, those liabilities do not attach to the innocent spouse's share of the marital estate. They do, however, follow the dissipating spouse's equitable distribution award. Therefore, the creditor's rights in this instance are limited to the debtor spouse's (dissipating spouse in this fact pattern) share of the marital estate post equitable distribution.

In interpreting and applying New Jersey law, the United States Bankruptcy Court for the Middle District of Florida, in *Jenson v. Montemoino*,[10] assessed the protections of N.J.S.A. 46:3-17.4 and held:

> ….the prohibition on either spouse severing, alienating, or otherwise affecting their interest in the tenancy by entirety during marriage without the written consent of both spouses evidences the legislature's intent to preserve the entireties estate and to elevate the interest of a married couple in the protection of their entireties property over the interest of a creditor of a single spouse in executing on such property.
>
> ….
>
> if a creditor of just one spouse were permitted to reach entireties property, then an encroachment on the non-debtor spouse's entireties assets would result, which would change the fundamental meaning of a tenancy by the entirety, and the unique feature of that tenancy would be destroyed. This recognition is now codified at New Jersey Statutes section 46:3-17.4, which requires both spouses to consent to any action which would jeopardize the entireties property.[11]

In *Daeschler v. Daeschler*, the Appellate Division dealt with the rights of a levying judgment creditor who sought satisfaction of his judgment lien secured against marital real property.[12] The debt belonged to only one spouse through an arms-length transaction. The *Daeschler* court held that the creditor's rights post-divorce were defined by the equitable distribution scheme in the judgment of divorce and limited to the debtor spouse's resulting interest post equitable distribution.[13]

It went on to specifically hold:

> We see no fundamental unfairness in so limiting rights of a judgment creditor of one of the spouses who levies before the divorce. To the contrary, we are satisfied that the protection and advancement of vested family interests affordable by means of a creative, effective, and flexible equitable distribution plan is a desideratum far outweighing any claim of a levying creditor to the fortuitous enhancement, attendant upon divorce, of the minimal execution value of the debtor spouse's interest in a tenancy by the entirety.[14]

In so holding, the *Daeschler* court underscored the "superceding will of the Legislature in enacting the equitable distribution law" to provide the family part with a "broad range of alternatives in the disposition of jointly owned real property" as an "essential tool in devising a fair and reasonable equitable distribution plan."[15]

The Court in *Vander Weert v. Vander Weert*, in connection with a mortgage unilaterally secured post-complaint by one spouse, opined:

> The real question then, in view of this State's strong commitment to the principle of equitable distribution, is whether, once a divorce complaint has been filed, an event that normally defines the scope and extent of distributable marital assets, *see, e.g., Portner v. Portner*, 93 N.J. 215, 220-221, 460 A.2d 115 (1983), a unilateral action by one of the spouses that substantially diminishes the distributable value of a tenancy by the entirety may be permitted to impinge upon the court's power to deal with that property as part of its overall distribution scheme. We are persuaded that such a unilateral effort to affect the distributability of the tenancy in common may not be countenanced.
>
> To begin with, it is clear that, as a general matter, the distributable marital estate is deemed to include assets diverted by one of the spouses in contemplation of divorce and for the purpose of diminishing the other spouse's distributable share. *See Kothari v. Kothari*, 255 N.J. Super. 500, 605 A.2d 750 (App.Div.1992), so holding where the subject of the diversion was cash. We recognize that where the remaining marital estate is sufficient to permit debiting the husband's adjudicated share with the amount of diversion, the matter remains essentially one between the parties. Execution of a mortgage, however, necessarily involves the rights of third persons, thus creating additional equitable and legal considerations.[16]

While recognizing and similarly dealing with the rights of third persons—the mortgagee in *Vander Weert* and analogously the judgment creditors of the dissipating spouse—the Court concluded that "a post-complaint mortgage executed by only one of the tenants by the entirety, conveys no more than the interest in the property, if any, accorded the mortgagor-spouse by the equitable distribution judgment."[17] "To allow a creditor of only one spouse to reach entireties property in satisfaction of an individual spouse's debt would necessarily infringe and destroy the non-debtor spouse's right and interest in the whole of the property."[18]

In order to solidify the equitable distribution scheme and the shifting of liabilities onto the dissipating spouse, the matrimonial practitioner and the trial judge should reduce the shifted liabilities to judgments in favor of the innocent spouse. This rudimentary tool (*i.e.*, judgments) is intended to protect the innocent spouse and, as discussed below under step three, will permit the innocent spouse to levy against the shareholder spouse's interest in the family business (business F).

## Step Three: Enforcing Judgments against a Shareholder's Interest and the Use of a Constructive Trust

When representing the innocent spouse, in order to secure a judgment obtained against the dissipating spouse, a constructive trust should be obtained against the dissipating spouse's shareholder interest in business F. A constructive trust is typically a remedy that is imposed upon property of an individual where a failure "to do so will result in an unjust enrichment" to the person retaining the property.[19] To impose a constructive trust, all that is required "is a finding that there was some wrongful act…."[20] However, for property to be held in a constructive trust there is no requirement that the property was acquired by wrongful means.[21]

In this instance, the constructive trust will then create an obligation upon the dissipating spouse to keep the innocent spouse apprised of any income generated as a result of the shareholder's interest in the business. The matrimonial practitioner should also consider recording a notice of *lis pendens* upon property owned by business F. This second layer of protection insures that if a sale occurs, at minimum, the innocent spouse will be made aware of it.

However, if property owned by business F is not sold but is instead generating rental income, the innocent spouse has the ability to obtain a lien via the judgments entered as discussed above, and seek a levy upon the dissipating spouse's shareholder interest. In *Leonard v. Leonard*, a published Chancery Division case, the trial court discusses in detail the options available to a levying spouse against a shareholder of a minority interest in a limited liability company.[22] The *Leonard* court concludes that N.J.S.A. 42:2B-45,[23] which governed the rights of a creditor to a debtor who is a shareholder member of an LLC, permits a spouse to obtain a writ of execution upon the shareholder's interest.[24]

However, the *Leonard* court also clarifies that the debtor spouse in this situation:

> [O]nly has the rights of an assignee of the limited liability company interest. The entry of judgment in this manner does not deprive any other member of the LLC the benefit of any exemption laws applicable to his or her limited liability interest. Further, the entry of judgment does not provide defendant [debtor spouse] with the right to interfere with the management of the LLC or force dissolution of the company or foreclosure upon company interest.[25]

Therefore, if business F decides to withhold distributions to the shareholder spouse, the debtor spouse will not be able to force any distributions. Nevertheless, any distributions made to the shareholder spouse must be utilized to satisfy the judgment obtained by the debtor spouse.

The realities of seeking to shield liabilities through layers of corporate protection and the attendant difficulties are not a new concept. Finding a way to pierce, or at least work around, the corporate layers is complicated and not always possible. However, these potential options may be useful in either structuring a settlement or actually collecting on income/assets held by a corporate entity. ■

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## Endnotes

1. *Brown v. Brown*, 348 N.J. Super. 466, (App. Div.), *certif. denied*, 174 N.J. 193 (2002).
2. N.J.S.A. 2A:34-23.
3. *See Painter v. Painter*, 65 N.J. 196 (1974).
4. *Stout v. Stout*, 155 N.J. Super. 196, 205 (App. Div. 1977).
5. *Ibid*.
6. *Painter, supra*, at 218.
7. *Wasserman v. Schwartz*, 364 N.J. Super. 399, 416 (Law Div. 2001).
8. *Neiman v. Hurff*, 11 N.J. 55 (1952)(*quoting Whitney v. Lott,* 134 N.J. Eq. 586, 589 (Ch. 1944)).
9. *See generally, Freda v. Commercial Trust* Co., 118 N.J. 36 (1990) (finding the statute inapplicable to the case at bar due to the entry of the contract prior to the effective date of the statute).
10. 491 B.R. 580, 589-590 (Bankr. M.D. Fla. 2012).
11. *Id*.
12. 214 N.J. Super. 545 (App. Div. 1986).
13. *Id*. at 548 & 554.
14. *Id*. at 554-555.
15. *Id*. at 554.
16. 304 N.J. Super. 339, 348-349 (App. Div. 1997).
17. *Id*. at 349.
18. *Jenson v. Montemoino*, 491 B.R. 580, 589 (Bankr. M.D. Fla. 2012).
19. *D'Ippolito v. Castoro*, 51 N.J. 584, 588 (1968).
20. *Id*. at 589.
21. *Stewart v. Harris Structural Steel Co.*, 198 N.J. Super. 255 (App. Div. 1985).
22. 428 N.J. Super. 272 (Ch. Div. 2012).
23. N.J.S.A. 42:2B-45 was repealed as of March 1, 2014, and replaced by N.J.S.A. 42:2C-43, which provides creditors with the same rights set forth under N.J.S.A. 42:2B-45.
24. *Id*.
25. *Id*. at 274-275.

# Revisiting *Newburgh* and a Parent's Obligation to Contribute to the Cost of College Education

*by Jay M. McManigal*

What turmoil family lawyers have experienced in the past year over the cyclical college debate. This article focuses on the Court's commentary in *Newburgh*, which resulted in the law relied upon today, which has created a divide between professionals and intact/divided families alike. Specifically, is the law written in a way that ensures protection of a parent's fundamental right to rear children while also protecting the best interests of the child in the wake of a divorce? And how do these issues impact families in New Jersey?

New Jersey laws are changing, growing and evolving based upon the social and financial landscape. The state recently experienced significant upheaval in the alimony law, and ultimately the trickle down effects that flow from such a shift. One such effect will certainly involve the transformation of college contribution. What once seemed so certain now carries with it a burden, in part upon the child, to contribute both financially and emotionally.

> In the past, a college education was reserved for the elite, but the vital impulse of egalitarianism has inspired the creation of a wide variety of educational institutions that provide post-secondary education for practically everyone. State, county and community colleges, as well as some private colleges and vocational schools provide educational opportunities at reasonable costs. Some parents cannot pay, some can pay in part, and still others can pay the entire cost of higher education for their children. *In general, financially capable parents should contribute to the higher education of children who are qualified students.* In appropriate circumstances, parental responsibility includes the duty to assure children of a college and even a postgraduate education such as law school.[1] (emphasis added)

In establishing the well-known *Newburgh* factors, Justice Stewart Pollock provided the commentary above, explaining the Court's decision to permit the child of the deceased a claim in the wrongful death action. Even though this was not a family law case, family court judges apply the *Newburgh* factors in analyzing a college contribution claim. Justice's Pollock's commentary regarding the accessibility of a college education remains accurate today. In Oct. 2013, nearly 66 percent of high school graduates were enrolled in colleges and universities. Among those high school graduates enrolled in college, nearly 93 percent were full-time students. About 60 percent of those enrolled in college attended four-year schools.[2]

However, the cost of college has significantly changed. In 1981-82, the average cost of college tuition, fees, room and board in current dollars was $3,489 per year for all institutions (public and private). In 2011-13, the cost of college in current dollars was $19,339.[3] While college costs have increased over 500 percent, the median household income has not kept up. In 1984, the median household income for the state of New Jersey was $27,776.[4] Thus, the average cost of college would account for 12 percent of the median household income. In 2013, the median household income for New Jersey was $61,782.[5] Thus, in 2013, the average cost of college would account for 31 percent of the median household income. Nonetheless, college may still be highly accessible to the majority of children in the state despite the increased cost, if it is understood and appreciated that the child's first choice may not be a financial choice of the parents.

The essence of this statement is outlined in *Newburgh*, but has been lost in its years of simple translation.

With two-thirds of high school graduates attending college, the average annual cost of college now accounting for 31 percent of the median household income, and the constitutional questions posed in the introductory paragraph of this article, isn't it time for the Legislature to revisit the *Newburgh* factors and address the issue of college contribution?

Many practitioners have seen the unintended consequences of *Newburgh*. On some occasions, practitioners see litigants, who are already struggling financially, forced to contribute to their child's college education. On other occasions, practitioners see the children of divorced families intentionally caught in the crossfire of emotions that accompany post-judgment litigation over college expenses. The facts should affect the outcome. Consider this example: The non-custodial parent has been estranged from the child completely by the custodial parent; the child does not want to have a relationship with the non-custodial parent; the non-custodial parent and custodial parent are struggling financially with little available funds for college; the child has chosen to attend an out-of-state college, which results in double the cost of an in-state college; and the custodial parent has filed a notice of motion to compel contribution from the non-custodial parent after the child has already begun to attend his college of choice.

These circumstances far too often present themselves, and courts grapple with deciding these emotionally charged and financially difficult cases. Does the court force a financially incapable parent to contribute to the child's college education, or does the court leave it to the child to determine how he or she will pay for college?

The author agrees with Justice Pollock, that financially capable parents should contribute toward their child's higher education costs. This is likely a moral endeavor that nearly all parents would like to achieve—the ability to contribute toward their child's college expenses.

However, under what legal basis has this moral obligation become a legal obligation? In *Newburgh*, the Court states that parents have a duty to provide a necessary education for children. By definition, a person who attains the age of 18 is an adult. Many states have memorialized laws establishing such limits on a parent's obligation to support a child once that child has reached the age of majority at 18 or 19 years of age, except in the event of certain extenuating circumstances. A majority of the states have clearly defined cut-off dates for a parent's obligation to support a child.[6] While issues of child support and emancipation might also exist, practitioners can recognize the issue that has the greatest financial impact on a family is the cost of college. Practitioners can also recognize that in some post-judgment cases, the court should intervene to protect the child from being caught in the emotional crossfire.

The increasing costs of a college education and the surrounding child support and emancipation issues have made the topic of college contribution a very volatile one for post-judgment litigation. Not all litigants have the best of intentions when litigating these types of cases. New Jersey law has been interpreted in such a way that the child has a duty to communicate with both parents concerning his or her educational desires.[7] Unfortunately, in some instances this obligation has been used by one or both parents to put the child in the middle of the battle for the sole purpose of choosing a side.

So what can family lawyers do to address these dilemmas? How can the state ensure that the family unit is protected; that a parent's fundamental right to make decisions regarding the child is protected; and that in appropriate circumstances, the court can intervene on the issue of college expense contribution when necessary?

The author believes the solution is for the state Legislature to codify the laws regarding college expense contribution, putting emphasis on recognizing that the parent-child relationship is an important factor in analyzing college contribution claims.

The author believes the statute should be written to clearly articulate that a trial court need not require a custodial parent or non-custodial parent to contribute to their child's college in all cases. This provision should be made clear at the forefront of the statute to provide the court and litigants with guidance that some cases may warrant a parent to contribute to college, but not all.

The author believes the decision to order a parent to contribute to their child's college education should be at the discretion of the trial judge based upon a review of economic and non-economic factors. The economic and non-economic factors that are articulated in *Newburgh* should be included in the statute, including the following amendments:

**1)** whether the parent, if still living with the child, would have contributed toward the costs of the requested higher education;
**2)** the effect of the background, values and goals of the parent on the reasonableness of the expectation of the child for higher education;
**3)** the amount of the contribution sought by the child for the cost of higher education;
**4)** the ability of the parent to pay that cost;
**5)** the relationship of the requested contribution to the kind of school or course of study sought by the child;
**6)** the financial resources of both parents;
**7)** the commitment to and aptitude of the child for the

requested education;

**8)** the financial resources of the child, including assets owned individually or held in custodianship or trust;

**9)** the ability of the child to earn income during the school year or on vacation;

**10)** the availability of financial aid in the form of college grants and loans;

**11)** the child's relationship to the paying parent, including mutual affection and shared goals as well as responsiveness to parental advice and guidance;

**12)** the relationship of the education requested to any prior training and to the overall long-range goals of the child;[8]

**13)** the extent to which the paying parent has been involved in the decision making process for the child's college education;

**14)** the extent to which the child contributes toward his or her own college education;

**15)** the child's options to attend state or local colleges compared to private institutions;[9] and

**16)** any other factor that may impact the court's decision.

The author believes the law should codify the restrictions set forth in *Gac*,[10] and establish parameters for the timing in which college expense contribution applications should be filed (*i.e.*, unless extenuating circumstances apply, prohibiting a parent from seeking reimbursement for all college expenses after the child has graduated from college and where there has been no relationship with the custodial parent). Custodial parents should be afforded greater latitude if the application for college expense reimbursement is filed before the child incurs expenses for college because they have provided the non-custodial parent with the opportunity to be a part of the decision prior to the college expenses being incurred. However, if the application is filed after the college expenses are incurred, "[t]he failure [to initiate the application to the court before the expense are incurred] will weigh heavily against the grant of a future application."[11]

Procedurally, the author believes the Legislature should establish minimum requirements for financial disclosure when a parent files an application for college expenses contribution. If a party is going to bring an application that may impact a significant portion of the other party's income, basic financial disclosure and transparency should be required. The author believes the law should require that when a parent initiates an application with the court for college expense contribution from the non-custodial parent, the parent should be required to file a completed and current case information statement. The moving party should also attach as exhibits to his or her application all documentation regarding college tuition, room and board, fees, expenses, financial aid, grants, scholarships and any other information related to college expenses. The moving party should also attach to his or her case information statement information regarding the child's income and the child's contribution to his or her college expenses. The responding parent should be required to attach a completed and current case information statement to his or her responsive pleading. These requirements would facilitate the process of determining the cost of college and the parties' ability to pay.

Finally, the author believes the statute should provide guidance for the court in addressing college contribution cases where the parent-child relationship is broken as suggested in *Black*.[12] This analysis is factually sensitive, as certain issues such as past domestic violence and child abuse may be a factor. The author believes the court should have significant flexibility to address these types of circumstances. Presuming issues of domestic violence and child abuse do not exist, if the court were to analyze the factors above and find the child has failed to engage in a relationship with the parent, then the trial judge should have the option to order that the child and non-custodial parent attend counseling or therapy. The court should also have the flexibility to either make the completion of therapy a prerequisite for the non-custodial parent's college contribution, or a condition of the non-custodial parent's contribution to college. The author presents this differentiation because in some cases, especially for applications filed after the child has incurred the college costs, the court may decide to have the estranged child engage in therapy with the non-custodial parent prior to the non-custodial parent being obligated to contribute toward college. This option places greater responsibility on the adult child to repair the broken relationship with the parent. Perhaps the law should include a provision indicating that prior to a review of the above-mentioned factors, there should be a rebuttable presumption that a parent should not be obligated to contribute to the college education costs of an adult child who refuses to have a relationship with that parent.

The statutory proposal established above will allow the courts to analyze college expense contribution claims in a fair and equitable manner taking into consideration all of the circumstances. Even though this proposal does

not join the majority of states that have automatic emancipation dates, it does provide a statutory framework that seeks to balance a parent's fundamental right to rear children and the best interests of the child. ■

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## Endnotes

1. *Newburgh v. Arrigo*, 88 NJ 529, 544 (1981).
2. U.S. Bureau of Labor and Statistics.
3. Nces.edgov/fastfacts.
4. U.S. Census Bureau–Historical Income Tables: Households, Table H-8.
5. U.S. Census Bureau–Historical Income Tables: Households, Table H-8.
6. National Conference of State Legislatures, Termination of Support–Age of Majority, www.ncsl.org.
7. *Black v. Black*, 436 N.J. Super. 130, 92 A.3d 688, (Ch. Div. N.J. 2013).
8. *Newburgh, supra*, 88 N.J. at 545.
9. *Black, supra*, 436, N.J. Super. at 147-48.
10. *Gac v. Gac*, 186 N.J. 535 (2006).
11. *Gac, supra*, 186 N.J. at 547.
12. *Black, supra*, 436, N.J. Super. at 140.

# Commentary
# The Other Side of the Coin: The Role of Savings in Fixing an Alimony Award

*by Robert M. Zaleski*

The argument has been made that under New Jersey law, savings, as a component of an alimony award, must be defined exclusively as a device that is employed "to protect…against the day when alimony payments may cease because of [the payor spouse's] death or change of circumstances."[1] It is beyond dispute that New Jersey law acknowledges savings as a component of alimony for this limited purpose. However, in reality married persons save and accumulate funds for a wide variety of reasons that have nothing to do with protecting against the loss of alimony and/or income. Proper analysis and application of New Jersey law demands a much broader definition of savings than the one previously suggested.

When determining an award of alimony, the court must consider all 14 factors set forth in N.J.S.A. 2A:34-23(b). These factors include: the actual need and ability of the parties to pay; the standard of living established in the marriage or civil union and the likelihood that each party can maintain a reasonably comparable standard of living; and the opportunity for future acquisitions of capital assets and income. Any spousal support award that "lacks consideration of [all] the factors set forth in N.J.S.A. 34-23(b) is inadequate."[2] Against this backdrop, consider factual scenarios where a savings component should be part of an alimony award based upon the aforementioned statutory factors.

All human beings share certain basic needs (food, housing, medicine, medical attention, clothing) that are necessary for subsistence. Beyond these basic needs New Jersey law has acknowledged the concept of 'need' includes reasonable expenditures for shelter, transportation and personal expenses. A non-exclusive list of these expenditures can be found in Schedules A, B and C of the family case information statement, which must be filed in all contested divorce actions. Intact couples who fear the need to supplement their incomes in the future often elect to address this concern by making regular contributions toward savings or retirement plans.

Although N.J.S.A. 2A:34-23(b)(1) requires the court to consider the needs of the parties when fixing an alimony award, debate continues over whether discretionary savings should be treated in the same manner as all the other Schedule C personal expenses referenced in the case information statement when determining the amount of alimony.[3] At first blush, it may seem almost counter-intuitive to conclude that the act of saving money should be treated as the equivalent of the act of spending money. The very fact that a couple has the ability to save money on a regular basis seems to imply a surplus of income over and above the amount which is 'needed' in order to pay for ongoing living expenses. However, on closer examination it is clear that failure to recognize regular contributions toward a savings 'expense' as part of the alimony calculus would be contrary to New Jersey law.

The statutory factors set forth in N.J.S.A. 2A:34-23 cannot be regarded in a vacuum because their definitions and significance are interrelated. Factor one refers to the "actual need" of the parties but fails to define 'need.' Factor four helps to define 'need' by requiring the court to consider "the standard of living established in the marriage…and the likelihood that each party can maintain a reasonably comparable standard of living." When the court examines the likelihood that the marital lifestyle can be maintained, factor eight requires it to consider each party's "opportunity for future acquisitions of capital assets and income."

When statutory factors one, four and eight are read in conjunction with one another, 'need' is not defined by the cost of subsistence, but rather by the amount of money necessary to maintain the parties' marital lifestyle. If a couple elects a marital lifestyle where spending is limited to 'subsistence level' as a means of accumulating savings, this conscious and cautious decision cannot be used to

justify a payor spouse's claim that the needs of the dependent spouse should be defined as the cost of subsistence for purposes of calculating alimony. If this were not true, the statute would not require the court to consider each party's opportunity for "*future* acquisitions of capital assets and income." Numerous decisions confirm that spousal support may include an amount that allows for the accumulation of "reasonable savings."[4] While it is true that these decisions reference the propriety of a savings component to protect the supported spouse in the event that alimony ceases (due to the death of the payor) or is modified (or terminated) due to a change of circumstances (such as the retirement of the payor) they certainly do not prohibit consideration of a savings component to achieve a wider range of objectives.

Except in circumstances where costs are prohibitive, marital settlement agreements generally require the payor spouse to maintain life insurance to secure his or her alimony payments. The amount of coverage the payor spouse is required to maintain is calculated based on the amount of the alimony award and the anticipated length of the obligation. However, the payor's obligation to maintain life insurance ends on the day his or her alimony obligation terminates. Therefore, life insurance requirements only protect the dependent spouse if the payor spouse dies before alimony is terminated; they do nothing to protect a dependent spouse whose right to receive alimony is lost while the payor is still alive.

Alimony obligations are routinely terminated based upon a finding that changed circumstances (such as the reasonable retirement of the payor) have occurred. If the amount of alimony awarded failed to include a savings component, the dependent spouse may be rendered incapable of accumulating savings from the date of divorce forward. In such cases, the dependent spouse is left with no alimony and no savings. For these reasons, a provision that requires the payor spouse to provide life insurance for the duration of the alimony obligation cannot serve as blanket justification for excluding a savings component when the amount of the alimony award is calculated.

Even in cases where the payor spouse maintains life insurance and dies while the alimony obligation is still in existence, the dependent spouse's right to have a savings component included in the alimony award cannot be ignored. This is because the amount of life insurance maintained by the payor is determined by the size of the alimony award. If the dependent spouse has a right to have savings included in the calculus when the initial alimony award is fixed, to exclude savings would unfairly reduce the amount of alimony and the corresponding amount of life insurance the payor must maintain.

It is undisputed that New Jersey law authorizes the courts to make alimony awards in amounts sufficient to enable the dependent spouse to accumulate savings on which to draw in the event alimony ceases due to the death of the payor spouse or a change of circumstances. But does New Jersey law provide any authority for acknowledging a savings component for the purpose of enabling the dependent spouse to accumulate post-divorce savings in the same fashion in which the parties accumulated savings during the marriage? The answer is yes, and the authority is N.J.S.A. 2A:34-23(b).

Trial courts determine the standard of living established in the marriage by considering various elements, including spending on items such as "the marital residence, cars owned, typical travel and vacations each year, entertainment, household help, and other personal services."[5] However, when courts make findings regarding marital lifestyle, the "ultimate determination must be based not only on the amounts expended, but also what is equitable."[6]

New Jersey law authorizes the courts to order a supporting spouse to maintain life insurance designating the dependent spouse as beneficiary, or to establish a trust for the dependent spouse's benefit, in order to secure alimony payments subsequent to the death of the payor.[7] However, in cases where the cost of life insurance is prohibitive and the supporting spouse has insufficient assets to create a trust, such orders do not prove helpful. To account for this situation, under New Jersey law, trial courts retain broad discretion to "make alimony orders in amounts large enough to enable a dependent spouse to accumulate savings on which to draw income should the paying spouse predecease the dependent spouse."[8]

The New Jersey Legislature has expressed an undeniable interest in protecting former spouses, and the New Jersey Supreme Court has held that this interest was the predominant public policy underlying the Legislature's 1988 amendments to N.J.S.A. 2A:34-23 and N.J.S.A. 2A:34-25.[9] Trial courts have authority to enter alimony orders "as the circumstances of the parties and the nature of the case shall render fit, reasonable, and just, and require reasonable security for the due observance of such orders…each case must stand on its own facts and deference must be given to the trial court's ability to weight the equities and take appropriate action."[10]

If New Jersey case law prohibited alimony awards from including a savings component designed to enable the dependent spouse to grow his or her estate post-divorce, in a manner commensurate with the history of savings established during the marriage, it would do so in contravention of N.J.S.A. 2A:34-23, which requires consideration of: 1) the needs of the payee; 2) the standard of living established in marriage; and 3) the ability to accumulate income and assets. No reported case even remotely suggests that such a prohibition has been established. To the contrary, the Appellate Division has held that trial courts must clearly set forth factual findings and legal conclusions regarding N.J.S.A. 2A:34-23(b)(8), which requires consideration of "the opportunity for future acquisitions of capital assets and income when making alimony awards."[11]

In marriages where the parties truly engaged in regular savings as a part of their lifestyle, an alimony award that fails to incorporate a savings component for the dependent spouse deprives that spouse of a fair alimony award while providing the payor spouse with an unjustifiable windfall.[12] Conversely, if the initial alimony award includes a savings component, which reflects the actual regular savings exercised by the parties during the marriage, and that award is never terminated or modified due to changed circumstances, the payor spouse is not harmed and the dependent spouse receives no unintended windfall. This is because the amount of the alimony award has been fixed at the proper level from the outset.

Under New Jersey law, the courts are required to assess only the parties' actual standard of living.[13] For this reason, courts should be careful to examine the actual savings habits employed by the parties when making a determination regarding whether the alimony award should reflect a savings component. Regular contributions toward the accumulation of savings, such as automatic deductions from payroll checks, demonstrate a conscience lifestyle choice. This decision to save money on a regular basis is usually inseparable from the corresponding decision to refrain from excessive spending on discretionary expenses such as vacations, summer homes and lavish wardrobes. It is the act of saving money regularly and continuously that makes 'savings' part of a couple's 'marital lifestyle' and requires that savings be treated like any other expense. In contrast, a couple who saves no money for 15 years but deposits money into joint savings in the 16th and final year of their marriage, after winning the lottery or receiving an inheritance, cannot legitimately describe such savings as part of marital lifestyle. Saving of this type cannot be accurately described as an 'expense' because: 1) there is no history of regular 'expenditures' designed to accumulate savings, and 2) there is no evidence of sacrifice or self-denial that dictates the decision to engage in regular savings should be treated as a component of marital lifestyle. In such cases proper focus would be upon equitable distribution of the funds acquired in this fashion, rather than recognition of a 'savings' expense, when alimony is calculated.

Some couples may engage in a pattern where they save for a short period of time, spend their savings, then repeat the cycle. This fact pattern may also justify the conclusion that the marital lifestyle does not include a regular expenditure for 'savings.' For example, making regular deposits into a Christmas club and spending these funds each December is very different than making regular contributions to a 401(k) account that remains untouched. A Christmas club is merely a device utilized to help pay the line item expense for gifts found in Schedule C of the case information statement. To include both the Christmas club contributions and gift expense on the case information statement would double count the same expense.

In reality, people save for a variety of reasons, many of which have nothing to do with protecting against a day when alimony ceases. These reasons include: 1) the desire to establish an estate that can be passed to their progeny; 2) the desire to make future purchases of big ticket items they were unable to afford during coverture; and 3) the desire to make future investments that require large lump sums of capital. People in intact marriages do not save exclusively for the purpose of protecting against a day when their incomes will diminish, and a fair reading of the case law does not support the conclusion that a savings component can only be included in an alimony award if the parties engaged in savings to protect against loss of income. There is no sound reason why a savings component should be excluded from an alimony award where it is necessary to protect against the destruction of a divorced spouse's ability to fund the financial goals the parties established together during the marriage through sacrifice and thriftiness.

Some have argued that if savings is treated as a line item expense, income alone would define marital lifestyle without regard for the actual 'spending' in which the parties engaged. This argument may ring true in marriages where the parties do not engage in a regular

and consistent pattern of saving money. However, where regular savings and an ongoing fiscal restraint are hallmarks of a marriage, equity demands that money saved should be the focus rather than money spent. Considering that income actually spent on contributions to charity, gifts to third parties, and tithing to churches are all expenses that help define marital lifestyle, it is hard to imagine that a regular contribution to a 401(k) account or any other savings account that has remained substantially intact throughout coverture, would not receive similar treatment when examining needs and marital lifestyle for purposes of fixing alimony. It is difficult to justify an interpretation of New Jersey law that rewards a spendthrift spouse with a greater award of alimony, while punishing the payee spouse who has exercised restraint and temperance throughout the marriage.

It has been argued that the reward for frugality during the marriage is received at the moment when the marital savings are divided between the parties as and for equitable distribution. Except in those very limited circumstances addressed earlier, this argument is obviously flawed because it ignores the very issue being discussed—whether savings should be a component of 'alimony.' Failure to treat regular and consistent contributions that have resulted in the accumulation of savings as the equivalent of any other Schedule C expense would clearly result in an unjustified windfall in situations where one spouse's stream of income is sizeable and the other spouse's is not. This is because the spouse whose income stream is significant would logically have a better "opportunity for future acquisitions of capital assets" post-complaint, under N.J.S.A. 2A:34-23. Conversely, the spouse whose income stream is *de minimis* is likely to be left with no ability to continue saving in a manner consistent with the marital lifestyle.

The earning capacities of the parties and the stream of income arising therefrom can, and should, be considered when fixing the amount of alimony payable under N.J.S.A. 2A:34-23. Therefore, it is erroneous to suggest that including a savings component in an alimony award is improper based upon the notion the dependent spouse would actually be receiving 'equitable distribution' of the future income stream of the payor spouse.

Permitting the spouse who has the superior stream of income to retain 100 percent of the monies that were regularly contributed toward savings during the marriage is inherently unfair. If he or she continues to save in a manner consistent with marital lifestyle, an unjustifiable windfall results. If he or she elects to stop saving, post-divorce, and elects to spend this windfall, the parties will likely be in equipoise at retirement age, without significant savings or incomes. This, in turn, likely leads to a motion to terminate alimony that is granted because the payor spouse has spent his or her share, and the dependent spouse's share, of the savings component that should have been shared between the parties in the form of alimony, since the date of the judgment of divorce.

Unlike gifts and donations that end up in the hands of third parties, savings remain with the person who makes the investment. This bolsters the assumption that the payor spouse should continue to have 'the ability to pay' some additional alimony to the dependent spouse to satisfy the savings component established during the marriage.

Pursuant to the newly revised alimony statute N.J.S.A. 2A:34-23(j)(1), there is a "rebuttable presumption that alimony shall terminate upon the obligor spouse or partner attaining full retirement age…" N.J.S.A. 2A:34-23(j)(3) now specifically acknowledges that when making such a determination:

> the Court shall consider the ability of the recipient to have saved adequately for retirement as well as [a list of 8 specific] factors. These factors include:
>
> (e) The reasonable expectations of the parties regarding retirement during marriage or civil union and at the time of the divorce or dissolution.
>
> (g) The obligee's level of financial independence and the financial impact of the retirement by the obligor upon the obligee.

Practitioners seeking to protect the ability of the obligor spouse to terminate alimony upon reaching retirement age may wish to negotiate for the inclusion of language that makes explicit reference to the inclusion of a savings component in the negotiated alimony award. For example, a sentence could be included in the divorce settlement agreement that states: "The amount of alimony fixed herein includes a savings component and the parties anticipate that the payee spouse shall be in a position to rely upon such savings to achieve financial independence upon the payor spouse reaching normal retirement age."

N.J.S.A. 2A:34-23(b) makes no reference to the

spending the parties engaged in during marriage. Instead, the statute references the "actual need and ability of the parties to pay," as well as the likelihood of "maintaining a reasonably comparable standard of living." Judges are empowered to make alimony awards that include savings components as the individual acts and circumstances of each case dictate. Where a dependent spouse's need for financial protection is not found to be compelling, a judge may decline to provide security devices.[14] But where the court has weighed the statutory factors of N.J.S.A. 2A:34-23 and considered the facts and circumstances of the case, it is clearly within the court's authority to fix an award of alimony that includes a savings component.

There will certainly be hybrid factual scenarios where the analysis suggested herein may be tested. One example would be the couple that saves regularly and accumulates assets while simultaneously incurring unpaid credit card debt in order to pay ongoing expenses. When such cases arise, examination of the facts peculiar to each matter, and the application of equitable principles, should serve as guideposts.

Opposition to inclusion of a savings component in the alimony calculus appears to arise from a stubborn refusal to acknowledge that both the needs and the contributions of spouses whose earnings are limited (such as homemakers) deserve to be fully recognized. The focus should be on identifying the legal and equitable rationale that supports recognition of the needs and contributions of both spouses. ■

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## Endnotes

1. *Davis v. Davis,* 184 N.J. Super. 430 (1982).
2. *Crews v. Crews*, 164 N.J. 11, 26 (2000).
3. Savings is one of the line items listed on Schedule C of the standard case information statement.
4. *Lefkon v. Lefkon,* N.J. Super. (App. Div. 2006)(unpublished __ Docket No. A-5951-03T15951-03T1; *Davis v. Davis,* 184 N.J. Super. 430, 437 (1982); *Khalaf v. Khalaf,* 58 N.J. 63, 70 (1971).
5. *Lefkon v. Lefkon,* (App. Div. 2006)(unpublished __ Docket No. A-5951-03T15951-03T1; *Hughes v. Hughes,* 311 N.J. Super. 15, 34 (App. Div. 1988).
6. *Lefkon v. Lefkon,* (App. Div. 2006)(unpublished __ Docket No. A-5951-03T15951-03T1; *Glass v. Glass,* 366 N.J. Super. 357, 372 (App. Div. 2004).
7. *Davis v. Davis,* 184 N.J. Super. at 436-440; *Jacobitti v. Jacobitti*, 135 N.J. 571, 582 (1994).
8. *Jacobitti, supra* at 576.
9. *Jacobitti, supra* at 579.
10. *Davis v. Davis, supra* at 439 *quoting Meerwath v. Meerwath,* 71 N.J. 541, 544 (1976).
11. *Gnall v. Gnall,* N.J. Super. (App. Div. 2013)
12. *Aronson v. Aronson,* 245 N.J. Super. 354, 364 (App. Div. 1991).
13. *Hughes v. Hughes,* 311 N.J. Super. 15, 34 (App. Div. 1988); *Lefkon v. Lefkon,* . (App. Div. 2006)(unpublished __ Docket No. A-5951-03T15951-03T1.
14. *Meerwath v. Meerwath,* 71 N.J. 541 (1976).