New Jersey Family Lawyer

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CHAIR'S COLUMN

We Have Been Very Busy

by Ivette R. Alvarez

On Saturday, Jan. 27, 2007, before a record-breaking 450 family law attorneys, the Family Law Section held its annual symposium. A full-day seminar organized by Frank Louis, a former section chair and Tischler Award recipient, the symposium explores cutting-edge issues in family law. This year, for the first time, the symposium had among its panelists a justice of the New Jersey Supreme Court. Justice Roberto Rivera Soto, author of the *Steneken* decision and the dissent on *Mani*, among others, provided the judicial perspective.

This year the section has refocused its legislative mandate and worked very hard not only to comment on, but to get involved in the legislative process by pushing for legislation that benefits our practice and

our clients. On Jan. 20, 2007, Governor Jon Corzine signed the irreconcilable differences bill into law. The section worked very hard to have this bill passed. With the masterful assistance of Valerie Brown, legislative counsel for the New Jersey State Bar, several members of our section, including the Honorable Robert A. Fall, Frank Louis, Thomas Snyder, Brian Schwartz, Jeralyn Lawrence, and myself, met with legislators, formed coalitions with other groups, testified before the Assembly and the Senate, wrote letters and successfully lobbied for this important change.

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SENIOR EDITOR'S COLUMN

Call to Action

Attorneys Must Act Now to Preserve the Confidentiality of Fee Arbitration

by John P. Paone Jr.

(Editor's Note: Set forth below is an informative and important comment regarding an aspect of our practice in which virtually all of us, unfortunately, have participated or will participate. Fee arbitration is a less-than-frequent byproduct of family practice. For years, fee arbitration has been a confidential process, thereby enabling all participants the freedom to attempt to resolve issues, even at a late stage, without the added specter of public dissemination of the relative positions of the parties and the ultimate outcome of the dispute. As we all know, the confidentiality of settlement discussions and settlement agreements assist in the collaborative process of resolution of all disputes, including, but not limited to, fee disputes.

Recently, the New Jersey Supreme Court determined to end the confidentiality of attorney ethics proceedings, and there is now a rule being proposed

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A new location and program format are planned
for the NJSBA 2007 Annual Meeting…

Borgata

HOTEL CASINO & SPA

AT RENAISSANCE POINTE
ATLANTIC CITY

May 16–18, 2007

Save the date for the NJSBA's yearly educational and networking event. Look for further details about the new program format and events on www.njsba.com and in *New Jersey Lawyer Newspaper.*

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New Jersey Family Lawyer

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Now our clients no longer have to wait 18 months from their actual separation to allege a no-fault ground for divorce. All they have to state in their complaint is that the marriage has been irretrievably broken for six months or more, and there is no prospect of reconciliation. I do not have to tell you what a difference this will make in our practice

Others in the section, including Amanda Trigg and Thomas Snyder, are working with legislators and other groups to enact changes to the adoption statute. We expect to have results on this effort by next month. In the meantime, Margaret Goodzeit, together with others on our Legislative Committee, continue to review and comment on bills of relevance to our practice.

We also author or collaborate on *amicus* briefs on issues that impact our practice. The section was at the forefront and participated in making history when Tom Snyder collaborated in authoring the State Bar's *amicus* brief on *Lewis v Harris*. Later, the section was instrumental in the State Bar's pronouncement that "the Civil Union bill will create a separate, unequal and unnecessarily complex legal scheme?…that will not satisfy the Supreme Court's determination that the 'unequal dispensation of rights and benefits to committed same sex partners can no longer be tolerated." In the past three years we also have submitted briefs on *Weishaus, Mani, Gac, Fischer* and *In Re: Jacoby*.

The section participates in important Supreme Court committees, by contributing the viewpoint of the family law attorney. Most recently the section, mobilized by John Paone, former section chair and Tischler Award recipient, requested that the State Bar lobby to oppose the proposed amendment to the Fee Arbitration Rule, Rule 1:20. The proposed amendment goes against the very purpose of the fee arbitration process—confidentiality—and much to the detriment of our hard working members, would permit allegations by the former client to be made public.

The section honors those that give of themselves to better our practice. This year, for the first time, the Tischler Award will go to a retired family part judge—the Honorable Herbert Glickman. Announcements for this event will be coming out soon. Be sure not to miss it.

In May we will be honoring Lynn Newsome, a former section chair and Tischler Award recipient, on her installation as president of the New Jersey State Bar Association. Her reception will be a ticketed event, and will take place on May 16, 2007, during the State Bar's Annual Meeting in Atlantic City. Please mark the date on your calendar, as we would like a record turnout for Lynn, a true and committed friend of the section.

Last but not least, section members network and have fun together. From March 28th to April 1st we will be in sunny San Juan, Puerto Rico, enjoying the Bridge the Bars Retreat. We will be staying at the premier El San Juan Hotel and Casino at a greatly discounted room rate. In addition to continuing legal education seminars, we will enjoy an opening reception by the beach, a breakfast buffet on two days, a brunch with a sensational speaker, a reception in Old San Juan and a party at a Hacienda at the foot of El Yunque, the rain forest. All events are included in the registration price. Reservations already indicate that this will be the best-attended retreat so far. For more information call my assistant at 973-532-7035. *Nos vemos en Puerto Rico!* ■

Confidentiality of Fee Arbitration

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by the Professional Responsibility Rules Committee to do the same for fee arbitration matters.

In a compelling and comprehensive analysis, John Paone, Esq., sets forth the salient reasons why fee arbitrations should remain confidential. I urge all of you to carefully read this thoughtful analysis, and I urge each of you to actively participate in the process, if, in fact, you concur with the conclusion that it is extremely important for the fee arbitration process to remain confidential.)

As most practitioners were preparing for the holidays, the Supreme Court of New Jersey published a notice to the bar concerning Rule 1:20-A-5 governing the confidentiality of fee arbitration matters. Specifically, the Court has agreed to consider, on an expedited basis, a rule change proposed by the Professional Responsibility Rules Committee, which would eliminate the confidentiality of fee arbitration. The rule amendment reads as follows:

> Disclosure by persons requesting fee arbitration. The requesting party may make public statements regarding the fee arbitration process, the submission and content of the fee dispute, and the result, if any, of the arbitration. If a requester speaks publicly, a respondent may speak publicly regarding the fact that a request for fee arbitration was submitted, the content of the dispute, the result of the arbitration if a result has obtained at the point when the respondent speaks, and the fee arbitration process.

Under the current rule, and since 1978, all fee arbitration records and proceedings are confidential. The proposed amendment gives clients (the "requesting party") the right to make public all aspects of the fee arbitration process, both during and after arbitration.

It is important that our voices be heard in opposition to this misguided proposal. Proponents of the rule amendment point to the termination of confidentiality in the ethics process as brought about by *R.M. v. Supreme Court of New Jersey*.[1] They argue that the same reasons that require the ethics process to be open should apply to opening fee arbitration disputes. They further argue that the interest in protecting an attorney's reputation does not justify prohibiting a lay complainant in a fee arbitration proceeding from publicly speaking on the matter during or after the arbitration process is completed.

There are no less than 10 reasons why the proposed rule is wrong and must be rejected by the Court:

1. Fee arbitration is not a client's fundamental right. It is an option created by the Court to address fee disputes in a non-litigated and private forum. No litigant is compelled to enter fee arbitration. Indeed, fee arbitration must be elected by the litigant, or it does not take place. Any litigant who does not agree with the requirement of confidentiality does not have to elect the fee arbitration process, and is free to litigate the dispute in a public forum.
2. Attorneys lose the right to litigate the fee dispute whenever the litigant elects fee arbitration. It is significant when the door to the courthouse is closed to any class of citizens (in this case attorneys). When fee arbitration was adopted in 1978, the Court concluded that it was acceptable for attorneys to forfeit their right to litigate in return for the resolution of the fee dispute through a confidential arbitration process. There can be no legal or equitable justification for lawyers losing their constitutional rights to litigate if confidentiality is stripped from the arbitration process.
3. Because there is no record in arbitration, what the litigant elects to report from this process effectively can go unchecked or without redress. This differs from the litigation process where there is a record to address false claims or allegations. Furthermore, because the revelation of information in response to a fee dispute often will touch upon the attorney-client relationship, the attorney may have no effective means of disputing false allegations of a litigant without violating other rules of confidentiality.
4. Fee arbitration must be a mutual process. Litigants receive a less expensive and more expeditious forum to resolve their disputes. Attorneys receive confidentiality. To unilaterally change one side of that equation transforms arbitration from a mutual process to a sword clients can wield against attorneys.
5. By their nature, arbitration proceedings are not public. Indeed, it has been long recognized that "confidentiality is the cornerstone of arbitration." Therefore, it is improper to think of confidentiality as a veil to shield the public from this process. Rather, confidentiality is part and parcel of the process of arbitration, a process that is only an alternative that clients can elect if they do not wish to litigate a fee dispute in a public forum.
6. The proposed rule only permits disclosure if the litigant elects not to maintain confidentiality. Specifically, the attorney must maintain confidentiality unless the litigant elects to "speak publicly." How it is determined that the litigant has spoken publicly becomes a minefield for attorneys who breach confidentiality at their own risk. While I oppose any effort to repeal confidentiality, making confidentiality a one-way street is even worse.
7. The situation faced in *R.M.* is distinguishable, and does not mandate the elimination of confidentiality in fee arbitration matters. Specifically, the ethics process is the exclusive process to address improper attorney behavior. Conversely, arbitration is not the exclusive process for addressing fee disputes.

Indeed, fee arbitration is an alternative process. Clients who do no like the process always have the option of litigating the matter in a public forum.

8. It bears noting that when a fee dispute rises to the level of ethical misconduct, the fee arbitration panel must refer the matter to the ethics committee. In those cases, the matter becomes public in accordance with the decision in *R.M.* Therefore, there is already a vehicle in place to pierce the confidentiality of fee arbitration when ethical misconduct is at issue. The proponents of the rule amendment apparently overlooked this as they have adopted an overbroad approach that would indiscriminately eliminate confidentiality for all fee arbitration disputes.
9. Fee arbitration panel members often attempt to resolve disputes by consent. Confidentiality assists the free and frank discussion during these negotiations. Without the assurance of confidentiality, the disputants may be unwilling or hesitant to offer concessions for fear that it may be interpreted as an admission of fault.
10. Unlike in a courtroom, in arbitration the Rules of Evidence do not strictly apply, and litigants are generally permitted to say almost anything. In addition, although written submissions are to be submitted in advance, litigants frequently bring documents to the arbitration that were not supplied beforehand. These proceedings go forward in this undisciplined manner in order to accommodate clients who frequently elect to appear *pro se.* Making public these undisciplined proceedings in any way, shape or form places lawyers, their reputations and their livelihood in peril.

Clearly, the Professional Responsibility Rules Committee did not give sufficient consideration to the consequences of eliminating the confidentiality of fee arbitration. Fee arbitration is not tantamount to an ethics proceeding, and it is therefore shortsighted to conclude in knee-jerk fashion that because one proceeding has been made public, so must the other. I urge my colleagues to provide their comments regarding this rule amendment to Stephen W. Townsend, Esq., Clerk of the Supreme Court, the Supreme Court of New Jersey, Hughes Justice Complex, P.O. Box 970, Trenton, New Jersey 08625-0970. Comments must be delivered by March 15, 2007. Unless your voice is heard loud and clear, the Court may adopt this misguided proposal as another bad idea whose time has come. ■

ENDNOTE

1. 184 N.J. 208 (2005).

FROM THE EDITOR-IN-CHIEF EMERITUS

The New Rules

by Lee M. Hymerling

With the advent of the new court term, several major rule changes have become effective, each of which will have a dramatic effect upon matrimonial practice. First, Rule 5:5-2 was adopted and is the byproduct of the Supreme Court's decision in *Weishaus v. Weishaus*,[1] and closes issues raised in/created by *Crews v. Crews*.[2] Second, Rule 5:5-9 was adopted dealing with the entry of judgments in response to *Entress v. Entress*.[3] Third, Rule 5:5-6 was adopted implementing a statewide program of mandatory mediation after the Mandatory Early Settlement Program (MESP)but before trial. Each of these rule changes will be discussed within the body of this article.

When our Supreme Court decided *Crews* in 2000, it addressed "...whether marital lifestyle findings should be made on the entry of a divorce judgment that includes support so as to facilitate the official handling of subsequent modification applications." Justice Jaynee LaVecchia's opinion directed that when a lower court established an alimony award, it was required to make findings establishing the standard of living during the marriage as part of the court's assessment of the adequacy and reasonableness of the award to determine whether an award would enable the parties to enjoy a lifestyle "reasonably comparable" to that enjoyed during the marriage. In *dicta*, the Supreme Court directed:

> [t]he setting of the marital standard is equally important in *an uncontested divorce.* Accordingly, lest there be an insufficient record for the settlement, the Court should require the parties to place on the record the basis for the alimony award including, in pertinent part, establishment of the marital standard of living, before the Court accepts the divorce agreement.[4]

Four years later, in *Weishaus*, the Supreme Court revisited *Crews* within the context of an uncontested case, and specifically reconsidered its directive that the finding of a marital lifestyle should be mandatory in every uncontested case that included a provision for alimony.

Significantly in *Weishaus*, the Court reconsidered the earlier language contained in *Crews* concerning lifestyle findings, observing as follows:

> Our directory language in *Crews* concerning uncontested divorce actions was offered to encourage parties and courts to make marital lifestyle findings, or at the very least to preserve the evidence necessary to such a determination at the time of entry of a judgment of divorce. Although the parties and *amici* now argue that we should discard the *Crews* requirements concerning the marital standard in all uncontested cases, we decline to do so. We lack objective evidence of the systemic problems that the *amici* have asserted. What we do have is the case presently before us—a complex divorce in which the parties were able to settle all but two issues: the marital lifestyle and the supported spouse's ability to maintain a comparable lifestyle post-divorce under the terms of the support to which she agreed. The lower courts' faithful adherence to our directive that such cases require court findings on marital lifestyle has resulted in an appeal of an otherwise settled case and the disruption and uncertainty of an unresolved marital action. We come now to the reluctant conclusion that, notwithstanding the economy and efficiency considerations that led to that directive, there are valid reasons to revisit the issue and to allow flexibility to trial courts when entertaining settled divorce actions.[5]

The Supreme Court continued at pages 143-44 as follows:

> Divorce actions involve personal, even intimate, details of people's lives. The parties are often intensely emotional. Progress toward resolving disputes and reaching a speedy conclusion easily can deteriorate into contentious and difficult interactions that thwart settlement. Therefore, while settlement is an encouraged mode of resolving cases generally, "the use of consensual agreements to resolve marital controversies" is particularly favored in divorce matters. *Konzelman v. Konzelman*, 158 *N.J.* 185, 193, 729 *A.*2d 7 (1999). In *Konzelman*, Justice Handler elaborated on the important role that consensual agreements play in divorce matters:
>
> Voluntary agreements that address and reconcile conflicting interests of divorcing parties support our "strong public policy favoring stability of arrangements" in matrimonial matters. *Smith v. Smith*, 72 *N.J.* 350, 360, 371 *A.*2d 1 (1977). The prominence and weight we accord such arrangements reflect the importance attached to individual autonomy and freedom, enabling parties to order their personal lives consistently

with their post-marital responsibilities….Thus, it "would be shortsighted and unwise for courts to reject out of hand consensual solutions to vexatious personal matrimonial problems that have been advanced by the parties themselves." *Petersen v. Petersen*, 85 *N.J.* 638, 645, 428 *A.*2d 1301 (1981). For these reasons, "fair and definitive arrangements arrived at by mutual consent should not be unnecessarily or lightly disturbed." *Smith, supra,* 72 *N.J.* at 358, 371, *A.*2d 1. The very consensual and voluntary character of these arrangements render them optimum solutions for abating marital discord, resolving matrimonial differences, reaching accommodations between divorced couples, and assuring stability in post-divorce relationships.[6]

Such agreements generally are upheld, to the extent they comply with the equitable precepts embodied in *N.J.S.A.* 2A:34-23a, -23b, and-23.1. *Petersen, supra*, 85 *N.J.* at 642, 428 *A.*2d 1301; *Konzelman, supra*, 158 *N.J.* at 194, 729 *A.*2d 7. A settlement agreement will be reformed, however, where a party demonstrates that the agreement is plagued by "unconscionability, fraud or overreaching in the negotiations of the settlement." *Miller v. Miller*, 160 *N.J.* 408, 419, 724 *A.*2d 752 (1999).

In this matter, none of the latter concerns is in play. The trial court amended the parties' agreement solely because it concluded that it was required by *Crews* to make marital lifestyle findings, and the Appellate Division affirmed on that basis. We now hold that in uncontested divorce actions, trial courts must have the discretion to approve a consensual agreement that includes a provision for support without rendering marital lifestyle findings at the time of entry of judgment. Our holding in *Crews* should no longer be read to require findings on marital lifestyle in every uncontested divorce. A trial court may forego the findings when the parties freely decide to avoid the issue as part of their mutually agreed-upon settlement, having been advised of the potential problems that might ensue as a result of their decision. Even if the court does decide not to make a finding of marital standard, however, it nonetheless should take steps to capture and preserve the information that is available.[7]

In *Weishaus*, the Court specifically referred to the Supreme Court's Family Practice Committee, chaired by Judge Eugene Serpentelli, for its consideration and recommendation regarding how best to capture marital lifestyle information effectively for use in later post-judgment proceedings. The Court observed at page 144:

> We shall refer to the Supreme Court Family Practice Committee for its consideration and recommendation the question of how best to capture marital lifestyle information efficiently and economically. Many suggestions have been advanced in this appeal. We encourage the Committee to consider those, and other suggestions for preemptively easing the burden on parties and the courts when future modification applications arise following an uncontested divorce. Because the trial court here did not believe that it could exercise the independent judgment that we today allow, we are constrained to remand this matter to that court.[8]

As directed in *Weishaus*, the matter was considered by the Family Practice Committee, which concluded that a viable vehicle existed for the preservation of lifestyle analysis needed to address the goals established by *Crews* and the referral to the committee directed by *Weishaus*.

In its report, the Family Practice Committee noted that the revised case information statement form (CIS), adopted as the result of the 2002-2004 rule cycle, included an amended budget as an integral component, a left-hand column that required information reflecting joint marital lifestyle enjoyed by a family prior to their separation. The Family Practice Committee understood the column had been intended to preserve marital lifestyle information to meet in a practical sense the very data that *Crews* intended to preserve.

The committee also understood that it has long been the policy of the New Jersey courts to encourage settlements, particularly in matrimonial actions. As Jusitce Zazzali wrote in *Puder v. Buechel*:[9]

> For nearly forty-five years, New Jersey courts have found that the "'[s]ettlement of litigation ranks high in [the] public policy' " of this State. *Nolan ex rel. Nolan v. Lee Ho*, 120 *N.J.* 465, 472, 577 *A.*2d 143 (1990) quoting *Jannarone v. W.T. Co.*, 65 *N.J. Super*, 472, 476, 168 *A.*2d 72 (App.Div), *certif. denied*, 35 *N.J.* 61, 171 *A.*2d 147 (1961)). Therefore, our courts have actively encouraged litigants to settle their disputes. *E.g., Morris County Fair Hous. Council v. Boonton Tp.*, 197 *N.J. Super*. 359, 366, 484 *A.*2d 1302 (1984). Advancing that public policy is imperative in the family courts where matrimonial proceedings have increasingly overwhelmed the docket. As the Appellate Division has aptly stated: "With more divorces being granted now than in history, and with filings on the rise, fair, reasonable, equitable and, to the extent possible, *conclusive settlements must be reached*, or the inexorable and inordinate passage of time from initiation of suit to final trial will be absolutely devastating…." *Davidson v. Davidson*, 194 *N.J. Super*. 547, 550, 477 *A.*2d 423 (1984) (emphasis added). Consequently, our courts approve numerous settlements in divorce cases "*so long as the parties acknowledge that the agreement was reached voluntarily and is for them, at least, fair and equitable.*" *Lerner v. Laufer*, 359 *N.J. Super*. 201, 217, 819 *A.*2d 471 (App.Div 2003) (emphasis added). This practice preserves the "right of competent, informed citizens to resolve their own disputes in whatever way may suit them." *Ibid.*[10]

It was against this backdrop that new Rule 5:5-2(f) was adopted. That

provision reads:

> In any matter in which an agreement or settlement contains an award of alimony, (1) the parties shall include a declaration that the marital standard of living is satisfied by the agreement or settlement; or (2) the parties shall by stipulation define the marital standard of living; or (3) the parties shall preserve copies of their respective filed Family Case Information Statements until such time as alimony is terminated; or (4) any party who has not filed a Family Case Information Statement shall prepare Part D ("Monthly Expenses") of the Family Case Information Statement form serving a copy thereof on the other party and preserving the completed Part D until such time as alimony is terminated.

Adoption of this rule seems to close the issue created by *Crews,* obviate the need for specific lifestyle findings to be made, and eliminate the specter of settled cases spawning contested lifestyle hearings, while at the same time providing a viable vehicle for the preservation of lifestyle analysis.

The bar should accept and follow this rule, not just because it is in the rule book, but because it represents a practical and reasonable solution to the problem that *Crews* had identified. The reality is that post-judgment motions can overwhelm the court system, and that adequate base point information is not often available.

Many criticized the *Crews* opinion, and to an extent that criticism was justified. It is to the Supreme Court's credit that the problem has now been addressed.

Undoubtedly some will bemoan the requirements of Rule 5:5-2 and some might even contend the rule expects too much. Not so. It is not unreasonable for the courts to require in our property settlement agreements or stipulations that include an alimony award that there be a declaration…"that the marital standard of living is satisfied by the agreement or settlement…" or that "…the parties shall by stipulation define the marital standard of living…" or that "…the parties shall preserve copies of their respective filed Family Case Information Statements until such time as alimony is terminated" or that "…any party who has not filed a Family Case Information Statement shall prepare part of the family CIS serving a copy thereof on the other party and preserving the completed Part D until such time as alimony is terminated."

It is evident that the rule creates choices. It presents four distinct alternatives for a party to select with counsel. Will use of the rule address all of the issues that would have to be addressed by findings made after a full lifestyle hearing? That is not possible. But what it will do is assure that a measure of information will be preserved that will be available for post-judgment use.

The Supreme Court deserves our thanks for its willingness to reconsider the mandate of *Crews*. Left for future case law will be the evolution of how the preserved information the rule requires will be used as post-judgment modification motions are judged.

The second rule amendment addresses issues concerning the entry of judgments after settlements are reached. Again, these issues were referred to the Supreme Court Family Practice Committee by appellate referral. In *Entress*, the Appellate Division addressed issues relating to the practice of attaching to a final judgment of divorce a copy of a transcript of the parties' agreement as spread upon the court's record. *Entress* involved multiple post-judgment applications concerning child custody and related matters.

Judge Lorraine Parker wrote:

> With respect to the judgment, we have expressly held that the entry of a judgment appending a transcript purportedly addressing the order's provisions is a violation of *R.* 4:42-1(a)(4), which requires "a separate numbered paragraph for each separate substantive provision of the judgment or order." *J.S. v. D.M.,* 285 *N.J. Super.* 498, 500, 667, A.2d 394 (App.Div.1995). It is a disservice to the litigants, as well as the court, for a trial judge to enter a judgment of divorce appending a transcript of an agreement placed on the record. Recorded proceedings frequently suffer transcription errors. *See, e.g., State v. Cohen,* 73 *N.J.* 331, 344, 375 A.2d 259 (1977). By requiring the parties to reduce their agreement to writing, and thereby clarify the terms and conditions, we will assure that such errors will not occur and that both parties will fully understand and assent to the agreement they are entering. In lieu of a judgment stating all of the substantive provisions in numbered paragraphs, a properly drafted and executed written settlement agreement satisfies the *R.* 4:42-1(a)(4) requirement and may be incorporated into a judgment of divorce.[11]

Judge Parker continued, "Family Part judges must refrain from entering judgments and orders appending transcripts that purport to set forth the terms and conditions of the parties' agreement." *Entress* requested the Family Practice Committee consider recommending the adoption of a rule "…prohibiting the practice and establishing the proper form of a judgment of divorce." The committee expanded the inquiry not only to address the issue discussed in *Entress*, but also to include problems related to the entry of same day judgments.

The result of this inquiry was the adoption of Rule 5:5-9:

> **Procedures Concerning The Entry of Certain Final Judgments of Divorce**
>
> When a settlement is placed on the record and a judgment of divorce is entered orally, a contemporaneous written final judgment of divorce shall be entered either in the form set forth in Appendix XXV of these rules or in a form as consented to by the parties. If the final judgment of divorce that is

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SENIOR EDITOR'S COLUMN

Musings on Alimony, Lifestyle and Women

by Bonnie Frost

In *Crews v. Crews*,[1] the New Jersey Supreme Court affirmed that judges should consider the lifestyle of the parties when awarding alimony. When courts are deciding whether to award alimony or not, they are to rely on the factors set out in the statute, N.J.S.A. 2A: 34-23. The amount a court awards, however, is within the "sound discretion" of the court. What exactly does this mean, and how is it determined, in theory and in practice? What is its impact on women, the primary recipients of alimony?

Many states throughout the country use alimony guidelines. This column does not advocate the use of guidelines. To the contrary, guidelines will not remedy the post-judgment lifestyle dilemmas of dependent spouses. Some states use guidelines that determine the length of the alimony term (*i.e.* one year of alimony for every three years of marriage; less than six years, only rehabilitative alimony is available). Other states use percentages of the differences in the net incomes of the parties to determine the amount to be awarded.

In an informal survey of attorneys throughout the state, attorneys note that after all is said and done, courts want the parties' combined net incomes to be allocated between them, with the recipient spouse receiving 40 percent of the net and the payor spouse receiving 60 percent. Alimony is thus determined to be between 30 and 33 percent of the difference in the parties' gross incomes to reach the "desired" 60/40 allocation. There seems to be a tacit acceptance of the use of between 25 and 33 percent of the gross differential in incomes by judges throughout the state to determine the amount of alimony.

Surely, any use of such a formulaic differential would result in an automatic reversal by the Appellate Division; however, in practice, this seems to be what is happening. In addition, in a marriage of fewer than 15 years, the recipient receives limited duration alimony; whereas, if the marriage is more than 15 years, a spouse receives permanent alimony.

I am sure many readers have heard a judge say that the court cannot award alimony for a term longer than the length of the marriage. Rules of thumb and formulas, such as these, while tacit, exist and drive many alimony awards.

What does this mean to us as practitioners? While such percentages and rules of thumb regarding the duration and amount of alimony may be helpful to get both sides in the ballpark when trying to settle a case, the question remains: When they are used to determine the outcome in a case, are they fair?

The Supreme Court has stated in *Miller v. Miller*,[2] that there is a strong public policy of guaranteeing fairness and equity in the dissolution of marriages. For the purposes of this column, alimony will be discussed in terms of the ex-husband paying the ex-wife, since that is what happens most often. But the fact remains that there also are dependent spouses who are men, and who may face similar issues. This column is meant to provoke thought and discussion about *business as usual*.

The U.S. Census data reveals that since the late 1980s at least half of the single-parent families live in poverty, and three quarters of these families are headed by divorced or separated women.[3] A woman in the workforce will earn 73.2 cents for every dollar a man earns. If she is an African American woman that number declines to 67 cents, while Hispanic women earn even less, at 58 cents.[4]

Since women still continue to earn less than men, this legacy of lower pay follows a woman throughout her life, translating into significantly less retirement income for women because of lower income and lower contributions to Social Security. One loses more than retirement benefits when not on a payroll; one loses seniority and experience, which lead to promotions and raises. Staying out of the workforce for only seven years during a 40-year career may cut retirement benefits by up to half. Women are out of the workforce for an average of 11.5 years throughout their lifetime.[5]

Fewer than two percent of all working women earn more than $75,000, whereas approximately 7.4 percent of working men earn more than $75,000. The actual numbers from the U.S. Census reflect that 7,451,000 men earned $75,000 or more, while only 1,947,000 (including 99,000 African American women and 61,000 Hispanic women) women earned that amount.[6]

In *Turner v. Turner*[7] the Court asked the question, "Does a

divorced woman have a duty and obligation to seek suitable employment to maintain herself in the style of living to which she became accustomed during the marriage?"[8] There, the judge stated that alimony could cause a wife to "live a life of physical and mental indolence." Further, he stated that: "in 1978, there are many women who have considerable skills and are able to command salaries far in excess of what many men earn."[9] The Court advocated for rehabilitative alimony as a "blueprint for the future which will have 'teeth' to compel a recipient of alimony to obtain employment."[10]

Two years later, in *Lepis v. Lepis*,[11] the New Jersey Supreme Court stated that our laws are gender neutral. While courts are permitted to award "permanent" alimony, with few exceptions, they impute income to women whether or not their married life supported such an imputation. The Child Support Guidelines direct judges to impute income to spouses if they are,"without cause, voluntarily unemployed or underemployed."[12] Thus, most alimony awards presuppose the dependent spouse *must* enter the workforce. Moreover, equitable distribution is nearly always an equal distribution, even though New Jersey is not a community property state and permits an unequal distribution of assets. The economic needs of a dependent woman are not alleviated by the equal division of property.

Finally, in 2000, Judge Phillip Carchman wrote in *Cox v. Cox*,[13] about the "transfer of earning power" that occurs during a traditional marriage where the homemaker spouse's efforts increase the other spouse's earning capacity at the expense of her own, citing Joan M. Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*.[14]

How, then, do rules of thumb and formulas in the determination of alimony not increase the disparity in earnings of men and women in the workforce, when a woman's earning power is not in excess of what a similarly situated man might earn, but, in fact, is at least 25 percent less? To make matters worse, only 15 percent of divorced women in the United States are awarded alimony in any given year.[15] It is understandable why single mothers and their children descend into poverty after divorce, and why an equal division of property does not compensate for the difference.

Consider, for instance, the mother who received half of the property in equitable distribution and is the primary custodial parent of the children. During the marriage, she did not work, but cared for the home and children while her husband invested in his career. When the amount of alimony awarded is only between 25 and 35 percent of the disparity in the income (*after* income is imputed to the wife), and where the wife has the primary responsibility to care for the children and enters a workforce where she earns 75 percent of what a man earns, the woman is far less well off economically than the man after divorce.

A working parent who is the primary caretaker of children (male or female), cannot work long hours, work late on short notice, travel or relocate for work; whereas the noncustodial parent can. The primary parent is still responsible for doing the laundry for the family, running errands, scheduling children's activities, planning menus, cooking and otherwise tending to the children's needs—all of which limit the ability to attend to a career. Therefore, primary caretakers tend to obtain jobs that are more flexible and easier to move in and out of in order to meet the needs of their children.

Even more perplexing, however, are the *Turner* and *Lepis* legacies of imputing income to women to militate against the former husband's burden to pay alimony, regardless of the facts. Our courts are given discretion under the alimony and equitable distribution statutes to deviate from the expected. Even when the facts cry out for an unequal division of assets, this rarely happens. Frequently one sees the 50-year-old man arguing for a reduction in his support obligation based on a change of circumstances when he cannot find a job because of his age. But, routinely, 50-year-old wives who have not worked are imputed income by courts. As women age, their earning power decreases. Women, in mid-life and older, who work full time, earn less than two-thirds the income of men in the same age group. Women between 55 and 64 earn 57.7 percent of the income of men in that age bracket. The average income for women 55 to 64 was $21,388, while men in that age bracket earned $37,469.[16]

Older women tend to be in the traditional *female* jobs of sales, service and clerical work. Many came of age before the 1970s, and the onset of the women's movement, which encouraged women to have careers. Therefore, they do not have the education or training for higher paying jobs. Also, after divorce these women are forced to enter the workforce immediately to support themselves and their children to actualize the imputed income. Another consideration is that three out of four caregivers for elderly relatives are female.[17]

The choice to have children and sometimes to stay home to care for them (recall the 11.5 years out of the workforce) results in cumulative economic penalties that appear only after divorce. In the supposed lifetime marital partnership, which has undertaken to raise a family, the mother makes a greater commitment *up front*. If there is no divorce, the parties' contributions to this partnership throughout their lives are fair. But when the partnership is ended prematurely with divorce, the mother's frontloaded commitment reverberates for the remainder of her life. These penalties are then compounded by *rules*

of thumb, percentage allocations of income, and an equal distribution of property.

The rules of thumb regarding the years of alimony awarded and the percentage allocation of income should have no place in theory or practice. Their use assuredly challenges the premise that economic needs drive alimony decision making.The choice to have children and sometimes to stay at home to care for them results in cumulative economic penalties that appear only after divorce.

As a result, it is suggested that advocates and courts alike should implement what the statutes, rules and case law permit: the disproportionate allocation of property and the non-imputation of income to the supported spouse, especially where the supported spouse has not worked, is older or has been the primary caretaker of children or elderly relatives. ■

ENDNOTES

1. 164 N.J. 11 (2000).
2. 160 N.J. 408,418 (1999).
3. U.S. Bureau of Census 1992.
4. U.S. Dep't of Labor, Women's Earnings as Percent of Men's 1979-1999.
5. Miriam, Hill, Women Shouldn't Put Off Planning for Retirement at http://money.phillo.com/investing/stories/iwom.asp.
6. U.S. Census Bureau, Statistical Abstract of the United States 481 (1999).
7. 158 N.J. Super. 313, (Ch. Div. 1978).
8. *Id.* at 314.
9. *Id.* at 315.
10. *Id.* At 317.
11. 83 N.J. 139, 155 (1980).
12. Rules Governing the Courts, Appendix IX-A(12).
13. 335 N.J. Super. 465 (App. Div. 2000).
14. 21 Fam. L.Q. 573,575 (1988).
15. U.S. Bureau of Census, 1982, 1985, 1988 and 1990.
16. Divorce, Older Women and Alimony, Collaborative Family Law Affiliates, 2007 at http://www.nocourtfamlaw.com/indespage_8/articles.
17. *Id.*

From the Editor-in-Chief Emeritus

Continued from Page 81

> entered is in the form set forth in Appendix XXV, the parties within ten days of such entry may submit to the court a proposed amended form of final judgment of divorce setting forth the terms of the settlement or specifically incorporating the parties' written property settlement agreement. The court in its discretion may relax the ten-day limit.

In its discussion of these issues, the committee adopted the reasoning contained in *Entress.* Transcripts are not a good substitute for a carefully crafted property settlement agreement or set of stipulations. By the same token, a judgment should be entered in written form to contemporaneously memorialize the oral adjudicatory act.

The rule accomplishes something more: It recognizes that the preparation of property settlement agreements takes time. The rule contemplates that, within 10 days of the entry of the contemporaneous judgment, an amended judgment may be prepared, and that the court has the discretion to relax the 10-day time limit.

We, as members of the bar, also should view the requirements of Rule 5:5-9 as a reasonable response to a real problem.The entry of judgments should not be delayed. Stipulations spread upon the record should be reduced to writing. Delay serves no good purpose. We should try to work within the 10-day limit, but not hesitate to ask, when a complex agreement must be written, for a reasonable amount of additional time. Reasonable requests for additional time should be honored.

The third major family part amendment to the 2007 rulebook relates to the statewide implementation of an amended version of the pilot program for the mandatory mediation of the economic aspects of divorce matters not settled by an MESP.

The pilot program had been in effect for many years. During the latter years of the pilot, considerable success was achieved in several of the pilot counties. Ultimately, on recommendation of its Complementary Dispute Resolution (CDR) Committee, the amended program contained in Rule 5:5-6 was adopted.

The amended program went beyond the pilot program with its inclusion of an option to mediation in those situations in which litigants opt in favor of an alternate CDR event. The nuances of the program will be explored in a later column.

Each of the three new rules that have been adopted will have an impact upon our practice. With Rule 5:5-2, the issues of *Crews* and *Weishaus* have been addressed in a manner likely to ease the concerns of many and avoid unnecessary and self-defeating plenary hearings. Rule 5:5-9 requires the contemporaneous form divorce judgments but allows time to prepare a more detailed writing. Rule 5:5-6 implements statewide an expanded but improved program for the resolution of the economic aspects of divorce matters not settled by an MESP. Each of these rule amendments demands the immediate attention of all who practice in the family part. ■

ENDNOTES

1. 380 N.J. 131 (2004).
2. 164 N.J. 11 (2000).
3. 376 N.J. Super. 125 (App. Div. 2005).
4. *Id.* at 26 (emphasis added).
5. *Weishaus* at 142-143.
6. *Id.* at 193-94, 729 *A.*2d 7 (citations omitted).
7. *Weishaus* at 143-44.
8. *Weishaus* at 144.
9. 183 N.J. 428, 437-438 (2005).
10. *Puder* at 437-8 (emphasis added).
11. *Entress* at 134.

What Changes in Financial Circumstances During the Pendency of a Divorce Action Should be Disclosed?

by Margaret Goodzeit

What obligation does a party to a divorce action have to disclose, either informally or by way of amendment of his or her case information statement (CIS), changes in his or her financial circumstances during the pendency of a divorce action?

If the matter goes to trial, Rule 5:5-2(c) requires the filing of an updated CIS 20 days before "final hearing." But what if there never is a final hearing other than an uncontested divorce? What if a party has changed jobs, or sold assets for an amount significantly greater than that reported on his or her initial CIS? And further, is there a difference whether those changes occur before the parties signed a settlement agreement or after they sign it but before an uncontested divorce hearing takes place?

The author was faced with some of these issues when retained to represent a former wife on her appeal of a trial court's denial of her request to reopen her judgment of divorce.[1] The facts of the case are not complex. Upon settlement, the former husband left the marriage purportedly with a negligible amount of liquid assets. Yet within a matter of days following the entry of the judgment of divorce (granted on the same day the parties executed their property settlement agreement) the former husband purchased a home for $450,000 *cash*, two luxury vehicles and jewelry, and soon thereafter expended a significant amount of funds improving his new home. Just prior to the expiration of one year after the entry of the judgment of divorce, the author's client filed a motion to reopen the judgment based on her former husband's fraud, misrepresentation and misconduct, and other grounds. Simply stated, as there were few liquid assets available to the former husband, as disclosed in the CIS filed by him, there was no obvious explanation for his expenditure in excess of a half million dollars in cash so soon after the ink was dry on the settlement documents.

In response to the motion to reopen the judgment, the former husband explained that his interest in his employer's business, in which he claimed on his CIS to have invested $15,000—but as to which he had executed a promissory note for the entire purchase price—had been sold before the parties settled. Significantly, the former husband also conceded that six days *after* he filed his CIS, he increased the amount of his investment in the business from $15,000 to $26,000, executing a new promissory note reflecting the increase in his obligation to $26,000. The former husband further conceded that the business was sold four months *prior* to settlement, and that he received substantial proceeds of sale. Significantly, however, he did *not* provide the amount of his sale proceeds, nor did he ever directly say the sale proceeds were utilized to make the substantial purchases earlier referenced.

The trial judge denied the author's client's motion to reopen the judgment, suggesting that she might have a malpractice cause of action against her former attorney. Inasmuch as the existence of the former husband's investment in the business had been disclosed—albeit with a purported value of zero—the trial judge blamed the failure on the part of the author's client and/or her counsel to pursue discovery as the reason for her predicament.

The Appellate Division reversed and remanded the matter to the trial court for discovery regarding the nature of the former husband's source of funds for the purchase of the assets described earlier. One of the issues faced by the Appellate Division was the former husband's obligation to amend his CIS in light of the sale of his interest in the business, which he had, for all intents and purposes, listed at a zero value. It was not insignificant that the sale of the former husband's interest in the business took place four months prior to the parties' execution of a property settlement agreement. Further, there was a not a small amount of money involved. It was not $5,000 or $10,000 that was at issue; the amount involved was clearly in excess of a half million dollars.

On appeal the author argued that pursuant the first sentence of Rule 5:5-2(c), the former husband was "under a continuing duty to inform the Court of any changes in the information supplied on the Case Information Statement."

Rule 5:5-2(c) provides as follows:

> Amendments. Parties are under a continuing duty to inform the Court of any changes in the information supplied on the Case Information Statement. All amendments to the statement shall be filed with the Court no later than 20 days before the final hearing. The Court may prohibit a party from introducing into evidence any information not disclosed or it may enter such other order as it deems appropriate.

Challenging the trial judge's position that it was the former wife's fault in not pursuing discovery with respect to the value of her former husband's investment, the author's client relied upon Rule 5:5-2(c) to place the burden on her former husband to provide her with notice of the sale, which certainly would have impacted her negotiations and resolution of her matter.

In an academic dissection of Rule 5:5-2(c), the Appellate Division stopped short of embracing the author's client's interpretation. At the outset, the Appellate Division found that "the second and third sentences of the Rule seem to envision a duty to amend the CIS in anticipation of a contested proceeding," because "[a]s a sanction for a litigant's failure to do so, the Rule authorizes the Courts to 'prohibit a party from introducing *into evidence* any information not disclosed or it may enter such other order as it deems appropriate'."[2] The Appellate Division presumed this qualified language limited the broader language in the first sentence.

To support its contention, the Appellate Division reviewed the background of the adoption of Rule 5:5-2(c), and found that while the rule initially referenced a continuing duty to amend the CIS 20 days "prior to trial," as finally adopted, it only referenced "final hearing." The Appellate Division noted that final hearing also might reference an uncontested divorce proceeding. However, the appellate court was not clear regarding what the intention was in changing the verbiage.[3]

Acknowledging that it could be burdensome for parties to update CIS every time there is a change in assets, liabilities, income or expenses, "there may be good sense in requiring parties to update their CIS filings unilaterally with or without an adversary's demand to do so or an upcoming Court event, when they have experienced a material increase or decrease in their income, expenses, assets or liabilities. As presently drafted, however, the Rule does not have an explicit condition of materiality."[4]

The Appellate Division, thus, did not resolve the issue of when a CIS should be automatically revised in the absence of a contested trial. However, in light of the specific facts of the author's client's case, the court determined that further discovery and investigation were required regarding several issues raised in the matter. The Appellate Division also indicated, in a footnote, that they were circulating the opinion to the counsel of presiding family part judges and to the Supreme Court Committee on Family Practice for their consideration of the issue, and for possible amendment or clarification of the rule.[5] While it is the author's understanding that the Supreme Court committee is indeed considering this issue, no recommendations are yet public.

In the meanwhile, practitioners have to determine whether and when changes in financial circumstances during the pendency of litigation require disclosure (whether informally or by amendments of CIS). In considering this issue, the author is reminded of Frank Louis' article about spousal fiduciary responsibility, which was authored for the 2004 Family Law Symposium. Therein, Louis examines this state's case law requiring "fairness" in transactions between husbands and wives, the duty of good faith dealings between spouses, and, in essence, the imposition of fiduciary obligations between spouses, who are akin to "partners."[6] The logical expansion of Louis' discussion results in the inescapable conclusion that (at least material) changes in financial circumstances during the pendency of a dissolution litigation require disclosure.

That being said, how do attorneys determine what is a material change in financial circumstances that seemingly would require disclosure? Naturally, each case is fact-specific, and generalizations may get us in trouble. However, some suggestions are as follows:

> Market fluctuations within liquid asset accounts, inclusive of the receipt of interest and dividends, may not automatically give rise to the amendment of a CIS or other disclosure;
>
> The trading of stocks within a brokerage account, as long as monies are not withdrawn from the account and used for another purpose, may not automatically give rise to the filing of an amendment of the CIS or other disclosure;
>
> Investment of marital assets into a new asset (purchase of a home, investment in a new business, investment in commercial real estate, as examples), should give rise to the amendment of a CIS or other disclosure;
>
> The sale of an asset (other than stocks within a brokerage account, as aforesaid), should give rise to the amendment of a CIS or other disclosure, especially if the sale proceeds materially exceed the value initially placed on the asset or in the event that no value was placed on the asset in the previous CIS.
>
> A change in employment resulting in a substantial increase in income should give rise to the amendment of a CIS or other disclosure. But what if the party only received a small increase in income by switching jobs? Or what if a party does not change jobs but receives a substantial raise in salary subsequent to the filing of the initial CIS?

There can be no doubt that full

Continued on Page 101

Appellate Practice for the Family Lawyer

by the Hon. Robert A. Fall

This article is designed to provide family law practitioners with some basic and practical suggestions for the effective handling of an appeal to the Appellate Division of the superior court.The author's intent is not to provide a step-by-step explanation of the appellate process—something you should be able to discern from a careful reading of the Rules Governing Appellate Practice.[1] There also is a wealth of information available on the topic of appeals on the Judiciary website,[2] including Appellate Division organization; Appellate Division parts; appellate forms; appellate process; an 87-page dissertation on New Jersey standards for appellate review; procedures for filing of emergent applications; Appellate Division notices to the bar; Appellate Division calendars; and procedures for electronically filing an appeal.

A basic understanding of appellate practice, however, must begin with a description of the court itself, and its functional operation. The court consists of eight parts—A through H—each comprised of four or five judges. Everything in the Appellate Division is based on seniority, *i.e.*, how long a judge has been assigned to the Appellate Division. Each of the eight senior judges on the court is a presiding judge of a part. The next eight judges in order of seniority are the second-tier judges, each sitting on one of the eight parts. The second-tier judges preside in the absence of the presiding judge. The next eight judges in order of seniority are the third-tier judges, each of whom sits on one of the eight parts.

The remaining judges are dispersed among the eight parts to create either a four-judge or five-judge part. Over the last several years, there have been three five-judge parts and five four-judge parts, for a total court complement of 35 judges.

The theory behind the seniority system is to approximately equally disperse judicial appellate experience among the eight parts.

Each Appellate Division judge has one law clerk, and the two senior judges on each part have two. In addition, the Appellate Division has a central appellate research section consisting of approximately 20 full-time research attorneys.

All appeals are screened by the director of central research. If an appeal is complex, has multiple issues, contains issues of public importance, or involves an issue of first impression, it may be selected by the director for completion of an in-depth research memorandum by one of the staff attorneys to assist the court in consideration of the issues presented. In addition, the central research staff attorneys research issues raised in all appeals in which a party moves for summary disposition pursuant to Rule 2:8-3.

The chambers of Appellate Division judges are located in Hackensack, Morristown, Jersey City, Springfield, New Brunswick, Eatontown, Trenton, Westmont, and Atlantic City. Arguments are principally scheduled and heard in designated Appellate Division courtrooms located in Hackensack, Morristown and Trenton. However, arguments also are periodically scheduled in Atlantic City, Elizabeth, Paterson, Newark, Mount Holly, Toms River, and other areas throughout the state, as determined by the presiding judges.

The regular Appellate Division court calendar for parts A through H runs for a total of 39 weeks from the second week in Sept. until the first week of the following June. Each year, except for the presiding judges,Appellate Division judges are rotated among the eight parts. This allows the judges to sit for a year or more with as many different judges as possible during their judicial careers. For example, in eight-and-a-half years on the court, the author sat with approximately 27 different judges, some more than once.

The rotation system provides an enriching experience for the judges, broadens the judicial perspective, and balances divergent thinking. During the spring of each year, the presiding judge for administration—currently Judge Edwin H. Stern—in consultation with the other presiding judges, and with the approval of the Supreme Court, determines the composition of each part for the ensuing court year.

During this 39-week court year, each judge produces approximately 110 written opinions, constituting the opinion of the court on each case. On the average, fewer than 10 percent of those opinions are approved for publication. Whether an opinion is approved for publication is determined by the presiding judge of each part.

The general criteria governing whether an opinion is published includes whether the court's decision involves an issue of first impression; whether it adds to the body of law on the subject of the case; whether it involves an issue of public importance; or whether it

will be helpful to the trial court or practitioners. The unpublished opinions are issued *per curiam*, Latin for "by the court as a whole,"[3] and the identity of the author of the opinion is not disclosed.

During the regular 39-week court term, there are six recess weeks (Judicial College in Nov.; holiday/New Year's for two weeks in Dec./Jan.; winter recess in Feb.; and a two-week spring recess in April), during which there are no regular calendars scheduled. However, during each of the 39 weeks, each part receives motions and considers applications for emergent relief.

On a rotating basis within each part, two judges are assigned each week to consider and decide motions that are filed with the clerk's office, which are randomly assigned and equally dispersed to each of the eight parts. Although the assignment of motions by the clerk's office among the parts is done randomly, if the motion involves a case already scheduled before a particular part, it is assigned to that part for consideration.

Emergent applications to the court are handled a bit differently. During the 39-week regular court term, the state is geographically divided into areas based on anticipated volume of emergent matters, and based on the number of judges whose chambers are located within that area. For example, during the 2006-2007 court year, Area 5 consists of Ocean, Monmouth, Burlington and Mercer counties. Eight Appellate Division judges are chambered in that area. The senior of the eight judges developed a rotating weekly schedule during the 39-week court term, during which one of the judges is assigned to consider any emergent applications that emanate from those four counties. That emergent duty schedule is published in both the *New Jersey Lawyer Newspaper* and *New Jersey Law Journal,* and is available on the referenced New Jersey Judiciary website.

It is, therefore, important to remember that if an attorney intends to make an emergent application to the Appellate Division, he or she must check the emergent duty schedule to identify the judge to whom that application must be made. The emergent application procedure will be specifically discussed later in this article.

In addition to the regular court term, each Appellate Division judge sits for a two-week period during the summer recess. The two-week summer parts usually run from the second week in June until the end of the first week in Sept., and generally consist of two judges in each summer part. Routinely, there are at least two different summer parts sitting during each two-week period. A separate emergent duty area schedule is issued for the summer part period. During each two-week period, each summer part judge writes 10 more opinions, handles emergent applications emanating from counties within the judge's assigned area, and considers and decides motions randomly assigned to that summer part.

The Appellate Division decides approximately 7,000 appeals and 7,500 motions each year, and handles hundreds of emergent applications. It is the largest statewide intermediate appellate court in the United States.

The average time for disposition of an appeal—from the date of filing of the notice of appeal to the date of filing of the written opinion—is about 14 months. Naturally, delays in obtaining the requisite transcripts, failure to meet rule-based time requirements, and the degree of complexity of the appeal, all play a role in determining the length of that time period. Many appeals are resolved in less than a year; others linger for 18 or more months.

The Appellate Division also has several special programs for certain categories of appeals. Currently, there are six retired Appellate Division judges on recall who conduct conferences under the Civil Appeals Settlement Program (CASP). This program is designed to identify, during the initial processing of the appeal, those appeals that could be settled. The CASP judges conduct conferences and settle hundreds of appeals each year. Note that the Appellate Division civil case information statement requires the attorney indicate whether he or she thinks the appeal may benefit from a CASP conference.

The clerk's office also administers an approved protocol for the accelerated processing of appeals from final orders terminating parental rights, adjudicating child abuse and neglect complaints, or from final judgments of adoption, orders for kinship legal guardianship, and other family part appeals where the primary issue is custody of a child. Family part appeals are administratively screened, and, if determined appropriate for the program, are placed on an accelerated transcript and briefing schedule that usually results in the resolution of the appeal within six to eight months of the filing of notice of appeal.

There also are special accelerated programs for the handling of criminal appeals where the sole appellate issue involves the sentence; for appeals from orders of civil commitment in Sexually Violent Predator Act cases; and for appeals involving the registration and community notification provisions of Megan's Law.

These special programs collectively adjudicate thousands of appeals each year.

It is important to understand that appeals are not assigned to a particular part until after the appeal is perfected, which means that all required transcripts, briefs and appendices have been filed. Moreover, the appeals are scheduled before the parts by the court clerk on a random basis. The exceptions are where there has been a prior remand and an appeal from the remand proceedings, in which case the appeal will generally follow the senior judge on the part that rendered the remand opinion; and

where the appeal was initiated as an emergent application, the appeal will generally follow the judge who issued the emergent order.

On a typical calendar week of a four-judge part during the 39-week court year, either all four judges or only three of the judges are on the calendar. If four judges are assigned that week, then 16 cases are calendared; where only three of the judges are assigned that week, 12 cases are calendared. In either case, six are scheduled for oral argument at a designated location, and the remaining cases are submitted to the court for opinion without oral argument.

When the appeal calendar for a particular week is prepared, it is first sent by the clerk, with all 12 or 16 case files, to the presiding judge. Usually, the presiding judge receives the calendar and case files approximately six weeks prior to the scheduled court date. The calendar is normally balanced with complex and less complex appeals, based upon a screening process utilized by the director of central research. Most often, the calendar has at least one appeal that is accompanied by an in-depth research memorandum prepared by a staff attorney of central research.

The presiding judge then reviews the case files and assigns each appeal as either a three-judge or two-judge case. That determination is generally made based on consideration of several factors, including the complexity of the case, the length of the record, and whether it initially appears to be a case meeting the criteria for publication. The presiding judge also assigns a memo to the law clerk(s) of each judge assigned to that calendar.

There is a common misperception among family law practitioners that when two judges are assigned to handle their appeals, an affirmance of the trial court's order or judgment is the likely result. Actually there are court statistics that, at first blush, appear to support that conclusion. Court records reflect that in two-judge civil appeals, approximately 79 percent result in affirmance, 17 percent in reversal and four percent in modification. However, in three-judge civil appeals, approximately 63 percent result in affirmance, 25 percent in reversal and 12 percent in modification. In actuality, the affirmance rate for family part appeals—other than guardianship, termination of parental rights appeals—is approximately 57 percent, whether the case is a three-judge or two-judge assigned appeal. And, of course, that 57 percent affirmance rate is lower than that for the category of civil appeals overall.

However, included within these civil appeals' statistics are administrative prisoner appeals from disciplinary actions taken by the Department of Corrections and administrative appeals from the denial of unemployment compensation benefits by the board of review. The vast majority (well over 90 percent) of these two categories of civil appeals result in affirmance, largely a product of the standard of review applicable to administrative appeals. When those appeal categories are factored out of the statistical measure, there is virtually no difference in the affirmance rate between two-judge and three-judge family law appeals.

There also is a common misperception that the affirmance rate for family cases is lower in argued cases than in cases submitted to the court for decision without argument. Court statistics support that misperception. Approximately 69 percent of the argued civil appeals are affirmed, and about 80 percent of the submitted civil appeals are affirmed. Again, virtually *all* of the board of review and prison disciplinary appeals are submitted, not argued, cases. As noted, a very large percentage of those appeals are affirmed, thereby skewing the apparent difference in affirmance rates between argued and submitted appeals; in actuality, there is little, if any, difference in the affirmance rate for argued and submitted family part appeals.

Hopefully, a word about the author's former colleagues will provide attorneys with some understanding of the thorough consideration given to appeals. The Appellate Division judges are a rather remarkable group. Although the interpersonal dynamics and volume that so often typify family part cases can take a significant emotional toll on a trial judge, making that judge's job very difficult, if not unpalatable at times. There are no harder working judges than those assigned to the Appellate Division.

It is not easy writing approximately 120 written opinions, handling hundreds of motions and considering numerous emergent applications each year. These judges possess a tremendous work ethic.

In a typical weekly calendar, each judge must, well in advance of the calendar date, read and analyze nine or 10 case files on the calendar, prepare and transmit to his or her colleagues a memorandum (called a pink) on each of those cases, in which each judge expresses his or her tentative view of the appeal; read, digest and analyze all of the key authorities on the subject; review and consider any research memorandum prepared on the appeal, if applicable; prepare for oral argument and the conference held immediately thereafter; prepare drafts of opinions (called greens) on the opinions to which the judge is assigned to write for the court; and engage in conferences with colleagues to finalize the opinion, most often resulting in opinion re-drafting.

When assigned to motions, the judges also must read, twice each week, between five and 15 motions, consult with their colleagues and then either prepare or review a proposed order disposing of the motion. When on emergent duty, the judges must drop everything else when an emergent application is presented, consider the application and issue an order adjudicating

the issues presented. Motions and emergent matters range widely in the degree of difficulty, complexity and the amount of judicial time required for resolution.

In preparing or defending an appeal, aside from complying with the obvious rule-based requirements, it is the author's experience that family law practitioners often reflect a failure to understand some appellate basics. It is in this area that, hopefully, attorneys will find this article most useful.

First, it is always important in an appeal to recite and focus on the standard of review applicable to an appeal. The most common reasons for reversal in family part appeals are: 1) the failure of the trial court to make adequate findings of fact or law; 2) legal error in application of controlling statutory or case law or court rules; 3) failure to conduct a plenary hearing to resolve material issues of relevant fact in dispute; and 4) an abuse (call it misapplication) of discretion by the trial court.

Appellate courts exist to correct legal error, not to disturb factual determinations made by the trial judge where there is substantial, credible evidence in the record to support those factual findings. This is called the substantial evidence rule, and constitutes the standard of appellate review applicable to the findings and conclusions of a trial judge regarding existence or non-existence of a certain state of facts upon which the judge's decision is founded. The Supreme Court fully explains this standard of review in *Cesare v. Cesare*.[4]

After reading the record, an appellate judge may feel he or she would have decided the questions of fact differently. However, that is not a basis for reversal if there is substantial evidence in the record, found to be credible by the trial judge, to support those factual findings. In such circumstances, the substantial evidence rule generally requires appellate acceptance of those findings.

Thus, if an attorney is the respondent, he or she should be arguing application of the substantial evidence rule. However, if an appellant can demonstrate that the trial court failed to make or articulate adequate findings or conclusions for its decision, *i.e.*, failed to comply with the requirements of Rule 1:7-4(a), then it should be argued that the court's findings are not supported by substantial, credible evidence contained in the record.

Additionally, if the record was inadequate to provide the trial court with a basis upon which it could make its findings, then the respondent can often successfully argue that a remand is required for an evidentiary plenary hearing.[5]

If an attorney have received a favorable decision from the trial court, but it is rather obvious that the court failed to make adequate findings of fact or state conclusions of law, and a notice of appeal is filed, he or she might consider gently requesting the court to issue an amplification of its decision pursuant to Rule 2:5-1(b). Obviously, this is a judgment call best made in consultation with the client, but it should be at least considered if the attorney believes a reversal and remand is inevitable for failure of the trial court to comply with the requirements of Rule 1:7-4(a).

A much harder appeal is where the misapplication of discretion standard of review is applicable. This involves review of certain discretionary choices made by the trial court. Examples are evidentiary decisions, whether to grant an adjournment, whether to extend the discovery period, and the like. To be successful, an attorney must demonstrate that the judge misapplied his or her discretion in reaching the appealed conclusion.

However, there are certain substantive decisions that implicate both the misapplication of discretion standard and the substantial evidence rule. For example, assume a long-term marriage with a significant income disparity, with the trial court awarding rehabilitative alimony of $150 per week to the wife for three years, while at the same time finding that her reasonable needs exceeded her income capacity by $400 per week and that her husband's net income exceeded his reasonable needs by $500 per week. Absent other circumstances the attorney would argue that, accepting the factual findings, the trial court's conclusions were not supported by substantial credible evidence in the record, and that the court had misapplied its discretion in failing to award permanent alimony and failing to award an amount adequate to maintain the marital standard of living at a level reasonably comparable to that during the marriage.

The point of this discussion is that all too often family law practitioners fail to articulate, either in their brief or at oral argument, the applicable standard of appellate review or to demonstrate how application of that standard dictates reversal or affirmance.

As a general proposition, family law practitioners should take advantage of the optional preliminary statement in the brief permitted by Rule 2:6-2(a)(6). This is where an attorney can provide the appellate judges with a concise overview of the client's position in the appeal. The author calls it the Elmer Gantry approach, where the attorney can demonstrate in not more than three pages, without footnotes and with minimal, if any, citations, the righteousness of the client's cause. If present, the preliminary statement is often the first thing an appellate judge will read in order to understand the basis of the appeal.

It also is the author's observation that the briefs of many family law practitioners are unnecessarily long and seemingly disorganized. Killing multiple trees in the course of attempting to present a dissertation on multiple subjects usually fails to imbue the court with the righteousness of a client's position.

It would seem most appropriate

for the attorney to lead with his or her best argument, which should be adequately and clearly set forth in the point heading. A point heading that simply states, for example, that "the trial court misapplied the law," means little unless given some context. The text of each of argument should be concise and logical, with appropriate references to controlling law and citation to applicable portions of the record.

It is generally best not to attack or denigrate the trial judge in a brief or, for that matter, during oral argument. The same applies to the showing of contempt for an adversary. All appellate judges were once trial judges and lawyers, and are generally repelled by such an approach.

A much-debated issue is whether an attorney should ask for oral argument. The answer to that question should be based on reflection, consultation with the client, tactical considerations, and use of the attorney's best judgment. Certainly, if an appeal seeks to chart new territory, oral argument would seem preferable.

Some practitioners believe they should always ask for oral argument. If that is the attorney's default position, be aware that oral argument, once requested, cannot be waived without the consent of the adversary.

A request for oral argument must be made within 14 days after the respondent's brief is served, or upon order of the court. As a practical matter, late requests for oral argument are generally honored.

Some attorneys seem surprised to learn that there is no requirement that oral arguments in the Appellate Division be taped or transcribed. Attorneys also should be aware that, upon request and with the consent of the adversary, the judges of the Appellate Division are usually amenable to telephonic argument in lieu of the requested oral argument. If an attorney so elects, and with the court's permission, it is the attorney's responsibility to arrange for the conference call. Such requests should be made through the clerk's office in Trenton, as direct contact to the judges on the panel is disfavored. Currently, Frank Frascella of that office handles those requests.

Additionally, if the attorney intends to have the client present during telephonic argument, it is appropriate to inform the judges and the adversary at the start of the telephonic argument. It also should be noted that requests for adjournments of a scheduled oral argument also must be made through the clerk's office.

Prior to oral argument the attorney should become thoroughly familiar with the record, as it is not unusual for one of the judges to ask, upon hearing an assertion: "Where is that in the record?" The attorney also should be thoroughly familiar with the judges assigned to the appeal, particularly with any relevant reported decisions they may have authored or served on the panel of.

It is usually appropriate to immediately begin with the strongest argument, directing attention to the presiding judge, and emphasizing the righteousness of the client's position. Do not waste time or bore the panel with the procedural and factual history. Remember, the judges have read the record and briefs, have often formed tentative positions or inclinations in their preliminary memoranda (pinks) to their colleagues and also may have had the benefit of an in-depth research memoranda.

Although not intended, the author believes some practitioners exude arrogance or a know-it-all attitude, while others attempt to demean their adversary. Such style or tactics do not help an attorney's cause.

The best way to prepare for an appeal is to anticipate as many of an adversary's arguments as possible and develop appropriate responses to them, including citation to relevant authority. The attorney should thoroughly know all case law, statutes and rules of court applicable to the issues in an appeal. In particular, he or she should be prepared to distinguish any case law that appears to run contrary to the asserted position. Of course, an attorney should never orally cite to a case that does not appear in the briefs and, if he or she wishes to call the court's attention to relevant cases decided or legislation enacted subsequent to the filing of the brief, he or she must follow the procedures set forth in Rule 2:6-11(d).

The attorney also should attempt to anticipate questions posed by the judges on the panel. All of the judges are stylistically different. Some will essentially allow the attorney to make a presentation without interruption; others will immediately begin the session with a barrage of probing questions that illustrate their concerns, and it is not unusual for an attorney to be asked, at the outset: "What is the applicable standard of review?"

If an attorney does not understand a question that is posed, he or she should not be afraid to ask for clarification. Additionally, if the attorney gets sidetracked by the questioning, he or she should always return and conclude with the main Elmer Gantry point. The thrust of this entire discussion is that there is no substitute for thorough preparation for oral argument.

A WORD ON UNPUBLISHED APPELLATE DIVISION OPINIONS

Rule 1:36-3 provides that an attorney cannot cite or reference an unpublished opinion unless the court and all parties are served with a copy, as well as all other known relevant unpublished opinions, including those adverse to the position of the client. Moreover, "[n]o unpublished opinion shall constitute precedent or be binding upon any court."[6] The author believes unless an unpublished opinion is directly on point, inclusion of unpublished opinions is of questionable value. On the other hand, if one of the judges on the panel

served on the panel of a relevant unpublished opinion, there may be some value to its citation.

A basic point to remember is that appeals can only be taken from a *final* order or judgment.[7] An order or judgment is considered final *only* if it disposes of all issues regarding all parties. The noted exception in family law is that a final order of custody after a plenary hearing on that issue, where the issue of custody has been bifurcated from the other issues in a family action, is considered a final order for appeal purposes.[8]

Otherwise, prior to filing a notice of appeal, the attorney must file and serve a motion for leave to appeal from an interlocutory order with the clerk of the Appellate Division "within 20 days after the date of service of such order[.]"[9] However, if there was a motion for reconsideration of that order filed in the family part within 20 days of its service, "the time to file and serve the motion for leave to appeal to the Appellate Division shall be extended for a period of 20 days following the date of service of an order deciding the motion for reconsideration."[10] The filing of a motion for leave to appeal does not operate as a stay of the order or proceedings in the trial court, except upon motion, in the first instance, to the family part or, if denied by it, to the Appellate Division.[11]

Less than 20 percent of motions for leave to appeal from an interlocutory order are granted. Leave to appeal is rarely granted on calendar or discovery issues, or from the exercise of judicial discretion, unless it is clear that the trial court has misapplied its discretionary authority. However, leave to appeal is more often granted where the ruling in the order was clearly erroneous or prejudicial; where practicality dictates resolution of the issue before all other issues are adjudicated, or where the matter involves an important issue of law or public concern.

The attorney also should be mindful that Rule 4:42-2, which permits certification of certain orders by the trial court as final, is only applicable if the order would be subject to process to enforce a judgment pursuant to Rule 4:59.[12] Therefore, this final certification process is essentially unavailable in appeals from orders entered in the family part. It also is inappropriate to achieve finality by requesting the trial court to dismiss the remaining claims, without prejudice, subject to reinstatement if the Appellate Division reverses the trial court's order.[13]

All motions filed with the clerk of the Appellate Division pursuant to the procedures set forth in Rule 2:8, including motions for leave to appeal, are considered, on the papers submitted, by two judges. As with emergent applications discussed below, it is important to remember that "[i]f the transcript [of the family part proceedings and decision] cannot be obtained in time for the motion, an affidavit may be filed in lieu thereof giving the substance of such testimony[]" and decision.[14] Additionally, "[m]otions shall not be argued unless the court directs oral argument."[15]

As the author has noted, the filing of a notice of appeal does not operate as a stay of the order or judgment being appealed. Once a notice of appeal has been filed, "the supervision and control of the proceeding on appeal shall be in the appellate court from the time the appeal is taken[.]...The trial court, however, shall have continuing jurisdiction to enforce judgments and orders pursuant to Rule 1:10[.]"[16] If the attorney is seeking a stay pending appeal, the motion must, in the first instance, be made to the family part and, if denied, to the Appellate Division.[17] An order of the Appellate Division granting or denying a stay may be reviewed on motion to the Supreme Court, on notice to the Appellate Division, without taking an appeal to the Supreme Court.[18]

Due to the nature of family part proceedings, it is possible that new or changed circumstances may warrant seeking additional relief from the family part while an appeal is pending in the Appellate Division on the same issue, *e.g.,* the amount of child support. In such circumstances, it is the attorney's responsibility to seek, from the Appellate Division, an order remanding the matter to the family part to allow consideration of said application.[19]

One of the most common complaints about practitioners by family part judges is their failure to comply with Rule 2:5-1(b) (requiring the mailing of the notice of appeal and civil case information statement to the trial judge), and Rule 2:5-6(c) (requiring a party filing a motion for leave to appeal from an interlocutory order to serve a copy thereof upon the trial judge).

The author found it annoying to see a brief that was shoddy in appearance, looking as if it had just rolled out of bed, or disorganized in content. Regarding appendices, the author always preferred the included documents be placed in chronological order, which allowed for better understanding in the context of the appeal.

The procedures applicable to emergent applications are covered well by the information contained on the Judiciary's website. There are several important points for attorneys to consider. Once an attorney has been retained to file an emergent application, the first thing he or she should do is obtain a copy of the order from which relief is being sought. If there is no such order, one should be prepared and delivered to the court for execution. Next, the attorney should go to the Judiciary website, and, under "About NJ Courts," click on "Appellate Division;" then click on "Appellate Forms" and scroll down to and click on form 10498, "Fact Sheet on Application for Emergent Relief." The attorney should then print out the form and complete it by fully answering all the questions posed.

In the interim, the attorney

should identify the Appellate Division judge currently on emergent duty in the geographic area where the order or judgment was entered, and contact the Appellate Division judge's chambers to speak with the judge's secretary or, most usually, the judge's law clerk. The attorney should explain his or her intent to file an application for emergent relief, and inquire about the identity of the second judge who will consider the application. In the Appellate Division, the second judge will be another judge from the panel on which the emergent judge sits. Since there are discreet differences in requirements from judge to judge, the attorney should specifically inquire about the procedure that must be followed, and, for example, whether the judges will accept facsimile transmissions of the emergent papers. If so, the completed fact sheet should be faxed to each judge with its requested enclosures. A copy must be transmitted to the adversary as well.

The threshold question to be determined by the judges is whether they will consider the client's application as an emergent matter. The attorney must, of course, clearly demonstrate the emergent nature of the client's application and the irreparable harm that will result if the matter is not quickly adjudicated.[20] In some instances, the judges may determine that there is sufficient time to file a motion in the regular course pursuant to Rule 2:8, and reject the matter as emergent in nature. If so, the attorney should promptly file the motion with the clerk's office. There is usually a three-week turnaround time from the filing of the motion.

Assuming the attorney meets the emergent threshold, if there is no appeal presently pending and the order from which emergent relief is being sought is final, the attorney should prepare and transmit with the application for emergent relief a notice of appeal and civil case information statement, along with the applicable $200 fee (or the attorney's superior court account number) for filing a notice of appeal. If the order is interlocutory, the attorney also must file a motion for leave to appeal. If the attorney does not have an account with the clerk's office, he or she must submit separate checks payable to the "Clerk of Superior Court" in the amounts of $200 and $30. If leave to appeal is granted, the $30 check will be returned. If leave to appeal is denied, the $200 check will be returned.

On occasion, if requested, the two judges considering the emergent application may permit a telephonic argument of the application. In any event, a copy of the order granting or denying the requested relief will be issued and usually transmitted to the attorney by fax.

CONCLUSION

This article is far from a complete guide to appellate practice for family law attorneys. Rather, it is intended to convey some useful information and advice to family law practitioners when handling an appeal to the Appellate Division. Hopefully, it achieves that intended purpose. ■

ENDNOTES

1. *See* R. 2:1 to 2:13.
2. *See* http://www.judiciary.state.nj.us/.
3. *Black's Law Dictionary*, Seventh Edition (1999).
4. 154 N.J. 394, 409-11 (1998).
5. *See e.g., Peterson v. Peterson*, 374 N.J. Super. 116, 124 (App. Div. 2005); *Harrington v. Harrington*, 281 N.J. Super. 39, 47 (App. Div.), *certif. denied*, 142 N.J. 455 (1995); *Rolnick v. Rolnick*, 262 N.J. Super. 343, 364 (App. Div. 1993).
6. *Rolnick*, 262 N.J. Super. 343, 364 (App. Div. 1993).
7. R. 2:2-3(a).
8. *See* R. 5:8-6.
9. R. 2:5-6(a), in the form prescribed by R. 2:8-1.
10. R. 2:5-6(a).
11. *Ibid.*
12. *See D'Oliviera v. Micol*, 321 N.J. Super. 637 (App. Div. 1999).
13. *See Ruski v. City of Bayonne*, 356 N.J. Super. 166 (App. Div. 2002).
14. R. 2:8-1(a).
15. R. 2:8-1(b).
16. R. 2:9-1(a).
17. R. 2:9-5(b).
18. *Ibid.*
19. *See* R. 2:9-1(b); *Rolnick, supra*, 262 N.J. Super. at 366.
20. *See Crowe v. De Gioia,* 90 N.J. 126, 132-35 (1982)(generally outlining the criteria for considering interim relief); *see also, Peregoy v. Peregoy*, 358 N.J. Super. 179, 203 (App. Div. 2003).

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The New Bankruptcy Act and its Impact on Family Law

Everything You Hope Your Client Does Not Need to Know About Bankruptcy Law

by Madeline Marzano-Lesnevich

On Oct. 17, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 became effective, substantially revising the bankruptcy code in many ways. The amendments of the 2005 act significantly impacted the practice of family law, including the establishment and enforcement of orders for support, equitable distribution, the payment of counsel fees and other third-party obligations, and other relief included in marital settlement agreements in the ordinary course of everyday family law practice.

In many ways, the 2005 act has provided more security for parties who have secured obligations through a divorce action. Through the expansion of its definition section (to include an important definition of "domestic support obligation"), through the extension of its list of discharge exceptions to include property distributions and other non-support-designated debts, through the heightened designation of support obligations in the list of priorities, and through the enhanced requirements placed on debtors seeking to free themselves from their divorce-related obligations, the 2005 act is a step in the direction toward assuring those rights secured under a divorce settlement agreement.

REMAINING CURRENT ON SUPPORT: A NEW PREREQUISITE FOR FILING UNDER CHAPTER 13

Perhaps the most significant change to the Bankruptcy Code created by the 2005 act, as it impacts family law, is the added prerequisite for a party seeking to file for bankruptcy under Chapter 13 to remain current in his or her support obligation. In Chapter 13 bankruptcies, the debtor is to arrive at a plan that is acceptable by the trustee by which his or her debts shall be repaid, and 11 U.S.C. Section 1328(a) permits the debtor to have discharged certain debts (including non-support debts arising out of a marital settlement agreement) as soon thereafter as the debtor has made all payments pursuant to the plan. One tremendous benefit to the debtor filing a Chapter 13 bankruptcy proceeding is that if the proposed plan is accepted and followed, the debtor is afforded the opportunity to retain his or her residence. As stated above, however, the 2005 act incorporates an additional requirement for discharge under 11 U.S.C. Section 1328(a):

> …[I]n the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation…such debtor [must] certif[y] that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid…

Therefore, only a debtor who is current on his or her domestic support obligation will find relief under a Chapter 13 proceeding.

The 2005 act also has added the "failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition" as grounds for dismissal, pursuant to 11 U.S.C. Section 1307(C)(11). Further, not only must the debtor be current on his or her support up to the date of the filing of his or her certification, but he or she must remain current on support obligation, or risk having his or her residence sold to satisfy the domestic support obligation.

An interesting issue that is likely to arise from this change to the Bankruptcy Code, and its impact on family law, is whether or not the non-debtor spouse can waive his or her right to have the debtor certify that support is current, or waive his or her right to the support altogether. It is not impossible to imagine a scenario where a non-debtor spouse is awarded the former marital residence, but the home remains in the name of the debtor spouse at a subsequent point when the debtor spouse files for bankruptcy under Chapter 13. Under such a scenario, the debtor spouse would

need to succeed in having his or her plan accepted by the trustee in order to save the residence. According to the above-referenced language of the 2005 act, this debtor spouse would have to certify that his or her support obligation is current. Even if his or her support obligation were not current, however, the non-debtor spouse, to whom the house was awarded as part of the property division in connection with their divorce proceeding, may have a stronger interest in preserving the residence than in preserving his or her support award. This would create the untenable situation whereby the non-debtor spouse must assess what is more important—receiving support, or maintaining the residence.

Such a fact pattern carries with it severe implications. First, the question remains whether such a waiver would even be permitted under 11 U.S.C. Section 1328(a). The language of the statute, while explicitly addressing the permissibility of the debtor to waive the discharge of a debt otherwise dischargeable under Chapter 13, is silent with regard to whether the obligation of the debtor to remain current on his or her support obligation can be waived by the party holding the debt.

This leads to the related question—whose debt is it? In the case of spousal support, the answer would seem clear, as the non-debtor spouse is likely the creditor, and a stronger argument can be made in favor of permitting the non-debtor spouse the opportunity to waive support in favor of saving the house. However, the same is not necessarily true in the case of a child support obligation, wherein many states do not permit the waiver of child support, the rationale being that a child support obligation belongs to the child, and not the custodial parent. Under such a scenario, a counter-argument must be anticipated that a non-debtor spouse should not be permitted to negotiate support intended for his or her child against the maintenance of a residence that has been awarded as property division, but which is otherwise subject to a pending foreclosure.

Regardless of whether or not this issue is resolved in favor of permitting the non-debtor spouse the opportunity to waive the requirement for the debtor to remain current in support in order to receive relief under Chapter 13, such a proposal would have to be approached in an extremely careful manner. While it is true that the parties (the debtor and the non-debtor spouse) may find themselves in the unique circumstances of having a similar objective (albeit for different reasons) of securing the debtor relief under Chapter 13, a further potential entanglement that must be contemplated is what happens if the non-debtor spouse is permitted to waive the support requirement so the debtor can secure relief under Chapter 13 and save the house, but the debtor spouse fails to obtain the relief under Chapter 13 for reasons independent of his or her ability to remain current with the support obligation? Under such a scenario, the non-debtor spouse could find him or herself in a very difficult situation, for while under 11 U.S.C. Section 1328(a) remaining current on a support obligation is a prerequisite for obtaining relief under Chapter 13, obtaining relief under Chapter 13 is not a prerequisite for remaining current on a support obligation—especially a support obligation that has been waived.

11 U.S.C. SECTION 523: THE NEW EXCEPTIONS TO DISCHARGE

Introduction

Exceptions to discharge remain governed by 11 U.S.C. Section 523, which sets forth an enumerated list of specific debts excepted from discharge. The exceptions to discharge provided for by 11 U.S.C. Section 523 are applicable to discharges brought through Chapter 7, 11, and 12 proceedings, as well as hardship discharges under Chapter 12 and 13 proceedings.

Changes to 11 U.S.C. Section 523(a)(5)

Prior to the enactment of the 2005 act, 11 U.S.C. Section 523 contained two exceptions to discharge that related to debts arising in the context of a dissolution of marriage. The first was found at 11 U.S.C. Section 523(a)(5), and excepted from discharge any debt:

> to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that—
>
> A. such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to §408 of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such state); or
>
> B. such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

Clearly, the exception to discharge afforded by 11 U.S.C. Section 523(a)(5) under the former Bankruptcy Code contained substantial limitations. First, by its very language the old 11 U.S.C. Section 523(a)(5) exception only applied to a creditor who was "a spouse, former spouse, or child of the debtor." With the expanding nature of family law, and of our definition of family, many significant potential creditors with debts arising from an analogous context have been deprived of their debts being protected by the discharge exception: legal

guardians and relatives, such as grandparents or siblings who have undertaken custodial responsibility for a debtor's children, could not rely upon the language of the old 11 U.S.C. Section 523(a)(5); even a creditor who is the non-biological, or even the biological, parent of the debtor's child would not fall within the language of the statute unless they were the "spouse, or former spouse…of the debtor."

Further, sub-paragraph A limited the applicability of the exception to non-assignable debts of the spouse or child (or only those debts assigned to governmental agencies). Even more significant, pursuant to sub-paragraph B, only those debts that were "actually in the nature of alimony, maintenance, or support" were excepted from discharge, regardless of their designation as alimony, maintenance, or support.

The 2005 act has addressed the troubles of limitation and crafting inherent in the former 11 U.S.C. Section 523(a)(5) by replacing the above-referenced language with "domestic support obligation," such that any debt or obligation that falls within the definition of domestic support obligation is now excepted from discharge in bankruptcy. The 2005 act has, therefore, also been revised to include a definition of domestic support obligation, which is found at 11 U.S.C. Section 101(14A):

> The term 'domestic support obligation' means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—
>
> (A) owed to or recoverable by—
>
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
>
> (ii) a governmental unit;
>
> (B) in the nature of alimony, maintenance , or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
>
> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—
>
> (i) a separation agreement, divorce, decree, or property settlement agreement;
>
> (ii) an order of a court of record; or
>
> (iii) a determination made in accordance with applicable bankruptcy law by a governmental unit; and
>
> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

This new definition includes obligations and debts held by not only the spouse, former spouse, and child of the debtor, but the child's "parent, legal guardian, or responsible relative" as well.

Changes to 11 U.S.C. Section 523(a)(15)

The second exception relevant to family law established by the former 11 U.S.C. Section 523 was set forth at 11 U.S.C. Section 523(a)(15), and was intended to serve as a catch-all for those debts and obligations arising from the dissolution of a marriage that did not meet the requirements of the former 11 U.S.C. Section 523(a)(5)—that is, those debts and obligations that were considered alimony, maintenance or support, both in their designation, as well as in practice. Such obligations most frequently took the form of property division, or equitable distribution. The former 11 U.S.C. Section 523 provided a "conditional exempt" status upon such debts:

> not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless—
>
> (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expanded for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or
>
> (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequence to a spouse, former spouse, or child of the debtor.

Again, prior to the 2005 revisions, the exception from discharge afforded debtors pursuant to 11 U.S.C. Section 523(a)(15) was subject to explicit limitations. Specifically, such debts were subjected to both the ability-to-pay test, pursuant to sub-paragraph A, as well as the balancing test pursuant to sub-paragraph B, prior to receiving exempt status. In fact, sub-paragraph (c)(1) to the former 11 U.S.C. Section 523 obligated a creditor seeking an exception to the discharge of his or her debt to file an application requesting same:

> … the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15) as the case may be, of subsection (a) of this section.

The new 11 U.S.C. Section 523(a)(15) established by the 2005

act does away with the conditions placed upon such debts before affording them exempt status, and simply includes, among the enumerated exceptions that fall within the provision, any debt:

> to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit.

As a result, non-support obligations pursuant to 11 U.S.C. Section 523(a)(15) are placed in parity with support obligations pursuant to 11 U.S.C. Section 523(a)(5). Accordingly, 11 U.S.C. Section 523(c)(1) has been amended by the 2005 act, and reference to (15) has been deleted, so the exception is now automatic, and no longer requires the creditor to file an adverse proceeding to secure an exception of his or her debt to the discharge.

COUNSEL FEES AS AN EXCEPTION TO DISCHARGE

A counsel fee award stemming from a divorce action is subject to discharge just as any debt for which no exception is otherwise provided pursuant to 11 U.S.C. Section 523. Therefore, prior to the 2005 act, the issue regarding whether or not a debtor's obligation to pay counsel fees could be dischargeable in bankruptcy hinged upon the determination of whether or not the award fell within the 11 U.S.C. Section 523 exception to discharge reserved for debts of "alimony, maintenance, or support." Again, with the above-referenced revisions to 11 U.S.C. Section 523(a)(5), which incorporated a new, more inclusive definition of "domestic support obligation," and addition of 11 U.S.C. Section 523(a)(5), which further excepted any other obligation all other debts arising from a divorce settlement agreement, the distinction is not as important for Chapter 7 proceedings as it is for Chapter 13 proceedings, where the distinction still remains pertinent. Accordingly, even subsequent to the 2005 act, the issue of whether a counsel fee obligation stemming from a divorce proceeding may be excepted from discharge in a Chapter 13 proceeding will depend upon whether the obligation is deemed part of a domestic support obligation pursuant to 11 U.S.C. Section 523(a)(5).

As with any debt subject to this distinction, the determination will be made in accord with federal bankruptcy law, and not state law. However, while this determination remains a matter of federal bankruptcy law, the bankruptcy court may look to the state law for guidance.[2] The starting point for the court, in distinguishing non-dischargeable support obligations from dischargeable property settlement debt, is determining the basis for the creation of the obligation.[3]

In *Bearden*, the court addressed the issue of whether the debtor's obligation to pay the counsel fees of his former spouse—an obligation that was memorialized and incorporated into the parties' divorce agreement—could be discharged in a Chapter 7 proceeding, or whether this debt fell within the 11 U.S.C. Section 523(a)(5) exception to discharge as "alimony, maintenance or support." It is noted that this matter was decided Sept. 6, 2005, and therefore was subject to the exceptions that predated the revisions of the 2005 act. Accordingly, the court assessed the nature of the award in the context of the then-existing 11 U.S.C. Section 523(a)(5) exception, and established a three-part requirement to determine whether the counsel fee award could be considered alimony, maintenance, or support, and therefore excepted from discharge:

1. the underlying debt must be in the nature of alimony, maintenance, or support, in contrast to a debt in the nature of a division of property;
2. the debt must be owed to a former spouse or child; and
3. the debt must be incurred in connection with a separation agreement, property settlement agreement, divorce decree, or other order of a court of record.

A determination regarding the dischargeable nature of a counsel fee award following the 2005 act is likely to be subject to a similar criteria, except the second criterion also would permit the debt to be owed to (or recoverable by) a spouse of the debtor, or a parent, legal guardian, or responsible relative of the debtor's child, in addition to the former spouse or child.

In *Bearden*, the court determined the latter two factors to not be in issue, and focused its inquiry on the first factor. In ultimately concluding that the counsel fee award was, in fact, in the nature of alimony, maintenance or support, the court looked to the state statute permitting the counsel fee award, the factors considered in rendering the award, and the language incorporated into the agreement governing the award. With regard to the factors considered, the court noted that the factors—including the parties' financial needs, the income earned by the parties, and the parties' respective abilities to earn—were all tailored toward determining the non-debtor spouse's ability to support herself.

CHAPTER 13 PROCEEDINGS: THE EXCEPTION TO THE EXCEPTION

The discussion above has focused on the changes to the discharge exceptions embodied in the 2005 act, and their impact on the non-dischargeable nature of debts arising in the matrimonial dissolution context. The 2005 act has clearly provided enhanced protection to such creditors by eliminating the distinction between debts in the form of support (which under the

former code were not dischargeable) and all other divorce-related debts (which under the former code were dischargeable), in favor of a general rule that makes all such debts equally non-dischargeable.

While it is now the general rule that any debt arising out of a divorce settlement agreement cannot be discharged in bankruptcy (regardless of its designation as support or otherwise), an important exception to the general rule remains where the support distinction is relevant, and the matrimonial practitioner must be wary of its existence when crafting such agreements. Specifically, while the distinction between support and non-support debts has been eliminated, pursuant to 11 U.S.C. Section 523(a), in all Chapter 7 bankruptcies, all Chapter 11 bankruptcies, all Chapter 12 bankruptcies, and all Chapter 13 hardship bankruptcies, this distinction remains in the case of all Chapter 13 bankruptcy actions brought pursuant to 11 U.S.C. Section 1328(a).

Pursuant to 11 U.S.C. Section 1328(b), a court may discharge any debt, "at any time after the confirmation of the plan and after notice and a hearing," if the following circumstances are met:

> (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable; (2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and (3) modification of the plan under section 1329 of this title is not practicable.

Discharges rendered pursuant to this provision are often referred to as Chapter 13 hardship discharges. However, 11 U.S.C. Section 1328(c)(2) specifically excepts from discharge under the hardship provision, "any debt…of a kind specified in section §523(a) of this title." Again, the debts specified in Section 523(a) encompass both debts stemming from a domestic support obligation, as well as all other debts stemming from a separation agreement.

Analogous language is not found, however, in 11 U.S.C. Section 1328(a)—the companion provision to the 11 U.S.C. Section 1328(b) Chapter 13 hardship provision. Pursuant to 11 U.S.C. Section 1328(a), "as soon as practicable after completion by the debtor of all payments under a plan," a court shall grant a debtor a discharge of all debts provided for by the plan where the following circumstances are met:

a. In the case of a debtor with a domestic support obligation (created either by judicial or administrative order, or by statute), the debtor has completely satisfied all payments of the domestic support obligation, including all amounts due before the petition was filed, but only to the extent provided for by the plan); and
b. The debtor has certified that such amounts have been paid.

Similar to 11 U.S.C. Section 1328(b), discharges permitted pursuant to 11 U.S.C. Section 1328(a) are subject to exceptions. However, whereas the 11 U.S.C. Section 1328(b) exceptions include all debts listed in Section 523(a) (which include both domestic support obligations and all other obligations arising from a marital settlement agreement), 11 U.S.C. Section 1328(a) only excepts Section 523(a)(5) debts (domestic support obligations), and does not except all other debts arising from a marital settlement agreement.

It is, therefore, important for the matrimonial practitioner, when negotiating and drafting a settlement agreement, to consider the possibility of a party filing for bankruptcy under Chapter 13. During the negotiation process, when issues of support are regularly arrived at in the context of the agreement as a whole, and often resolved through tradeoffs on other non-support-related issues, an attorney must consider the possibility that an obligation to pay sums as and for equitable distribution, or an obligation to assume a marital debt, may become discharged. A court considering whether a specific obligation established by a settlement agreement is subject to a Chapter 13 discharge will not give weight to whether a debtor undertook such an obligation in exchange for a more relaxed support obligation.

Likewise, this support/non-support distinction is important in drafting the agreement, as resolution of the issue of whether a particular debt may or may not be discharged under a Chapter 13 bankruptcy will often hinge upon whether or not the debt is designated support, and whether or not the debt is, in fact, in the form of support.

Certainly, an argument can be made that any obligation arising out of a marital settlement agreement constitutes support. A party receives financial relief when he or she is relieved of an obligation to pay a particular debt to a third-party creditor that they would otherwise have to pay, and this, it could be argued, constitutes support. Likewise, the obligation to pay monies toward the satisfaction of an equitable distribution or property division can be considered support. However, such a determination will rest upon established bankruptcy law, and not on the law of the state court from which the obligation was established.

In *Fife v. Fife*,[4] the Supreme Court of Utah was faced with a situation in which it had to decide whether the federal bankruptcy law or the state law governed when determining what constituted alimony, maintenance, and support,

in a matrimonial divorce action. The parties in the above case were granted an annulment of their marriage. The plaintiff was awarded certain jointly acquired property, and the defendant was ordered to pay the designated creditors, who had claims against such property. The defendant failed to pay the creditors and filed for bankruptcy the day before a hearing was scheduled on the defendant's failure to pay the creditors. The bankruptcy court adjudicated the defendant's case; however, the state court entered judgment against the defendant for the amount the plaintiff was forced to pay her creditors.

The defendant argued that his adjudication in the bankruptcy court gave the bankruptcy court jurisdiction over his assets and liabilities, and therefore the state court had no authority to enter a judgment against him. The plaintiff argued that denying the state courts authority to enter a judgment against the defendant would "emasculate a state court's power to grant equitable relief simply by seeking sanctuary in bankruptcy."

The Utah Supreme Court held that:

> The judgment entered after the adjudication evidenced a provable claim in bankruptcy, that it was 'in ease' prior to the adjudication, not within the 'exception to discharge' language of Sec 17 of the Act, U.S.C.A. § 35, and not a claim of such nature as not to be provable in bankruptcy, and consequently the state court was without authority to enter such judgment.

The Court reasoned that the plaintiff had a remedy, in that she could resort to the defendant's assets in the bankruptcy proceedings, along with his other creditors.

The *Fife* decision established that the bankruptcy court, and not the family court, would determine what constituted support. This decision was superseded by *In re Waller*.[5] The *Waller* decision involved a husband's petition to the court to reopen his previously closed bankruptcy case and to enjoin his ex-wife from enforcing a decree of the state court, which adopted as part of the decree a separation agreement providing for alimony, maintenance, support and division of property. The agreement contained a provision that, "the husband shall pay and indemnify and hold the wife absolutely harmless from all existing debts."

The bankruptcy court decided that the award of household furniture to the wife and the order requiring the husband to pay all marital debts and indemnify his ex-wife from the debts was simply a division of property, and did not constitute alimony, maintenance or support under Ohio law. Accordingly, the debt was dischargeable in bankruptcy.

The United States Court of Appeals 6th Circuit was faced with the question of whether to defer to the bankruptcy court's definition of alimony. The United States Court of Appeals held that the husband's obligation to his former wife "to pay and indemnify and hold that wife absolutely harmless from all existing obligations" constituted alimony, maintenance and support, and therefore was a debt not dischargeable in bankruptcy by reason of the exception to discharge. The Court reasoned that the bankruptcy court had misinterpreted the state law. The Court further stated:

> Inasmuch as the Bankruptcy Court may now render null and void judgments of state courts dealing with the personal liability of a bankrupt, that Court should act with caution in order not to abuse the balance between the state and federal relationship.

Notwithstanding the *Waller* decision, the incorporation of the historical and statutory notes to 11 U.S.C. Section 523 establish that:

> What constitutes alimony, maintenance, or support, will be determined under the bankruptcy laws, not State law. Thus cases such as In re Waller, 494 F.2d 447 (6th Cir. 1974)…are overruled, and the result in cases such as Fife v. Fife, 1 Utah 2d 281, 265 P. 2d 642 (1952) is followed.

For further discussion regarding Chapter 13 and the debtor's requirement to remain current on support, see the section above.

11 U.S.C. SECTION 362: AUTOMATIC STAY

Exceptions to automatic stays, the injunction issued automatically upon the filing of a bankruptcy case that prohibits collections actions against the debtor, the debtor's property or the property of the estate, were expanded by the 2005 act, as they relate to family court proceedings. 11 U.S.C. Section 362 (b)(2)(a) was amended to add several new exceptions, which include automatic stays of the following:

> (A) …the commencement or continuation of a civil action or proceeding—
> (i) for the establishment of paternity;
> (ii) for the establishment or modification of an order for domestic support obligations;
> (iii) concerning child custody or visitation;
> (iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or
> (v) regarding domestic violence;
> (B) …the collection of a domestic support obligation from property that is not property of the estate;
> (C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;
> (D) …the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in

section 466(a)(16) of the Social Security Act;

(E) …the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

(F) ….the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) …the enforcement of a medical obligation, as specified under title IV of the Social Security Act…

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. The expansion of the exceptions to the automatic stay by the 2005 act makes it more difficult for debtors to utilize the advantages of a stay.

It is important to note the significance of 11 U.S.C. Section 362 (b)(2)(B), which permits the collection of a domestic support obligation from property that is not property of the estate. In Chapter 7 cases, earned income of the debtor is not property of the estate, while in Chapter 12 and 13 cases, earned income of the debtor is property of the estate. The new section of the bankruptcy law makes earned income of an individual Chapter 11 debtor property of the estate. 11 U.S.C. Section 1115(a)(2) states:

(a) In a case in which the debtor is an individual, property of the estate includes, in addition to the property specified in section 541—

(1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first.

11 U.S.C. SECTION 507 PRIORITIES: WHERE FAMILY COMES FIRST

Thus far, the focus of this article has been on the discharging of debts and the exceptions to discharge— that is, what debts shall and shall not survive the bankruptcy petition. Having established what debts survive the bankruptcy petition, it is important to look at how the distribution of monies to satisfy the surviving debts is handled. The 2005 act includes drastic amendments to the former scheme by which such distributions were made.

The Bankruptcy Code establishes an order by which claims are paid from the bankruptcy estate, after the estate has been accumulated. All creditors with claims of a higher priority designation must be paid, and their debts satisfied in full, before credits with claims of lower priority designations receive payment. If two creditors maintain claims of the same priority, the claims are treated equally, and they shall receive an equal, prorated share of their debt.

The list of priorities is set forth in 11 U.S.C. Section 507. Prior to the enactment of the 2005 act, domestic support obligations were considered the seventh priority. Therefore, under the prior act, a creditor seeking to collect monies owed from a domestic support obligation was often unlikely to do so, because by the time his or her debt was considered, the debtor's estate had been expended to creditors of higher priority.

The 2005 act, however, elevated domestic support obligations to the number one priority. 11 U.S.C. Section 507 states, in pertinent part:

(a) The following expenses and claims have priority in the following order:

(1) First: (A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.

(B) Subject to claims under subparagraph (A), allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition, are assigned by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative to a governmental unit (unless such obligation is assigned voluntarily by the spouse, former spouse, child, parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt) or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition be applied and distributed in accordance with applicable nonbankruptcy law.

It is important to note the distinction between Section 507(a)(1)(A) and Section 507(a)(1)(B), because while both are considered first priority, creditors falling under the latter category shall find their claims "[s]ubject to [the] claims under subparagraph (A)." Creditors falling into the Section 507(a)(1)(A) category include those parties, such as spouses, former spouses, or children of the debtor, who are owed support as of the date of the filing of the bankruptcy petition. Creditors falling within Section 507(a)(1)(B) include those governmental units

to whom such support obligations have been assigned.

CONCLUSION

The 2005 act is certain to have substantial implications, both positive and negative, for family law and the family law practitioner. The upside is increased security for the non-debtor spouse in preserving and collecting upon their debts in an equitable and expeditious fashion. The downside is the increased transactional costs as practitioners begin to navigate this uncharted territory, and test within the judicial system principles and definitions that did not formerly exist. There certainly exist scenarios that will arise as a result of the 2005 act that have not thus far been contemplated, and only time will tell how judicial interpretation further carves into the provisions of 2005. However, with so much uncertainly, one thing can be assured—the creditor who has been secured an obligation against a debtor through the divorce context is afforded more protection that he or she was prior to Oct. 17, 2005. ■

ENDNOTES

1. *In re Bearden v. Bearden,* No. 03B30385 (Bankr. N.D. Ill. 2005).
2. *Id.*
3. *Id.*
4. 1 Utah 2d 281, 265 P.2d 642 (1952).
5. 494 F.2d 447 (6th Cir. 1974).

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Financial Circumstances Disclosure and Divorce Action

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disclosure of material changes is the recommended procedure to follow. When representing the spouse whose actions have resulted in the change of value or existence of assets, or whose income has increased more than minimally, the author believe it is incumbent upon attorneys to advise their clients to disclose this information, even in the absence of an amendment to or clarification of Rule 5:5-2(c). Without such disclosure, a party could be subject to further litigation once the other party learns of the withheld information.

The *Kravchenko* case, further, teaches attorneys representing the spouse who is not in control of the assets to be more vigilant in pursuing discovery, or alternatively, in protecting themselves in obtaining a client's knowing waiver of his or her right to pursue such discovery. In the *Kravchenko* case, the existence of the asset was not hidden. Thus, the case was not governed by *Von Pein v. Von Pein*,[7] where the husband had concealed entirely the identity and existence of various investment accounts. In *Kravchenko*, rather, the value of a disclosed asset was misrepresented, inasmuch as the investment was stated to have, effectively, a zero value. Should the former husband's sale of that interest for hundreds of thousands of dollars—during the period of negotiations of this matter and months prior to the execution of a property settlement agreement—have been disclosed to his spouse? Most of us would agree that it should have been disclosed.

What if a matter has been settled, and after the execution of a property settlement agreement, but before the entry of an uncontested divorce judgment, there is a change in a party's financial circumstances? Is there an obligation to disclose this once the matter is settled? The author feels certain that most practitioners would answer in the negative. After all, the case has been *settled*. But what if the party whose financial circumstances changed for the better knew prior to the settlement that such improvement were imminent? No cases have been located that address this issue.

Until Rule 5:5-2(c) is amended or further clarified, attorneys should be consistent in their advice to clients, especially those whose conduct during the course of litigation results in a material change in financial circumstances, regarding their disclosure obligations. New Jersey has been progressive in its desire to require full and meaningful discovery; any suggestion that the actions such as those engaged in by the former husband in the *Kravchenko* matter would be condoned under the state's rules seems contrary to the quest for fairness. Any doubts regarding the need for disclosure should be resolved on the side of openness, the author beleives. Only in that way will the system work efficiently, will motions to reopen judgments be reduced in number, and will time be saved for matters that are more deserving of the appellate courts' limited time and scrutiny. ■

ENDNOTES

1. *Kravchenko v. Kravchenko*, Docket No. A-1564-05T5, decided June 28, 2006.
2. *Id.*, at 13.
3. *Id.*, at 14.
4. Id., at 15.
5. *Id.*, at 16, fn3.
6. *Rothman v. Rothman*, 65 N.J. 219, 229 (1979).
7. 268 N.J. Super. 7 (App. Div. 1993).

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Retrieving Electronically Stored Information Incident to Divorce

by Charles F. Vuotto Jr. and Joshua A. Freeman

The technology revolution has mainstreamed the presence of computers throughout our society. Computers are used for entertainment, managing finances and communication, having become a standard component of daily life. When parties decide to divorce, the information stored within computers is often relevant to one or more issues in the parties' case. The law surrounding technology and computers is in the early stages of development. The regulation of accessing electronically stored information on a computer in the context of matrimonial litigation remains unsettled, despite the fact that such information may be germane to a divorce proceeding. While we are all familiar with the holding of *White v. White,*[1] recent legislation may change the way matrimonial practitioners address these issues.

LEGISLATIVE HISTORY OF MONITORING ELECTRONICS AND COMMUNICATION

An analysis of the law governing the access and retrieval of electronically stored information begins with the New Jersey Wiretapping and Electronic Surveillance Control Act.[2] The New Jersey wiretap act, enacted in 1968, mirrors the federal wiretap act, which Congress implemented earlier the same year. A brief examination of the development of both the federal and state laws provides a necessary understanding of their scope, purpose and relationship to the access of electronically stored information on computers.

In enacting Title III (commonly known as the wiretap act) of the Omnibus Crime Control and Safe Streets Acts of 1968,[3] Congress responded to evolving legal principles of privacy and emerging technologies by overhauling existing federal law for the surveillance and interception of conversations.[4] Both the wiretap act and New Jersey's wiretap act recognized a privacy right in communications by prohibiting the recording of conversations, either in the form of wiretaps on phones or hidden microphones.

By 1986, the technology and forms of surveillance sought to be addressed by Congress 18 years earlier extended to concepts not contemplated at the time of its passage. Substantial advances in technology allowed people to interact through mediums beyond the telephonic (wired) and face-to-face means to which the existing law was limited. The advent of wireless phones, radio transmissions and fax machines, as well as the genesis of microchip technology (and its corresponding impact on computers). all exceeded the reach of the law.[5] Consequently, Congress modernized the wiretap act with the passage of the 1986 Electronic Communications Privacy Act (ECPA).[6] New Jersey achieved uniformity with these federal revisions in 1993, by amending the New Jersey wiretap act with provisions identical to the ECPA.[6]

In addition to extending the scope of the law to include previously unaddressed technology, the ECPA amendments organized the communications it regulated into distinct classes. As amended, the wiretap act is divided into three titles. Title I (previously the original Title III of the wiretap act) covers the interception of conversations; Title II regulates access to email and other forms of electronic communications, while Title III governs tracing devices such as pen registers and caller ID.[7]

Issues in family law most commonly implicate Titles I and II, and arise in the context of one spouse's access to the private communications of the other.[8] There are important differences between Title I and Title II that result in differing treatment of the communications they govern. On the federal and state level, judicial treatment of oral and wire communications intercepted under Title I differ from email and electronically stored information accessed under Title II. To understand the role of Title I and Title II communications in family law, it is necessary to briefly examine their disparate treatment by the ECPA.

Although they share commonality in applying to private and government action (as well as providing for damages), oral and wire conversations under Title I are distinguishable from electronic communications under Title II in several ways. First, Title I communications have been in existence and regulated for a considerably longer time than those addressed by Title II.

The body of law concerning wiretaps and privacy is familiar to courts, as opposed to the relatively new concept of emails and online interaction. Courts and legislatures

continue to be confronted with various cases in which Title II issues arise, establishing rules to guide their adjudication.

The most significant difference between Titles I and II is the application of the exclusionary rule. The exclusionary rule addresses the ability to bar the submission of evidence procured in violation of a law. Oral or wire communications intercepted in violation of Title I are subject to a strict interpretation of the exclusionary rule, and are inadmissible.[9] In contrast, no such remedy exists regarding electronically stored information accessed in violation of Title II. An intercepted phone call may thus be excluded from evidence under federal and state law, while an email providing a verbatim transcript of the same communication can be admissible.

DEVELOPMENT OF THE LAW CONCERNING ELECTRONICALLY STORED INFORMATION

In *White v. White,* the only case on point, a New Jersey court considered one spouse's accessing the email of the other in matrimonial litigation. The trial court held that a wife's retrieval of her husband's email correspondence with his girlfriend did not violate the New Jersey wiretap act because the form in which the emails existed at the time they were accessed was not within the scope of the statutory language. Additionally, the wife was an authorized user of the computer, making access in violation of the law a legal impossibility.

In *White,* both parties continued to reside in the marital home during the pendency of their divorce. The husband lived in the sunroom where the family computer was kept. All family members had access to the room, which contained the home entertainment center as well as the computer. After discovering evidence of the husband's extramarital affair, the wife retrieved the emails and offered them as evidence during the divorce proceeding for consideration in deciding custody of the parties' children.[10] In ruling that the emails were admissible if relevant, the court provided a legal framework for analyzing the access of electronically stored information under the New Jersey wiretap act.

In finding that the wife had not violated the New Jersey act, the court focused on the nature and status of the various forms of email. After discussing the various forms in which electronic communications are stored in their course of delivery between sender and recipient,[11] the court launched into an analysis of the emails accessed by the wife, and concluded that her actions could not be found to be a violation of the statutory language.[12] In reaching its conclusion, the court adopted the observed definition, which strictly defined the forms in which an electronic communication must exist in order for it to be accessed in violation of the New Jersey wiretap act.

The court next addressed the concept of authorization. The court held that the specific circumstances under which the discovery and retrieval of the emails occurred could not be found to constitute an unauthorized access under the statute. The court noted that the wife had authority to use the computer despite the fact that she infrequently exercised the right. Furthermore, the court determined that her authorization to use the computer was reinforced by the fact that the system or files accessed were not password protected.[13]

Although the *White* holding is important because it is precedential in the context of retrieving electronically stored information incident to divorce litigation in New Jersey, it is somewhat limited in its analysis, and does not consider subsequently enacted legislation as detailed below. Despite engaging in an in depth analysis of the nature of electronic communications and the New Jersey wiretap act, the *White* court failed to address the fact that emails (and other Title II communications) are generally not subject to an exclusionary rule.[14] The court's decision also limited its ruling by finding that no violation of the statute occurred, but did not discuss potential remedies in circumstances where a violation could be found. Thus, while significant, *White* is only the first step in analyzing the law on the subject.

It also is important to note the age of the *White* case, and the progress made in legislation since then. *White* was decided in 2001, and despite being relevant authority in New Jersey, may be affected by recent legislation. Amendments to the Criminal Code and the Rules of Court regulating computer activity and electronic information will impact the adjudication of issues dealing with spousal access to email in matrimonial litigation. On April 14, 2003, the New Jersey Legislature enacted three statutes (N.J.S.A. Section 2C:20-23,[15] N.J.S.A. Section 2C:20-25,[16] and N.J.S.A. Section 2C:20-31[17]) that will have a substantial impact on the issues addressed herein.

N.J.S.A. Section 2C:20-23 provides definitions for computer criminal activity and the above related statutes. N.J.S.A. Section 2C:20-31 generally governs the wrongful access and disclosure of information on a computer. Subsection (a) provides for third-degree criminal liability for the purposeful accessing of a computer and disclosure of corresponding information data without (or in excess of) authorization. Subsection (b) makes it a crime in the second degree if such action concerns data that is legally protected (*i.e.,* information protected by any law, court order or Rule of Court). N.J.S.A. Section 2C:20-25 seems to be very similar to N.J.S.A. Section 2C:20-31, except that it defines the prohibited activity in more detail and appears to be directed toward computer hacking of large systems. It defines computer criminal activity, similarly makes it a third-degree crime under Subsection (a) to

access computer information, and provides for varying penalties depending on the information accessed and damage caused.[18]

Violations under these two statutes are separate crimes and can result in a conviction under both from a single act.[19] Criminal liability thus exists for wrongful access under N.J.S.A. Section 2C:20-25 as a distinct offense from access and disclosure under N.J.S.A. Section 2C:20-31.

The amending of the Rules of Court to match those of the Federal Rules of Civil Procedure[20] is the latest example of the continuous development in the law governing electronic development. The applicable amendments to the Part IV Rules now include electronically stored information as discoverable material,[21] and extend existing discovery rules to conform to this concept.[22] While the influence of the amended Court Rules on matrimonial litigation may be indirect because of their intended focus on civil actions,[23] the inclusion of the issue of electronically stored information at a case management conference makes the issue a potential source of attention early in the divorce proceeding.

Obviously, these legislative actions significantly impact matrimonial litigation. Potential criminal liability for illegally accessing computers and disclosure of information has clear implications for spouses (and perhaps counsel) who are found to have engaged in a manner prohibited by statute.[24] Moreover, a determination that a party is guilty of such conduct can obviously result in adverse consequences in the ultimate disposition of their divorce proceedings.

An important consideration in analyzing the adjudication of issues dealing with electronically stored information and family law is the relationship between the recently enacted statutes and existing state, federal, and case law. Perhaps the most relevant factor is that of authorization, and the approach taken by a court in determining whether electronically stored information was accessed illegally. Significantly, N.J.S.A. Section 2C:20-23(q)[25] articulates a more structured definition of "authorized access" than previously established under *White*.[26] As a consequence, two standards for approaching the issue of authority to access electronically stored information can exist on a single set of facts. The analysis under the federal and New Jersey wiretap act employed in *White* examines the circumstances (whether access was prohibited or the information was password protected) in which access occurred, as opposed to an analysis of the same concept under the Criminal Code, which provides a broader definition of authorization to enable it to be applicable to the wide spectrum of acts that occur beyond scenarios involving family members.

The act of wrongfully accessing and disclosing electronically stored information of a spouse implicates N.J.S.A. Section 2C:20-25 and N.J.S.A. Section 2C:20-31, with potential additional liability under *White* and the New Jersey wiretap act. The full impact of the recently enacted Criminal Code on spousal access of electronically stored information will not be fully understood until the question is considered within the context of matrimonial litigation.

ACCESSING ELECTRONICALLY STORED INFORMATION AND ADVOCATING FOR THE DIVORCE CLIENT

A primary point for an attorney to consider when advising a client to access computer information of their spouse is the manner by which the data is accessed. As articulated in *White*, only the New Jersey wiretap act contemplates certain forms of email.[27] Specifically, emails in temporary storage folders on a computer that have not reached their recipient are of the type that may be accessed in violation of the wiretap statute. Messages read and saved are thus not within the scope of the New Jersey act. Only communications that are still in transmission can be illegally accessed. Identifying the difference in this regard can be critical. Accessing such records may nonetheless run afoul of the legislation enacted in 2003, even though such access may not violate the wiretap act (per *White*).

A spouse may retrieve, without consequence, an email message that has been read and saved to a computer's hard drive under *White*, because the transmission of the communication has been completed. However, exposure under the statute may exist because acquiring the same information by alternative means may be illegal. Accessing such information is relatively easy, and may be accomplished by people with little or no computer savvy. Advanced surveillance software and monitoring programs that can be installed on a computer to surreptitiously record communications concurrent with their transmission may constitute unlawful access even under the wiretap act.[28] Consequently, clients must be made aware of the potential penalties in employing more sophisticated methods of accessing their spouse's electronic communications (or engaging in such conduct through a third party).

It also is critically important to recognize the corresponding potential criminal liability that ominously applies to such scenarios. Although distinctions can be drawn between forms of storage and access that may violate the New Jersey wiretap act, the same nuances do not apply to N.J.S.A. Section 2C:20-25 and N.J.S.A. Section 2C:20-31. The Criminal Code does not discern the state of transmission in which electronically stored information exists when accessed, nor does it indemnify the accessing party by differentiating means of access. Criminal computer activity is broadly defined and potentially violated by acts that may be found

to not offend the New Jersey wiretap act.

Another significant concept is the recognition of the relationship between such accessed documents and the exclusionary rule. As previously noted, while accessing a spouse's email may violate the law governing electronically stored information, there is no rule by which such information would be deemed inadmissible. Thus, electronic communications illegally accessed under *White* or the legislation enacted in 2003 may be admitted, although civil and criminal liability may attach for retrieving them.

As it relates to liability, the most important point of practice for attorneys advising clients in terms of accessing electronic information of a spouse is imparting an understanding and explanation of the concept of authorization. Both civil and criminal liability associated with retrieving information from a computer is predicated on a lack of authorization, or acting in excess of authorization.[29] An analysis of whether a party was an authorized user of a family computer appears to be fact-sensitive. In *White,* the trial judge considered the absence of: 1) a prohibition from using the computer, and 2) a password to protect the accessed information.[30] It is important to note, however, that such an inquiry is case-specific, and an unambiguous standard for finding authorization does not exist.

The circumstances presented under *White* may be distinguishable from potential cases in which authorization to use and access the computer of a spouse may be found by a court to be less obvious. Attorneys should be mindful of scenarios where: 1) a client does not routinely access or make use of a computer, 2) is accessing information that is password protected, 3) has been prohibited from using the computer, 4) is unable to access or make use of a computer because of its location in a locked or remote area, or 5) any other factor relevant to an analysis of authorization.[31]

Thus, determining the authority of a client to use a family computer should be a threshold issue in assessing a case and devising a plan for discovery. While the existence of a password or other factor suggesting a lack of authority does not appear to be determinative on the ability to access electronically stored information on a family computer,[32] matrimonial practitioners must proceed cautiously when information is protected by password.

In addition to the previously discussed potential for civil and criminal liability under the New Jersey wiretap act and Criminal Code, the specific landscape of the case and the client's good faith in accessing the computer information of the spouse should be considered. Although information contained on a family computer may be relevant, or even helpful to divorce litigation, its use should be considered in light of the overall benefit to the case and potential for adverse consequences in a judge viewing production to be the result of bad faith or criminal actions.

Perhaps a thornier issue is that the potential exists for liability to attach to an attorney based upon the illegal accessing of a spouse's computer information. Professional and ethical standards prohibit attorneys from advising clients to secure information of a spouse in a manner they know to be in violation of the law.[33] This consequence requires attorneys to not only be aware of what acts constitute illegal access of electronically stored information, but be able to competently evaluate the law under the circumstances of a case in order to avoid accountability. Remember that N.J.S.A. 2C:20-25 governs the wrongful access of computers, and N.J.S.A. Section 2C:20-31 governs the wrongful access and disclosure of information on a computer.

If counsel attempts to use electronic information he or she knows the client has illegally obtained, is he or she "disclosing" it as contemplated by N.J.S.A. 2C:20-31? If the attorney counsels the client to unlawfully access a spouse's computer, has counsel aided and abetted an offense committed by the client? If so, criminal liability may attach to the attorney as well.

Technology has integrated computers into the social fabric, and made them a permanent fixture of modern life. The generational gap that once existed as the computer industry established itself has almost been erased, and basic skills for their use have become the norm. However, a gap has been created between the exponential growth in computer technology and the ability of the law to adjust. Social dependence on computers to communicate and manage daily life has resulted in their increased presence in matrimonial litigation. The absence of explicit rules governing the treatment of many issues implicated by computers requires attorneys to take a cautious approach in advising divorce clients. As the legislation and legal principles concerning technology develop, they will transcend into all areas of the law. In the interim, family law practitioners must have an awareness of all laws related to technology and computers and their impact on divorce law. ■

ENDNOTES

1. *White v. White,* 344 N.J. Super. 211 (Ch. Div. 2001).
2. N.J. Stat. Ann. §§2A:156A-1 to –34.
3. 18 U.S.C. § 2510-2522 (2000).
4. Richard C. Turkington, Protection for Invasions of Conversational and Communication Privacy by Electronic Surveillance in Family, Marriage, and Domestic Disputes Under Federal and State Wiretap and Communications Acts and the Common Law Privacy Intrusion Tort, 82 *Neb. L. Rev.* 693, 700-704 (2004) (discussing enactment of the federal wiretap tap act as the Congressional response to the emergence of privacy law and protection of individual liberties by the Supreme Court).
5. *Id.* at 703 (describing how advances in technology antiquated the law).

6. 18 U.S.C. § 2510-3127 (1994).
7. *Cacciarelli v. Boniface,* 325 N.J. Super. 133, 136 (1999).
8. Camille Calman, Note, Spy vs. Spouse: Regulating Surveillance Software on Shared Marital Computers, 105 *Colum. L. Rev.* 2097, 2106 (2005) (listing the division of communications among the three Titles).
9. *Turkington, supra* at 703.
10. *Turkington, supra* at 704.
11. *White*, 344 N.J. Super. at 215, 217.
12. *Id.* at 219 (explaining the ways email can be stored and citing *Fraser v. Nationwide Mutual Insurance Company*, 135 F. Supp. 2d 623, 633-634 [E.D. Pa. 2001], to articulate that the transmission of emails is an "indirect" process that places messages in various "temporary" folders until they are read for the purpose of protecting their loss, which does not include the saving of the communication by the recipient after it has been read).
13. Id. at 219-20 ((observing that N.J.S.A. §2A:156A-1(q), describes the form of storage for an email accessed in violation under the New Jersey wiretap act to be limited to a "temporary" type for "purpose of backup protection," and that "the Act as not meant to extend to e-mail retrieved by the recipient and then stored.")).
14. *Id.* at 221.
15. *Turkington, supra* at 704.
16. N.J. Stat. § 2C:20-23 (2006).
17. N.J. Stat. § 2C:20-25 (2006).
18. N.J. Stat. § 2C:20-31 (2006).
19. Specifically, N.J.S.A. § 2C:20-25(a) imposes third-degree criminal liability for accessing "any data, data base, computer storage medium, computer program, computer software, computer equipment, computer, computer system or computer network." The similar language and provision for third-degree criminal liability under N.J.S.A. § 2C:20-31(a) is most applicable to an analysis of spousal access to email because the information is unlikely to be of a legally protected nature (thus subject to the stepped up liability as a second-degree crime per N.J.S.A. § 2C:20-31(b)).
20. N.J.S.A. § 2C-20-25(h) states "…a conviction for a violation of any subsection of this section shall not merge with a conviction for a violation of any other subsection of this section or 10 of P.L. 1984, c. 184 (C. 2C:20-31), or for conspiring or attempting to violate any subsection of this section of section 10 P.L. 1984, c. 184 (C. 2C:20-31), and a separate sentence shall be imposed for each conviction."
21. Report of the Discovery Subcommittee on Proposed Rule Changes Regarding Electronically Stored Information (Nov. 2005): New Jersey Legislature Judiciary Committee (Discovery Subcommittee Report).
22. N.J. Ct. R.4:5B-2.
23. For example, R. 4:18-1 providing for the production of documents has been amended to allow for requests concerning the discovery of electronically stored information to specify the form of production.
24. The catalyst for the changes in the federal and corresponding New Jersey Rules was the *Zubulake v. USB Warburg, LLC* series of decisions from the Southern District Court of New York. These decisions [I through VI: "*Zubulake I*", 217 F.R.D. 309 (S.D.N.Y. 2003), "*Zubulake II*" 230 F.R.D. 290 (S.D.N.Y. May 13, 2003), "*Zubulake III*" 216 F.R.D. 280 (S.D.N.Y. 2003), "*Zubulake IV*" 220 F.R.D. 212 (S.D.N.Y. 2003), "*Zubulake V*" 229 F.R.D. 442 (S.D.N.Y. July 20, 2004), "*Zubulake VI*" 231 F.R.D. 159 (S.D.N.Y. Feb. 3, 2005)] were based on a shift in the policy of the treatment given to the non-disclosure and erasure of electronically stored information, as well as the ramifications for a party who engages in such actions during discovery. Thus, the amendments drafted to address these concepts are peripheral to matrimonial litigation because of the nature of discovery in a divorce action. Married couples have personal knowledge of one another in contrast to parties in civil litigation who are attempting to discover information pertinent to a specific claim. The relationship between the litigants is the distinguishing factor in considering the applicability of the amended rules to family law.
25. The concept of liability for disclosure is indicative of the development of the law of electronically stored information and exemplifies the process by which such change occurs. As noted by the trial judge in White, "Interestingly, the language of the act [New Jersey act] refers to 'access' rather than 'disclosure' or 'use', thus one court has held that a person 'can disclose or use with impunity the contents of an electronic communication unlawfully obtained from electronic storage,' *Wesley College v. Pitts*, 974 F. Supp. 375, 389 (D. Del. 1997). *White,* 344 N.J. Super. at 221.
26. N.J. Stat. § 2C:20-23(q) is the definitional statue for the computer related crimes additional to the Criminal Code and provides that authorization under N.J.S.A. § 2C:20-31 and N.J.S.A. § 2C:20-31 "means permission, authority or consent given by a person who possesses lawful authority to grant such permission, authority or consent to another person to access, operate, use, obtain, take, copy, alter, damage or destroy a computer, computer network, computer system, computer equipment, computer software, computer program, computer storage medium, or data. An actor has authorization if a reasonable person would believe that act was authorized."
27. The issue of authorization of the electronically accessed data by the family part judge in *White* was a more conceptual approach (that focused on the absence of prohibition) in contrast to the one utilized in criminal law under which authority to access is based on "lawful authority" and the ability to consent (in the context of protecting search and seizure rights). The *White* court simply considered the wife's authority to access the family computer in the context of whether there was an explicit prohibition against her use or password, which would denote the intent of husband to restrict her access. *White* at 244.
28. *White*, 344 N.J. Super. at 220 (only emails in transitory storage are potentially violated under the New Jersey wiretap act because once an email is read and placed in a post-transmission storage folder, it ceases to be in the temporary form contemplated by the law).
29. Such software can be illegally accessed in more than one way. If the program is designed to copy a communication within the folder it is stored by the computer while it awaits retrieval by the recipient, it violates access of information as previously discussed under Title II because the communication was in temporary storage. In the event the communication is

copied by the program when it is not in temporary storage (but still not yet retrieved by the recipient), it can violate Title I (which contains a provision to include electronic communication that have not been stored) as an intercepted communication. *See Calman, supra* at 2098, 2101.

30. N.J.S.A. § 2C:20-31(a) and (b) as well as N.J.S.A. § 2C:20-25 base liability on a "person purposely or knowingly and without authorization, or in excess of authorization…"
31. *White,* 344 N.J. Super. at 221.
32. The *White* court did not define or limit its analysis of authorization. The absence of a prohibition and password were merely the two considerations used by the judge to illustrate that the access was not unauthorized. The factors for an inquiry in terms of authorization in the context of matrimonial litigation under *White* appear to be based on a concept of reasonableness and implied consent.
33. There is no known reported decision that has found the accessing of a spouse's email to be unauthorized. Thus, there is not an observable threshold for what circumstances would constitute unauthorized access (*White* only provides guidance as to why the actions in the specific case do not offend the limits of authorization, without analyzing other factors that may impact such an inquiry or establish a general rule). Even in the event that such a precedent is established, the information is potentially accessible through discovery.
34. N.J.R.P.C. 1.2 (d) states in pertinent part "A lawyer shall not counsel or assist a client in conduct that the lawyer knows to be illegal, criminal, or fraudulent…"

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