AGE: THE MOST OVERLOOKED ISSUE IN OUR PRACTICE

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Given the number of seminars presented and cases decided in recent years, it is hard to believe any issue could be considered overlooked. Yet, an examination of the literature and recent case law demonstrates that age, a factor in both the alimony and equitable distribution statutes, is infrequently discussed. Traditionally the symposium has been the one seminar where new theories can be explored thus this article will attempt to inter-relate the concept of age with different legal issues that arise in matrimonial matters so that perhaps we will have a different perspective on what I have characterized as the most overlooked issue in present day matrimonial practice.

AGE AND ALIMONY CONSIDERATIONS

When the Legislature modified the alimony statute in 1988, it determined as a matter of public policy that it would be appropriate to have the factors which courts were required to consider in making alimony awards delineated in the statute. The third factor in _N.J.S.A._ 2A:34-23(b)(3) is "the age, physical and emotional health of the parties". It is reasonable to assume there was some legal significance to age since the Legislature saw fit to include it in the statute, particularly since in the early alimony cases it is rarely even mentioned. Not only was it included, it was prominently placed in the beginning. Except in the area of retirement, the pre-statutory alimony cases certainly did not

highlight age. This creates the opportunity for creative counsel to emphasize it's importance.

The Supreme Court, in each pre-statute alimony case it decided referred to many factors but never age. For instance, in Martindale v. Martindale, 21 N.J. 341, 352 (1956) a classic alimony case which relied on an even earlier 1918 case, Dietrick v. Dietrick, 88 N.J. Eq. 560, 561 (E & A 1918) (which it characterized as the "leading" case) the Court observed alimony should reflect:

> "the physical condition and social position of the parties, the Husband's property and income, including what he could derive from personal attention to business and also the separate property and income of the Wife". Martindale at 352 citing Dietrick at 561.

Similar comments can be found in Bonnano v. Bonnano, 4 N.J. 268, 273 (1950) where the Court observed alimony should be "suitable to the circumstances of the parties" and relied, once again, on Dietrick. In all these foundational alimony cases age was never mentioned.

Thus, prior to the statute, the Supreme Court in a series of cases over approximately seventy-five years never even mentioned age as a factor. The only pre-statute case which even referred to age was Turl v. Turl, 34 N.J. Super. 313 (App. Div. 1995) but, interestingly, only referred to the age issue as it related to the Wife, which was not surprising since alimony was primarily focused on the Wife's needs more than the Husband's ability to pay. It is also interesting that in certain post-statute cases, the Appellate Division never mentioned age. See Stout v. Stout, 155 N.J. Super. 196, (App. Div. 1977); Greenberg v. Greenberg, 126 N.J. Super. 96

(App. Div. 1973); Guigliotta v. Guigliotta, 164 N.J. Super. 139 (App. Div. 1978).

The Supreme Court considered alimony again before adoption of the alimony statute. In Capodanno v. Capodanno, 58 N.J. 113, 118 (1971) the Court, relying on Martindale, Bonnano, and Dietrick, simply reaffirmed the principles cited above. The Court discussed "needs" defining them as the amount of money necessary to maintain the Wife in a manner "near commensurate as possible with her former status". Capodanno at 118. Only in Khalaf, also decided by the Supreme Court in 1971, was there any reference to age. However, Khalaf's comments must be carefully scrutinized; they reflected, in part, an unfortunate emphasis in earlier cases on fault, a factor , while statutorily preserved is of dubious, if little, legal significance.

Mrs. Khalaf was married to a doctor whose husband "wrongfully left her"; the Court found she was "entitled to carry on as still married", so long as Dr. Khalaf was "reasonably able to meet these needs". Khalaf at 70. While there was no direct reference to Mrs. Khalaf's age, the Court noted she devoted twenty-six years of her life and geared her lifestyle to maintain a household and rearing a family. In a veiled reference to her age the Court noted the clock cannot be turned back to and ask her to get a job and develop a career was not appropriate. In language that is particularly significant in alimony generally and which explains the societal or public policy basis for spousal support, the Court noted that had she chosen to work twenty-six years ago, she might "now be well

advanced in her chosen work". Khalaf at 70. Thus, even if not expressly relied upon, the wife's age and the consequent impact upon her earning capacity in the alimony analysis.

In my own personal notes summarizing Khalaf, I characterized the Khalaf principle as the "older wife rule", since in the decision the Court not only awarded what it presumed was a healthy level of support ($150.00 a week), it observed the amount was designed to allow her to accumulate savings to "protect herself against the day when alimony payments may cease because of her husband's death or other changes in circumstances". Khalaf at 70. Thus, in a clear recognition of the linkage between age and needs, the Court believed an alimony award must not only meet the dependent spouse's present needs but incorporated the requirement to provide a fund to secure the dependent spouse's future financial security into the concept of need.

This language preceded equitable distribution. An interesting historical footnote is that there were many people who supported the equitable distribution as a concept in the 1971 amendments because they argued it would either minimize or eliminate alimony. While that did not occur, it is clear our law recognizes a direct relationship between the two. Rothman v. Rothman, 65 N.J. 219, 234 (1974).

The Khalaf reasoning about the need to assure financial security for a dependent spouse in the future is equally appropriate today as it was in 1971. It is particularly important where by virtue of the equitable distribution a scheme a Court cannot

conclude that there is sufficient liquidity, when combined with social security, to guarantee a reasonable lifestyle for the dependent spouse in the future. This highlights an important practice point, ignored by attorneys because they fail to focus on the importance of age in their presentation. Arguments must be made and evidence introduced to demonstrate why your proposed overall economic approach will not only be fair now but also in the future. Khalaf's focus on the future was not simply bottomed on concepts of fairness; it was a recognition of economic necessity. Several years ago there were a series of seminars for Judges whose purpose was to address issues of gender bias in judicial decision making. These seminars were not lectures, but Fred Friendly discussion groups where moderators changed the facts to illustrate pre-planned legal principle. Moderators were instructed not only to emphasize the importance of eliminating gender bias thus assuring judicial determinations were fair regardless of gender at the time they were made, but also to emphasize that determination must also be fair in the future. Judges were taught to focus not only on the impact of their decision today, but how it would affect the parties in the future. Unfortunately, now there are perhaps only two or three Judges in the entire state in Family who actually attended these seminars. Thus, the emphasis that the fairness of a decision must be measured both at the time it was made and in the future has unfortunately been lost not only on Judges but on lawyers as well. Nonetheless, it remains not only a viable issue it is essential to the fairness of any spousal support and distributive scheme.

This concept of "looking down the road" is particularly important in cases where the dependent spouse has either deferred or sacrificed her career and there is inadequate pension funding when combined with social security to meet her future needs. A substantial argument exists that because of the party's age and proximity to retirement, a reasonable alimony component must include the need, if not the necessity, to save for the future. The argument cuts both ways; Factor 4 in the present alimony law imposes the statutory imperative of "comparability" thus certainly the supporting spouse can articulate the same concerns. There are studies that demonstrate a dependent spouse's standard of living generally decreases while the support spouse's increases after divorce. Those studies can be juxtaposed with an argument that implicit in any alimony award given the parties' ages, is a component for future security. It is also consistent with the statutory, if not societal imperative, for spousal support awards to be "fair and equitable". See Miller v. Miller, 160 N.J. 408, 426 (1999) (there is a "strong statutory and public policy of ensuring fairness and equity in the dissolution of marriages"). As advocates, it is our responsibility to provide Courts with a factual basis to support claims that the concept of fairness must apply both now and in the future. While Lepis at 146 notes that alimony orders "define only the present obligation of the supporting spouse" that does not undercut the broader systemic interest that if Courts address issues for the future there will be a diminished need for post judgment modification motions.

Such arguments are stronger if the parties are older and not younger. In considering the future, that does not only mean someone who is over 50 since financial planning should not begin too late but early in a person's lifetime. The argument to a Court should be personalized by inquiring when the Judge began to think of their family's future financial security. Shouldn't the same concern, asked rhetorically, be provided to a litigant.

This entire concept must be juxtaposed with another argument that, at least in my view, is frequently overlooked. The fundamental reason why dependent spouses' standard of living decreases and supported spouses' standards increase is the differential in their earning capacities, a factor in the alimony statute and also in Factor 5 in the equitable distribution statute (See 2A:34-23.1(g). If there is a disparity in earning capacities, is it not reasonable to argue, over time, there should not be some disproportionate division of assets as a consequence of that capacity. Does it not logically follow that the supporting spouse will more than be able to make up the disproportionate division because of the difference in earning capacities[1]. Thus, in proposing that Courts consider the fairness of any award in the future by disproportionately dividing assets you would argue the statutory factors, ranging from the ability to maintain a comparable standard of living ("why is that only at the time of the divorce and why not in the future?"), the earning capacity of the parties and

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[1] Rothman at p 232 in ft. 6 rejects any suggestion there be a presumption assets should be divided equally.

in the equitable distribution statute the economic circumstances of each party at the time of the division of property (see Factor F in N.J.S.A. 2A:34-23.1), compel such an approach.

The argument is substantially stronger if the disparate earning capacity is the product of how the marriage functioned. In other words, the fairness of recognizing the future economic circumstances of the parties is easier to advance when the disparate earning capacity itself was created or caused by how the marital partnership functioned. A parent who stayed home to raise children (itself a statutory factor) has had their earning potential depreciated by the marriage, while the employed parent has their earning capacity enhanced. At least one commentator has succinctly observed, "the wife increases her husband's earning capacity at the expense of her own". Goldfarb, "Marital Partnership In The Case For Permanent Alimony", published in "Alimony New Strategies For Pursuit In Defense" (Section of Family Law ABA).

If one party continue to receive the economic benefit in the future of an enhanced earning capacity created by the sacrifices of the other spouse, is it unreasonable for the Court to consider how the unfairness increases or is exacerbated by age? This unfairness is more patent if the parties are older yet in their prime earning years. This is particularly true where the dependent spouse is at an age where it is virtually impossible to recreate a career they might have had, while the supporting spouse enjoyed the benefits of having their earning capacity enhanced. In response, the argument must be made is the fairness is provided by more or less equally

dividing marital assets even though they were acquired by one spouses earnings coupled with a permanent alimony award. Yet, the response to that contention is why must the dependent spouse suffer an ongoing prejudice if they do what the supporting spouse has an absolute right to do, i.e. remarry, which would trigger an alimony termination. The contingent nature of any alimony award, which is necessarily subject to lifestyle contingencies, explains why there needs to be a disproportionate division of assets or a Khalaf savings component above and beyond the traditional "needs" component.

A savings component is generally only thought of as part of the parties lifestyle. It is frequently argued by counsel for the supporting spouse that it is a pertinent CIS line item since this was "part of" their lifestyle. In fact, frequently lifestyle is moderated by such savings. I make a distinction between a savings component part of lifestyle and the need to guarantee the future financial security of a dependent spouse. This can be coupled with concerns about the stability of social security and that a Court must ultimately recognize that alimony, at some point in the future, will stop because of the supporting spouse's retirement. Thus, it is not unreasonable to argue there should be some inclusion in the case information statement for a Khalaf savings component.

A DIFFERENT LOOK AT RETIREMENT

With this background, the issue of retirement becomes particularly important and implicit in any retirement analysis is

the issue of age. It is beyond the purview of this article to review the retirement cases but an interesting variant on retirement was raised by a high placed AT&T Executive who argued to me the retirement cases "missed the point". He was 55 years of age as was his wife. He insisted that any legal principle that treated he and his wife disparately and required him to work until age 62 or 65 was fundamentally unfair. He reasoned he and his wife had reached an understanding early on in their marriage which was fairly typical[2]. She would stay home and raise the children while he would financially support the family. He had his job and she had hers. He then reasoned it was unfair for her to "retire" from "her" job since the children were emancipated, but he was still required to pursue "his".

I took that broad formulation and argued there was statutory support for his concept in the Legislature's judgment embodied in the statutory imperative the parties have "reasonably comparable standards of living". An article previously written on the point and contained in the materials argues comparability should not be limited only to economics but should include lifestyle issues as well. Leisure time is not only important, it is frequently the dream of most parties. Why, in a long term marriage should only one party have the right to enjoy leisure time while the other should not at the same age? What else could comparability mean is the

[2] In Dilger v. Dilger, 242 N.J. Super. 380, 388 (Ch. Div. 1990) Judge Bassler in a somewhat different context recognized the right of the Court to consider the "reasonable expectations" of the parties on the retirement issue.

theme to be pursued. If they have each fulfilled the goals they, themselves, determined were appropriate at commencement of the marriage shouldn't they be treated comparably? The argument is perhaps best made with sociological studies presented to the Court in the form of a Brandeis brief arguing the important societal and health benefits of leisure time, contrasted with the adverse impact of stress on one's health, i.e. such as continuing to be a matrimonial lawyer after the age of 50. It is an argument predicated on age, inter-related with the facts of the marriage and the statutory factors which is never made. While I am uncertain whether it should be implemented as literally as my client suggested, it is nonetheless an argument that can be advanced by the supporting spouse, along with all others, to either justify a fixed termination date for retirement or achieve some other economic benefit in the panoply of issues presented to the Court.

The observation the Supreme Court made concerning the impact of the marriage on Mrs. Khalaf's earning capacity is a significant point. A generalized alimony factor has always been the impact of a marriage on a dependent spouse's earning capacity. The adverse impact increases with the passage of time but as a practical matter, it is even more significant when the dependent spouse is older. My own experience has been there is a significant divergence of opinion between Judges as to their willingness to impute income to a woman who is over 50 years of age and has not worked outside the home for over 25 years during the marriage. The economic reality in the marketplace is that people, as they age, are less marketable. That

is the hurdle the supporting spouse must overcome which is combined with judicial reluctance to compel (in the Court's mind) a dependent spouse who has been out of the workplace for 25 to 30 years to "work at McDonalds". An appropriate legal response representing the supporting spouse is there is a full panoply of laws prohibiting age discrimination and earning capacity is a statutory factor thus it must be considered. If the Legislature didn't want older dependent spouses to have income imputed (the argument goes) it would have said so. That is probably more rhetoric than reality; it is far more difficult for an older person with little experience to find employment.

For purposes of this argument, it is a reasonable legal argument to contend the Legislature, being aware of the language in the Khalaf case, for the first time put age in a statute because it was a policy statement that older dependent spouses should not have significant, if any, income imputed to them. While I cannot represent why age was included in the statute, the absence of any reference to age as a factor, itself, in the earlier cases becomes significant and as a matter of statutory interpretation may even be correct.

Certainly, Justice Pashman's observation in Lepis that it is not one's status as a wife, but the actual economic dependency that determines both duration and the amount of alimony remains appropriate. The concept of imputation is not necessarily, in my view, precluded by age. Nonetheless, imputing income to a woman who is 56 years old and has not worked for twenty-five years as a

consequence of the marriage is far more problematical and predicated on harsher economic realities than the strength of a legal argument.

In representing supporting spouses, particularly professionals in later stages of their careers, I frequently hear the complaint it is far more difficult to work the number of hours and under the stress they did when they were younger. They argue how unfair it is to be held to a standard of working that were it not for divorce would have changed resulting in more leisure time and less stress. Should divorce change long standing expectations? Maybe. The desire to cut back is a concept that should readily be understandable to a jurist who, perhaps, made the decision to go on the bench for that very reason. The importance of the argument may well be based on the number of hours the professional worked, which is frequently documented in an expert report because of its direct relationship to reasonable compensation in the valuation process.

The argument's significance of the argument is particularly important in dealing with someone who is working 60 to 70 hours a week. He does not want to work part time, but only perhaps 45 hours a week. The argument is juxtaposed with testimony this was always a marital plan that the supporting spouse would cut back at a point in time when children were emancipated or when a certain age was reached.

It is important because Courts have the tendency to generally and appropriately in most cases base support on demonstrated capability established by income figures earned during the last

several years. If those income figures were enhanced by working long hours in an arduous job, isn't it reasonable to point out to a Court, particularly where the supported spouse no longer has the responsibilities for child care, i.e. has retired from their job, to factor in some reduction in the number of hours used in determining capability which would result in lower income and a lower alimony award. In contrast, of course, is the contention this is mere sophistry - if the statute speaks to earning capacity and there is a cut back, then any claimed income reduction should be addressed in a Lepis changed circumstance argument. It is uncertain to how a Court will resolve the issue, but emphasizing the advancing age of a litigant working under stressful conditions and long hours, may well create consideration, if not sympathy, from the Court on other issues.

Alternatively, if your first argument does not succeed, then perhaps an Agreement or decision can include language that support was predicated on the supporting spouse working 70 hours a week but that it is not unreasonable for that spouse to cut back and work fewer hours in the future, i.e. equivalent to language that a future retirement at a specific age is made in good faith. It might well be difficult for a Court to reject such a reasoned approach; it represents the mid position between rejecting the argument in its entirety or automatically using a lower number for capability. By having such language if there is a subsequent reduction in income, the entire thrust of the post-judgment litigation may change with elimination of any divorce related contentions that a decrease in

income is divorce related. As counsel for the supporting spouse, you stand before the Court with a contractual recognition that reduced was not only anticipated, done in good faith, but appropriate thus inferentially mandating a support reduction.

IMPACT OF AGE ON THE LIMITED DURATION ALIMONY STATUTE

At the recent seminars on the Limited Duration Alimony Statute, while there was much discussion, if not confusion, as to what the Legislature meant by the statute, there was virtually unanimous agreement on one central point - Judges would focus on the parties' age more than any other factor, perhaps even duration, in determining whether limited duration alimony ("LDA") was appropriate.

The materials contain an earlier article written about limited duration alimony and the Divorce Study Commission Report which I contend provides the most accurate source documents for defining the legislative intent in limited term alimony. Simply stated, alimony is not some entitlement a spouse receives along with a marriage license. Rather, there is a public purpose underpinning alimony bottomed upon the simple proposition that since marriage is the most fundamental institution in our society when this most personal of relationships ends our law, which is nothing more than a reflection of society's morals and values, must require divorcing spouses to treat each other fairly. cf; Miller at 426. What constitutes fairness requires an analysis of how each particular marriage functioned. What did each party contribute and what did each party sacrifice in economic and non-economic terms? Limited duration

awards should not be determined by a quantitative analysis of years but a qualitative analysis of many factors, some of which are contained in the statute with other pertinent considerations outlined in the Divorce Study Commission Report. All, individually or cumulatively, are designed to aid the Court's analysis so the end result is fair and a reflection of what occurred in this marriage - not marriage in the abstract.

Frequently, as a consequence of children or decisions otherwise made in the marriage by the spouse, one party's earning capacity is materially depreciated and another's enhanced, either because of duration or other factors. That would strongly suggest, given the limited purpose of the LDA Statute, that permanent alimony would be appropriate. This view is buttressed by the structure of the statute which mandates the Court to first determine permanent alimony is not appropriate. It was the Divorce Study Commission's belief that LDA was to be applied in limited cases and not to replace permanent alimony. It was a needed option to address marriages where rehabilitative alimony was neither necessary nor appropriate, but after analyzing all factors to require some economic assistance but where a permanent obligation would not be fair.

The length of any obligation is directly related to that person's age. Absent unusual factors, it was the consensus of virtually everyone at the seminars, Judges, lawyers and participants included, that fairness in a short to moderate term marriage with a young supporting spouse would not compel a support obligation for

thirty years when the marriage was only ten. That does not mean there could not be circumstances, even with a young supporting spouse, where permanency was not appropriate, primarily because of the impact of children. In articulating the basis for a limited duration alimony award, however, the impact of age must be highlighted. Ironically, it focuses the analysis on the fairness of an alimony award in the future, i.e. it would be unfair to require the supporting spouse to pay for so many years in the future because of their young age. Yet, isn't that argument similar to the one advanced earlier that in the fairness analysis, an alimony award must not only be tested by it's fairness when made but whether it would be fair in the future.

Whenever a legal principle has validity, it's viability is explained when it is applicable in different, if not contrasting, factual scenarios. Looking forward to the future confirms how age, if appropriate in any area of our law, it is most important in an award of limited duration alimony.

AGE IN THE TRUE ESSENCE OF DISTRIBUTING A CLOSELY HELD BUSINESS

An issue that I have rarely, if ever, heard argued is the inter-relationship between age and the standard of value in an equitable distribution case. If I am correct that the standard of value should not be predicated on something that is not occurring, i.e. a sale (fair market value) as opposed to what is - the ongoing benefit received by the owner (value to the holder) then age (how long that benefit will be enjoyed) is not only pertinent, but perhaps critical. Some discussion of the concept is necessary to

emphasize the point which can be argued in any event.[3] It is important to emphasize the statutory factors contained in N.J.S.A. 2A:34-23.1 are not valuation factors; rather, they are distribution or what I characterize as fairness factors. They must be analyzed in the context of the statutory purpose of equitable distribution which recognizes and reaffirms the marital partnership concept.

The thrust of the analysis should be in light of the statutory purposes of equitable distribution which recognizes and reaffirms the concept of a marital partnership. The seminal Rothman decision (utilizing gender biased language) observed the purpose was to recognize

> "the essential supportive role played by the wife in the home acknowledging that as a homemaker, wife and mother she should clearly be entitled to a share of the family assets accumulated during the marriage. Thus, the division of property upon divorce is responsive to the concept that marriage is a shared enterprise, a joint undertaking that in many ways it is akin to a partnership only if it is clearly understood that far more than economic factors are involved, with the result in distribution be equitable within the true intent and meaning of the statute." See Rothman v. Rothman 65 NJ 219, 228 (1974). (emphasis added)

The Supreme Court in Brandenburg v. Brandenburg 83 NJ 198, 210 (1980) noted that not only had there to be a recognition of each spouse's contributions to acquisition of marital property including the homemaker's contribution, but to effectuate a true equitable

[3]The following portion of this article is largely taken from an earlier article: Louis, Equitable Distribution Value: An Alternative To Fair Market Value (New Jersey Family Lawyer: March, 1996)

distribution there needed to be "an assessment of the spouses contribution in each individual case". Brandenburg at 210. In this assessment and in your own analysis, keep in mind the Supreme Court's observation in Chalmers v. Chalmers 65 N.J. 186, 194 (1974) (in rejecting an argument that fault was relevant) that the property distributed didn't belong to one party or the other but actually to both; what the court was doing was simply determining how to allocate property that already belonged to the party. Chalmers at 194. This is critical in rebutting the oft advanced contention why the non-titled spouse should receive a portion of "my" business. What is being distributed are marital assets; it is their assets regardless of title, acquisition or effort that already were "theirs" before filing that are allocated between spouses. Any distribution must be done in light of the statute's presumption that "each party made a substantial financial or non-financial contribution to the acquisition of income and property" during the marriage. The presumption and the Chalmers allocation language properly emphasize the concept that marital not personal assets are being divided.

The anomaly of using fair market value as the standard in the divorce setting is patent. Implicit in the fair market analysis is the concept an asset is being sold. Yet, in a divorce case, the precise opposite is true. What is fascinating is that the early cases focused not simply on a fair market value standard, but one emanating from the Revenue Ruling 59-60, which is an IRS ruling dealing with valuing closely held corporations for estate and gift

tax purposes. See Lavene v. Lavene, 162 N.J. Super. 187, 192-193 (Ch. Div. 1978) on remand from 148 N.J. Super. 267 (App. Div. 1977). While there are many reasons to equate divorce with death, implementation of the statutory policies underpinning equitable distribution is not one of them. Phrased another way, what statutory equitable distribution purpose is advanced by equating the two and what public policy reflecting marital partnerships is served by treating the asset as being sold when it is not.

Subsequently, other Courts repeated the Lavene approach and Fair Market Value, almost without questioning by Courts, lawyers or commentators became the standard. Yet, is it consistent with the Legislative purpose in equitably distributing assets in a divorce context? Certainly, it is not difficult to point out the distinctions between divorce and death yet that is the precise standard our Courts apply. The most fundamental distinctly is that in divorce the owner continues to own the asset. This is distinctively different from valuing an asset where, by virtue of death, the owner is no longer involved. Should the asset be valued differently if the owner continues? Is that more consistent with the reality involved in a divorce case? Are there advantages in continuing to operate the business that the fair market value method fails to consider? Should economic reality or economic theory govern our practice?

WHAT IS BEING VALUED?

Aside from the question of whether fair market value is the appropriate standard our courts have never addressed an even more

fundamental question. What is being sold? Are we valuing the asset as if it is all being sold or what someone would pay to become a partner with the owner (the divorcing spouse) in a continuing operation? An example utilizing a professional practice illustrates the distinction. Assume a sole practitioner who, quite naturally, argues the practice has no real value" beyond it's fixed assets because the professional is the person clients come to see. If there is a sale and the professional leaves, how does the practice have value ("I am the practice")?

An argument like that questions the adequacy of the fair market value approach but also ignores the reality the true value of the practice is the cash flow generated and which the professional continues to receive after the divorce. Under present law the appraiser would attempt to translate that future income stream into a present fair market value, but that never answers the quandary of the impact on the income stream if the professional, as contemplated in the fair market value methodology, were to leave. The asset is valued based on the cash flow generated by the professional in the model as if he or she is staying.

Yet if what is being valued is changed some arguments criticizing the fair market value approach no longer apply. If the willing buyer doesn't purchase the entire practice, but simply pays to become a partner in the practice with the professional with the enhanced reputation who is remaining the "buyer" and ultimately receives (as does the remaining professional) the benefit of the future income stream. The nexus between the purpose of equitable

distribution is apparent and the theory is that the non-titled spouse, through sacrifices or direct contributions, (economic and not), has materially contributed to the development, maintenance, and enhancement of the business generating the cash. Thus, the model is consistent with the public policy. Valuing what the benefits are of being associated with the professional more accurately values what was acquired by the marital partnership, i.e. the ability to earn money in the future and the degree of risk associated with that effort. Thus, by using this standard (as opposed to an outright sale) the spouse is compensated by accurate market driven numbers - not irrelevant hypotheticals.

A willing buyer would, arguably, pay more to join a professional practice with someone with an enhanced reputation and thus enjoy the likelihood of a consistent income stream in the future with the risk reduced by that reputation. Wouldn't a lawyer pay more to join Gary Skoloff as a partner than to buy his practice if he was retiring to his farm and leaving the practice? However, I have rarely seen practices valued in this fashion. Rather, they assume that the entire practice is being sold which does nothing more than create disrespect for the law by the professional who points out that the value is being determined on a set of facts that does not exist. This disrespect is the by-product of the fair market value doctrine.

This "buy-in" approach presents a more logical nexus between determining value and the purposes of equitable distribution. In the buy-in the non-titled spouse is compensated for the marital

efforts made to place the professional in a position since another professional would pay an ascertainable amount of money to receive the economic benefits of the practice, i.e. the marital asset. It would recognize the sacrifices made by the non-titled spouse or the direct contributions that materially contributed to the development, maintenance and enhancement of the practice. In other words, what is being valued is not what is being sold but what is being maintained and continued - precisely the situation in a divorce . In short, what the professional is compensating the non-titled spouse is for a portion of the value being maintained by the professional or the "value to the holder". This appears to be a more logical approach to valuing an asset in a divorce context and in the distribution context should materially be effected by the age of the business owner.

It is ironic that one of the reasons the Supreme Court declined to give buy-sell agreements conclusive effect because they did not reflect "the realities of the present situation". See Bowen at 48. In Bowen, the Court observed since the shareholder was not selling stock, it would be inappropriate to permit a buy-sell agreement to be conclusive as to value because the shareholder would "continue to experience the benefits of being a 22% share-holder and an employee". Thus, the Supreme Court declined to give a buy-sell agreement conclusive effect on value because there was not going to be a sale (or any of the other triggering events such as death) contemplated by the buy-sell agreement. Yet, the Trial Court in determining value must rely upon the very sale the Bowen Court

pointed out would not occur. Similarly, and equally anomalously in Dugan v. Dugan, 92 N.J. 423, 434 (1983) the Court observed that good will was a distributable asset but noted that despite an individual practitioner's inability to sell a practice, good will still must be considered because "obviously, equitable distribution does not require conveyance or transfer of any particular asset". Dugan at 434. The anomaly of using the Fair Market Value standard, predicated upon a sale, was not raised in either case.

By applying a valuation approach that measures the value of the asset to the person who continues to own and receive the benefits of that ownership, is most consistent with why we equitably distribute assets. Our law presumes that assets have been acquired as a result of the efforts of the marital partnership. As the Supreme Court noted in Dugan, it would be inequitable "to ignore the contribution of the non-attorney spouse to the development of that economic resource" since "after divorce, the law practice will continue to benefit from the good will as it had during the marriage". Dugan at 423. (emphasis added)

If this approach to value more accurately satisfies the statutory purpose and we are truly valuing the economic benefit received by the owner as the business continues to operate, then isn't age a highly relevant factor? Shouldn't there be some rational distinction between the economic benefits a 59 year old owner of the business might receive as contrasted with someone who is 40? Yet, when was the last time you saw a Court reduce the percentage for the non-titled spouse because of the age of a party?

I suggest there be the concept introduced into our law recognizing rational distinctions - a concept I will entitle the "Doctrine of Rational Distinctions". If the underlying basis of any Family Part decision is fairness and rational distinctions can be made between disparate factual circumstances, shouldn't those rational distinctions in facts result in differing result for litigants? It is hard for anyone being objective not to concede the rationale distinction in the benefits between a 60 year old and a 40 year old owner of a business. Yet, the argument does not automatically apply since it depends on the nature of the business. A manufacturing business is more likely than a professional practice to be sold. Since in the event a sale might occur fair market value may be more relevant. Thus, the initial assumption that fair market value is inappropriate may not apply in this situation since the asset is sellable and that the owner will, in fact, be receiving the benefit of a sale i.e. the fair market value.

ORGLER'S IMPACT

The materials include a second article I wrote concerning Orgler v. Orgler, 237 N.J. Super. 342 (App. Div. 1989). It addressed, several years ago, the importance of age. The older a person is, thus closer to retirement, the more reasonable it is for a Court to factually find the business will be sold. If a sale is no longer "speculative", as that term is defined by Orgler, then the tax consequence that would be created by a sale are a more economically justifiable factor. Thus, under Orgler's reasoning these latent tax consequences must be considered in the percentage

allocated to the non-titled spouse. Once again, the Doctrine of Rational Distinction applies - isn't it more reasonable to assume a 60 year old is more likely to sell a business than the 40 year old. Thus, don't you have to treat the two individuals disparately? Thus, whenever you represent the older business owner, it is imperative you argue the more likely the asset will be sold and the more significant the Orgler tax consequence issue is. Orgler cannot be forgotten and is an implementation of the statutory requirement that tax consequences must be considered. See N.J.S.A. 2A:34-23.1(J).

MILLER V. MILLER: THE IMPACT OF AGE

Recently, the Supreme Court in Miller v. Miller, 160 N.J. 408 (1999) addressed imputation questions. The Miller analysis directly implicates age issues. While Miller involved many issues, the trial court's decision was ultimately partially reversed because the Supreme Court found assets obtained by Mr. Miller should have a cash flow imputed to them creating a change of circumstances warranting a review of support. Mr. Miller sought a decrease in his alimony obligation which was granted by the trial court. On appeal, his ex-wife argued the failure to consider what could have been earned from Mr. Miller's extensive investment portfolio undercut his claim of changed circumstances and was reversible error. Her argument was predicated on her contention the Court should adopt for divorce purposes "a different definition of income for purposes of calculating and modifying alimony award than the one used in a taxation context". Miller at 421 She further argued she should not

be prejudiced by how her ex-husband chose to invest his assets which was stocks. Mrs. Miller pointed out the difference between income and growth investments, arguing it was unfair that because her ex-husband chose to invest primarily in growth stocks that she should be prejudiced by that decision since it meant his income stream from investing was far lower than it could otherwise have been. She reasoned income for alimony purposes should encompass "potential" income and the standard for investment income should be no different than the "capability" standard used in unemployment or underemployment. The law must look at, she believed, not what is but what could reasonably be. Miller at 421.

Relying on long standing law that a supporting spouse's assets may be considered in calculating an alimony award, citing Innes v. Innes, 117 N.J. 496, 503 (1990); Bonnano at 274 and Aronson v. Aronson, 245 N.J.Super. 354, 363-364 (App. Div. 1991) and a trial level opinion in Stiffler v. Stiffler, 304 N.J. Super. 96, 102 (Ch. Div. 1997). In Stiffler, Judge Fischer imputed an income stream based upon the value of an inherited residence albeit it was non-income producing. The Court agreed with Mrs. Miller. It found there was "no functional difference between imputing income to a supporting spouse earned from employment versus that earned from investments". Miller at 423. Thus, it wasn't the type of asset that was determinative - but it's size establishing the legal principle that size does matter.

Mr. Miller's portfolio was earning only 1.6% annual interest on his portfolio of growth stocks. The Court rejected arguments by

Mr. Miller it would be "difficult" for Courts to impute income from differing types of investments. The Court was clearly correct. It is far more difficult to select an appropriate capitalization rate than a rate of return on investments. The Court concluded the proper income imputation "under the present circumstances" was a rate of return based on long term corporate bonds. This rate was predicated on Moody's Composite Index on A Rated Corporate Bonds. The Court did not observe that historically stocks had performed better than bonds, but it would not be equitable to impute the average 12% growth rate of stocks because of "the inherent risks" involved in stock market investments.

Anyone who invested in bonds and seen the value decrease as interest rates rose would question the inference about risk and bonds. Miller turns, quite obviously, on the facts of Mr. Miller's circumstances. As the Court said, it's ruling in this case was based on the "present circumstances", therefore, it was appropriate to utilize the corporate bond rate. While the opinion does not specifically say how old Mr. Miller was, the parties were married in 1967 and he filed a Complaint with the Equal Employment Opportunity Commission charging Merrill Lynch with age discrimination when he was terminated in 1995 so it is reasonable to assume Mr. Miller was in his late 50's or early 60's. Would the result be different if Mr. Miller was 40 years old and if the "present circumstances" were different?

Any investment advisor will emphasize there is a direct relationship between the type of investments people should make and

their age. It is relatively easy to prove, if not through the Court's common experience than through a report from a stock broker and investment theory, that risks of stocks are ameliorated over time. If you invest for the long term, which a person can if they are younger, the increased risk in stock investments is justified. In contrast, the closer a person is to retirement, investment theory recommends assets be weighted more toward corporate bonds, preferred stock or stable dividend paying securities which are less volatile.

Miller is apparently being read by Courts and counsel as mandating an imputation predicated on the corporate bond rate. Yet, what may have been appropriate for Mr. Miller to invest in those circumstances is far different than a 40 to 45 year old professional in peak earning years, particularly if there is a history of assuming more risk in personal investments utilizing a rate of return linked to stocks may be more reasonable and appropriate given those "present circumstances". It is important to emphasize this relates not only to inherited assets, non-income producing assets, under Aronson and Stiffler but also assets received in the distributive scheme.

Once again, the Doctrine of Rational Distinction can be argued. Why is it fair to use a ruling predicated on specific facts and acknowledged as such by the Court to all other cases? Isn't there a rational distinction between how a 45 year old invest and a 60 year old invest? If the Court accepts that simple principle, then shouldn't, merely as a consequence of age, a higher imputation figure be utilized.

PENSIONS

If Courts are permitted to examine the fairness of an Agreement by considering the future and if it is a Court's intention, as it frequently is, to equalize retirement benefits, there is an aged actuarial basis that would permit arguments there should be an aged based disproportionate division of retirement assets. If it is the Court's intention to assure each of the parties at retirement are in the same position then a younger spouse needs less money in a retirement account than an older spouse. This can be easily demonstrated either thru testimony of a litigant or, preferably, thru a short letter from an accountant explaining if it is the Court's intention for each litigant to have, for example, $500,000.00 in a retirement account, the litigant who is 40 needs less money than the litigant who is 50 to have the same amount of money at 59 ½. Since money will be invested for a longer period of time, less money is needed to achieve the same amount the other party which would receive. This is an age based discrimination rooted in economics, if not simple mathematics.

The argument would have to be inter-related with other factors bearing on the fairness of the overall distribution but if it is equality the Court is seeking so there will be comparable lifestyles at retirement, there is not only a statutory basis for disproportionate division but it may appeal to a Court's sense of fairness.

LIFE INSURANCE

It is traditional, if not necessary, for support to be

guaranteed by maintenance of a life insurance policy upon the supporting spouses life. Yet, there is a direct relationship between the cost of maintaining many policies and the age of the insured. An agreement that fails to recognize the potential for increased costs without simultaneously providing for a decrease in coverage as the dependent spouse (and children) become older over time has the potential to become fundamentally unfair. Not only do you have a situation where the cost of maintaining a <u>fixed</u> level of life insurance becomes prohibitive, it also is not necessary to guarantee future support. Given the need to make rational distinctions between different facts, is it not logical that the amount of insurance necessary to secure a future alimony obligation is different when the alimony recipient is 40 rather than 50? Accepting that fairly obvious proposition should lead to the drafting of an Agreement (or a judicial determination) that the amount of life insurance coverage should be reduced as the recipient of support ages. This is accomplished by negotiating for automatic step downs memorialized by a schedule attached to the Agreement. I frequently see Agreements where $500,000.00 of life insurance is maintained until the obligation to pay alimony terminates or the last child is emancipated. If the alimony obligation is $50,000.00 per year and the recipient is 40 at the time of the Agreement, how is it logical or fair that the same level of coverage be maintained when the recipient is 60? Not only might the cost become prohibitive as the supporting spouse ages, you create a circumstance where the payee might unjustly be enriched.

Similarly, the age of the children and the amount of insurance necessary to guarantee future child support should also be inter-related. I frequently will offer to maintain a level amount of life insurance, i.e. no reduction as the children become older or the dependent spouse ages but only as part of an overall settlement in exchange for some other concession. It is one thing to structure an agreement in this fashion purposely as part of a negotiating plan; it is another because you have failed to recognize the significance of age.

There are other aged based issues relating to pensions. In your typical divorce case, pensions are equally distributed (assuming there is an in kind division of the asset) as of the filing date of the Complaint with pension contributions made post filing added back to income on the issue of support. Yet, is it not relevant the employed spouse has the opportunity to continue to contribute significant sums, particularly if the supporting spouse is relatively young which would have the effect of placing that person in a significantly advantaged position as retirement. The statute recognizes that the ability to acquire future capital assets and income is a statutory factor bearing on the fairness of a Judge's award. See, N.J.S.A. 2A:34-23(b)(7). The disparity becomes more patent depending on the age of the pension participant. An individual who is 40 may be able to acquire a very, very significant amount of assets post filing and divorce. This ability is arguably a statutory based factor permitting a Court to consider a disproportionate distribution of the pension in existence as of the

filing date of the Complaint.

The response to such a contention is that under the statute, pension assets that are not distributed in the original divorce are eligible for alimony consideration regardless of how the issue is resolved. I suspect these are arguments that are not frequently made and find their basis in either the statute or simple economic facts.

There are also other aged based questions in dealing with pensions in the area of alimony. Under many plans, and certainly with an IRA, a participant is eligible to access the money in a retirement vehicle commencing at age 59 ½. Subject to the statutory prohibition on double-dipping (which would not apply in a post judgment setting) there may well be significance to the difference in timing between what constitutes a good faith retirement and an age where a person can retire in good faith (perhaps 62 to 65) and when this cash flow might be eligible.

Any careful presentation of evidence in a post-judgment setting or a trial should recognize this eventuality, particularly where there is a significant difference in ages between spouses.