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Support Symposium

Chairman's Column

Chairman Addresses Current Issues Before the Courts

by Frank A. Louis



In past columns I've primarily written about the Section and the projects we've undertaken. Most past Chairs have utilized the column in a similar manner, however, I'd like to depart from that practice by making certain observations about the substantive law and, in particular, some

issues I believe to be interesting and provocative. By raising them, I hope to promote discussion and even perhaps judicial comment. My purpose in raising these issues is not necessarily to urge adoption of any particular point of view but to provoke discussion though, in candor, I do have a specific point of view on most of the issues.

What Impact Should QDROs Have On the Kikkert Decision?

In a recent attempt to settle an ESP case, I recommended the parties distribute the husband's pension by utilizing a Qualified Domestic Relations Order (QDRO). The husband's attorney, objecting to the proposal, pointed out the clear language in *Kikkert v. Kikkert*, 177 N.J. Super. 471 (1981); *aff'd*, 88 N.J. 4 (1981) recommending that an interest in a pension be satisfied from other assets to reduce "continued strife and hostility." With a QDRO, however, is there really any risk of continuing strife and hostility, and would it not be more equitable and consistent with the goals of the marital partnership to permit both spouses to share, in whatever percentage the court ultimately determines, in deferred compensation, which was

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The New Jersey Guidelines

Editor's Note: What follows is an edited version of a program sponsored by the Essex County Bar Association Family Law Committee in cooperation with the American Bar Association Family Law Section, the New Jersey State Bar Association Family Law Section, and the National Council of Juvenile and Family Court Judges.

Participants included George Hochberg, Chairman of the Essex County Bar Association Family Law Committee; Beverly Groner, Chairperson of the ABA Family Law Section; Alan Grosman, Chairperson-Elect of the NJSBA Family Law Section and Executive Editor of the *New Jersey Family Lawyer*; N.J. Superior Court Judges B. Thomas Leahy and Stephen Shaeffer; Former NJSBA Family Law Section Chair Thomas Zampino; Supervising Hearing Officer Lawrence Rauer; Ira Lurvey, Chairperson of the Family Law Section of the California Bar Association; Michael Pallarino, Esquire; and Diane Dodson, Director of the Child Support Project of the ABA National Resource Center for Child Advocacy and Protection.

We gratefully acknowledge that a transcript of the seminar was prepared for the Essex County Bar Association Family Law Committee. The transcript was edited by New Jersey Family Lawyer Editor-in-Chief, Lee M. Hymerling. Given the importance and length of this important transcript, no editorial will appear in this issue.

George Hochberg: I am Chairperson of the Family Law Committee of the Essex County Bar Association.

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Annual Dinner

April 7, 1987...

Look inside for
the reservation form.

Chairman Addresses Current Issues Before the Courts

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relied upon by the parties for their future financial security? Ultimately, this particular case settled but the issue remains and hopefully will be addressed by a court.

Should Rehabilitative Alimony Terminate Upon Remarriage?

I recently raised a question during negotiations over an alimony provision that was classically rehabilitative in that it was designed to afford the wife the opportunity to receive retraining and financial support during the period of time she was becoming economically self-sufficient or, in *Lepis* terminology, it was designed to eliminate any economic dependency upon her spouse. Logically, it seemed that simple fairness required that the economically dependent spouse continue to receive this assistance even if during the three-year support period she cohabitated or remarried. Needless to say, the prospect of paying alimony after a remarriage was not warmly received by the husband and the matter remains unresolved. There are strong legal arguments on both sides and the issue has yet to be specifically addressed in New Jersey. Certain out-of-state courts, however, have concluded that the purpose of rehabilitative alimony continues despite remarriage and, therefore, it should continue. There is a bill presently pending in the Legislature providing that rehabilitative alimony does not terminate upon remarriage. Since it is an issue that comes up virtually on a day-to-day basis, I would hope it would be addressed either by a court or the Legislature in the near future.

How Should a Court Consider Tax Consequences In Equitable Distribution?

The Supreme Court, in *Dugan v. Dugan*, 92 N.J. Super. 423, 441 (1983), in a one-line comment, noted that: "Moreover, potential federal tax consequences should be considered in determining equitable distribution." That logical and simple statement has created difficult trial problems and materially interfered with settlements and is an appropriate area for judicial clarification. No reported decision gives any direction to courts, or counsel, as to how the principle is to be applied. Should courts only consider tax consequences when a reasonable likelihood exists they will be incurred within a foreseeable period of time, or should they be considered even if the property, based on the evidence, would not be liquidated for 20 years? Do you deduct a potential tax on a gain where the spouse, through legitimate yet sophisticated tax planning, might significantly reduce or eliminate the potential tax consequences? There are a number of ways for this to occur including, but not limited to, property exchanges, refinancings to obtain equity, sales subject to condemnation proceedings, installment sales, and the timing of a sale in a tax year when other losses (arguably, assets themselves) might be available. Guidance is required not only in the complex cases, but even in the simple case where a pension is valued at \$20,000.00. Is that the amount subject to equitable distribution, or simply

the gross number from which projected tax consequences should be deducted? Once again, it is an appropriate area for judicial comment.

How Should a Court Consider Tax Consequences In Equitable Distribution?

What are the significant public policy considerations underpinning a rule of law that prohibits judicial modification of an executory equitable distribution provision where changes of circumstances render the agreement unfair and inequitable? Our courts have continuing supervisory control over agreements and will decline to enforce a spousal support agreement where it is no longer fair and equitable. Why is a distinction made as to an executory equitable distribution provision which conceivably may result in incarceration for failure to comply with an agreement (assuming he has the ability) but which has become unfair because of changed circumstances?

Moreover, how does one reconcile the general comment that equitable distribution is not modifiable with the language in *Smith v. Smith*, 72 N.J. 350 (1977), that where changes in one party's situation may be so "great" they may be permitted to apply to the court for "appropriate equitable consideration of the special circumstances?" Is that language limited solely to support and, if so, why? Lastly, did not the Appellate Division in *Schaeffer v. Schaeffer*, 184 N.J. Super. 423 (App. Div. 1982) modify an equitable distribution provision relating to the sale of a house because of changes in circumstances that the court perceived to be in the children's best interest? I am certain that I am in the minority, perhaps even alone, in believing that courts, under certain circumstances, have the right to modify executory equitable distribution provisions. Yet, if nothing else, the issue is interesting.

May a Court, After the *Weber* Decision, Award Alimony For a Limited Period of Time Where It Is Not Rehabilitative In Nature?

It is my experience that a significant number of cases, particularly those involving short- to medium-year marriages, are settled by the parties with alimony being paid for a limited number of years. These agreements may involve supported spouses who are already rehabilitated and have no particularized need for training. They reflect the view that in short- to medium-length marriages permanent alimony is inappropriate. The Appellate Division in *Weber v. Weber*, 211 N.J. Super 533, reversed the trial court's decision fixing a termination date for alimony, observing that alimony "should be limited in duration *only* if it is rehabilitative in nature or if there are other circumstances indicating that alimony should terminate at a fixed time in the future," relying on footnote #9 in *Lepis* and the *Arnold* and *Turner* decisions. Does that language express a policy that our courts only have statutory authority to award either classic rehabilitative alimony or permanent alimony, and there is no ability to award alimony for a limited period of time, i.e. a fixed term of years? It is an issue directly affecting our day-to-day practice and should be the subject of continuing discussion, review and, hopefully, judicial comment. □

and insurance. Pending bills are directed at marriage and family laws, credit, and housing. The Commission is now focusing on criminal justice and education. Obviously, gender bias in the statutes has a great impact on divorced people and their families.

While the legal community throughout the nation watches the progress made in New Jersey, the general public is shocked by a book on women and divorce that was published last year. Lenore J. Weitzman's book, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America*, has been critically acclaimed and widely reviewed, discussed, excerpted, and condensed in a variety of publications.

For ten years, Dr. Weitzman, a sociologist at Harvard University, researched the impact of the laws that regulate marriage and divorce. In *The Divorce Revolution*, she shows how unfair and unequal divorce laws and practices lead to the systematic impoverishment of many divorced women and their children. Laws that were intended to eliminate the acrimony of divorce, to treat women and men equally in divorce settlements, have not resulted in equality. She says:

Divorce has radically different economic consequences for men and women. While most divorced men find that their standard of living improves after divorce, most divorced women and the minor children in their households find that their standard of living plummets . . . when income is compared to needs, divorced men experience an average 42 percent rise in their standard of living in the first year after the divorce, while divorced women (and their children) experience a 73 percent decline.

In the 1986 Task Force report, Robert D. Lipscher, Administrative Director of the Courts, stated that the Administrative Office of the Courts, at the request of the Task Force, is studying matrimonial judgments to establish the extent of gender bias and determine appropriate remedial action.

Asking judges and lawyers to become sensitive to gender bias is asking a lot. To alter behavior and attitudes demands time and energy and an open mind. It requires self-examination as well as examination of common myths and stereotypes. It is contrary to common practices and, therefore, requires courage. Nevertheless, it is the courage that judges and lawyers are expected to have.

New Jersey lawyers have an opportunity to confirm their commitment to legal ethics by confronting the age-old issue of discrimination based on sex. They have an opportunity to do what is right. □

An Example of the Family Law Section's Excellence—Focus on the Family Committee

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response to the Focus on the Family Committee ("Focus" or the "Committee") should put such claims to rest. The State Bar's authorization for the Family Law Section to proceed with Focus, may, in years to come, be viewed as one of the more significant actions taken by the State Bar and, certainly, by the Section.

"Focus . . . will be a 'think tank' to harness the energy of lawyers and the independent experts on all issues . . . affecting Family Law."

Focus on the Family is an interdisciplinary committee consisting of an executive committee of family lawyers and 72 New Jersey psychiatrists, psychologists and social workers, all of whom have *volunteered* their time. The list is impressive, to say the least, and includes virtually every recognized expert across the State in their respective fields. It also includes, as volunteers, Dr. Albert Solnit of Yale University, one of the authors of "Beyond the Best Interests of the Child," a book that had direct impact on custody litigation in the State, and Dr. Alyssa Benedek of the University of Michigan. Drs. Solnit and Benedek are nationally renowned family care experts, and their presence on a Section committee reflects the degree to which we have advanced as an entity and the extraordinary prospects for Focus.

Focus essentially will be a "think tank" to harness the energy of lawyers and the independent experts on all issues directly, or indirectly, affecting Family Law. It will recommend, create and, if necessary, implement programs to enhance services already provided by the Courts, and review pending legislation enabling the State Bar to respond with a vast array of expertise to the ever-increasing bills introduced in the Family Law area. The Committee will also serve as a resource, available to local municipalities, with such problems as teenage suicide, and substance and sexual abuse in school systems. Most importantly, the Committee will be run under the auspices of the Section and, ultimately, the State Bar Association.

The Committee has already divided into seven subcommittees:

1. Prevention of Drug and Alcohol Abuse
2. Prevention of Juvenile Delinquency
3. Prevention of Physical Abuse of Children
4. Custody Litigation
5. Step-Parent/Child Problems
6. Counselling and Supporting Children in Crisis
7. Prevention of Sexual Abuse of Children

Focus will require neither funding nor authorization from the State Bar to solicit funds as it appears the programs will not require funds or can be paid



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