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Chairman's Column

Early Settlement Panels: A Program Worthy of Pride

by Frank A. Louis

It may surprise some people to hear that I believe matrimonial lawyers are too modest. Yet, we have been too reticent in talking about our contributions to the Family Court. Perhaps the best evidence of our efforts is the success of the Early Settlement Program (ESP). What is surprising about the Program is not its success, but the fact that it is the only state wide program originated and administered by the Bar where lawyers, without complaint or compensation, regularly volunteer their time to resolve cases. Happily, in recent months our contributions have been noticed. The Chief Justice personally signed hundreds of certificates recognizing panelists' contributions. He also observed, in the May 22 issue of the *Law Journal*, that 67 percent of cases submitted to Early Settlement resulted in settlements. In actuality, the other cases were materially advanced towards settlement, and the program, by any measure, is the single most cost effective alternative dispute program in existence.

The challenge we face is not to maintain the program, but to improve and expand it. The Supreme Court, recognizing this, amended R. 5:5-5 to provide for panels to hear post-judgment cases. The Court presently has before it an additional amendment to R. 5:5-5 recommended by the Family Part Practice Committee mandating establishment of Early Settlement Programs, in conjunction with the county bar associations, *in all counties.* This new expansive Rule was formulated initially through the joint efforts of the Section and the American Academy of Matrimonial Lawyers. We urge the Court to adopt it as recommended.

Virtually every Supreme Court committee involved in Family Law has favorably commented upon ESP. As far back as 1979, the Pashman

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The Nature of The Judicial Process in Family Law: The Case of O'Brien v. O'Brien

by Hon. Richard D. Simons

O'Brien v. O'Brien, 66 N.Y.2d, 498 N.Y.S.2d 743 (1985), was a particularly interesting appeal to decide. It was interesting first because it provided the Court with an opportunity to construe a new statute in an important area of the law, and it resulted in a substantial change in the rules governing the relationship of spouses and the property acquired from their joint efforts while married. My wife and I were married when I was in law school and she worked during that time to help out with our expenses at home and at school. I have often told her that because of her contribution she had an artisan's lien on my earnings—if she didn't lose possession of the *res*. Now, after *O'Brien* her position is much improved. Now she has an inchoate incorporeal hereditament. It is undetermined in amount and there is no presumption that she is entitled to a moiety—but at least she can claim ownership of an equitable share.

But the *O'Brien* case was and is interesting to me for another reason—it is interesting because it illustrates better than most cases how dramatic changes in our law come about. In saying that, I speak of the success of the process—not the results in this particular case.

The former rules regulating the disposition of the property acquired by a husband and wife during marriage were devised to fit the social patterns of another day. When applied to today's life styles—regrettably in some cases by judges burdened with dated pre-

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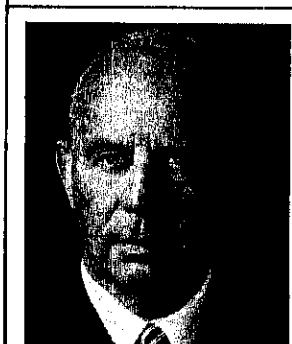
Richard D. Simons



The Honorable Richard D. Simons is a Judge of the New York Court of Appeals. He wrote the landmark O'Brien *decision in which the highest court of the State of New York held that the medical degree of Dr. O'Brien was marital property, subject to equitable distribution.*

prepared before *O'Brien v O'Brien*—I will have to rethink the problem." And so shall we all. No decision reflects perfect wisdom or ultimate truth, even in its limited application to the facts of the case under advisement—to say nothing of its application generally. The discovery of the soundness of the decision must be left to the disciplined analysis of other judges and the criticisms of scholars and practitioners as we all rethink it.

Sooner or later the Court will take another look at the rule stated in *O'Brien*, and then—either satisfied or dissatisfied with it—we will refine or reinterpret it. Unfortunately, we do not select the materials with which we work, and we cannot recall the case and reexamine it when we are ready to do so. It is you lawyers who set our agenda by selecting the cases we hear. Your role is of first importance, not only because you move the Court to action by the matters you bring before us, but because it is you who develop a record that is adequate to raise the issue and cast light on all its aspects. It is you who by your argument—by your advocacy, to put a higher calling on it—persuade the Court to expand or contract the rule or perhaps overrule it.

An experienced lawyer told me years ago that wise and insightful judges are produced largely by listening to wise and insightful lawyers argue appeals. I have long since recognized that there was a good deal of truth in his statement. The function of advocacy is critical to development of the law and you act as a good deal more than representatives and protectors of your clients when you appear before the Court. You are also custodians of the ideals and hopes of our citizens and the faith they have in an ordered and just society. Your commitment to that obligation is your identification.

And that is why the *O'Brien* case fascinated me, because in microcosm it demonstrated all the dynamic forces of our system of law at work.

In my 23 years of writing judicial opinions, I have never written a decision which caused as much comment as *O'Brien*. It excited some of you, it disappointed others, and it positively enraged a few. At the time we decided it, *O'Brien* represented to the judges of the Court the sensible application of a statute passed in response to a perceived social need. As with all our decisions, only time will tell whether it is written in sand or concrete. I leave it to you, with all your wit and ingenuity, to prove us right or wrong and to join the courts in continuing to develop this law of ours in the way it has always been developed, through the application of reason to the ever changing facts and circumstances of human experience. □

Early Settlement Panels: A Program Worthy of Pride

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Committee observed that ESP was "a meaningful settlement tool." Two years later, Pashman II found that 11 of 21 counties had functioning programs and these had "made valuable contributions to the administration of matrimonial justice" and recommended adoption of an ESP rule which ultimately was promulgated and embodied in R. 5:5-5.

Our own research reveals that 19 of 21 counties have functioning programs with varying formats county-to-county. There is, across the State, a general push for uniformity of practice; however, that would be a mistake in Early Settlement Programs. The programs in Ocean and Monmouth Counties have totally different procedures but yet are equally successful. This is an area where local bar decisions must prevail, and while the concept of uniformity may have merit in other areas, it would be unfortunate if it were imposed in ESP.

ESP is a Bar program. It works best when administered by the Bar utilizing, where necessary, the resources of the judicial system. Based on the Ocean County experience, this system functioned with a success rate of over 90 percent when lawyers picked cases, panelists and made determinations with respect to adjournments. This may, to some, seem to be an overly aggressive view of Bar involvement in the judicial process. I prefer to view it as the Bar fulfilling its responsibility as a partner in the justice system. This Section will do whatever we can to assist local Family Law committees in achieving this goal or, alternatively, improving their own programs. Our existing ESP committee is available at any time to render any needed assistance.

For those who feel the Bar is being too aggressive, I would point out the unanimous observations of the Family Part Practice Committee. They are significant and extend far beyond the simple settlement of a case. Each local committee should be familiar with these and rely upon them in any ongoing discussions with your local presiding judge. As adopted they are set forth hereafter:

1. ESP has the significant and important result of improving the public's perception of the Family Court system and, in particular, its fairness and sensitivity. Publicity enhancing the program's image and perception of delivering prompt and quality justice should be encouraged.

2. An effective ESP requires close cooperation between the Bench and the Bar, and the benefits of this partnership, experience has demonstrated, extend far beyond ESP. Counties with very successful ESP's generally have excellent Bench/Bar relations enabling other problems to be resolved through consultation. Establishment of such a non-confrontational atmosphere inevitably results in fewer contested cases, higher rates of settlement, and a generally more efficient system.

3. By virtue of the fact that lawyers, in most counties, administer the system, and in all counties supply the people power enabling the system to function, the program is extremely cost effective. It is perhaps the most efficient and effective complementary dispute resolution system in existence, and adoption of a mandatory court rule provides due recognition to its success and insures its continuing improvement. That the primary supporters of the rule are lawyers, is, perhaps, the most significant aspect of the proposal.

4. Another effect of the ESP is that it enhances the image of lawyers who are now, perhaps for the first time, perceived by the public as sensitive, caring individuals concerned with litigants.

5. An effective ESP has the added benefit providing a procedure to educate younger lawyers as to how to prepare, and ultimately settle, a matrimonial case. The importance of this cannot be underestimated as there is no better educational experience than the practical resolution of a matter. Only in ESP will a young lawyer have direct access to an experienced and able matrimonial practitioner who will reveal not only what the law is, but the practical elements of preparing and settling the case. The long-term effect of such an educational process will increase the caliber of matrimonial lawyers resulting in a higher rate of settlement, better client representation, and improved public perception of lawyers in general.

6. Experience demonstrates that an attitude develops in counties where Effective Settlement Programs exist. The attitude is, in essence, one of teamwork among lawyers designed to settle cases as opposed to litigating them, whether in the context of ESP or not. This attitude is reflected in counties where, as adjuncts to formal ESP's, lawyers, on an ad hoc basis, confer with other lawyers on a trial day in an informal attempt to settle someone else's case. Some judges, recognizing this salutary trend, have requested lawyers to attempt to assist in settling cases while they are waiting for their own conferences. This creates an atmosphere where settlement is promoted and trial discouraged with the public, and the system being the ultimate beneficiaries.

7. As an adjunct to alleviating court congestion, ESP has a tendency to eliminate from the system those cases involving simple factual and legal disputes enabling the court to devote more attention to those difficult matters resulting in an ability to more effectively manage complex cases. As such, it is an effective form of case management enabling the court to devote time, on a pre-trial basis, to those complex cases which, experience demonstrates, results in their more frequent resolution through settlement than through trial.

You should justifiably be proud of such a program. We thank the Chief Justice for his recent public recognition of ESP and are confident that it reflects an ongoing commitment by the Court to the program. For those of you who have been involved in the program, you deserve not only our appreciation, but more recognition by the public. We shall attempt to achieve that to a greater degree this year. □

It's Time To Expand *Beck*

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In order for the child to grow into a well-adjusted adult, capable of entering into and maintaining satisfying relationships with his or her own family, emotional and psychological factors must be fostered—a sense of security, trust and self worth. These attributes are the direct result of the relationship between the child and both parents. Contemporaneously, sex roles have been changing. Women have developed careers as well as family goals. The economy has also changed—the two-income household is now quickly becoming the norm.

The result is a trend towards a typical household of two working adults, with child-raising functions allocated between them, resulting in meaningful relationships between each parent and the children. When the parents divorce, both wish to continue raising their children, thereby preserving the relationship. The children, in turn, have developed a special relationship with each parent, and may suffer if their contact with one parent is unduly restricted following a divorce.

The Committee urges that judges be sensitive to expanded roles of both the mother and the father in the family. The proper approach should allow each parent a continuing meaningful role in the life of the child after the divorce. The Committee discussed certain recommendations which would implement this new approach. One recommendation was that as a first step, the terms "custody" and "visitation" should be replaced by terms reflecting shared time and shared participation in decision making. The goal is to ensure that each parent has sufficient time with the child to develop and preserve a relationship. Some judges on the Committee, embracing this approach, have fashioned custody awards in terms of the shared time concept. When announcing the award in open court, these judges have explained to the parties that they should work together in spite of their obvious differences, to make joint decisions concerning the welfare of the child.

It was against this backdrop that *Beck* was decided. But did *Beck* go far enough? We think not.

In *Beck*, the Court catalogued the factors to be considered by a judge contemplating an award of joint custody. Those factors focused upon the practicability of the joint custody arrangement, whether the child would benefit from such an arrangement, whether the parents had a potential for cooperation, financial status, as well as the preference of the child. The Court specifically noted that the requisite criteria for joint custody would only "coalesce infrequently." What was implicit was that joint custody, although then recognized, would be the exception rather than the rule.

We agree that there should be no hard and fast rule governing custody determinations. Custody determinations in all instances must be founded upon the best interest of the child.

There is "nothing new under the sun." Solomonic justice is as relevant today as it was eons ago. But Solomon did not recognize the concept of custody and certainly would not have known what joint custody meant or what it was all about.

What is joint custody and why is it so important? Why need that label be so reluctantly given? What is so important about that label? T.S. Eliot once focused upon the importance of labels and invented a word, indicating that the word assumed a life all of its own. That is really what has happened with the labels of "custody" and its derivative "joint custody."

Knowledgeable practitioners know that in settled matters many different labels are frequently used.