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Chairman's Column

Judges Have Rights, Too

by Frank A. Louis

I have previously written about the effective partnership our Section has forged with the Supreme Court. It represents the type of relationship all Sections and the State Bar Association itself should develop with the Court. We should be justifiably proud that it is the Family Law Section setting the way. Yet, because the relationship is based on mutual respect we have the right, if not the obligation, to speak out when we disagree. This is one of those times.

As a whole, there is no group more deserving of our support than Family Part judges. They are overworked and generally underappreciated by the public. Dealing with emotionally charged issues on a daily basis, they operate under constant pressure yet are always required to do so calmly and dispassionately. As they have supported us in the past, it is now time for us to support them. On certain issues it is inappropriate for them to speak out publicly, yet if we truly are partners with the Court we should be able to speak out about the areas where we disagree, particularly when the issue involves support of the trial bench. Such an instance is the existing procedure involving filing of complaints against judges with the Advisory Committee on Judicial Conduct (ACJC).

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Section Chair Frank A. Louis addresses the Annual Dinner audience.

Gary N. Skoloff received the Saul Tischler Award at the Section's Annual Dinner on April 7, 1987.

Equitable Distribution, The Elective Share and Death: The Black Hole

by John E. Finnerty

Death before adjudicated divorce cuts off rights to equitable distribution in a pending divorce action; separation under circumstances giving rise to a cause of action for divorce results in forfeiture of the elective share right. In effect, if more of the property in a marital estate is in the name of one spouse, and that spouse dies during the pendency of a divorce action—having earlier disinherited the other spouse—the surviving spouse would be wiped out. Lost would be all equitable distribution rights to the property owned solely by the decedent, and as well the right of election against the decedent's Will.

Our current statutory and judge-made law creates this black hole of injustice that can sweep within it unsuspecting litigants and attorneys. It is an uncharted spectre for both litigant and lawyer and must be addressed now by the Legislature and the Bar.

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Recent Cases

by Myra T. Peterson

***CHILD SUPPORT*—Child Not Emancipated Simply Because She Does Not Live with Parent; Child Support Payments to be Made to Child**

[*Logio v. Logio*, A-2757-85T7]

The oral settlement agreement incorporated into the April 1985 Judgment of Divorce provided that the defendant-husband would pay the plaintiff $75 per week for child support for their unemancipated daughter and be responsible for the daughter's automobile, insurance, medical expenses and educational expenses until she graduates from college or for a period of two years.

In December 1985, the defendant-father filed a motion seeking to declare the daughter emancipated as of October 1, 1985, asserting that the daughter no longer lived with the plaintiff and was working full time as a waitress. The plaintiff countered by stating that the daughter was a full-time student, part-time worker and not emancipated.

The trial court agreed. It ruled that the daughter's separate living arrangement did not mandate her emancipation, that the two years had not elapsed, and ordered that the defendant pay the child support due directly to the daughter. The Appellate Division affirmed, based on the reasons set forth in the opinion below.

Logio v. Logio, A-2757-85T7, (App. Div., Decided November 12, 1986) (O'Brien and Skillman, J.J.A.D.) (Not yet approved for publication).

***CHILD SUPPORT*—Institution of Child Support Guidelines Are Not Trigger for Increased Support**

[*Clark v. Clark*, FM-04-24839-71]

At the time of the parties' divorce in 1973, the defendant was ordered to pay $45 per week for the support of three children. His gross income was $13,000.

In 1986, by which time the defendant remarried and had two more children, the Camden County Board of Social Services applied to the court on behalf of the plaintiff's three children for modification of child support based upon the institution of the Child Support Guidelines and the defendant's then income of $26,000 gross. (During the 13-year period, inflation in the area increased 140 percent so essentially the defendant's income did not keep up with the inflation.)

The court ruled that the institution of child support guidelines was not in itself a reason for support to be modified; first there must be a showing of changed circumstances pursuant to *Lepis v. Lepis*, 83 N.J. 139 (1980). Here, given inflation and the maturation of the children, there were changed circumstances but absent such, modification would not occur.

[*Comment: If each time new case law or new guidelines appeared modification motions were entertained solely on the change in the law or guidelines, our courts would be in chaos. Importantly, when considering the proper support amount under the guidelines, the court considered the fact that the defendant now had five rather than three children, which is in keeping with the Pashman II report in considering remarriage and the obligations attendant thereon in connection with a modification motion.*]

Clark v. Clark, FM-04-24839-71, (Sup. Ct., Chan. Div., Family Part, Decided October 27, 1986) (Segal, J.S.C.). □

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Judges Have Rights, Too

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The Advisory Committee on Judicial Conduct was created by R. 2:15-1, which was adopted July 23, 1974, and established a detailed procedure outlining how the Committee (nine members consisting of two retired Justices, or Judges, and not less than three members of the Bar) is to perform its duties. This committee uniquely impacts upon family lawyers since, because of the emotional nature of Family Part cases, a significant number of complaints filed with ACJC originate in our courts. It is, therefore, an appropriate topic for me to comment upon, yet the following represents my own personal views and *not* the position of either the Family Law Section or the New Jersey State Bar Association. There is no question of the utility and necessity of providing a mechanism to review inappropriate judicial conduct, yet the present procedures have created a climate that is unhealthy and, further, have the clear potential to undermine judicial morale. Therefore, it is an issue I feel compelled to address.

Under the rules, a person alleged to be aggrieved files a written statement, criticism or complaint (see R. 2:15-18(a)) with ACJC. Yet, when such a statement, criticism or complaint is filed, the judge involved is *not* notified. Apparently, the determination not to notify the judge is bottomed on two public policy considerations. First, there is the belief that the filing of the complaint might be utilized by a disgruntled litigant to compel a judge to consider recusation and, secondly, that it would be unduly upsetting if every complaint were made known to the trial judge. Neither of these justifies the fundamentally unfair deprivation of notice. Concepts of simple fairness should require notice to a trial judge of a complaint filed under R. 2:15-18(a).

Once the statement, criticism or complaint is filed with the Advisory Commission, the Committee is obligated, unless the complaint is obviously "unfound-

ed or frivolous," to "make a preliminary investigation to determine what, if any, action should be taken." (See R. 2:5-1(a).) If the preliminary investigation does not disclose "sufficient cause to warrant further proceedings," the complainant is notified, and unless the judge has personal knowledge of the complaint, no notice is provided. (See R. 2:15-8(c).) If after the preliminary investigation the Committee believes "sufficient cause" exists, the ACJC is directed, depending upon the circumstances, to either require the complainant to file a verified complaint or notify the judge of the nature of the charge. Thus, the Committee has the right to direct the complainant to file a complaint, upon which the ACJC believes a prima facie case exists, without first permitting the judge to be advised of the investigation or, significantly, to present facts in defense of the allegation before any formal filing. (See R. 2:15-10(a)(b).)

There are no time parameters within which the Committee is to complete its preliminary investigation, and it is not unrealistic to expect it to take months, particularly if transcripts must be ordered. There is something inappropriate about a Superior Court judge being the subject of an investigation and not having the opportunity to present any facts in defense, or even to receive notice of the complaint, for such a prolonged period of time. Thus, if after a number of months the judge is finally advised that there has been criticism, is it realistic, or even fair, to expect that judge to then reconstruct what may have happened to one of 50 cases on a motion day many months ago? Any person involved in any ethics or other investigatory matter knows the difficulty of attempting to substantiate a defense months after an alleged incident. The delay in notice is more than unfair, it may well be prejudicial.

Moreover, the present procedure makes no distinction in the Advisory Commission between the prosecutorial and adjudicatory functions. Thus, you have the same body investigating an incident and then adjudicating the existence of probable cause. Even lawyers have greater rights as recognized by the Supreme Court in *In Re Logan*, 71 N.J. 583, 586 (1976) where the Court observed that:

> We have independently arrived at the conclusion that the *investigative and prosecutorial functions of a committee should be separated from that of formulating disciplinary recommendations* to the Court and that policy will be formally implemented in a revision of the Disciplinary Rules now in progress. (Emphasis added.)

Other questions are equally disturbing. Assume that one particular judge who has been in the Family Court for sometime is the subject of a number of complaints all having been investigated with the Committee concluding, for whatever reasons, that insufficient evidence exists to proceed to formal hearing.

Subsequently, a complaint is filed. Are those prior matters, unknown to the judge, considered, in any respect, in the determination that the newest complaint proceed to hearing? Or, as common experience suggests, is the view that where there is smoke, there is fire? Perhaps if the judge had been provided with the opportunity to supply investigators with the other side of the story, then even the smoke might disappear. Justice is always best served by an airing of both sides of a dispute—not just one.

R. 2:15-7 provides that there shall be no award of costs unless ordered by the Supreme Court for "good cause." It is not clear if the term "costs" includes counsel fees, but even if it does, it seems unfair that a judge should have to bear any defense expense in an ACJC proceeeding that was successfully defended. While it might be inappropriate for the Attorney General to represent the judge (R. 2:15-15 requires the Attorney General to prosecute proceedings in the Supreme Court), perhaps consideration could be given to either of the following procedures.

If a complaint filed against a police officer arising out of the performance of that person's duties is resolved in the officer's favor, the municipality must reimburse the officer's defense costs. (See N.J.S.A. 40A:14-155.) Adoption of a similar provision would send the salutary message that the system is supportive of trial judges who successfully defend complaints, which, although "not unfounded," are ultimately determined to be without basis in either fact or law. Moreover, such a procedure would minimize the difficult situation of judges retaining lawyers, with or without normal fees being charged, which in actuality, is frought with either actual or appearances of conflicts.

Secondly, insurance exists that would provide a defense for trial judges sued under Section 1983 and/or in the context of an ACJC complaint. It seems unfair to require a trial judge to personally purchase such insurance since from a policy standpoint it should be a cost of the justice system. Either of these alternatives represents the type of support trial judges should receive, and I hope the Court would give consideration to some of these suggestions.

As this is my last column, I wanted to end by thanking those judges, lawyers, and friends who have been so supportive this year. It has been an enjoyable, though challenging, endeavor, and I am confident that the progress the Section has made this year, on all fronts, will be advanced in the future. My best wishes to Alan, Myra, Jim, and Richard who can be assured that, if needed, I will do what I can to help. More importantly, I am certain that all of you will do the same. □

DTE Updates Book on Retirements Equity Act

An article entitled "Retirement Equity Act of 1984 (Domestic Relations Aspects)" appeared on pages 129-135 of the *New Jersey Family Lawyer* in the March 1986 issue. This article was based upon a publication entitled *Retirements Equity Act: Divorce and Pensions*, published by DTE (Divorce Taxation Education, Inc.). DTE has updated its book to include REA changes made by the Tax Reform Act of 1986. The revised book may be obtained by contacting DTE, Inc., 1710 Rhode Island Avenue, N.W., Suite 600, Washington, D.C. 20036. □