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Chairman's Column

Oral Argument: The Rule Must Be Enforced

by Frank A. Louis

In recent years there has been a virtual revolution in Family Law practice with lawyers being intimately involved in formulating and implementing these changes. Ongoing revisions of Court Rules have resulted in a more responsive system significantly improving the quality of justice in the Family Court. Many of the evils observed in the Pashman I Committee's report (July, 1979) have been eliminated. The thrust of the various Supreme Court committees has focused upon what Judge Pressler in *Fusco v. Fusco*, 186 N.J. Super. 321, 329 (App. Div. 1982) observed was the real business of the courts—"dispensing substantial justice on the merits." The continuing lawyer involvement in the newly appointed Family Part Practice Committee demonstrates the salutary commitment of the Supreme Court in involving lawyers in the process.

Yet in certain areas it is apparent that rule changes alone are insufficient. One of the problems addressed in Pashman I, and again in the Family Part Practice Committee, is the issue of oral argument. Enactment of R. 5:5-4 seemingly places this issue behind us enabling our attention to be directed to other areas. Yet, for some reason, despite the clear and compelling language of the Rule, in numerous counties the practice is, regardless of the type of motion, to refuse oral argument. This practice unfortunately extends not only to non-routine discovery motions, but to complex pendente lite and other motions critical not only in a case's resolution, but to clients' perceptions of whether "substantial justice" is actually being dispensed. The Rule, on its face, is quite clear:

> Motions in family actions shall be gov-

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Premarital Assets Revisited: The Asset Acquired "In Comtemplation Of Marriage"

by William J. Thompson,

The starting point for any discussion of equitable distribution must focus upon the provisions of N.J.S.A. 2A:34-23 which, by its express terms, authorizes the New Jersey court to "effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage." The concept of "during the marriage" as contained within this statute has received considerable attention, focusing primarily upon the *end* of the marital relationship for equitable distribution purposes. In recent years, however, our courts have also commenced a re-examination of the *beginning* of the marital relationship. What had once been viewed as axiomatic may no longer be crystal clear.

Initially, our courts viewed as axiomatic the theoretical concept that the period for consideration of equitable distribution began at the inception of the marriage. As stated in what has become the keynote decision of *Painter v. Painter*, 65 N.J. 196, 217 (1974):

> Obviously, the period commences as soon as the marriage ceremony has taken place.

As similarly stated in *Chalmers v. Chalmers*, 65 N.J. 186, 192 (1974):

> In *Painter v. Painter*, 65 N.J. 196, also decided by us this day, we have held that the span of time embraced by the equitable distribution of property provisions of the amended statute, N.J.S.A. 2A:34-23, extends *from the marriage of the parties* to the date the complaint for divorce is filed. . . . (emphasis added)

As a result of these early decisions, the concept of exclusion of premarital assets developed as an integral aspect of equitable distribution in any matrimonial case. Matrimonial practitioners assumed, based upon the above precedents, that property acquired prior to

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William J. Thompson is a member of the firm of Archer & Greiner in Haddonfield. He is an editor and contributor to the New Jersey Family Lawyer *and a member of the Executive Committee of the Family Law Section of the New Jersey State Bar Association.*

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erned by R. 1:6-2(b) except that, in exercising its discretion as to the mode and scheduling of disposition of motions, *the Court shall ordinarily grant requests for oral argument on substantive and non-routine discovery motions* and ordinarily deny requests for oral argument on calendar and routine discovery motions.

The comment to the Rule carefully observes that while oral argument is discretionary (pursuant to R. 1:6-2(b)), R. 5:5-4 creates a presumption favoring argument, on request, on motions other than calendar and routine discovery applications. This is not a Rule that is, in any respect, ambiguous. Yet despite the clear language, the Family Part Practice Committee (1985-1986), because of continuing non-compliance, was compelled to review the Rule. The Committee, while observing that it was "succinct and clear," conceded that "not all judges comply with the Rule." (Family Part Practice Committee Report 1985-1986 at page 96.)

Other than referring the problem to the Conference of Presiding Judges to ascertain whether there was compliance, the Practice Committee took no further action. The Presiding Judges will be reviewing the compliance question in the near future, but if the problem persists, the Bar, in a constructive manner, must take appropriate action to insure that the Supreme Court's mandate is enforced.

While we strongly concur with Judge Pressler's observation in *Fusco v. Fusco, supra,* and again in *Rubin v. Rubin,* 188 N.J. Super. 155, 160 (App. Div. 1982) that while calendar clearance concerns are legitimate, those objectives cannot be pursued "at the expense of the failure by the court system to perform its function of dispensing substantial justice on the merits."

Substantial justice means more than a decision finding sufficient credible facts on the record. It requires a client to understand why the decision was made. It is extraordinarily difficult to explain to a client that a decision has been made but for reasons that remain a mystery. Matrimonial cases are difficult enough to settle, but actions undermining a client's trust in his attorney does not facilitate expeditious resolutions of emotional disputes. Rather, it creates fear, bewilderment, anger and, at time,s paranoia. Inevitably, the client's respect for the system diminishes and raises unfortunate questions about the integrity of a system declining to enforce its own clear rules.

Beyond this crucial point there are a number of other reasons why oral argument *and* enforcement of R. 5:5-4 are important, if not critical. These are set forth not to reopen an issue presumably closed after adoption of R. 5:5-4 (and virtually unanimously reaffirmed by the Practice Committee), but to provide additional reasons for the Bar's request for ameliorative action on the part of the Court, or AOC, to insure enforcement of the Rule in the future.

1. Judge Pressler accurately observed that the function of a court system is to dispense substantial justice on the merits. That must not only occur, but litigants must always perceive that their case (regardless that it may be one of thousands) has received the careful attention of the system. There is no better evidence and advertisement for the quality of justice than for a matrimonial litigant to watch a trial judge handle a pendente lite motion in a careful yet concise manner, demonstrating familiarity with the facts of the case. While litigants will not always agree with the result, it is vital that they understand the reasons why the trial judge ruled in a certain manner. Ultimately, that same trial judge's recommendations as to any proposed settlement will inevitably be given significantly more consideration by a litigant impressed with the judge's reasoning than will be given to a faceless determination bereft of reasons and leaving the impression that the system's primary concern is simply to remove the case from the system. It is an old saying that a person's perception of reality is perhaps even more important than reality itself, and while many recent reforms eliminated the reality of unfairness, we must nevertheless be cognizant of the importance of eliminating the perception of unfairness.

2. An experienced trial judge, particularly dealing with inexperienced attorneys, can, in the course of deciding a motion, provide guidance to counsel and clients concerning the ultimate resolution of issues. A practical trial judge may note during argument that based on the facts in the motion, it appearss at final hearing that the marital home will have to be sold, or that the supported spouse may be entitled only to term, not permanent, alimony. These expressions, however preliminary, provide a framework for settlement and assist the attorney in sensitizing the client to the potential weaknesses of the case.

3. Many simple cases can, if not totally settled, be significantly advanced towards settlement by a brief conference by the court (time permitting) on a motion day. Many cases are relatively simple and after completion of minimal discovery can be resolved. If that case appears on a motion calendar, an experienced and practical trial judge need not only address the motion issues, but also attempt to settle the entire case. Early settlement of matrimonial cases clearly benefits the litigants, the system and, most certainly, the attorneys.

4. Oral argument also acts as an effective screening device for the court to select appropriate ESP cases. Cases involving W-2 employees without business valuations are more effectively handled at an Early Settlement Panel conference than cases with significant factual disputes regarding income. The experienced trial judge can identify appropriate ESP cases at motions, set parameters for completion of discovery and, therefore, materially advance the matter towards quick and expeditious resolution.

5. Experienced trial judges can also utilize oral argument to communicate positions on issues to lawyers awaiting argument of their cases. While every matrimonial case is unnique, there are a number of issues arising in every case and judicial consistency, if communicated, eliminates many motions and expendites settlement. A motion day provides the perfect forum to disseminate the trial judge's feelings on recurring issues. Thus, a number of cases are actually settled without judicial involvement simply because the shrewed trial judge has already made known to the

Bar, through oral argument, his or her view on certain issues.

6. The failure of a trial court to provide oral argument frequently creates serious problems with pro se litigants. Judge Pressler, in the *Rubin* decision, focused on this issue and in a recent unreported Appellate Division decision (*Siner v. Siner*), the Appellate Division specifically suggested that "a procedure should be established so that pro se litigants are apprised of the manner in which their positions may be presented to the court." It is certainly unfair to the unrepresented litigant who appears in court expecting to receive oral argument without knowledge that in this particular court room the Court Rules do not apply.

Your Officers and Executive Committee are aware of the statewide problem with oral argument. We recognize our responsibility to attempt to deal with the issue, and I will keep Section members advised of our efforts. □

Premarital Assets Revisited: The Asset Acquired "In Contemplation Of Marriage"

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marriage remained exempt from equitable distribution, notwithstanding the commencement of a subsequent marital relationship. This position was further supported by ongoing decisions of our courts such as *Gauger v. Gauger*, 132 N.J. Super. 89 (Chan. Div. 1975), where the court concluded that ownership of certain farmland acquired by the defendant-husband and his mother as joint tenants prior to marriage was not subject to equitable distribution. As stated by the court:

> Defendant acquired ownership of the realty, not based upon the death of his mother in 1972 but upon the original grant in the 1941 deed by which he and his mother took title as joint tenants prior to his marriage in 1946. Property owned by husband or wife prior to marriage is immune from equitable distribution in a divorce proceeding.
>
> The court finds the subject realty was not acquired by the defendant during coverture and is not subject to possible equitable distribution under N.J.S.A. 2A:34-23. 132 N.J. Super. at 91.

In certain circumstances, however, our courts, while recognizing the concept of premarital exclusion, likewise recognized that, in certain circumstances, what would otherwise have been a premarital asset can, in whole or in part, become marital property. In a series of reported decisions, our courts held that premarital property can be "gifted" to the marriage so as to transform premarital property by gift to marital property. In *Canova v. Canova*, 146 N.J. Super. 58 (Chan. Div. 1976), the husband claimed that certain property, titled in joint name as tenants by the entirety, was exempt from equitable distribution as that property had been acquired following the sale of a home which the husband had owned prior to the marriage. The court concluded that the husband, in placing title to this property in joint name, had gifted separate property to the parties jointly thereby rendering the property subject to equitable distribution.

Similarly, in *Perkins v. Perkins*, 159 N.J. Super. 243 (App. Div. 1978) and in *Pascarella v. Pascarella*, 165 N.J. Super. 558 (App. Div. 1979), our Appellate Division reaffirmed this principle. In *Perkins*, the Appellate Division affirmed the trial court's determination that the defendant-husband's transfer of a premarital residence to joint names constituted a gift, rendering the real estate subject to equitable distribution. In *Pascarella*, the Appellate Division affirmed this principle, again addressing circumstances involving a premarital residence subsequently titled in joint names:

> There is no merit to the other contentions raised by defendant in support of his challenge to the equitable distribution. The trial judge properly considered the present fair market value of the marital residence, less the outstanding mortgage, as an asset of the marriage. While defendant had acquired the marital residence prior to his marriage to plaintiff, during the marriage he executed a deed conveying title to plaintiff and himself as tenants by the entireties. This conveyance constituted a gift to plaintiff, and thus the marital residence became property of the marriage subject to equitable distribution. . . . 165 N.J. Super. at 564.

Just as the concept of "gifted property" has been repeatedly addressed by our courts, so too have our courts addressed the concept of asset appreciation. In a series of decisions, our courts have provided guidance as to the includability of asset appreciation occurring during a marriage, notwithstanding the premarital acquisition of those assets. In *Scherzer v. Scherzer*, 136 N.J. Super. 397 (App. Div. 1975), our Appellate Division ruled that post-marital appreciation in a defendant's stock ownership of a closely-held corporation was subject to equitable distribution to the extent that value was attributable to the contributions of either spouse. *Id.* at 401. This theory was reiterated by our Appellate Division in *Mol v. Mol*, 147 N.J. Super. 6 (App. Div. 1977) in addressing conflicting claims to a marital residence. In *Mol*, the Appellate Division ruled that the plaintiff-wife was entitled to share in appreciation of her defendant-husband's premarital residence to the extent that appreciation was attributable to spousal contributions. As stated by the court, relying upon *Scherzer, supra:*

> We hold that plaintiff is not entitled to share in that portion of enhancement in value of the house which was due solely to inflation or other economic factors and to which he did not contribute in any way. However, there were no findings by the trial judge to distinguish that portion of growth and value which was the result of independent economic factors alone, such as inflation, and that portion to which plaintiff contributed or for which husband and wife were jointly responsible. 147 N.J. Super. at 9.

More recently, in *Griffith v. Griffith*, 185 N.J. Super. 382 (Law Div. 1982), the court reiterated these principles in concluding that the plaintiff-wife was entitled to share, by way of equitable distribution, in the mortgage pay down occurring during the marriage, upon the defendant-husband's premarital residence. While