Pendente Lite Motions

by Frank A. Louis

The most fundamentally misunderstood, yet perhaps the most important aspect of our practice is probably *pendente lite* motions. Reasonably, one would expect there to be a well-developed body of law discussing virtually every aspect of these motions. Not only would the legal framework, in which they are to be analyzed be thoroughly reviewed, but the policy consideration upon which courts base such decisions would be explored, so as new issues arise there would be analytical framework already in place to assure the law developed in a logical and uniform fashion. Yet, in stark contrast to other areas of family law, our case law is virtually silent on the single most important motion in our practice. This situation probably exists because such applications occur when trial courts simply do not have the time to write an opinion, and obtaining leave for appeal for appellate guidance is akin to being a Red Sox fan — you hope, wait and inevitably are disappointed.

More surprising is the virtual absence of comment by commentators who (like myself) will write on virtually any arcane topic. This article is intended to address this void and analyze the issue from a jurisprudential and systemic view. Only when the policy sought to be furthered by such application is defined and identified can the law develop appropriately.

Is the legal standard maintenance of the *status quo*? Should it be? Is that fair in the gender-neutral statutory scheme? Is it consistent with the statute? What are the policy issues involved? Does maintenance of the *status quo* help settle cases? In short, what is the legal standard for deciding *pendente lite* motions? This article will hopefully address and try to answer these questions.

Reasonably, one would expect there to be a well-developed body of law discussing virtually every aspect of these motions.

The Precedents

One noted commentator suggests maintenance of the *status quo* is the standard.[1] His treatise relies upon two pre-1988 statute cases; however, neither supports the proposition for which they are cited. They do not establish the assertion acknowledged to be the standard. On every motion day, lawyers and judges repeat the mantra that maintenance of the *status quo* is the legal standard but never cite any law, case, or policy consideration to support that proposition. If it ever was correct, changes in our law, most notably the 1988 statutory amendments to N.J.S.A. 2A:34-23, make it abundantly clear that blind adherence to maintaining the *status quo* as the standard is legally incorrect, flawed from a policy standard and has, when rigidly applied, created unfairness, if not injustice, in far too many cases. It is more accurate to characterize maintenance of the *status quo* as the "lore" since a review of the precedents does not establish it as the "law."

There appear to be two cases, *Monica v. Monica*[2] and *Ricci v. Ricci*,[3] which minimally address whether the legal standard for a *pendente lite* application is maintenance of the *status quo*.

Monica dealt with whether an appeal from a *pendente lite* order was interlocutory, and if the appeal was filed in a timely manner. In analyzing the wife's application to dismiss her husband's appeal, the court discussed the nature of *pendente lite* orders and whether they were final orders.

The Appellate Division wrote, notably, in *dicta*:

> **the object of the Order is *to secure the Wife the financial means whereby to live and to retain counsel until the Court shall have the opportunity to hear and determine the controversy.* The Order does not depend upon upholding the Wife's cause of action; it does not effect the merits of the suit. It is a mere temporary expedient *citing McGrail v. McGrail*, 51 N.J. Eq. 537 (Ch. 1893).[4]**

This is the only reference in *Monica* to the *pendente lite* standard; the decision neither mentions nor utilizes the terms "maintenance of the *status quo*," although cited for that principle.

The other case cited for the principle that the purpose of the *pendente lite* application is maintenance of the *status quo* is *Ricci*, where the issue was characterized as whether a juvenile domestic relations court had statutory authority to direct a "deserting" husband to pay past due rent as part of an obligation to provide adequate support for his family. Demonstrating how far we have come in 30 years, the court considered this an issue that touched "upon virgin areas of the law."[5]

The court concluded it had authority to direct payment of back rent since it was a necessary substitute for providing *pendente lite* relief, suggesting in language that

now seems gender-biased the wife is not "to be required to change her mode of living merely because the Husband has quit the marital home."[6] One might argue this language might be construed as establishing a standard, but it is hardly the comprehensive review of the issue one might expect or hope to have. Yet, *Salvatore* did not involve *pendente lite* issues at all. It included an appeal from a decision made after a full trial. Yet, it nonetheless characterized the law, as did *Ricci*, that the wife was not to be "called upon to cheapen her standard of life unless his means require it."[7]

Reading these cases together, they seemingly suggest the law focuses upon the wife's right to continue to receive the same level of support received before. Perhaps that is the genesis of the belief that the a *pendente lite* application's purpose is to maintain the *status quo*.

Viewed more dispassionately and objectively, it appears these *pendente lite* cases merely incorporated as the legal standard what they believed the standard to be at final hearing. This is precisely why *Salvatore* was quoted as authority by the Appellate Division in *Ricci*.

Courts made no distinction between the legal standard *pendente lite* and at final hearing. Yet, the economic reality is far different. That, by itself, is logical if you accept the argument that the legal standard *pendente lite* should be the same as the standard applied at final hearing.

Yet, we as practitioners, are aware of fundamental differences. No serious lawyer would decide support issues without even considering equitable distribution. Their inter-relationship is a central principle of our law. *Ricci*, *Monica* and *Salvatore* are all pre-equitable distribution cases, so perhaps the focus on support alone is understandable.

During the litigation, the parties are probably still filing jointly, so taxability may not be an issue. At final hearing allocating support between taxable alimony and tax-free child support is fundamental. Moreover, at final hearing a court is required to comprehensively consider a multitude of statutory factors and need this maintenance of the *status quo* is only one of many factors.

No serious lawyer would decide support issues without even considering equitable distribution.

Should these statutes form the standard for *pendente lite* relief? Is it fair to apply standards generally utilized for final hearing on a *pendente lite* basis, particularly given the direct inter-relationship between equitable distribution and support? Equitable distribution is unresolved *pendente lite*. There is almost inadequate information on the tax impact of any award. Taxes always have a direct and significant impact on support. Yet, the statute directs courts to use the factors "pending" resolution of a case, suggesting a legislative determination the factors apply both pretrial *and* at final hearing.

What is clear in reviewing the precedents, however, is that *no* case has ever attempted to analyze the inter-relationship between what the law is in awarding *pendent lite* support and the policy considerations that bear on such awards. Is there a relationship in the development of our law and public policy? Should there be?

Such an undertaking permits judgments to be made as to how the *pendente lite* legal standard should be determined and what it should be.

The Inter-Relationship Between Development of Law and Public Policy

Our law does not develop in a vacuum. There is a well-defined jurisprudential basis for resolution of the unique judicial issues; if there is one consistent strain in the development of law in New Jersey, it is that our law evolves in response to what courts perceive to be sound public policy.

The genesis of this principle might well have been Oliver Wendell Holmes' landmark work *The Common Law*, where he discussed the linkage of public policy and the development of the law.[8] New Jersey courts have recognized this linkage and have liberally quoted Holmes when confronted with a previously undecided issue. It is logical for there to be a rational relationship between sound public policy and simple concepts of justice. The two should go hand in hand.

An excellent example is *Falcone v. Middlesex Co. Medical Society*,[9] illustrating the interplay between policy and development of our law. *Falcone* involved the question of a doctor's admission to a county medical society. In determining the issue, Justice Nathan L. Jacobs went back to Holmes, noting, "the vital part played by public policy considerations in the never ending growth and development of a common law."[10]

Holmes noted, and it was cited by Justice Jacobs, that:

> **every important principle which is developed by litigation is in fact and at bottom the result of more or less definitively or definitely understood views of public policy."[11]**

In his analysis, Justice Jacobs concluded the "dominant factor" in development of our common law is the "common law principles" which "soundly serve the public welfare and the true interest of justice" citing *Collopy v. Newark Eye and Ear Infirmary*,[12] *Henningsen v. Bloomfield Motors Inc.*,[13] and Cardozo, *The Nature of the Judicial Process*.[14] Shouldn't, therefore, the "dominant" factor in determining the critical issue of what the legal standard for *pendente lite* support be policy considerations?

In recent years, our Supreme Court has followed Holmes' linkage of public policy and the development of law. In *Shackil v. Lederle Laboratories*,[15] the Supreme Court rejected the market share liability theory advanced by certain plaintiffs concerning childhood vaccinations, reasoning it would frustrate the public policy of development of safer vaccines.

Similarly, in *Kelly v. Gwinnell*,[16] the court, in an attempt to reduce the number of drunken drivers, concluded imposing social host liability would advance that salutary public policy. *Kelly* relied on *Palsgraff v. Long Island R.R. Co.*[17] for the proposition that in determining whether a duty of reasonable care existed the answer depended upon "an analysis of public policy."[18]

Support for the proposition that unique legal questions are determined by public policy considerations can also be found in cases decided by our Supreme Court in matrimonial law. In *Kinsella v. Kinsella*,[19] the Court found the attorney/client privilege was not absolute:

> **considerations of public policy and concern for proper judicial administration have led the legislature and the courts to fashion limited exceptions to the privilege. These exceptions attempt to limit the privilege to the purposes for which it exists.**[20]

Justice Gary S. Stein later noted courts should be mindful of the public policy considerations behind the psychologist/patient privilege, concluding, in some respects, it was even more compelling than the attorney/client privilege.[21] This seemingly confirms that in determining *how* to rule on unique legal issues the Court, mirroring Holmes' perceptive reasoning, ultimately based decisions on their perception of what sound public policy was.

I have, therefore, concluded that in analyzing what the law should be in determining *pendente lite* applications, public policy considerations must be examined. Equally important is the necessity for the standard to be consistent with the existing law. That, to some degree, mirrors the analysis of the *Ricci*, *Monica* and *Salvatore* cases. Yet, that analysis must not be done based upon outdated sexist legal principles but on what the current law is as we enter a new century. We need to interrelate sound public policy and existing law to determine what the standard should be. This must be done without regard to antiquated references to a legal standard that never was tested, analyzed, discussed or reviewed. It has been accepted far too long with far to little thought.

In determining what analytical framework to be used, not only does sound policy dictate the statute be utilized, but it is a statutory imperative as well.

Should the *Salvatore* standard still be the law? In determining support are courts directed to only consider the needs of the wife without regard to any other factor? Certainly we can agree that is not our present law. It is reasonable to analyze the issue in light of present law with the analysis commencing with the statutory factors embodied in N.J.S.A. 2A:34-23, which were adopted as part of a broad and overall comprehensive review of our law in 1988. It is in this context of linkage between public policy and law that the issue of the standard for *pendente lite* support should be analyzed.

The legislative origin of our present statute was discussed by the Supreme Court in *Innes v. Innes*.[22] The Court concluded the 1988 amendments were derived from the Commission on Sex Discrimination in the Statutes, whose purpose was to eliminate gender bias from our statutory law.[23] Generally, the commission's recommendations, ultimately, embodied in the statute, sought to assure that "husbands and wives be treated *equally* under the law." (emphasis added) That certainly was not the *Salvatore* standard.

A review of the statute reveals elimination of any references to either the husband or the wife emphasizing the statute's gender neutrality. Thus, any suggestion that one party or the other had some favored status before the law, either at final hearings or *pendente lite*, cannot be justified by a review of the statutory language or the legislative history. Moreover, the statute itself makes it abundantly clear it's provisions apply not only to final hearing and modifications but *pendente lite* applications as well. The beginning language of the statute notes it applies "*pending any matrimonial action* brought in this state or elsewhere ..."[24] Thus, in determining what analytical framework to be used, not only does sound policy dictate the statute be utilized, but it is a statutory imperative as well.

Public policy and an analysis of the existing legal framework are certainly two of the most important criteria to be considered in determining what the appropriate law should be on undecided questions of law. Yet, there is a broader perspective that must also be considered. My own analysis of family law determines a separate and distinct component which should be considered with the other two tests. In the final analysis, if this third criteria is not met, then the legal principle might well be flawed.

There is a societal imperative that judicial decisions arising from the most sensitive of personal relationships be fair. While perhaps simplistic, this broad-based fairness concept is and should be present in all aspects of family law. Its impact on how the law develops is best illustrated by our ever-changing equitable distribution law, although it is present

throughout the case law on all issues.

An excellent example, although certainly not the only one, of the impact of fairness on the law's development is graphically illustrated in *Goldman v. Goldman*.[25] Judge Herbert S. Glickman was confronted with a unique situation in this equitable distribution case. He characterized the case as presenting "special circumstances."[26] In resolving the issue of how a car dealership, which had significant value as of the valuation date but virtually none at trial, should be treated, he not only analyzed the issue in the context of the existing law but fundamental public policy considerations. He ultimately reached a result predicated on simple concepts of fairness that was also consistent with sound policy and the statutory purposes of equitable distribution.

As the Appellate Division noted in affirming his decision:

> **...the Trial Court here correctly recognized that he was confronted with the unique situation and that application of a rigid categorical analysis would have only *hindered him in fulfilling his ultimate obligation to effectuate a distribution of marital assets which overall was equitable to both parties.*[27]**

Goldman emphasizes that in determining unique legal issues, the law must be first analyzed, the public policy underpinning equitable distribution reaffirmed, and the end result fair. This concept of fairness, therefore, must be included as a criteria for determining the unique legal issues that arise.

I, therefore, believe in deciding novel issues the analysis must be based on a triad of considerations. This tripartite approach requires an analysis:

(A) Of policy issues and whether the proposed rule furthers sound public policy.

(B) Whether the proposed decision is consistent with existing law;

(C) Whether the proposed result is fundamentally fair.

The classic example is litigation concerning a claim of a right to cut a tree down, which then becomes the *res* of the action.

It is in this analytical context that what the appropriate *pendente lite* standard is should be determined.

What the Standard Should Be

Analyzing these factors leads to development of a *pendente lite* standard that is fair, consistent with law and recognizes the reality of what these motions really mean in the resolution of a matrimonial case.

Pendente lite applications have a unique duality which, in part, explains why courts attempt to "maintain the *status quo*." *Pendente lite* motions, like divorce cases themselves, have two major and fundamentally different components which are interrelated. On one hand a court must address issues of support while simultaneously being cognizant of the responsibility to allocate the parties' assets. There is an obvious need to maintain the *res* of the action, *i.e.*, the *assets*; if they are dissipated, the court cannot satisfy the statutory mandate of distributing assets which do not exist. Thus, there is a clear and compelling policy in assuring marital assets are not dissipated *pendente lite*; this broad policy imperative finds historical support in the equity jurisdiction of the Chancery Division, where matrimonial cases were originally heard.

A case highlighting the need in the traditional general equity sense of assuring the *res* of the litigation is maintained until final hearing but which nonetheless arises in the family context, is the Supreme Court's decision in *Crowe v. DeGioia*.[28]

Crowe essentially followed the analysis suggested in this article in determining the legal issues presented, which involved cohabitation. The court examined the public policy considerations by analyzing the large number of unmarried couples who lived together. The Court defined its task as shaping "a remedy that will protect the legally cognizable interest of the parties and serve the needs of justice."

In doing so, the Court highlighted the need for maintaining the *status quo*, suggesting that once the plaintiff had satisfied the traditional equitable requirements for issuance of a preliminary injunction, interim relief, including restraints and *pendente lite* support, was warranted. There is a fundamental difference in a matrimonial action, since a spouse need not demonstrate a legal right as did the plaintiff in *Crowe*, because the right to support and to share in assets already exists under the statutes. Yet, *Crowe* emphasized the importance, as general equity cases traditionally have, of the policy imperative of preserving the *status quo* before there can be a hearing on the merits.[29]

The classic example is litigation concerning a claim of a right to cut a tree down, which then becomes the *res* of the action. If the *status quo* is not maintained, *i.e.*, the tree is cut down *pendente lite*, then the *res* of the lawsuit no longer exists. Similarly, if assets are dissipated, the statutory and policy imperative of equitably distributing assets is lost as the tree might be lost. Both must be maintained so the court can fulfill its responsibilities.

In divorce cases, the concept of maintaining the *status quo* must be examined given the duality of the litigation. Assets must be maintained; without them there cannot be an equitable distribution. The policy considerations governing support are difficult and should be analyzed using the suggested tripartite criteria public policy, consistency with law, and fundamental fairness.

Therefore, to the extent assets are involved, the court should always endeavor to maintain the *status quo*, noting, as the Supreme Court did in *Chalmers v. Chalmers*,[30] that when you equitably distribute assets the court is merely allocating an asset which already "belongs" to both spouses. That responsibility cannot be fulfilled if the asset has been dissipated. Maintenance of assets is fair, mandated by the statute and a prerequisite to implementing the public policy underpinning equitable distribution.

Having determined that maintenance of the *status quo* is required for assets, should it also be the standard for support? The analysis must begin with the purpose of a *pendente lite* application and identification of the policy considerations such motions present. I have identified nine; there are probably more. Not surprisingly, none involve maintaining the *status quo*. In developing a legal standard by relying upon my own experiences in family court, I unconsciously confirmed a basic precept of Holmes' work. In a passage from his landmark work, *The Common Law*, characterized by his biographer as possibly "the most quoted passage in legal history," Holmes discussed the correlation between the development of law and our common experience.[31]

> **The life of the law has not seen logic: it has seen experience.**

That others' experiences will expand these factors is probably inevitable and certainly appropriate; yet, those new ones will also come from our common experiences reaffirming not only Holmes' brilliance, but his prescience. They should supplement my nine factors, but nonetheless, our common experience and objective review of the law will not lead to the conclusion courts should rigidly mandate maintenance of the economic *status quo* without regard to fairness, the payor's ability or the statutory factors governing support issues.

Having determined that maintenance of the *status quo* is required for assets, should it also be the standard for support?

A multifactorial approach may be complex; certainly, it is more difficult to apply than the singular "maintenance of the *status quo*." Yet, is it simplicity or justice that is the goal? If a judge is required to weigh and evaluate numerous statutory factors at final hearings, are litigants at *pendente lite* entitled to less? Since so many cases settle based on the *pendente lite* order, it is incumbent to design and utilize a standard that would most likely lead to a just result. A multifactorial approach does just that. The factors have been selected after an analysis of the triad of factors discussed earlier.

In deciding a *pendente lite* motion, I propose a court first consider what it is attempting to achieve by the order. The following factors provide the framework a court should consider in reaching that goal.

1. To permit each party to have sufficient financial resources so they are able, without being compelled to settle, to reach final hearing.
2. To establish a level of support that promotes settlements and avoids an order that is too high or too low that is then utilized as a bargaining chip.
3. To consider and recognize the best interests of children during *pendente lite* period.
4. To reasonably allocate the available net cash flow between the parties so they each can have a "reasonably comparable" standard of living *pendente lite*.[32]
5. To assure the support allocation does not provide either party with an advantage when the status of a child is an issue.
6. To minimize the disruption to children by avoiding sale of the marital home provided financial circumstances warrant.
7. To assure the terms of the order neither create adverse tax consequences for one party or leverage on tax issues for the other party.
8. To establish a level playing field enabling each of the parties to retain and maintain the necessary legal and expert assistance required for resolution of the issue.
9. To recognize in the support award, the ongoing costs of maintaining assets for distribution or servicing marital debt.

These factors would be analyzed in the traditional context of need, ability to pay, and the parties' standard of living. Yet, none of these factors suggest the appropriate support standard is blind adherence to maintenance of the status, although in certain high income cases it may well be appropriate to do so since there is sufficient net after-tax cash flow to meet each of the party's needs as set forth on their case information statements.

In that case, maintenance of the *status quo* is not only fair and appropriate, but consistent with the statutory alimony and child support factors. The more difficult issue in the higher income cases is not whether the *status quo* should be maintained, but the subsidiary issues that frequently arise. If there is an excess in net after-tax cash flow over both parties' expenses, how is it to be treated, and secondly, is savings an appropriate element for consideration on a *pendente lite* basis.

When representing the supported spouse, the argument advanced is that it is unfair, particularly in a long-term marriage, to permit one party to solely keep this additional cash flow. If it is the product of the marital success, why does it "belong" to one spouse as opposed to the other? In advancing that

position counsel should rely on *Gugliotta v. Gugliotta*,[33] where the court noted:

> **... a paramount reason (to award alimony) is to permit a wife to share in the economic rewards occasioned by her husband's income level, as opposed merely to the assets accumulated, reached as a result of their combined labors, both inside and outside the home The parties' standard of living was also as much a part of her efforts as his, and alimony is the vehicle by which the wife is permitted to share in this standard of living after the divorce.**

This reasoning has been cite with the approval by the Supreme Court.[34]

Conversely, the supporting spouse would argue that savings are not an appropriate "*pendente lite*" expense and secondly, the support obligations should be limited to the standard of living enjoyed during the marriage and the "extra" money is not required.[35] There is no case that I am aware of in New Jersey that addresses the legal issue whether savings is an appropriate expense item either *pendente lite* or at final hearing. My own view, particularly in a long-term marriage, is that it would be unfair and inequitable to permit one party to enjoy all the fruits of an income stream presumptively created by marital effort.[36] I find the *Gugliotta* quote most consistent with the entire thrust of our law.

There is frequently a direct relationship between how people live and the amount they save. Where the family made the decision to moderate (a term which has amazing elasticity in the higher income cases) their lifestyles so they can accrue savings to enjoy the lifestyle they deem appropriate upon retirement, this marital decision should be respected and enforced by a court.

Recognizing the duality of *pendente lite* motions and establishing two different approaches for courts to analyze the issues presented is the best mechanism to satisfy the purpose for such applications.

The Importance of the *Mallamo* Decision

Judge Mary C. Cuff's well reasoned and perceptive decision in *Mallamo v. Mallamo*,[37] is the most important case to read before arguing a *pendente lite* motion. In fact, it is one of the seven most important matrimonial cases decided. It crystallizes definitively the true nature of these applications. *Mallamo* resolved, and even more importantly highlighted, the legal question that *pendente lite* orders are subject to modification.[38] Judge Cuff's experience in family court was revealed in this passage:

> **In many instances the motion judge is presented reams of conflicting and, at times, incomplete information concerning the income, assets and lifestyles of the litigants. The orders are entered largely based upon a review of the submitted papers supplemented by oral argument. Absent agreement between the parties, However, a judge will not receive a reasonably complete picture of the financial status of the parties until a full trial is conducted. Only then can the judge evaluate the evidence, oral and documentary, and weigh the credibility of the parties. Only then can the judge determine whether the supporting spouse has the economic means represented by the other spouse or in the case of declining income has suffered legitimate economic reversal or as been afflicted with a temporary case of diminished resources occasioned by a divorce.**[39]

Mallamo is so critical because it permits a court to properly characterize the order being entered. Except in the straightforward relatively simple cases, with full, complete, accurate and undisputed information any order is not necessarily a prediction of the final result. Rather, it is a directive telling litigants what their rights, duties and responsibilities are until the court can make a completely informed decision. As Judge Cuff, again speaking from experience, noted, "only then," referring minimally to completion of discovery, does the court have the full picture. As the policy consideration hopefully make clear, the purpose of the order is to permit both parties to have an order entered on the best, albeit limited information available, to assure the parties are in a position to ultimately present complete, detailed and accurate evidence supporting their positions.

Mallamo, in theory, should reduce the importance of *pendente lite* orders; courts must emphasize they can modify (retroactively and prospectively) orders if after reviewing the totality of the evidence they conclude their initial decision would have been different had they known, *pendente lite*, what they now know at final

hearing. *Mallamo* is the vehicle by which courts ultimately fulfill their goal to assure both parties are treated fairly. Properly utilized, *Mallamo* should reduce *pendente lite* allegations that cannot be sustained. Might such an aggressive interpretation diminish settlements based on the *pendente lite* orders? Not necessarily in the W-2 case, but certainly in the more complex matters. Yet, who is offended by a procedure that rejects resolutions predicated on incomplete and misleading presentations and demands settlements be based on true, complete and accurate evidence? Justice is never offended by a fair result; it is never served by an unjust resolution.

Conclusion

Recognizing the duality of *pendente lite* motions and establishing two different approaches for courts to analyze the issues presented is the best approach to satisfy the purpose for applications. Requiring courts in their decisions, and attorneys in their papers, to focus the support analysis on the policy considerations which ultimately are designed to resolve cases, and to have that done in the context of the statutory framework, is the procedure best designed to do substantial justice to the litigants. No litigant has a right to receive the *pendente lite* order that provides leverage, or one that coerces settlement. No litigant is entitled to receive anything other than the fairest result the system can provide; no litigant should be required to accept any less.■

Endnotes

1. New Jersey Family Law Practice, Skoloff at 606, (ICLE 6th Edition).
2. *Monica v. Monica*, 25 N.J. Super. 274 (App. Div. 1953).
3. *Ricci v. Ricci*, 96 N.J. Super, 214 (J&D.R. Corp. 1967).
4. *Monica* at 277. (emphasis added).
5. *Ricci* at 222.
6. *Citing Salvatore v. Salvatore*, 73 N.J. 373 (App. Div. 1962).
7. *Salvatore* at 379.
8. Holmes, "The Common Law" (1881).
9. 34 N.J. 582 (1961).
10. *Falcone* at 589.
11. Holmes, "The Common Law," 35 (1881) cited in *Falcone* at 589. (Emphasis added)
12. 27 N.J. 29 (1959).
13. 32 N.J. 358 (1960).
14. 10 (1921).
15. 116 N.J. 155, 177 (1989).
16. 96 N.J. 538, 545 (1984).
17. 248 N.Y. 399 (1928).
18. *Kelly* at 544.
19. 150 N.J. 276.
20. *Kinsella* at 298. (emphasis added)
21. *Kinsella* at 329-30.
22. 117 N.J. 496 (1990).
23. *Innes* at 507.
24. N.J.S.A. 2A:34-23.
25. 248 N.J. Super. 10 (1991) *aff'd.* 275 N.J. Super. 452 (App. Div. 1994).
26. *Goldman* at 248.
27. *Goldman* at 457. (emphasis added).
28. 90 N.J. 126 (1982).
29. *See, Haines v. Burlington County Bridge Comm.*, 1 N.J. Super. 163, 175 (App. Div. 1949).
30. 65 N.J. 186, 194 (1974).
31. Baker, The Justice from Beacon Hill at 257, Harper Collins, 1991.
32. *See* factor 4 in N.J.S.A. 2A:34-23.
33. 160 N.J. Super. 160, 164 (Ch. Div. 1978) *aff'd* 164 N.J. Super. 139 (App. Div. 1978).
34. *Mahoney v. Mahoney*, 91 N.J. 488, 505 (1982).
35. *Lepis v. Lepis*, 83 N.J. 139, 150 (1980).
36. *See* N.J.S.A. 2A:34-23-1 ("It is a rebuttable presumption that each party made a substantial financial or nonfinancial contribution to the acquisition of income and property while the party was married.")
37. 280 N.J. Super. 8 (App. Div. 1995).
38. *Mallamo* at 12.
39. *Mallamo* at 16 (emphasis added)

***Frank A. Louis** is a partner in the Toms River firm of Louis, Roe & Wolf.*

Chair's Column

continued from page 2

and done, we are a service industry. At present, our consumers are less than satisfied with the service they are receiving, both as to its speed and cost. While a knee-jerk reaction to that may be other new, different, expanded mediations, if such programs will either usurp the early settlement panels presently in existence, and ultimately cost the consumers more time and money, we have achieved very little. If negotiated settlements are to be subject to frequent later attacks, not only have we not furthered the consumers' purpose, we have taken a step backwards.

In reviewing both the upcoming decision in *Konzelman* and the plan for mandatory mediation, we must not lose sight of the ultimate goal — fair and fast resolution with a financially reasonable cost for such a service. I am fearful that both the mandatory mediation program and attacks on settlement agreements do not foster that goal. Certainly, there must be a balance struck and unconscionable agreements cannot be enforced. If that is so, how does that rationale apply within the context of the newly proposed mandatory mediation program? It is something that we should reflect upon, both when the *Konzelman* decision is rendered and when you are called upon in your cases to be more imaginative in attempting to effect resolution by means of a negotiated settlement.■

Endnote

1. 307 N.J. Super. 134 (App. Div. 1998).