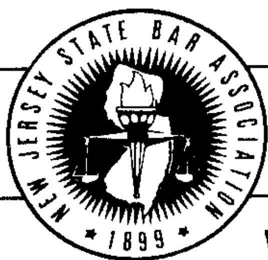

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Chairman's Column

Thank You Justice Pashman

by Frank A. Louis

The recent reorganization of the Family Part Practice Committee confirms the existence of a healthy partnership between Bench and Bar. The announcement by Judge Eugene D. Serpentelli of committee assignments demonstrates the significant lawyer involvement in the ongoing review of Family Law practice and procedure. I am pleased to announce that Section members have been selected to chair several major committees and on the remaining committees lawyers will have significant input. John Trombadore was selected to chair the Appointment of Counsel Committee, Patricia Smits the Pro Se Committee, Lee Hymerling the General Procedures Committee, Jeffrey Weinstein the Bench/Bar Committee, and I was pleased to learn that I had been reappointed as chair of the Rules Committee. Judge Serpentelli has again authorized use of adjunct lawyer members to assist the subcommittees, thus providing an even greater opportunity for Section input. Given the extraordinary response to the recent mailing soliciting participation in Section committees, there should be no shortage of volunteers. Thus, as in the last two years, the Section's participation in the Practice Committee is pervasive, and I am confident we will fulfill, as we have in the past, our responsibility professionally and materially to assist the Committee in reaching its goals.

In the light of what we have accomplished, it is appropriate to look back and thank those who have assisted us in achieving our goals. One person's contributions particularly stand out when we realize that only a few short years ago our aim was to convince the Court to *appoint* a standing Supreme Court Committee. The fact that there might be a significant lawyer involvement on the committee was only a hope. That lawyers would actually chair major

(Continued on page 76)

The Tax Reform Act of 1986 Makes Substantial Changes to Matrimonial Tax Rules

by Richard J. Flaster*

With the enactment of the Tax Reform Act of 1986 (the "Act") on October 22, a sweeping revision of the federal tax system was put into place. The Act embodies changes that will impact on virtually every taxpayer in the nation and will require new approaches to many business and personal transactions.

Given the lengthy evolution of this legislation and the wide media coverage it received, it is likely that its major tax reform points have already become common knowledge. However, submerged in the Technical Corrections section of the new law are several important changes to the specific tax rules that govern separation and divorce situations, and these provisions have attracted little (if any) media comment.[1]

In all events, the changes must be comprehended and digested rather quickly for they dramatically impact on divorce and separation arrangements, and some become effective immediately or have retroactive effect while the remainder will generally become effective on January 1, 1987. To facilitate this effort, the following is a summary of the legislative changes of particular note to matrimonial practitioners:

Alimony

A. *Eases Restrictive Front-Loading Rules.* Under the new law, the restrictive alimony recaptive provisions of §71(f) of the Internal Revenue Code (the "Code") have been completely revised and simplified. Under existing rules, alimony must continue for each of six post-separation years (unless either spouse dies or the alimony recipient remarries), and there is a recapture of any so-called "excess front-loading of alimony" during each of the last five of such years. Under the revised format, there is no six-year requirment and only the alimony payments made during the first three post-separation years are subject to recapture under the modified procedures. Indeed, as reformulated, although the level of alimony during

(Continued on page 77)

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Kelly v. Kelly, (M-23764-81, Decided May 29, 1986) (Chan. Div.-Ocean County; Clyne, J.S.C.) (Not yet approved for publication.)

CUSTODY—Trial Court Prevents Custodial Parent From Moving to New York Community on New Jersey Border

[*Szaloczy v. Szaloczy*, A-1887-85T7]

Plaintiff-wife appealed from a post judgment order denying her application for leave to move to New York with her infant daughter. Procedurally, after plaintiff's first motion was denied the Appellate Division reversed and remanded for proceedings consistent with *Cooper v. Cooper*, 99 N.J. 42 (1984) which had been rendered during the pendency of plaintiff's initial appeal.

Following the remand, defendant-husband filed a motion seeking custody of the parties' child and requesting a probation department investigation and a plenary hearing. The defendant's application remained dormant while the trial court considered on remand the plaintiff's motion to relocate to New York. The parties apparently agreed that the trial court should resolve the issues raised by defendant's motion based upon previously submitted evidence and updated certifications.

On September 24, 1985, the trial judge denied plaintiff's motion to remove the minor child from New Jersey and ordered her to return to this state with her daughter. The judge stated that plaintiff had failed to establish a real advantage to herself or to the child in moving to New York and found the move detrimental to the best interest of the child because it would deny the father's ties with his daughter. The court concluded that plaintiff's motivation in moving was malicious and calculated to impair any relationship between defendant and the children.

Plaintiff appealed, claiming that the trial judge's findings were not supported by sufficient credible evidence. In support of her claim, plaintiff stated she owned a home in Spring Valley, New York, was employed and attending instructional courses in business, that her family lives nearby and that defendant's visitation rights were not impaired.

The Appellate Division in a *per curium* decision expressed concern over the conclusory nature of the judge's findings and his failure to order a plenary hearing in light of the conflicting factual allegations. However, the court dismissed plaintiff's appeal in recognition of the fact that the main custody issue was about to be determined by the trial court and that the issue on appeal was "so closely intertwined" with that custody decision. Resolution of the custody issue might make the issues presented in plaintiff's appeal moot. The Appellate Division also noted that the plaintiff may appeal from any final order as to custody.

[*Comment: While the trial court could not have prevented the plaintiff from moving to Old Tappan, New Jersey, right on the New York border, it could prevent the plaintiff from remaining in Spring Valley, New York, just a few miles away. In fact, the court could not have prevented the plaintiff from moving to Cape May, which would have caused three hours driving each way for visitation rather than the one hour the move to Spring Valley, New York, would have caused.*

While N.J.S.A.9:2-2 certainly has a rational basis vis-a-vis jurisdiction in prohibiting the removal of a child of divorced or separated parents from New Jersey, our courts should not interpret the statute so literally as to fly in the face of common sense.]

[*Szaloczy v. Szaloczy*, A-1887-85T7) (App. Div., Decided June 10, 1986) (Gaynor and Baime, J.J.A.D.) (not yet approved for publication.) □

Thank You Justice Pashman

(Continued from page 65)

committees was, at best, a dream. That we have advanced so far so quickly is perhaps the most dramatic development in Bench/Bar relations in many years and, certainly, is the most significant long-term development in Family Law. It is a tribute to the dedication of those lawyers who have worked so hard to earn the Supreme Court's respect thus enabling the Section to become such an integral part of the Rule-making process.

Only recently, Vice-Chair Myra Peterson, appeared before the Supreme Court at a public hearing on last year's Family Part Practice Committee report to present the Section's position. In contrast to the disputes over adoption of the Civil Case Management Report, our only request was to seek delay in implementation of the proposed Offer of Judgment Rule, solely because of questions relating to the procedure, as opposed to the substance, which the Section strongly supported. The critical difference was the complete and total Bar involvement in formulation of the Practice Committee's report which permitted the Section to support a 160-page report without objection. No better evidence could exist to illustrate the salutary results of Bench/Bar cooperation.

Yet, it was only as recently as January 1983 that Lee Hymerling, in his Chairman's Column, advanced the Section's position that "a standing Family Court Committee should be created." At that time formation of such a committee was our Section's top priority, yet we would not have been successful without the support and guidance of Justice Morris Pashman. In March 1983, Justice Pashman received the Section's first Tischler Award in recognition of the dramatic impact he had on the then rapidly changing Family Law procedures. Under his guidance the first two Supreme Court Committees (Pashman I and Pashman II) to effectively study the Family Law system established the precedent that comprehensive review should not take place without Bar involvement. Lawyers who were privileged to serve on those Committees were always able to supply meaningful input into the Committee's ultimate recommendations which, to this day, form the bedrock of the revolution in Family Law in New Jersey.

In receiving the Tischler Award, in the presence of Justice O'Hern (another strong Bar supporter), the press and 250 lawyers, Justice Pashman, in clear and compelling language, called for creation of a stand-

ing Supreme Court Family Law Committee. He emphasized the importance of Bench/Bar cooperation as the Family Court itself was being implemented. It was strong, and as it turned out, significant support. After that speech, and his persistent efforts, the question became not whether we would have a standing committee but how it would be implemented. At all times Justice Pashman, as he had in the earlier Pashman Committees, fought for lawyer involvement, and Judge Serpentelli, to his credit, followed the practice established in Pashman I and II.

The various modifications suggested by the Family Part Practice Committee have improved not only the quality of justice in the Family Court, but the perception that the system is, in fact, responsive and just. Yet, we understand it is far from perfect. It must continually be monitored and improved, and the Practice Committee is the vehicle for Bar involvement in this process.

The ongoing effort of the Practice Committee is more than simply Justice Pashman's legacy; it is a tribute to his foresight and shrewd understanding that constructive change can only occur when Bench and Bar go forward together. As we go forward together, Justice Pashman, as usual, will be leading us, but we shall not forget that while he remains ahead he has always been behind us. For that, we remember and say thank you. ☐

The Tax Reform Act of 1986

(Continued from page 65)

the first three years will determine whether any payments are subject to recapture, the effect of recapture is felt only in the third year. More specifically, if alimony payments in the second year exceed the sum of (i) the payments made during the third year, plus (ii) $15,000, such "excess alimony payments" are recaptured in the third year—*viz.*, such excess is included in the income of the paying spouse and is deductible by the recipient-spouse in the third year. Similarly, to the extent that alimony payments in the first year exceed the sum of (i) the average of the alimony payments in the second year (reduced by any excess alimony for this year) and the alimony payments in the third year, plus (ii) $15,000, such "excess alimony payments" are recaptured in the third year.

Illustration: If H pays $60,000 in the first year, $40,000 in the second year and $20,000 in the third year, he will recapture aggregate excess alimony payments of $22,500 as income in year three. This $22,500 of recapture income for year three is derived as follows:

(1) $5,000 is attributable to excess alimony payments for the second year (*viz.*, the excess of the $40,000 payment in year two over the sum of the $20,000 payment in year three plus $15,000).

(2) $17,500 is attributable to excess alimony payments for the first year (*viz.*, the excess of the $60,000 payment in year one over the sum of $15,000 plus the average of the $40,000 second year payment, reduced by the $5,000 excess alimony payment for that year, and the $20,000 third year payment).

Ostensibly, the reason for the new rule was to prevent persons whose divorce occurred near the end of a year from making a property settlement in the early part of the next year through a deductible alimony payment. However, the rule obviously will impact upon a far broader spectrum of situations. Indeed, the rule itself sets forth simply a mechanical recomputation procedure and will apply to various situations. The only exceptions to its application are:

—where alimony ceases upon (and by reason of) the death of either spouse or the remarriage of the recipient-spouse by the end of the third year.

—where the payments at issue are made under a support decree which is not a decree of divorce or separate maintenance (*e.g.*, a temporary support order).

—where the payments are made pursuant to an obligation extending over at least three years to pay a fixed portion or portions of the income derived from a business or item of property or from services rendered. (Note: this exception from recapture for so-called "fluctuating repayment arrangements" differs from the predecessor rule in that it reduces the required term from six years to three years and appears to allow different percentage arrangements to apply to different portions of the fluctuating income standard.)

Effective Date: These new excess alimony recapture rules will generally apply to all "divorce or separate instruments" (*i.e.*, decrees of divorce or separate maintenance or written instruments incident to such decrees, a written separation agreement or other support order) that are executed after December 31, 1986. It will also apply to divorce instruments executed before January 1, 1987, which are modified after December 31, 1986, but only if such modifications explicitly provide that the new rules shall apply. Further, even where divorce instruments have been executed prior to December 31, 1986, and have not been so modified, the recapture provisions of the old rules shall thereafter apply to the first three post-separation years.

B. *Removes Requirement that Alimony Terminate on Death*. Under the current rules, a payment is not considered alimony unless the obligation for payment ceases upon the death of the recipient-spouse. The paying-spouse cannot be required to continue payments to a substitute recipient, and the divorce or separation instrument must recite that there is no such requirement. The new law, obviates this required recitation in the divorce or separation instrument. As long as the applicable state law provides for the payments to cease upon the death of the recipient, the payments will be respected as alimony even in the absence of such explicit recitation.

Effective Date: This change is not only effective immediately, it is given retroactive effect back to January 1, 1985 (*viz.*, the general effective date of the Domestic Relations Tax Reform Act of 1984)—thus providing absolution for any possible prior violations of this requirement.