WAIVER OF CHILD SUPPORT

It is axiomatic that children have a unique status in the law and that contractual agreements relating to their support cannot be drafted with finality since they are unrepresented and their rights can never effectively be waived. This lack of finality is buttressed by the general rule that spousal support agreements relating to children define only a present obligation and are always subject to modification as changes occur. See generally Lepis v. Lepis, 83 N.J. 139 (1980). In fact, the Supreme Court made a significant distinction in the rules governing modification of child support, as opposed to alimony, by establishing a more liberal and easier to satisfy standard of "best interests". Lepis at 157.

That standard may be satisfied in a number of different ways, not the least of which is mere passage of time and the increasing age of children. See Lepis at 151. (Also see Testut v. Testut, 34 N.J. Super. 95, 101 (App. Div. 1955) making a similar statement over thirty-five years ago.) Yet, many clients, while recognizing an obligation to support their children would like to see finality in both alimony and child support.

I have previously addressed the question of finality in alimony and have concluded that, with careful draftsmanship, a supported spouse's right to seek modification of alimony under Lepis can effectively be circumscribed if not eliminated. Louis, 1987 N.J. Family Lawyer, at p. 182. The fundamentally more difficult question is whether any limitation can ever be imposed

upon the parental obligation to pay child support. The simple, but unacceptable, answer is that any restriction would be unenforceable.

Our case law is replete with references how child support should be determined, but the "touchstone" in determining the amount has always been and will continue to be "the welfare of the child". Gordon v. Gordon, 147 N.J. Super. 585, 590 (App. Div. 1977); Daly v. Daly, 39 N.J. Super. 117 (Juv. & D.V. Ct. 1956). It is for that reason, among others, that courts have repeatedly rejected parental attempts to draft agreements precluding increases, or even waiving child support. See Clayton v. Muth, 144 N.J. Super. 491 (Ch. Div. 1976) (Court refused to enforce an agreement precluding any increase in child support); Montanez v. Montanez, 146 Super. 350 (App. Div. 1977) (trial court decision which required amendment of a complaint by welfare mother who filed for divorce but failed to request child support affirmed by the Appellate Division.) See also Kopak v. Polzer, 4 N.J. 327, 333 (1950); ESB, Inc. v. Fischer, 185 N.J. Super. 373, 378 (Ch. Div. 1982).

A fascinating aspect of Family Law is the attempt to structure an agreement that meets your client's needs in the light of law which, on its face, seemingly prohibits that very relief. There is no question there can never be a guarantee that contractual language limiting modification, either as to alimony and, most definitely, child support, will be enforced. Yet, there is logic and precedent to suggest there are available options to attempt to

meet such demands. If there is one fundamental concept that must be kept in mind, however, it is that any provision will ultimately be attacked on the grounds that: a) it is not in the child's best interest; and, b) in Lepis terminology it is no longer fair nor equitable and thus subject to modification. These legal and practical considerations must always remain foremost in counsel's mind in attempting to draft limiting language.

Perhaps the least effective, but most often tried, mechanism of waiving child support is a provision whereby the supporting parent transfers their right, title and interest in the marital home to the custodial parent "in lieu of child support". This is the type of provision that is most susceptible to attack for at least two reasons. First, by its very nature, a house is not liquid and does not provide the support a custodial parent needs. Thus, a situation is created where the need for support might very well prompt the application to attack the provision. Secondly, that kind of absolute waiver is unprecedented and directly contrary to the established precedent. Thus, there is very little chance that if the children's needs are not being met by the custodial parent that such a provision would be enforceable. If, however, you are willing to undergo this risk, which I do not advise, the language of the agreement should characterize the transfer, not as a "waiver", but a prepayment of support at levels consistent with the supporting spouse's obligations. This should, with a great deal of specificity, be set forth in the agreement and subject to the prophylactic devices described hereafter concerning judicial

involvement.

What is a potentially more interesting approach is to construct an agreement based upon existing precedent. While it is clear that the law does not allow a waiver of child support, it is equally clear that precedent outside the State and, more importantly, in New Jersey, will sanction an assignment of the responsibility to pay support. Utilizing the sanctioned device of "assignment", when combined with the strong judicial policy approving settlements, Petersen v. Petersen, 85 N.J. 638, 642 (1981), may well satisfy the client's demand for finality.

It is not generally known that the Appellate Division, in Bengis v. Bengis, 227 N.J. Super. 351 (App. Div. 1987), sanctioned what was the equivalent of, on unique facts, a waiver of child support. Bengis is probably not well known because of the unusual circumstances in which it arose. In this post-judgment action, the custodial parent appealed a trial court determination holding the father of the children and Plaintiff's former husband responsible for child support and relinquishing her then present husband ("McGettigan") from child support. Immediately, it is apparent that Bengis is an unusual case. Mr. and Mrs. Bengis were divorced in 1977 and Plaintiff remarried McGettigan in 1982. That marriage ended in 1985 and Plaintiff sought support from McGettigan arguing he stood "in loco parentis" to the children.

After the marriage, McGettigan arguably commenced a course of conduct establishing the in loco parentis relationship. He went so far as to enter an agreement pursuant to which he agreed to adopt

the Bengis children. The trial court found that the parties had entered into such an agreement with that intent and further that McGettigan's actions had "interfered with and caused a breach in the relationship between the natural father and the children". Bengis at 357. Based on those findings, in a pendente lite setting, the Court found the requisite financial detriment required by Miller v. Miller, 97 N.J. 154 (1984) and directed McGettigan to pay child support but which terminated on divorce.

The Court also found that the underlying contract, which included a relinquishment of support from the natural father, was "not binding" because it was an agreement that would "preclude children from seeking support from the natural father". The trial court, seemingly in reliance on long standing precedent, found such a result to be void as contrary to public policy. On appeal, the Appellate Division reversed, concluding that as to the contract the trial court found to be unenforceable, that there was "no basis for that conclusion". Bengis at 361.

The Court, in critically important language that must not be forgotten in any attempt to effectuate relinquishment of a child's rights, observed that interspousal support agreements would be void if they led to a "reliance on public assistance" citing Bergen County Welfare Board v. Cueman, 164 N.J. Super. 401, 404 (Juv. & Dom. Rel. Ct., 1978). In other words, when welfare is involved, all bets are off. The Court then went on to make a significant distinction between bargaining away a child's rights contrasting that act with assignment of the support duty to a financially

responsible third party.

The Appellate Division relied on a California case where the Supreme Court of that State held that an agreement assigning the duty to pay support is "specifically enforceable and in conformity with public policy". Spellens v. Spellens, 49 Cal. 2d. 210, 317 P. 2d. 613 (1957) cited in Bengis at 362. Thus, New Jersey law recognizes a distinction between a waiver of child support and an assignment to a responsible third party, thus providing the precedential basis for negotiations to achieve the very result previously thought unachieveable. Logically, this should equally apply to blanket waivers or a provision precluding an increase in support. In other words, Bengis may permit foreclosure of the right, previously thought to be immutable, to seek increases pursuant to Lepis.

In fascinating language the Appellate Division in Bengis went on to note that not every agreement relieving a natural parent of support would be held to violate public policy. While, not surprisingly, the decision noted that wherever the welfare of the children is of concern, the Court has discretion "to reject" such an agreement, the Appellate Division significantly found that the trial court had applied a "faulty premise" that "every agreement for support by a third party is per se contrary to public policy". The trial court, on remand, was directed to determine the nature of the agreement, the consideration therefor and articulate, if it was not enforced, why it did "not warrant judicial enforcement". Bengis at 362. These comments reflect the strong preference courts

like to give to freely negotiated agreements.

Thus, it appears that a New Jersey Court will sanction an agreement relieving a parent from the payment of child support if: a) public welfare is not involved; b) it is not contrary to the welfare of a child; c) the person to whom support is being assigned is "financially responsible". Bengis at 361. That then raises the question of drafting and negotiation. In order for an agreement to be specifically enforced, it must be clear that the children's needs, both at execution of the agreement and in the future, are adequately met and that the party assuming financial responsibility has the financial ability to meet the reasonable needs of the children both now and in the future. There is nothing in the language of Bengis that seemingly prohibits assignment of the support responsibility to the custodial parent yet there should be, for an agreement to be enforceable, some specific consideration for that assignment reasonably related to the present and reasonably anticipated needs of the children. Generally, the agreement should link the equitable distribution and alimony provisions to the waiver.

In many respects, the negotiation process is similar to a waiver of alimony. The consideration must be sufficient to support a waiver of a right granted by the Supreme Court in Lepis or, phrased otherwise, in the light of the specific terms and provisions of the waiver, and the consideration for it, the underlying agreement, in the light of all of the circumstances, is fair and equitable. If it is not, changed circumstances preclude

judicial enforcement of a spousal, or child support, agreement that is no longer fair and equitable. The inquiry whether the agreement is fair and equitable must directly consider the bargained for consideration that forms the basis for the waiver or relinquishment of support and justifies the Court's later view that the waiver, because of those provisions, is fair and equitable.

In my view, that consideration must carefully be set forth in the agreement. I have set forth hereafter language that I have used in the past concerning child support and for illustrative purposes the language previously suggested in an earlier article regarding alimony since the concepts are similar. The relinquishment of support relating to child support may be in two parts with differing degrees of risk as to each. First, there is the type of relinquishment sanctioned in Bengis which is a total termination of the child support obligation. Secondly, and this is important in terms of attempting to obtain finality, the waiver of the right to seek an increase. The latter, in my judgment, is probably easier to enforce.

One practical observation that might be important in obtaining an agreement that will later withstand attack is to suggest, at the time the matter is settled, for the Court to deviate from its normal practice and make factual findings that, in the light of the circumstances, this particular provision is fair and equitable. If you are dealing with a pro se, such a prophylactic step would not only be prudent, but essential. The state-wide practice of judges, when approving agreements, declining to make factual findings that

the agreement is fair and equitable, except for the finding that the parties have entered into them voluntarily, is neither a creature of statute or precedent. Rather, it is a practice that has developed over time primarily out of practicality since it would, in every case, be difficult to implement a settled case if judges were required to make findings on fairness. Yet, an agreement that is carefully crafted and meets not only a child's present and future needs, but also receives judicial approval at the time is incorporated in a judgment, has a greater likelihood of withstanding attack.

PROPOSED LANGUAGE (CHILD SUPPORT)

In negotiating the relinquishment of the wife's right to seek increased child support, the parties have considered the levels of alimony paid (Article 4.3) and the amount of and the manner in which equitable distribution is being paid (Article 5.1). The wife acknowledges that but for her promise not to seek an increase in child support, the husband would not have altered his prior positions on equitable distribution and alimony (specificity here is helpful). The parties have further considered the rights of the children to share in the future anticipated financial success of the husband. They acknowledge, however, that by virtue of the financial terms of this agreement, they have not only provided for the children's present needs but all anticipated future needs while recognizing that law would permit, over time, periodic increases in child support.

While the parties acknowledge that waivers of child support and other obligations relating to a child may not be binding as a matter of law, they nevertheless wish to adopt the rationale of the Appellate Division in Bengis v. Bengis where the court concluded that the custodial parent has the right to relinquish child support claims from a parent and that such an agreement does not necessarily violate public policy. The wife acknowledges that she is voluntarily assuming the responsibility of any right to seek an increase in child support subject, however, to the

husband's compliance with his financial obligations set forth herein (see Article 4.3 and 5.1). She acknowledges that she is financially capable of discharging that responsibility by virtue of the negotiated alimony and equitable distribution provisions set forth herein.

Both parties intend this agreement to be a final and irrevocable resolution of all issues relating to child support. If the wife, or anyone on her behalf, institutes a legal action regarding the payment of any money regarding a child, other than as set forth in this agreement, the wife shall indemnify and hold the husband harmless against any costs, expenses or out-of-pocket payments he is required to make by way of additional child support, legal fees or any other expenses of whatever kind or nature.

PROPOSED ALIMONY LANGUAGE

5.6 The parties have specifically reviewed the existing law and have recognized the fact that spousal agreements are modifiable upon changes in circumstances. The parties have further recognized that they have separately agreed to irrevocably terminate the husband's alimony obligations at the expiration of one hundred twenty (120) months (see Article 5.1(E)). They further acknowledge that they have agreed to provide that the husband's alimony obligations during the ten-year period shall not be increased by any changes in his circumstances. In recognition of the foregoing, the parties have agreed to increase the amount of support to be paid by the husband from that previously offered. In particular, the wife acknowledges that the husband has altered his previously advanced alimony position in reliance upon the wife's promises and representations regarding the non-modifiability of the spousal support both during the one hundred twenty month period. The wife further warrants and represents that she acknowledges but for her promise in this article the husband would not have altered his alimony position and that notwithstanding any language contained in the Lepis decision, the alimony, during the one hundred twenty month period, shall not be subject to any increase and that this provision is irrevocable even if any or all of the following occur solely or in combination.

A. The husband's dramatic and substantial change of income, of whatever nature, scope or duration.

B. Inheritance of money by the husband.

C. Acquisition of new assets by the husband.

Specifically, the wife waives any rights she may have under the Lepis decision to later argue that such subsequent changes in circumstances render the amount of alimony either unfair or inequitable. It is the specific intention of the parties to introduce concepts of collateral estoppel into this agreement to prevent the wife from seeking an upward modification of the alimony provision during the one hundred twenty month period.