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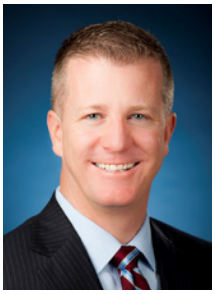
Chair's Column

The Challenges Ahead

by Michael A. Weinberg



As I embark upon my year as chair of the Family Law Section, I want to express my gratitude and appreciation to the immediate past chair, Stephanie Frangos Hagan. Stephanie brought a unique mix of experience, initiative, and passion to the section, while also remaining active in the Morris County Bar Association, where she is scheduled to be installed as president in January. I was fortunate to work along with Stephanie on the section's executive committee for the past five years. Through her devotion and commitment to the section, Stephanie has left big shoes to fill. I thank Stephanie for her hard work, her dedication, and her friendship.

I am also privileged to continue to work alongside Sheryl Seiden, Ronald Lieberman, and Robin Bogan, each of whom remain committed to the section and its continued growth and development. I am also fortunate to have the opportunity to work with the section's newest officer, Derek Freed, whom I am sure will continue to be an asset to the section in the years ahead.

I would be remiss if I did not also express my gratitude and appreciation to the section's previous immediate past chair, Timothy McGoughran, who spent this past year lighting the pathway for Stephanie and for me. Tim has been, and continues to be, a tireless advocate to the New Jersey State Bar Association and the section. I thank him for his many years of service, and appreciate all he has done for me and for the section.

As chair of the section, I plan to continue the great work of Stephanie, Tim, and the others who came before me. With the opportunities, and the challenges that come with being chair, I want to leverage the wonderful influence of the section and its members, by focusing on a plan and goals for the coming year.

This is a critical time for our profession. Certain practices surrounding child custody and child support-related issues are creating alarm. To that end, one specific area that will require focus in the year ahead is the prevention of further restriction and limitation upon judicial discretion in the area of family law. I very much respect our state's legislators, and understand

their constitutional role. But our courts are a co-equal branch of government. Legislative efforts to impose 'guidelines' or 'presumptions' erode and overshadow the importance of judicial discretion within our practice.

Indeed, I can think of no area where the exercise of judicial discretion is more critical than in the determination of child custody and parenting time-related issues. To be clear, I do not believe that equal physical custody of a child should be the presumed result in every case. Instead, custody and parenting time-related issues should continue to be decided by our Judiciary on a case-by-case basis, without a mandate or rebuttable presumption of exactly equal shared physical custody. The facts of each case matter. A 50/50 shared custody presumption changes that critical focus from what is in a child's best interest to how the parents of that child can be treated equally. That is not the same question, and threatens to convert our current focus on the child's best interest when that child cannot speak for him or herself to a standard concerned about what is in the best interests of the parents.

Another area of our practice that is uncertain is intrastate relocation. Given the Court's determination in 2017, in *Bisbing v. Bisbing,* with regard to matters involving interstate relocation,[1] I also believe it is appropriate for the section to now evaluate what standard should be utilized when a custodial parent seeks to relocate within the state of New Jersey. Clearly, further guidance and clarification is needed here.

I would also like to continue the section's focus upon the need to review and revise our state's existing probation child support statute, which continues to be misunderstood and misapplied. I am thankful to Jeralyn Lawrence and Stephanie, as well as their existing subcommittee, for the good work they have and will do to make it clear that there is a difference between when a child is emancipated and when the child support obligations administered through the New Jersey Family Support Payment Center are terminated. Those concepts are not one and the same, no matter how often it is cited as such in courts across our state.

Additionally, the time has come for the section to work cooperatively with the Real Property, Trust and Estate Law Section of the New Jersey State Bar Association to revisit and revise New Jersey's elective share statute, which, as currently written, could lead to a surviving spouse being left without a statutory remedy in the event of the premature death of his or her spouse during pending divorce proceedings.[2]

During my year as chair of the section, I also feel it is important to continue to expand our community outreach activities. In our desire to be part of the community, we must look beyond our own members. We, as a section, have so much to offer, and I am certain that our contributions will be welcomed and appreciated by those in need. I look forward to working with my fellow officers and section members in the coming year to increase awareness of, and relevance of, the section throughout the state.

My goals this year also include further development of a sense of excitement and interest in the section, and the good work we do. The section is committed to having a diverse and robust membership, and it is important that we foster a continued understanding of diversity and equality in the year ahead. Within this context, I also intend to work cooperatively with my fellow officers and section members to cultivate new and fresh ideas in the year ahead, so the section can continue to be recognized and thought of as a leader and a voice for our profession.

After serving my clients, the opportunity to serve the New Jersey State Bar Association and the Family Law Section has been incredibly rewarding and truly one of the highlights of my career. The Family Law Section is one of the largest and most active sections in the New Jersey State Bar Association. Our 1,300 members come from firms all across the state, united by a desire to be part of a community, to learn from their fellow attorneys and find new and collaborative ways to serve both their profession and their clients. We come from diverse backgrounds; from big cities and small towns; from large law firms and boutique law firms; from Northern New Jersey where the Giants rule, to Southern New Jersey where the Eagles fly high. We have different perspectives, different political beliefs, different tastes, and different temperaments. Yet, for all of those differences we, as a section, are united through our intimate and often challenging work with families, and by core common goals. We want to help; we want to be of service. We always strive to be better, and to make the lives of our clients better. We want to make a difference, and to help those around us succeed. The section helps us do all of that, and I am truly grateful to my fellow officers and section members for their contributions of their time, talent, resources, and enthusiasm.

As a child, my parents would often remind me that you get out of something what you put into it. That holds true for every aspect of our lives, from our careers, to our

families, to our communities. It is has been my experience that it also holds true for professional organizations like this section. As a longstanding member of the section, I, along with many others, have devoted countless hours to its mission. While it has not always been easy, I have very much enjoyed my work on behalf of the section because of the people I have been fortunate enough to share the experience with. I intend to spend this coming year working even harder to lead the section to meet the many challenges that lay ahead. I cannot, and will not, be doing it alone, and I look forward to working with Sheryl, Ron, Robin and Derek, as well as the other section members, to make this year a meaningful and rewarding experience.

Endnotes

1. *Bisbing v. Bisbing*, 230 NJ 309 (App. Div., 2017).
2. N.J.S.A. 3B:8-1.

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Editor-in-Chief's Column

Discovery Masters in Divorce Cases

by Charles F. Vuotto Jr.

There is a very interesting article in the June issue of the *New Jersey Lawyer* entitled "The Utility of a Special Master."[1] As correctly pointed out by the author (Harriet Derman), the applicable New Jersey Court Rules permitting the appointment of special masters are Rule 4:41-1 to Rule 4:41-5. Rule 4:41-1 provides as follows:

> The reference for the hearing of the matter by a judge of the Superior Court shall be made to a master only upon approval by the assignment judge, and then only when all parties consent **or** under extraordinary circumstances. An order of reference shall state whether the order is consensual and, if not, shall recite the extraordinary circumstances justifying the references.[2] (Emphasis added)

Therefore, if approved by the assignment judge of the county, special masters may be used by consent of the parties, even if extraordinary circumstances do not exist. As Derman points out, the appointment of special masters has been approved for such matters as review and allocation of counsel fees,[3] assistance to a court in a valuation dispute in a matrimonial matter,[4] overseeing an election dispute of absentee ballots of nursing home residents,[5] reviewing a large number of privileged documents,[6] and hearing motions to dismiss third-party defendants under Rule 4:6-2(e).[7] Beyond resolution of major substantive issues, litigants often get bogged down in discovery disputes, especially in high-asset cases. A special master is particularly helpful in these sorts of cases, since judges very rarely have the time (considering their other docket responsibilities) to deal with complex discovery motions. This author wonders, therefore, why aren't discovery masters (a form of special master) used more often in matrimonial matters?

Very often during matrimonial litigation there are one or two big issues in the case that create stumbling blocks to the resolution of all other issues. Usually, these issues relate to or are dependent on outstanding information. If parties are not able to resolve the major stumbling block or major point of disagreement in direct negotiations, and either have tried and failed at mediation and refuse to engage an arbitrator to resolve the issue, parties often resort to motion practice. However, the courts are reluctant to engage in piecemeal litigation, and major issues may often be reserved for determination at trial. This creates a situation where the parties have no other alternative but to continue to litigate and attempt to prevail on the major sticking point at the time of trial. Often the court does not have the resources to expend as needed to evaluate a major issue in the case by way of motion practice on a *pendente lite* basis, which usually would require a plenary hearing. Often these issues are pushed off until the final hearing or trial. However, if there was a mechanism in place to allow these isolated stumbling blocks in terms of discovery to be resolved, this author believes that many more cases would settle long before the trial date.

In fact, a special master employed to resolve a sticking point between the parties may also make an effort to assist the parties in resolving those issues in a consensual fashion. (Although this author would caution that the same concepts as discussed in *Minkowitz v. Israel*[8] would have to be addressed if the special master took on a facilitative role.)

How is this different than arbitration? Utilization of a special master arises pursuant to Rule 4:41-1. The court has discretion to appoint a special master under that rule, whereas the court cannot compel parties to engage in arbitration.

Clearly, the standard to be met in order to obtain the appointment of a special master (without consent) is high. The court requires (unless the parties agree otherwise) a showing of "extraordinary circumstances" justifying the appointment.

The cost of a special master must be considered. As

correctly stated by the court in *Zehl v. City of Elizabeth Board of Education*,[9] "the interest in alleviating administrative burdens harmonizes with litigants' interest in swift and economical resolution of their disputes."[10] The appellate court was warned that the appointment of special masters should be "judicious and limited."[11] As stated by Derman in the aforementioned *New Jersey Lawyer* article, "the implementing order should provide for the scope of the master's authority, specifying or limiting the master's power and may direct the master only to report on particular issues or to do particular acts or to receive and report evidence only."[12]

It is true that a reference to a discovery master may not exceed the scope of the parties' consent and may not be used as a device to limit a party's right to complete discovery and to present witness at trial.[13] With that acknowledged, however, utilizing a special master in the form of a discovery master who is paid to spend the time dealing with the minutia of discovery disputes would seem to be something parties should readily agree to when such disputes place a roadblock in the way of a resolution on the merits. ■

Endnotes

1. 312 *New Jersey Lawyer*, 52 (Harriet Derman, June 2018).
2. R. 4:41-1.
3. *Stanley & Fischer, P.C., v. Sisselman*, 215 N.J. Super. 200 (App. Div. 1987); I*n re: Unanue*, 311 N.J. Super. 589 (App Div.) *certif. denied*, 157 N.J. 541 (1998), *cert. denied*, 526 U.S. 1051 (1999).
4. *Levine v. Wiss & Co.*, 97 N.J. 242, 250 (1981).
5. *Petition of Battle*, 96 N.J. 63 (1984).
6. *Rivard v. Am. Home Products, Inc.*, 391 N.J. Super. 129, 153 (App. Div. 2007).
7. *New Jersey Dep't of Envir. Prot. v. Occidental Chem. Corp.*, 212 W.L. 1392597.
8. *Minkowitz v. Israel*, 433 N.J. Super. 111 (App. Div. 2013).
9. 426 N.J. Super. 129 (App. Div. 2012).
10. *Id.* at 137.
11. *Id.* at 142.
12. R. 4:41-3.
13. *See Cardell, Inc. v. Piscatelli*, 277 N.J. Super. 149 (App. Div. 1999).

Executive Editor's Column

If Cohabitation Does Not Have an Economic Component, Can It Withstand Constitutional Scrutiny?

by Ronald G. Lieberman

N.J.S.A. 2A:34-23(n) was a sea change in the law regarding how judges view cohabitation cases. But does that new law sink when viewed against the right to privacy? It is this author's conclusion that without a finding by a judge of specific economic dependency, economic needs or direct economic benefit, let alone lifestyle enhancement, between the recipient of alimony and a paramour, the cohabitation law should be considered an unconstitutional invasion of a recipient's right to privacy under Article I, Paragraph One of the New Jersey Constitution.

In order to see why the statute would be unconstitutional without economic involvements between the recipient and the paramour, a quick refresher on N.J.S.A. 2A:34-23(n) is required. Cohabitation was defined in the statute as "a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union but does not necessarily maintain a single household." There are seven factors set forth in the statute to evaluate the existence of cohabitation:

1. Intertwined finances such as joint bank accounts and other joint holdings and liabilities;
2. Sharing or joint responsibility for living expenses;
3. Recognition of the relationship in the couple's social and family circle;
4. Living together, the frequency of contact, the duration of the relationship and other indicia of a mutually supporting intimate relationship;
5. Sharing household chores;
6. Whether the recipient of alimony has received an enforceable promise of support from the other person; and
7. All other relevant evidence.

So, of the six specific factors listed in the statute to determine whether cohabitation existed, only two of them, factors one and two, actually mention economics, putting aside factor six about an enforceable promise to support (*i.e.*, palimony).

In order to keep analyzing the issue, it is necessary to review prior case precedent on the right to privacy before looking at case law on cohabitation. New Jersey residents are fortunate to have privacy guaranteed as a fundamental right, under a state constitution that protects against unjustified violations. As to Article I, Paragraph One of the New Jersey Constitution, it reads as follows:

> All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying life and liberty, of acquiring, possessing, and protecting property and of pursuing and obtaining safety and happiness.

The New Jersey Supreme Court has made it clear that "the language of that paragraph is more expansive than that of the U.S. Constitution. It incorporates within its terms the right of privacy and its concomitant rights."[1] "Although the state constitution may encompass a smaller universe than the federal constitution, our constellation of rights may be more complete."[2]

As a result of the right to privacy being defined as a fundamental right, governmental interference with the right can only be justified by a compelling state interest.[3] Moreover, "even if the governmental purpose is legitimate and substantial, the invasion of the fundamental right to privacy must be minimized by utilizing the narrowest means which can be designed to achieve the public purpose."[4] So, the state bears the heavy burden of making a strong connection between its conduct and the governmental interests to be served. That heavy burden capsizes the cohabitation statute into the waters of an unconstitutional intrusion of the right to privacy.

All practitioners are aware that alimony is "an economic right that arises out of the marital relationship and provides the dependent spouse with a level of support and standard of living generally commensurate

with the quality of economic life that existed during the marriage."[5] The New Jersey Supreme Court, 35 years ago, in *Gayet v. Gayet*,[6] addressed the issue of whether alimony could be modified based on cohabitation. In holding that the answer was yes, the Court adopted an economic needs test.[7] The Supreme Court held that it was the public policy of New Jersey that individuals have a privacy right "to develop personal relationships free from governmental sanctions."[8] The Court held that the economic needs test was necessary because "the extent of actual economic dependency, not one's conduct as a cohabitant, must determine the duration of support, as well as its amount."[9] Further, in determining that the economic needs test was necessary, the Court held that an economic needs test "balances the interests of personal freedom and economic support…"[10]

Years prior, in 1975, the Appellate Division, in *Garlinger v. Garlinger*,[11] reversed a trial judge's termination of alimony because of a recipient's new relationship, without first determining there were economic interactions between the recipient and the paramour. The Appellate Division reversed, finding that the recipient was not required to live a "chaste" life after divorce because that requirement would be "distinctly punitive."[12] Moreover, the *Garlinger* court found that once there was an absolute divorce, "the former wife [is free] from all martial obligations. Thereafter, except as a member of the public, she owes the former husband no duty to lead a virtuous life."[13]

As Justice Barry Albin wrote in *Quinn v. Quinn*,[14] "an anti-cohabitation clause (in a settlement agreement) untethered to economic needs, is contrary to public policy and unenforceable." The *Quinn* case does not help a practitioner interpret whether the cohabitation statute is unconstitutional if there are no economic needs or economic benefits, because *Quinn* was looking at enforcing a settlement agreement and its language regarding modification of cohabitation. In fact, the Court in *Quinn* held, in part, that a settlement agreement expressly providing for termination of alimony upon a cohabitation was enforceable.[15]

A practitioner need not look any further for the dividing line between a married couple and a cohabitating couple than Justice Albin's dissent, from page 63 through 64 of *Quinn*, where he outlined the various statutes that listed what rights and benefits a spouse had regarding marital privilege; intestate estate; surviving spouse elective share; eligibility for post-secondary education benefits; the effect of a deceased employee; the rights to family leave; how to hold property as tenants by entirety; exemption from taxes; and certain protections in the tax code, healthcare benefits and under the bankruptcy court. All of those benefits are economic in nature. So, throughout New Jersey law, economics infuse the relationship of a married couple, and without economics between the ex-spouse and a paramour the supporting spouse is doing nothing more than invading his or her former spouse's right to privacy.

"Apart from the economic impact upon either need or the ability to pay recognized in *Gayet v. Gayet* and other cited cases…the payor spouse may not control through loss or suspension of statutory alimony the social activities of the payee."[16] So, if there is no economic impact as a result of the relationship between the recipient and a paramour, is not the payor spouse merely controlling the recipient spouse, so much so that the New Jersey Constitution has been violated? To find the answer, the practitioner need look no further than *Reese v. Weis*,[17] where the Appellate Division held that a court must look at "direct economic benefits" to the supported spouse because of cohabitation and must look at "lifestyle enhancements directly attributable to cohabitation."

Alimony is an economic right, and *Gayet* held that without economics there is a violation of an individual's right to privacy under the New Jersey Constitution. So can there be a reasonable argument that the statute would be unconstitutional if all a trial judge found was that there was recognition in the social circles of a relationship or shared chores or the parties had frequent contact? How do any of those factors impact economics? This author believes they don't.

If the new relationship has no direct economic benefits or lifestyle enhancements, then wouldn't a finding of cohabitation causing a termination or suspension of alimony in that situation merely be a punishment for the recipient living an 'unchasted' life? If the supported spouse has not caused any economic harm to the supporting spouse because of the new relationship, then what interest does the supporting spouse have in how the supported spouse lives his or her life post-divorce? This author believes the answer is there is no interest. To find otherwise would be to invade an individual's right to privacy. Given that there is only a limited government interest in doing so, without economics between the recipient and the paramour, a finding of cohabitation under N.J.S.A. 2A:34-23(n) fails constitutional muster.

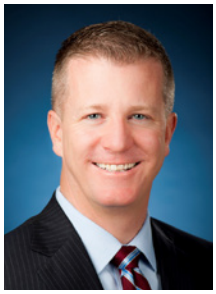
It is hoped that in the years to come (if not sooner) practitioners will receive guidance from courts as to whether the constitutionality of the cohabitation statute can survive if there are no economics. But until then, it appears on its face that the statute is constitutionally infirm without a finding of economics between the ex-spouse and a paramour.

Endnotes

1. *Planned Parenthood v. Farmer*, 165 N.J. 609, 612-13 (2000).
2. *Right to Choose v. Byrne*, 91 N.J. 287, 300 (1982).
3. *State v. Saunders*, 75 N.J. 200, 2017 (1977).
4. *In re Martin*, 90 N.J. 295, 318 (1982).
5. *Mani v. Mani*, 183, N.J. 70, 80 (2005).
6. 92 N.J. 149 (1983).
7. *Id*. at 153-54.
8. *Id*. at 151, *citing State v. Saunders*, 75 N.J. 200 (1977) (Unanimous court finding "a limited state interest in regulating and individual's personal decisions relating to privacy, which have nearly incidental effects on others") and *Right to Choose v. Byrne*, 91 N.J. 287, 303 (1982) (Finding that Article I, Paragraph One of the New Jersey Constitution declares the right to life, liberty and the pursuit of safety and happiness and, thus, protects the right to privacy).
9. *Id*. at 154.
10. *Id*. at 153-154.
11. 137 N.J. Super. 56, 59 (App. Div. 1975).
12. *Id*. at 60-61.
13. *Id*. at 60-61.
14. 225 N.J. 34, 60-65 (2016).
15. *Quinn, supra*, 225 N.J. at 50.
16. *Melletz v. Melletz*, 271 N.J. Super. 359, 367 (App. Div. 1994).
17. 430 N.J. Super. 552, 567-77 (App. Div. 2013).

Meet the Officers

Chair—Michael A. Weinberg



Michael A. Weinberg is co-chair of the family law department of Archer. As a partner in the matrimonial department, he concentrates his practice in matrimonial and family law. He is the co-chair of the Camden County Bar Association Family Law Committee and currently serves as an officer on the New Jersey State Bar Association Family Law Executive Committee. He is a matrimonial early settlement panelist for Burlington, Camden and Gloucester counties and has also recently been named as a certified matrimonial attorney by the New Jersey Supreme Court's Board on Attorney Certification. A master in the Thomas S. Forkin Inns of Court, Weinberg is a former chair of the Membership Committee. He has lectured for the Institute for Continuing Legal Education, the American Academy of Matrimonial Lawyers, American Trial Lawyers Association, and the National Business Institute, and has appeared on the television programs "Legal Lines" and "Legally Speaking." He has been recognized as a "Best Lawyer in America" since 2016. A former adjunct professor at Burlington County College, Weinberg assisted with the bankruptcy and divorce chapter in the *New Jersey Family Law Practice* 2002 and 2006 editions. He received his B.S. from Bentley College and his J.D., *magna cum laude*, from Capital University Law School, where he was published in the law review and was a selected member of the 1993 National Moot Court Team. He was a law clerk to the Honorable Charles A. Little.

Chair-Elect—Sheryl J. Seiden

Sheryl J. Seiden is the founding partner of Seiden Family Law, LLC in Cranford and practices family law exclusively. She has been recognized as a "Best Lawyer in America" since 2015, and has been selected by her peers as a Super Lawyer (and previously, a Rising Star) since 2015. Seiden is an officer of the Family Law Executive Committee (FLEC) of the New Jersey State Bar Association, and is slated to be chair of FLEC in May 2019. She is a past co-chair of the Young Lawyer Family Law Subcommittee for FLEC, and has been a member of FLEC since 2008. Seiden is also a fellow of the American Academy of Matrimonial Lawyers (AAML)–New Jersey Chapter, where she has served on the board of managers for the last three years. In Nov. 2014, she argued *amicus curiae* for AAML in *Gnall v. Gnall* before the Supreme Court of New Jersey. She is a member of the Union County and Essex County bar associations; is an early settlement panelist for the New Jersey Superior Court, Chancery Division, Family Part, Union County; and has been asked to serve as a blue ribbon panelist on several occasions by the early settlement panel for the New Jersey Superior Court, Chancery Division, Family Part, Essex County. Seiden graduated *magna cum laude* from New York Law School in 1996, where she served as the managing editor of the *New York Law School Law Review*. She received her B.A. in justice from American University in Washington, D.C. in 1993, where she graduated *cum laude*.

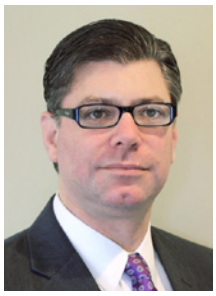
Vice Chair—Ronald G. Lieberman

Ronald G. Lieberman is the chair of the family law practice group of the firm of Cooper Levenson, PA in Cherry Hill. He is certified by the Supreme Court of New Jersey as a matrimonial law attorney, is a fellow with the American Academy of Matrimonial Lawyers, (AAML) and is board certified as a family trial lawyer by the National Board of Trial Advocacy. His practice is limited to family law issues, including matrimonial law, divorce, child custody, child support, parenting time, domestic violence, and appellate work. Admitted to practice in New Jersey, New York and Pennsylvania, Lieberman is president of the Camden County Bar Association and co-chair of its Family Law Committee. He is the secretary of the New Jersey Chapter of the AAML. He is also a years-long member of the Supreme Court's Family Law Practice Committee. A former master of the Thomas S. Forkin Family Law American Inns of Court, Lieberman has lectured on family law topics for the Institute for Continuing Legal Education, the New Jersey Association for Justice, Sterling Educational Services, the National Business Institute, the New Jersey State Bar Association and Burlington County and Camden County bar associations. He is executive editor of the *New Jersey Family Lawyer*, has authored articles that have appeared in the publication, and has been quoted in the *Courier Post, U.S. News and World Report, The New York Times* and on CBS 3 Philadelphia. He has been recognized as a "Best Lawyer in America" since 2016. Lieberman received his B.A. from University of Delaware and his J.D. from New York Law School. He was law clerk to the Honorable F. Lee Forrester, P.J.F.P. (Ret.).

Treasurer—Robin C. Bogan

Robin C. Bogan is a partner at the law firm of Pallarino & Bogan, L.L.P., in Morristown. She has devoted her practice to family law and related matters for over 20 years. Bogan is certified by the Supreme Court of New Jersey as a matrimonial law attorney. She is also actively involved in the legal community. She is the immediate past president of the Morris County Bar Association and past president of the Morris County Bar Foundation, and she has served as a member of the Executive Committee for the Family Law Section of the New Jersey State Bar Association since 2005. Bogan volunteers as an early settlement panelist for the superior court in Morris County. She is a barrister for the American Inns of Court and served as an investigator for the Ethics Committee for Morris and Sussex counties from 2006–2009. Bogan received the 2013 Professional Lawyer of the Year Award for Morris County from the New Jersey Commission on Professionalism in the Law. *New Jersey Monthly* named her as one of the Top 50 Women Lawyers in New Jersey and in 2017 one of the Top 100 attorneys in New Jersey. Bogan has lectured on family law issues for the New Jersey Institute for Continuing Legal Education, New York Practising Law Institute, the Barry Croland Family Law Inn of Court, and for the Morris County Bar Association. Her articles on family law issues have appeared in several professional publications. She received her J.D. in 1996 from Seton Hall University School of Law and her B.A. from the University of Richmond in 1993. Bogan served as a judicial law clerk for the Honorable Thomas H. Dilts, the presiding judge of the family part of the superior court of New Jersey in Somerset County, from 1996 to 1997.

Secretary—Derek M. Freed



Derek M. Freed is a member of the law firm of Ulrichsen Rosen & Freed LLC in Pennington. He concentrates his practice in matrimonial and family law. He is a matrimonial early settlement panelist in Mercer County and Somerset County. Freed has served as a member of the Executive Committee for the Family Law Section of the New Jersey State Bar Association from 2009-2010 and again from 2011 to the present. He has lectured for the Institute for Continuing Legal Education, the New Jersey State Bar Association, the New Jersey Association for Justice, and the Mercer County Bar Association with respect to family law-related matters. He was a co-author of the New Jersey State Bar Association's *amicus curiae* brief to the New Jersey Supreme Court on the matter of *Gnall v. Gnall* and the matter of *Bisbing v. Bisbing*. He is presently an associate managing editor of the *New Jersey Family Lawyer* and has had several articles published in the publication. Freed received his J.D. from Rutgers, the State University of New Jersey, with honors, and his B.A. from the College of William & Mary in Virginia.

Immediate Past Chair—Stephanie Frangos Hagan

Stephanie Frangos Hagan is a named founding partner in the law firm of Donahue, Hagan, Klein & Weisberg, LLC and has limited her practice exclusively to family law for more than 30 years. She is a graduate of Seton Hall Law School and received an undergraduate degree from Rutgers University. She is a frequent lecturer and panelist for NJSBA/ICLE and county bar associations on a variety of family law topics, including alimony, child support, custody, equitable distributions, domestic violence, civil unions and other family law issues. Hagan received the Distinguished Legislative Award from the NJSBA and serves as a blue ribbon panelist for the Essex, Union and Morris county family law early settlement programs. She has been a court-approved family law mediator since 2001 and certified by the American Academy of Matrimonial Lawyers as a family law arbitrator. Hagan has been a member of the Executive Committee of the Family Law Section for more than 20 years. She was formerly chair of the District Fee Arbitration Committee for Morris County, and was installed as an officer of the Morris County Bar Association and as a trustee of the Morris County Bar Foundation in Jan. 2014. She is currently the immediate past-president of the Morris County Bar Foundation and is scheduled to be installed as president of the Morris County Bar Association in Jan. 2019. Hagan has been named as a Super Lawyer's Top 100 attorney in New Jersey in 2015, 2017 and 2018 and as a Super Lawyer's Top 50 Women attorney in New Jersey since 2015.

In Memoriam: Honorable Graham Tom Ross, J.S.C. (ret.)

by Francis W. Donahue and John Finnerty

It is with great sadness that we note the passing of Honorable Graham Tom Ross, J.S.C. (ret.), who passed away at the age of 74 on Aug. 6. Judge Ross was born on June 29, 1944, in Biloxi, Mississippi.

Comments by John

Judge Ross and I became friendly when I was the chair of the Family Law Section, in 1993-1994. I had met him during the time I served on the Executive Committee, working my way up in the chairs, starting in the mid-80s. I remember him always having a twinkle in his eye and always taking responsibility for sharing his views about issues that would arise during discussions in our dinner meetings, at a time when the committee could fit around one table. He was not bashful, and we all loved that quality in him.

As we interacted about family law issues, we learned that we had a lot in common from our early years as 'young stallions.' Judge Ross attended North Plainfield High School and graduated in 1962. I attended Watchung Hills Regional High School and graduated the year before. We were both athletes and played against each other during those years for our respective high school baseball teams, but we did not know each other then. It also turns out that Judge Ross's best friend while he was at North Plainfield High School was Bruce Mangione, who resided in Watchung. Before Watchung Regional High School was created, residents of Watchung went to North Plainfield High School. Bruce had a brother, Eric, who Tom knew as well. Bruce became my best friend when he started at Watchung Hills Regional.

When we got to know each other and realized this common background, we, of course, attempted to regale each other with our past athletic accomplishments. (Tom was also a very good football player, with a powerful, stocky build.) He would describe to me the majestic home run blasts he had hit at Howard Kausche Field in North Plainfield by Route 22. In our stories, the more we told them and the longer we told them over time, the better we each became! It is amazing that we made our way through law school without being signed to major league contracts!

I remember to this day him flying with my wife and me, and our then two-year-old daughter, Lindsay, to the Family Law Retreat at Captiva Island the year I was chair. In those days, we had the ability to invite and pay for a judge to attend—one judge—and I chose him because he was special. I remember whenever I had a case in Somerset County, his gracious invitations to my adversary and me to accompany him into chambers to discuss attempted resolution. Never, during those times, did he fail to show us the back of his bathroom door, where a huge poster of Babe Ruth in a Red Sox uniform hung. He was a notorious Red Sox fan—and I use the word notorious with purpose—and I was a lifelong Yankee fan, which created a wonderful dynamic any time we had the chance to interact.

Whenever we were together, I always was able to get lost talking with him about baseball like we were boys. If it was the beginning of the year, it was the hopes for the season; at the end of the year, it was gloating about what had been accomplished. I even got to attend two or three Red Sox/Yankee games with him at Yankee Stadium, and they were wondrous experiences I will never forget in terms of the banter, interaction and affectionate insults that went on throughout the evening.

I am sorry for his passing, and I will miss our encounters, which became less frequent as time passed. But I always will feel he has been a part of my life. I will always remember and marvel at the interconnectedness we had from an earlier time, about which we were unaware until later.

Rest in peace my friend. I will miss you.

Comments by Frank

Tom and I attended Seton Hall University Law School in the mid-1960s, where we were one year apart. I graduated in 1968 and he graduated in 1969. We did

not become acquainted in the classroom or the library. We would see one another at social gatherings, the nursing school across the street or at parties. He had an ebullient personality. He had a boyish, engaging smile with a tinge of mischief, together with an infectious laugh. I lost touch with him after graduation for approximately 20 years, until his appointment to the bench in 1986, when I began appearing before him and again socializing with him at state bar events.

When I saw him socially, he had not changed. We would invariably reprise the fun and partying we so much enjoyed in law school. In chambers, he was informal, relaxed, practical and lawyer-friendly. In the courtroom, I found he was always prepared, knowledgeable and serious about his cases. It was a pleasure to appear before him, even when he ruled against me because he made findings of fact and conclusions of law that were difficult to dispute.

I recall many years ago, when I was still at Skoloff & Wolfe, I was asked to argue a case before Judge Ross because the lawyer who had been arguing the case had lost every one of the pretrial issues he argued. When I appeared at the next hearing, Tom told me in chambers he knew why I was there, and although we both chuckled about his consistent rulings against my predecessor, he made it clear that those rulings were based on the merits of the case. He then promptly denied all the relief I had requested.

For family lawyers, Tom Ross's retirement and his ill health were painful to see. That joy for life and dedication to family law he brought to the bench continued after his retirement, with his active participation in the Family Law Section of the state bar, until it became too difficult for him to participate. When I would see him sitting alone at a bar association social function, I would make it my business to sit with him and introduce him to others. It was on those occasions that his wit and charm would again shine.

Although I have focused mostly on his personality and social ability, it is not intended to demean his legal talent. I knew when I appeared before him, I would have to be prepared and precise in the facts and the law and, in return, I would expect a precise fact finding supported by applicable law.

Thus, I say farewell to my friend with whom I have shared much fun and merriment, and to a colleague and judge whom I respect for his dedication, intelligence and demeanor. ■

Third-Party Practice in Matrimonial Actions

by Michael A. Gill

Although divorce litigation usually involves a dispute between two spouses, there are factual situations that dictate including another person or entity in the litigation. The need for third-party joinder arises in various fact patterns, some of which will be discussed in this article. The failure to join necessary third parties to divorce litigation can create significant problems for practitioners and impede bringing closure to their case for litigants.

The analysis starts with Rule 4:28-1. In pertinent part, it provides:

> A person who is subject to service of process shall be joined as a party to the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest in the subject of the action and is so situated that the disposition of the action in the person's absence may either (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or other inconsistent obligations by reason of the claimed interest.

It should be noted that the rule does not require a cause of action to be pled against the third party being joined. As long as a third party's participation is required before complete relief can be afforded to the spouses, or if the joinder serves to avoid duplicative litigation in the future, joinder is appropriate. The policy of mandatory joinder of parties might be deemed a cousin of the entire controversy doctrine.[1] Joinder or intervention can arise in countless fact patterns. Some of the more common ones will be discussed in this article.

Joinder or Intervention for Partition of Real Property

Consider the following fact pattern. Kendall and Jaime get married in 2010. In 2011, they decide they want to buy a home. They find a home they like and agree to a purchase price of $250,000. However, although they qualify for a mortgage, the bank requires a $50,000 down payment, which the parties can't generate. Kendall's father, Earl, offers to advance the $50,000 down payment with a condition that he be placed on the deed to the property to secure his interest. Kendall and Jaime accept the offer and purchase the home, utilizing Earl's $50,000 down payment. The deed to the property is titled to Kendall, Jaime and Earl.

In 2018, Kendall files for divorce. Jaime files a perfunctory answer and counterclaim. The parties go through a period of discovery and eventually go to a matrimonial early settlement panel (MESP). Based upon the recommendation at the MESP, the parties agree that Jaime will retain ownership of the home in consideration for Kendall retaining his pension, as the two assets have essentially equal value. A matrimonial settlement agreement is drawn up pursuant to which Kendall conveys his interest in the home to Jaime, subject to Jaime's refinancing the mortgage. However, the lawyers and parties have overlooked one very important fact—Earl, who is not a party to the litigation, has a legal ownership interest in the home and his cooperation will be necessary to implement the settlement terms. The parties assumed all along that Earl would simply sign off on the property. He now refuses.

Earl takes the position that he wants the repayment of his $50,000 plus interest. Jaime's position is that Earl had always told the parties during the marriage he intended to forgive the $50,000 advance he made, and did not expect repayment. Kendall is disputing Jaime's recollection. He takes the position that Earl should be repaid. It is much more difficult to resolve these factual discrepancies when Earl is not a party to the litigation. Further, if the matter were to go to trial, although Earl would have the opportunity to testify and the court could certainly consider his testimony, a dispute can only be resolved as it relates to the issues between Kendall and Jaime. The court could not direct Earl to do anything because the court would have no jurisdiction over Earl.[2]

Such a scenario is avoided if Earl is joined as a neces-

sary party at the outset of the litigation. As a party to the litigation, Earl participates in the MESP and attempts could be made to reconcile the parties' factual discrepancies through the discovery process or through mediation. If the matter proceeds to a trial, Earl has the ability to assert his claim. Earl can likely be added to the litigation while it is ongoing; however, the parties are now in a situation where a resolution of their case will be delayed and the legal fees will increase. A third-party complaint can be included in an initial pleading, or by an amended pleading, so long as the amended pleading is filed within 90 days of service of the original complaint.[3] However, after the expiration of the 90-day period, a third-party complaint can only be brought by leave of court, which must be obtained by a notice of motion.[4]

Rule 4:28-1 provides the basic authority for joining Earl as a third party to the matrimonial matter. However, Earl could also have taken a proactive approach and asked to intervene in the matter to protect his interest pursuant to Rule 4:33-1. Either party could have joined Earl, although the logical party to join him would have been Jaime. Jaime could have named Earl as a necessary party in the counterclaim for divorce against Kendall, filing a third-party complaint against Earl. The third-party complaint would seek a partition of the real estate as it pertains to Earl's interest. A partition of real property is governed by statute[5] and court rule,[6] and would have allowed the court to quantify Earl's financial interest in the property if the parties could not resolve it through the MESP or settlement negotiations.

Joinder or Intervention for Loans from Third Parties

Another area where third-party practice may be appropriate is when a third party has loaned money to a marital couple during the marriage. This is, again, often done by parents or relatives of one of the spouses, although it could be any third party that loaned money to the couple.[7] In such a case, it may be prudent for the parent or individual who loaned the money to proactively intervene in the action and file a third-party complaint seeking repayment of their loan. Intervention (as opposed to joinder) is governed by Rule 4:33-1 and Rule 4:33-2.

Rule 4:33-1, in pertinent part, states:

> Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In this second hypothetical, Earl advanced the $50,000 down payment on the parties' purchase of their first home. However, in this hypothetical, Earl did not insist his name be placed on the deed, nor did he insist on anything in writing. Instead, the transaction was made with a check made payable from Earl to the parties with the word "loan" scrawled, barely legible, in the memo portion of the check. The parties go through a divorce years later, and Kendall takes the position that Earl is owed $50,000 from the marital estate. Jaime states it was always the parties' understanding the $50,000 was a gift, notwithstanding the somewhat ambiguous notation on the check. Earl believes he is entitled to get his $50,000 back. Accordingly, he should file a third-party complaint (against *both* parties), intervening in the action to protect his interest. Conversely, if there is a dispute about the validity of the $50,000 payment, one or both of the parties may want to third-party Earl into the litigation to resolve the dispute. If it is not resolved in the divorce action, conceivably Earl could file a lawsuit against both parties post-divorce, seeking repayment of the alleged loan.

A similar scenario was addressed by the Appellate Division in 1979, in *Biddle v. Biddle*.[8] In *Biddle*, Patricia and Ralph Biddle were going through a divorce. While the divorce was in progress, Anna Biddle, Ralph's mother, sought to intervene in the action to assert her interest in the parties' marital home.[9] Anna had advanced money to Ralph and Patricia to use as a payment for the acquisition of their marital home.[10] Anna took the position that the money she advanced to Ralph and Patricia was a loan, and that the parties agreed she was to have an equitable interest in the property and be paid a sum in proportion to her contribution if the home was ever sold.[11] Patricia took the position that the advance of funds by Anna was an unconditional gift.[12] Title to the property was held by Ralph and Patricia, as tenants by the entirety.[13]

The trial judge denied Anna's motion seeking to intervene in the divorce matter.[14] Ralph and Patricia subsequently went through a trial, and Ralph took the position that Anna's lien claim reduced the value of the

marital home, which was subject to equitable distribution, and served as a marital debt that both parties owed.[15] Anna testified at the divorce trial, contending she had a lien claim on the property.[16] The trial judge rejected Anna and Ralph's position, and after the trial the divorce judgment awarded Patricia full title to the property, "free and clear of any alleged liens by Ralph T. Biddle and Anna M. Biddle against the title."[17]

A few months after the entry of the divorce judgment, Anna filed a Law Division complaint against Ralph and Patricia seeking to recoup the monetary value of her claim to the former marital home. Patricia moved to dismiss the complaint based on *res judicata* principles. The trial court granted the motion and dismissed Anna's complaint. Anna appealed.[18]

The Appellate Division reversed the trial court dismissal and remanded the matter for further proceedings. The Appellate Division noted that Anna's participation in the divorce trial as a witness did not, without more, bind her to the determination made after that trial.[19] The Appellate Division also noted that "a mere familial relationship to a party in the action" is not, without more, binding on someone to a determination made in that action.[20]

The *Biddle* case presents a classic example of the risk of duplicative litigation when a necessary party is not joined in a divorce litigation.[21]

Joinder or Intervention of Necessary Parties Involving Transfer of Marital Assets

Third-party practice may also arise when it becomes evident that a third party is in possession of or has an interest in marital assets. In the next hypothetical, Kendall and Jaime have a long-term marriage of 25 years. Kendall has a 32-year-old son, Charles, from a previous relationship. For the last 10 years of the marriage, Kendall, knowing the marriage was deteriorating, was transferring funds and property to Charles. Jaime eventually files for divorce and, as discovery proceeds, becomes increasingly perplexed and concerned as it becomes evident the parties' assets are not nearly what she believed they were during the marriage. Initial discovery reveals that six months before a divorce complaint was filed, Kendall conveyed some investment real estate he acquired during the marriage, along with thousands of dollars, to Charles. That real estate and those funds are now legally owned by Charles, but Jaime's claim to those assets may remain viable. Charles would need to be joined as a third party in order to properly adjudicate the situation. Otherwise, the family court would have no control over Charles.

Joinder of Parties to Resolve Property Rights

In yet another hypothetical, Kendall and Jaime get married and move into a home that is owned by Kendall's father, Earl. The parties enter into an informal arrangement. Earl tells Kendall and Jaime that if they simply make the monthly mortgage payment and pay the property taxes on his home, that will serve as rent. Initially, the parties believe it is going to be a temporary situation until they find their own home. However, the months soon turn into years and, approximately five years later, the parties have saved enough money for a down payment on a home. However, Kendall and Jaime both like their neighborhood and their neighbors. They plan on raising a family, and there is a good school nearby. They discuss their options with Earl and he tells them they can stay in the property indefinitely, as long as they continue to pay the mortgage and the taxes. However, Kendall and Jaime tell Earl they would like to do some renovations on the home and inquire about buying it from him. Earl tells them to go ahead with their renovations, as he will likely gift the home to them in the future or leave it to them upon his passing. As is often the case in family matters, nothing is put in writing.

Kendall and Jaime had saved about $75,000 to put down on a new home. However, instead of purchasing a new home they replace the roof on Earl's home, which had been leaking, and also fund other improvements, including a new kitchen. As the years go by, Jaime and Kendall continue to upgrade the home with marital funds, including funding an addition.

Over 10 years, Kendall and Jaime complete numerous home improvements on the property and have substantially paid down the mortgage on the house. The home value has increased significantly since the parties have lived there, in great part because of the improvements Kendall and Jaime funded. They now have two children in the local school district. Unfortunately, the marriage breaks down and Jaime files for divorce. In the divorce action Kendall takes the position that the home belongs to Earl, and Earl, to Jaime's dismay, concurs with Kendall. Earl denies ever promising to gift the property to Kendall and Jaime. However, it is clear to Jaime that Earl is going to someday turn the home over to Kendall and Jaime will have received nothing for the many

years of joint efforts on the house, including the marital funds spent for improvements and the pay down of the mortgage. This is a classic case where Jaime should file a third-party complaint against Earl under the various equitable theories available to recover some of the equity in the home.[22]

Joinder to Assert Rights to a Third-Party Business Entity

One final hypothetical is offered to illuminate the efficacy of joining third parties to a divorce action. In this hypothetical, Kendall and Jaime get married in 1997. Kendall's parents own a small pizzeria on the Atlantic City Boardwalk. The pizzeria is a small mom and pop operation, and provides Kendall's parents a modest income. After the marriage, Jaime starts working at the pizzeria. Years go by and Jaime's role in the pizzeria continues to expand. For the next 20 years, Jaime often works 10- to 16-hour days, seven days a week, at the pizzeria, and takes over as manager. Jaime expands the pizzeria from a small counter service shop to a fine Italian restaurant with many tables and with banquet service. Kendall's parents essentially retire and allow Jaime to run the restaurant. The profitability of the business increases exponentially during the period of time Jaime is running it.

However, in 2017, the parties go through a divorce. The restaurant has always been owned by a limited liability company (LLC) that was set up 20 years ago. The only shareholders of the LLC are Kendall's parents, who have retired. Neither Kendall nor Jaime have an ownership interest in the restaurant. The restaurant would be the major marital asset if either party had an ownership interest in it. Jaime has devoted the last 20 years to nurturing the restaurant and converting it from a small pizzeria to a profitable restaurant. Upon consultation with a divorce lawyer, she learns the restaurant is not an asset of the marital estate because neither party has any ownership interest in it. Not only will Jaime not have a claim to the value of the restaurant in equitable distribution, she will have lost a livelihood as manager of the restaurant. Jaime's only remedy would be to third-party the LLC into the dissolution case and seek relief from the LLC and Kendall's parents under equitable theories.

When Joinder is Not Appropriate

An Appellate Division decision from 2010 gives an example when the joinder of a third-party entity was not appropriate. In *Tannen v. Tannen,*[23] one of the main issues between the parties was the status of four trusts, of which either the defendant or the parties' children were beneficiaries. The court, *sua sponte*, ordered the plaintiff to join the four trusts to the litigation.[24] The matter was tried over the course of several months and a final judgment of divorce was entered subsequent to the trial.[25]

As part of the final judgment, the trial judge directed that the trustees pay the defendant $4,000 per month in support. Both spouses appealed the judgment, as did the third-party defendant trusts.

Although the main crux of *Tannen* is the legal analysis of trusts and their status in dissolution actions, the Appellate Division reversed the trial court's *sua sponte* joinder of the trusts as "necessary" parties to the litigation. The Appellate Division found the trial judge erred in joining the trusts and in ordering the trusts to disburse funds, since the trusts were discretionary trusts and, under established law, the court did not have the power to direct the trusts to make disbursements. Accordingly, joinder of the trusts was not necessary.

Conclusion

Joinder of necessary third parties should be considered whenever a person or entity that is not the spouse in divorce litigation may have rights or have interests in the litigation that need resolution. Failure to do so could cause spouses to be subject to claims in the future, which should have been resolved in their divorce action or could cause a spouse to unjustly be denied the right to property or funds because the court has no control over a necessary third party. After months of litigation and discovery, on the eve of trial, a divorce litigant could find they have no remedy. The proper joinder of third parties can avoid such a scenario. ■

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Endnotes

1. R. 4:30A.
2. A fact pattern somewhat similar to this was set forth in *Biddle v. Biddle*, 166 N.J. Super. 1 (App. Div. 1979), which is discussed *infra* in this article.
3. R. 4:8-1(a).
4. *Id*.
5. N.J.S.A. 2A:56-1 *et seq.*
6. R. 4:63-1 *et seq.*
7. Certainly, not all third-party creditors should be joined in litigation. By way of example, parties are not going to third-party in their mortgage lender, assuming the validity of the mortgage is not being challenged. Joinder of a creditor is generally a family member or friend of the couple that has loaned them money, which is now in dispute.
8. *Biddle v. Biddle*, 166 N.J. Super. 1 (App. Div. 1979).
9. 166 N.J. at 2.
10. *Id*.
11. *Id*.
12. *Id*.
13. *Id*.
14. *Id*.
15. *Id*.
16. *Id*.
17. *Id*. at 3.
18. *Id*. at 1.
19. *Id*. at 7.
20. *Id*.
21. *But see Ross v. Ross*, 308 N.J. Super. 132 (App. Div. 1998) where the Appellate Division treated a third party, who had never been formally joined to the litigation, as a *de facto* third-party litigant. The third party filed opposition to a post-judgment motion that was filed in the trial court and was allowed to be heard on the merits of the matter, since her rights to the survivorship benefits of a pension were at issue. The Appellate Division subsequently considered her appeal of the trial court's ruling and actually granted her some relief, notwithstanding the fact that she was never formally part of the litigation. The appellate court stated that "the active level of [the third party's] participation in both the proceeding below and on appeal [are] sufficient to consider [the third party] an intervenor in this action....and...[the third party is] therefore bound by its decision". 308 N.J. Super. at 149.
22. Those equitable theories may include *quantum meruit*, unjust enrichment, constructive and resultant trust among other equitable theories.
23. 416 N.J. Super. 248 (App. Div. 2010).
24. 416 N.J. Super. at 257.
25. *Id*. at 254.

Significant QDRO Cases That Every Family Law Attorney Should Know

by Matthew L. Lundy

In 1984, Congress amended the Employee Retirement Income Security Act (ERISA) with the Retirement Equity Act of 1984 (REAct).[1] The passage of REAct included many innovations in the law, including the creation of the qualified domestic relations order (QDRO).[2] Pursuant to ERISA, "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."[3] The primary impact of REAct, which was put in place to reverse the windfall effect of ERISA's anti-alienation provisions,[4] is contained in the following language:

> Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.[5]

As a result of the above, QDROs have gone from an obscure legal mechanism to a relatively important but often misunderstood tool in domestic relations law. This article will survey the most important cases in family law related to pension division and QDROs.

The first New Jersey case to address pension division under QDROs following the passing of REAct was *Whitfield v. Whitfield*.[6] The court in *Whitfield* distinguished deferred distribution (true coverture) from present value (frozen coverture), but actually favored frozen coverture. However, in *Marx v. Marx*, the court held that the true coverture is the preferred method in New Jersey, as in most states.[7] What does this mean?

This means that, for example, if the parties are married on Jan. 1, 2000, and on that same day the wife is enlisted in the military, and the parties file for divorce on Jan. 1, 2016, they have 16 years of marriage overlapping with 16 years of service (assuming continuing active duty service). If the wife retires from the military on Jan. 1, 2020, then she has 20 years of service. What does the husband receive?

Under a frozen coverture fraction approach, the court would say that anything beyond the 16th year of service will not count toward the husband's (the non-member's) share. Thus, the court would value the pension as though the wife had fictitiously ceased working at the 16-year mark, and further fictitiously treat the pension as though it were vested and matured as of that divide, and split it in half. With 16 years of service, an active-duty military member would hypothetically receive 40 percent of the average of his or her highest three years of earnings. This statement is only hypothetical because, as a matter of fact, a military member actually needs 20 years of service to receive a military pension. Under the frozen coverture approach in this example, however, if the average highest three years of earnings at the date of filing was $100,000, then the pension is worth 40 percent of that sum, which is $40,000 annually or $3,333.33 per month, with half of that sum being $1,666.66 per month.

Under the approach laid out in *Marx*, however, the non-member husband would instead receive an as-yet undetermined portion of the pension, where the award is generally expressed as a fraction in which the numerator is fixed, but the denominator and the average highest three years of earnings continue to grow. The non-member husband in this example gets a smaller piece of a larger pie.

Which formula to use is an ongoing issue, because post-marital enhancements can be substantial. In *Barr v. Barr*, the court held that certain post-judgment increases in a pension's value are extraordinary and ought not to be factored into the marital portion.[8] Again, however, New Jersey does not espouse a frozen, present value approach.[9]

But what happens if a retirement pension is converted into a disability pension? In *Avallone v. Avallone*, the

court held that the portion of a personal injury award that represents reimbursement for marital assets lost due to a spouse's injury should be subject to equitable distribution.[10] In other words, even if a marital pension is converted into a different asset, the court may still have jurisdiction to divide it.

In *Panetta v. Panetta*, the court held that where only one spouse contributed to Social Security during the marriage, the spouse who did not is entitled to an offset against the other spouse's share of federal pension.[11] In other words, in cases involving non-participants in Social Security (who are becoming less common as these types of plans disappear), the non-participant can ask for an offset of the marital portion of the pension based on his or her non-participation in Social Security.

Finally, and most recently, in 2017, two significant events happened with military pensions. First, the National Defense Authorization Act went into full effect. The law, signed in 2016, limits the amount of disposable military pay that can be assigned to a former spouse as property distribution to 50 percent the total amount earned during the marriage. Previously, it had been possible to assign 50 percent of the entire pension (versus what was only earned during the marriage). Second, the United States Supreme Court issued an opinion in *Howell v. Howell*, holding that the parties cannot agree to indemnify against the conversion of a military retirement pension to disability pay.[12] Thus, if a military member converts his or her pension to disability, that conversion can totally eliminate the property interest of a former spouse in that pension.

As QDROs are a relatively new phenomenon, there can be no doubt that most situations encountered by attorneys will be ones not previously addressed in appellate case law. Thus, practitioners can expect an increase in this body of law in the coming years and decades. ■

Matthew L. Lundy practices in Cherry Hill.

Endnotes

1. 29 U.S.C. §§1001-1381.
2. 29 U.S.C. §1056(d)(3)(B).
3 29 U.S.C. §1056(d)(1).
4. Since its passing, ERISA has become a windfall for pensioners to keep money from their former spouses and children, because the original incarnation of ERISA did not permit QDROs or any creditor's rights against a pension.
5. 29 U.S.C. §1056(d)(3)(A).
6. 222 N.J. Super. 36 (App. Div. 1987).
7. 265 N.J. Super. 418 (Ch. Div. 1993). *See also Menake v. Menake*, 348 N.J. Super. 442 (App. Div. 2002).
8. 418 N.J. Super. 18 (App. Div. 2011). *See also Eisenhardt v. Eisenhardt*, 325 N.J. Super. 576 (App. Div. 1999) (holding that the coverture fraction should reflect the actual years worked, without including early retirement incentive credits, because this reflects reality. The gift of five extra years of service should not be used to reduce the fractional share of the pension when no work was actually performed for that service.).
9. *See Evans-Donohue v. Donohue*, 435 N.J. Super. 283 (Ch. Div. 2013).
10. 275 N.J. Super. 575 (App. Div. 1994).
11. 370 N.J. Super. 486 (App. Div. 2004).
12. 581 U.S. ___ (2017).

Divorce and Children with Special Needs: Financial Issues and Practice Tips for Lawyers and Forensic Accountants to Consider

by Francesca O'Cathain and Alexander Krasnomowitz

Children with special needs require special attention by all professionals involved. Parents, therapists, attorneys and certified public accountants (CPAs) should work closely together to ensure all available benefits are captured, and that the children receive sufficient support.

Given the dramatic rise in the recognition and treatment of children with special needs over the last 15 years, it is likely that family law attorneys and matrimonial litigation accountants already have worked with multiple families with children with special needs. Those needs may have ranged from relatively minor to requiring substantial care and support. Research studies report higher rates of separation and divorce for parents raising children with special needs.[1] Parents of children with an autism spectrum disorder divorce at a higher rate, especially in the early years.[2] Lawyers and forensic accountants need to be aware of the distinct issues that face these divorcing families.

To understand each child's specific educational and behavioral needs, practitioners should be familiar with the child's individualized education plan (IEP), prepared by school districts and mandated by the Individuals with Disabilities Education Act (IDEA).[3] Attorneys should review each child's IEP, and forensic accountants should verify the accuracy of any expenses associated with the IEP. Also, parents may have paid for additional evaluations by private experts, which should also be reviewed.

Attorney Practice Tip: It is not the matrimonial attorney's duty to become involved in any disputes the parents have with the school district. This area of law is a specialty that should be referred to an attorney familiar with special education law.

Individual Needs of the Child

Depending upon the nature and severity of a child's needs, the costs of raising that child may be astronomical. A 2014 study from JAMA Pediatrics estimated that, in the United States, parents raising one child with an autism spectrum disorder and intellectual disability spend approximately $2.4 million for that child over the course of his or her life.[4] In an intact family of children with special needs, these costs frequently cause financial concerns and a strain on families. If the parents divorce, there may be fewer resources available to service those needs, as the family is now providing for two households instead of one.

There may be disagreement on whether certain services are a necessity or a luxury. For example, for children on the autism spectrum there are many different types of therapies available, such as applied behavioral analysis therapy (ABA), verbal behavior therapy (VB), pivotal response treatment (PRT), discrete trial training (DTT), and early start Denver model (ESDM). Many therapies are covered by insurance, but others may not be covered. Uncovered therapies, such as horseback riding lessons, art therapy, and playgroup therapy, among others, may be helpful to the child, but may be viewed as a luxury by one parent.

Attorney Practice Tip: Create a timeline of how and when the parties decided on whether or not expenses were a necessity or a luxury when they were an intact family. Confirm the timeline with associated proofs, such as medical records or doctor, therapist, and school IEP meeting notes.

Accountant Practice Tip: Use the case information statement (CIS) for both litigants to estimate whether proposed forms of untraditional therapy fit into the family's current budget.

Needs of the Parent

One also needs to consider the specific needs of the parents and how they will be impacted by divorce. There will almost always be a primary caregiver in the family

whose own employment is affected. Statistically, more families with children with special needs are single-income families. Parents with a child with special needs may not be able to work traditional, fixed or full-time work schedules; they are more likely to work reduced hours and to have income decline over time.[5] There are substantial opportunity costs, as these parents frequently suffer from lost or disrupted employment.[6]

In a divorce, the caregiving spouse must explain to the court why he or she is unable to work or his or her schedule must be reduced, often defending their need for alimony or child support against allegations by the supporting spouse of underemployment, overreaching and exaggeration.

Attorney Practice Tip: Attorneys can help by instructing parents to create a calendar to demonstrate what childrearing responsibilities they have and how it directly impacts their employment.

Attorneys representing the parent seeking additional support should work with the parent to prepare a detailed treatment schedule as well as a detailed daily schedule that shows how the child's condition affects the child's life as well as that of the caregiving parent. A complete schedule that leaves no time for employment will support a claim for alimony and child support without imputation of any income to the caregiving parent. Attorneys representing the supporting spouse must counteract potential allegations of underestimating and minimizing the needs of the child in order to reduce payments. To counteract the allegations, review the history of what the parties spent on all their expenses, as well as what their ability to spend in the future will be, given the increase in costs as a result of supporting two households.

Attorney Practice Tip: When looking at a parent's financial needs, note that the parents are no longer living in an intact home and there may be a need to hire additional caregivers.

Accountant Practice Tip: Provide the retaining counsel with a projected budget accounting for new expenses across two households. Be sure to discuss with counsel how the projected budget can be used in settlement negotiations versus trial.

Determining Child Support

The New Jersey Child Support Guidelines should not serve as the basis for determining financial support for a child with special needs. The majority of states provide for some variance from child support guidelines or other adjustments in consideration of the special needs of a child. In order to arrive at a fair child support award, attorneys must prove the specific needs of the child and the associated costs.

The guidelines specifically recognize that the special needs of a disabled child may require an adjustment to child support. Child support calculations take into account not only parents' income, caregiving responsibilities and children's expenses, but also allocation of additional, extraordinary expenses such as necessary medical or education costs, day care costs, travel to therapies, child care for any siblings, and equipment. Life insurance costs may also be considered.

The parties should carefully consider whether child support or other benefits should be paid directly to the other parent, to the child directly, or into a special needs trust. Children can lose significant governmental benefits depending upon the manner in which support is paid. N.J.S.A. 2A:34-23 allows the court to order the creation of a trust:

> [T]he court may make such order as to the…maintenance of the children…as the circumstances of the parties and the nature of the case shall render fit, reasonable and just, and require reasonable security for the due observance of such orders, including, but not limited to, *the creation of trusts or other security devices, to assure payment of reasonably foreseeable medical and educational expenses.*[7]

The statute also permits child support to extend far beyond the typical age of emancipation:

> The obligation to pay support for a child who has not been emancipated by the court shall not terminate solely on the basis of the child's age if the child suffers from a severe mental or physical incapacity that causes the child to be financially dependent on a parent. *The obligation to pay support for that child shall continue until the court finds that the child is relieved of the incapacity or is no longer financially dependent on the parent. However, in assessing the financial obligation of the parent, the court shall consider, in addition to the factors enumerated in this section, the child's eligibility for public benefits and services for people with disabilities and may*

make such orders, including an order involving the creation of a trust, as are necessary to promote the well-being of the child.[8]

Unreimbursed medical expenses must also be allocated. Often these expenses are shared in proportion to the parties' incomes pursuant to the guidelines; however, in some cases it may be appropriate to divide the uninsured expenses in a disproportionate manner. It may be helpful to consider bringing in a benefits expert to analyze what will and will not be covered by government benefits and any private insurance held by either party. Practitioners should also address the issue of health insurance, including the cost of premiums and deductibles in the event the party carrying the insurance policy loses his or her ability to maintain their insurance plan.

Attorney Practice Tip: As of Feb. 1, 2017, child support obligations established in New Jersey automatically terminate when a child turns 19 unless a court order states otherwise or a parent seeks the continuation of child support.[9] Practitioners should ensure the appropriate court order is in place.

Accountant Practice Tip: In cases where continued support is sought after 19 years of age, the court will request justification. Accountants must work with clients to provide proofs for current and future expenses for the child.

Role of Family Lawyers and Forensic Accountants

The CIS, required under Rule 5:5-2, is generally the first chance to delve into the child's special needs and the costs associated with those needs. On page five of the CIS, litigants are required to provide information about the child's Social Security income or other government assistance. Although often ignored, Part F on the last page of the CIS provides for a brief narrative of any special issues or problems in the matter.

In creating a historical or prospective budget for Part D of the CIS or a prospective budget, family law practitioners and accountants should include line items for all services and needs of the child, including: physical therapy, speech therapy, behavioral therapy, doctor appointments, specialists, medications, eye care, medical equipment, therapy equipment, specialty clothing, dietary requirements, caregivers, activities, and home and vehicle modifications.

It is important that the parties consider services that are provided for by insurance or the board of education in their location, as well as the services they are fully or partially funding themselves. Attorneys and parents should review and compile all of the therapies the child receives. Every one of the child's doctors and alternative medicine practitioners should be included in the budget. The budget should also include the costs of medications, supplements, specialty foods (*i.e.*, gluten-free and/or organic foods), equipment, supplies, and caregiver training. The caregiving parent should be prepared to explain to the court the costs and necessity of obtaining a nonparent caregiver or other respite care. Special clothing, personal care costs, mileage, and meals should also be included, as these often-smaller costs can add up significantly over years or a lifetime.

Compare the affordability of the marital home to the costs of moving the family, particularly for a child whose needs were specially accommodated in the family home. Consider how a change in the school system may affect that child's IEP, as the new school system may either adopt the child's prior IEP or develop its own. If the parents fought long and hard with the school system, or even obtained special needs counsel to obtain the current IEP, those costs must be taken into consideration in assessing the reasonableness of a move. Other large budgetary items include vehicle, school and home modifications to accommodate the child, should the parties decide to move.

Each line of the budget that is not agreed upon by the parents should be supported by the parties' prior expenditures or a current objective estimate. A forensic accountant can help create schedules of prior expenses for each line item in dispute. For clarity and convenience, the name, address, and credentials of the provider should be detailed; any information, articles, or book excerpts regarding treatment or the child's condition and prognosis should be categorized and developed in the client file. Any waiting lists for therapies, programs, schools, or funding should be explored and understood.

Attorney Practice Tip: Consider attaching the detailed budget to the CIS[10] so the court has the benefit of reviewing the prospective needs of the child in addition to the historical family budget items required by the form.

Accountant Practice Tip: Accountants are often asked to work closely with the client to ensure the CIS is as accurate as possible before the document is filed. If counsel or the client has prepared the budget for the

child with special needs to attach to the CIS, be sure to verify the accuracy and reasonableness of the expenses.

Spousal Support in a Divorce with a Child with Special Needs

Consider how to meet the financial needs of the parent who has provided the majority of care for the child and may continue to do so after the divorce. If the parent has forsaken his or her livelihood to care for the child for many years, it may be impossible for the parent to meaningfully re-enter the workforce. Consideration should be give to how that parent will be able to live during his or her retirement, challenging the general rules of spousal maintenance and how marital property should be divided. In some cases, the caretaker parent may be entitled to spousal maintenance or alimony in a higher amount or for a longer duration,[11] or to a larger share of marital property.[12]

In some circumstances, parties may have entered into a prenuptial agreement providing that no alimony or maintenance would be paid in the event of a divorce. The fact that such an agreement may have been entered into at a time when the parties did not anticipate having a child with special needs may have an impact on the viability of the agreement, or on the amount of child support needed, and should be explored during the litigation process.

The parties cannot contractually agree in a prenuptial agreement to custody-related issues, because to do so would be against public policy.[13]

Attorney Practice Tip: Consider retaining a vocational expert to opine on what the caregiving parent may have earned had he or she continued in his or her career, or to assess any barriers to re-entry given current and future caregiving responsibilities.

Accountant Practice Tip: Provide counsel with both current marital after-tax cash flow and single after-tax cash flow if the vocational expert's opinion of projected earnings is reliable.

Equitable Distribution in a Divorce with a Child with Special Needs

Equitable distribution in New Jersey is governed by N.J.S.A. 2A:34-23, which sets forth all factors the court shall consider in determining the equitable distribution of all property that has been "legally and beneficially acquired by the parties or either of them during the marriage."[14] Although New Jersey is an equitable distribution state, which does not mean a presumption of an equal share of assets, the usual practice is that, absent unusual circumstances, assets are divided equally. Certain factors may allow for an unequal distribution of assets in cases where there is a child with special needs. These factors include the custodial responsibilities of a parent, the need of the child to continue residing in the marital home, and the need for a special needs trust to secure reasonably foreseeable medical or educational costs for the child. Think ahead, and perhaps seek a disproportionate distribution of retirement assets for the caregiver who will not continue accumulating retirement.

Attorney Practice Tip: If the marital home has special modifications to accommodate a child with special needs, consider whether the parent of primary residence should retain the home with delayed compensation to the other party.[15]

Accountant Practice Tip: If representing the parent vacating the marital home, and he or she requires special modifications to the new residence, be sure the client provides support (*e.g.*, contractor quotes) for any projected expenses included in the opinion.

Caring for Adult Children

Child support orders, whether entered by the court or reached via consent by the parties, typically expire when the child reaches the age of majority. In New Jersey, they typically expire upon reaching the age of 19, unless extended by court order. The presumption is that the child will be able to begin working and supporting him or herself at that age; however, some children have special needs that are so significant that they will never become self-supporting.

Some adult children with disabilities may need assistance with decision making. If so, the family should consult with legal professionals to explore guardianship. A guardianship may also be appropriate if the adult special needs child outlives his or her parents. As is often the case, the life expectancy of the child exceeds that of the parents. In these cases, practitioners need to consider support provisions for the care of the child once the parents are no longer able to provide care for the child, such as Medicaid/Medicare and other benefits. The private options greatly depend on the financial circumstances of the parties, what resources are available to them, and what resources they qualify for.

Attorney Practice Tip: If a family has sufficient income and assets, consider referring them to an estate

attorney to discuss trusts that can be established for the future support of the child.

Accountant Practice Tip: A CPA involved in the matter should work closely with the estate attorney in preparing the net worth statement, which takes into consideration the marital assets and liabilities.

Federal and/or State Financial Benefits

A child with special needs may be entitled to federal and/or state financial benefits, the purpose of which is to create a financial safety net. These benefits may be in the form of cash or contribution in kind toward educational, housing, or general living expenses. Diagnosis and documentation of need is often critical to a determination of these entitlements. These entitlements are often, but not always, financially means-tested.

There are two important public assistance programs available to families with a special needs child: Supplemental Security Income (SSI)[16] and Medicaid.[17] SSI is a means-based federal program that provides income through a cash assistance grant to persons with disabilities.[18] It provides a modest monthly stipend to meet basic needs of food and shelter, but does not pay for medical care. In most states, however, receipt of SSI automatically qualifies the recipient for Medicaid.[19] Maintaining SSI eligibility is critical because it is the gateway to Medicaid.

Medicaid is a means-based program funded by the federal government and managed by the states. Each state establishes guidelines for eligibility, services, benefits, and coverage limits. Medicaid provides access to healthcare and other programs that provide ancillary services. In New Jersey, Medicaid includes the program NJ FamilyCare, which provides healthcare coverage for children and certain low-income parents.

It is critically important to consider the effect that an adult child's receipt of income (such as inheritance or the proceeds of a life insurance policy) has on any benefits he or she may be receiving. Child support, if appropriate past age 19, may be detrimental to a special needs child's qualification for public benefits if handled improperly. For example, child support payments reduce SSI benefits dollar for dollar, which may, in turn, eliminate the child's eligibility for Medicaid. Since many insurance companies will not allow a parent to carry a child on his or her insurance policy past the age of 26, despite the child's special needs, it is imperative to keep the child qualified for Medicaid. The Social Security Administration's Program Operations Manual System (POMS), designed to provide guidance to administration officials, is also instructive to parents of a special needs child. According to the POMS, after a child reaches age 18, child support payments made on behalf of the child are treated as unearned income to that child.[20]

This mandate applies to child support arrears as well. If child support is received, one-third of the total support received is excluded and only two-thirds of the funds are considered in-kind support and maintenance, and will factor into the calculation.[21] Payments for shelter and food expenses are counted as if the child received the cash, rendering two-thirds of the value considered in-kind support and maintenance.[22] If the noncustodial parent pays for goods and services for the child, such as child care, tuition, phone, cable, or Internet service, these payments will not be considered income to the unemancipated adult child.[23]

Special Needs Trust

In some circumstances, the parties have the financial ability to create a special needs trust (SNT). An SNT allows families of disabled children to create a trust to provide for supplemental support/financial assistance that is not counted as income or in-kind support for determining the child's eligibility for SSI and Medicaid. These trusts are a crucial planning tool when a beneficiary with a disability receives an inheritance or other income.

A trust is a fiduciary relationship where a trustee holds legal title to a property and has the duty to hold, administer, and distribute that property for the benefit of one or more beneficiaries. There are two categories of SNTs: third-party trusts (which hold assets belonging to anyone other than the beneficiary) and first-party trusts (which hold assets belonging to the beneficiary, including child support payments). Any assets remaining in a first-party trust after the beneficiary's death must be used to repay Medicaid for expenditures made on the child's behalf.[24]

Child support payments are the property of the special needs child. Thus, payments can only be made to a first-party SNT.[25] If the trust funds are used for the special needs child's sole benefit and no distributions are made for food or shelter, trust distributions will not reduce SSI. Any assets owned by the child can be held by the trustee (including child support payments, unspent SSI, and gifts or bequests made directly to the special needs child). As first-party SNTs are subject to Medicaid payback provisions, they are ill suited for holding large sums of money. Third-party SNTs are best suited to hold

life insurance proceeds, as the trusts are not subject to Medicaid payback rules.[26] As assets in a third-party SNT must not be characterized as support for the child, any voluntary funds paid into a third-party SNT cannot replace child support payments.[27]

Attorney Practice Tip: Clients with special needs children should consult with an attorney specializing in SNTs. That attorney should then assist the family law practitioner in crafting the requisite language in the marital settlement agreement (MSA).

Accountant Practice Tip: If being called to testify as an expert in litigation, the CPA will have used projections for the child's future care. Be sure that all income and expense projections are justified with sound proofs that the court will understand and consider acceptable.

Conclusion

The costs of raising a child with special needs can be significant. Attorneys handling these cases should be prepared for a substantial undertaking, and should reach out to the specialists involved with the family, including education counsel or financial planners.

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Identifying and Valuing Intellectual Property and Intangible Assets During Divorce

by Lynne Strober, Jennifer E. Presti and Joan D'Uva

Marital practitioners can easily identify and value tangible assets like real estate and vehicles in a divorce. On the other hand, 'intangible assets,' like intellectual property (IP) such as patents; software; trademarks; copyrights; and trade secrets, and the income, royalties, and derivative income that flow from them, are more difficult to identify and even harder to value.

> The first distinction is that between the physical item and the IP associated with that physical creation (*i.e.*, the painting and the copyright in the painting). The second distinction is between the IP and the income such IP may generate (*i.e.*, the copyright in the painting and the money earned from merchandising that painting).[1]

Clearly, marital practitioners must discuss all known assets with their clients at the beginning of the divorce. At some point, there was a physical manifestation of one party's idea, or IP, and that is where the identification and, thus, the valuation of the IP asset becomes possible. Once an IP asset is identified, determining the date the asset was created is essential to define the asset as marital or non-marital and, thus, subject to distribution as part of the marital estate.

Identifying the Marital Portion of Intellectual Property and Intangible Assets

When intellectual property or another intangible asset is created during the parties' marriage, it can be easily identified as marital property that is subject to distribution at the time of the divorce. However, intellectual property or other intangible assets created prior to the marriage, whose value increased due to the efforts of both parties during the marriage, can also be subject to distribution at the time of divorce. The first question that must be asked at the time of the divorce is twofold: What is the asset, and when was it created? Then, a practitioner must ask: Were there any marital funds expended to develop, market, or defend the ownership rights of the asset?

Obtaining Information about Intellectual Property and Intangible Assets through Research and Discovery

When a party is suspected of concealing assets, or claims an asset is exempt from distribution at the time of the divorce, the use of discovery tools becomes invaluable. There are outside sources of independent research available, including the U.S. Copyright Office and the U.S. Patent and Trademark Office. Unfortunately for the inquiring practitioner, it should be noted that copyrights do not need to be formally registered for protection and, therefore, a search of the U.S. Copyright Office is not all-encompassing.

"Proof that an asset is immune from equitable distribution raises a rebuttable presumption that any subsequent increase in value will also be immune."[2] The burden then shifts to the non-owner spouse to demonstrate that: 1) there has been an increase in the value of the asset during the term of the marriage; 2) the asset was one that had the capacity to increase in value as a result of the parties' effort (an active immune asset); and 3) the increase in value can be linked in some fashion to the efforts of the non-owner spouse.[3] If this is shown, the presumption has been successfully rebutted and the matter is to be resolved by the trier of fact.[4]

In *Rothman v. Rothman*, the New Jersey Supreme Court created a three-step process for courts to follow: "[the court] must first decide what specific property of each spouse is eligible for distribution."[5] Then, a determination of its value for purposes of such distribution must be made.[6] Lastly, the court must decide how allocation between the spouses can most equitably be made.[7]

Valuing and Dividing the Intangible Asset at the Time of the Divorce

Once the asset is considered available for division in the divorce, practitioners use various methods to reach a defined value for the asset. Often, practitioners must work in conjunction with experts in valuation, to determine what kind of future income the asset will generate, and to include the expenditures each party will make to create future income from that asset.

Another issue for practitioners to be aware of is that the asset, such as a song, may be worth nothing at the time of divorce but could stand to become very valuable at some time in the future. The income associated with intellectual property, such as royalties or other derivative income (*e.g.*, a book that is then adopted into a screenplay that becomes a major motion picture), can also be hard to identify and quantify, especially when it has not been converted into profit at the time of divorce. Further, in the case of professionals and celebrities, there is also the issue of valuing the goodwill they have created through the use of their name and likeness.

The four most common approaches to estimate the fundamental or fair value of these types of assets are the cost approach, market approach, income approach and relief from royalty approach.

The cost approach is best when the asset is not presently producing income, nor is it expected to produce income in the near future. There are several methods within the cost approach, which include: historical cost, replacement cost and replication cost. Historical costs may be difficult to determine and would not take into account any technological advances, while a replacement cost approach would take technological changes into account. Simply determining the cost to reproduce or 'replicate' the asset as is without consideration for technological advances is known as the replication cost methodology.

The market approach provides an indication of value by comparing the price at which similar property was exchanged between willing buyers and sellers. While this approach offers a good indication of value, it is often difficult to find comparable transactions due to lack of disclosure of sales terms.

The income approach is most appropriate if the asset is in an income-producing stage. Future cash flows are estimated and discounted to the present to determine the value of the asset. It is important to take into account the risks inherent in the income stream. Taking the example of a patent, if the inventor has obtained a licensing agreement with a third party but the underlying product is not yet commercialized, the probability of success must be taken into account. There are risks that the invented technology will become obsolete or will be superseded by a new invention. Therefore, the discount rate is a very important factor in determining the value of the intellectual property.

The relief from royalty approach is a hybrid of the income and market approaches. A reliable sales forecast is necessary to estimate the income stream. An appropriate royalty rate must be determined and is often based on data obtained from public databases of licensing arrangements. The royalty rate selected is applied to the revenue stream and represents an avoided cost of having to license the intellectual property if it were not owned. The royalty represents the rental charge that would be paid to the licensor if this hypothetical arrangement were in place. In certain instances, it is possible that some intellectual property is of little or no economic value to warrant a rental charge.

When intellectual property assets are in an income-producing stage, their values are easily determinable and divisible. Other intellectual property assets may not have quantifiable values at the time of divorce, and alternatively may be treated similar to other assets that only have a future pay status, such as a pension.

Federal courts address the issues concerning copyright and patent law, as they are both governed by federal law. A review of case law throughout the United States shows how courts have addressed the issue of valuing intellectual property in the divorce.

In *Teller v. Teller*, the Supreme Court of Hawaii specifically found that the husband's patents and trade secrets were subject to division.[8] The Supreme Court held that: 1) husband's patents and trade secrets were subject to equitable distribution; 2) fair market value approach was appropriate for valuing husband's patents and trade secrets; and 3) patents and trade secrets did not depreciate.[9] In *Teller*, the complex issue arose because if an asset is created before a marriage but the patent is obtained after the date of marriage the patent is subject to division.[10]

> Inasmuch as intellectual property has not been the subject of equitable distribution in our courts, we have not developed a method of determining fair market value for such property.[11]

Jacoby v. Jacoby[12] addresses these issues as well. The intermediate court of appeals held that the parties formed a premarital economic partnership when they moved in together and used the income approach method rather than fair market value to value the husband's intellectual property.

In *McDougal v. McDougal*, on appeal by the husband's estate, the Michigan Supreme Court affirmed that, despite the husband's fault, division of property that awarded the wife half of the gross proceeds of patents during the marriage and future interest in patents was inequitable, and awarded the recipient spouse with a percentage of the stream of income and not a percentage of the IP asset itself.[13] The Court held that "[t]he new judgment on remand shall provide that the patents and licensing agreements are the property of the defendant, subject to the defendant's obligation to share the funds generated from those assets, as provided in the new judgment on remand."[14]

Once a value or approach to value is carefully analyzed, assuming the divorce case settles, the issues must be clearly addressed in a marital settlement agreement. The family law practitioner must spell out how the value of the asset may be tracked and paid out going forward. The agreement must address all possible contingencies, such as how future income and expenditures will be treated, and the length of the payout. In addition, the potential future success or failure of the asset are among the issues that need to be considered. If the divorce case is litigated, expert opinions will need to be presented, and in all likelihood each party will need to retain their own valuation expert.

Valuing Future Income from Royalties and Celebrity Goodwill

In addition to present property values, future income must also be considered. For example, royalties from copyrighted work or licensing fees from patents and trademarks may present considerable future income opportunities.

In *Canisius v. Morgenstern*,[15] the Massachusetts Appeals Court recently held that future royalties derived from a wife's ultra-successful novel should be divided equitably between the parties. In that case, the trial court noted the husband supported his wife financially and emotionally while she wrote the novel.[16] The trial court also noted that the wife's earnings from the novel neared $3,000,000 at the time of the divorce, and he ordered that she pay the husband a lump sum of $570,000.[17] With regard to future royalties, however, the trial court held that because they were too speculative, the husband was not entitled to them. The husband appealed and the Massachusetts Court of Appeals agreed with the husband, holding:

> The Wife's contractual rights to future royalty and other payments do not, in our view, involve mere expectancies as described in the foregoing cases. While the amount of the royalty and other payments to be received by [the wife] in the future cannot yet be ascertained, the right to receive those royalties and other payments was contractually established at the time of the divorce. Indeed, [her] interests in the present case are, in certain respects, analogous to a party's interest in the payment of pension rights which has been recognized as marital property subject to division.[18]

In *Canisius*, the Massachusetts Appellate Division indicated that future royalties were suited to "division on an 'if and when received' basis, with the judge determining the percentages of any future payments..." [19]

In many cases, it may be possible (whether through past royalties or payments or expert valuation) to establish the value of intellectual property. In those cases, the court may use those reasonable values in calculating marital property division.

Obviously, the sale price of IP is the best evidence of the value of the asset. However, when the IP has not been sold during the divorce action, the practitioners and their experts must look to the alternatives. If the IP asset is in income-producing status, an income approach or relief from royalty approach may be applied to determine the fair market value of the asset. If a reliable income stream can be projected and risks can be properly identified, an income approach may be applied. If the IP is not in income-producing status and it is too speculative to project any revenues or income, an alternative must be applied in dividing the asset. One such alternative is to utilize a formula much like one used for unvested stock options or pensions not in pay status. A coverture fraction could be determined based on the period of time of the marriage versus the period of time to develop the IP. This ratio may be used to determine the portion of the income stream to be paid to the nontitled spouse if and when the asset becomes income producing.

There are courts that have also determined that the value of intellectual property is too speculative to consider, and that the judge may opt to exclude the property from marital property calculations. In *Yannas v. Frondistou-Yannas*, for example, the court considered the invention of the husband, who held patents on artificial skin.[20] The trial judge held that future income from those patents was so speculative they did not need to be included as part of property assignment.[21] The Massachusetts Supreme Judicial Court agreed that the judge did not abuse his discretion in his division of the marital assets because he was not obliged to place a value on the husband's royalties, patents, or copyrights because the future income from this source was too speculative to consider.[22]

Much like royalties, goodwill, can be divided at the time of divorce. With regard to celebrity goodwill, once the court recognizes the celebrity goodwill as marital property, the next challenge is valuation. Valuation of celebrity goodwill depends on the level and duration of benefits, as well as the associated risks.[23] No set technique exists for valuing celebrity goodwill. Similar to other intangible assets, celebrity-goodwill valuation methodologies include a percentage of gross earnings or revenue, excess earnings, relief from royalty, and enhanced earnings.[24] These approaches are based on the premise that the value is the present worth of future benefits.[25]

In 1988, in *Piscopo v. Piscopo*, the issue of celebrity goodwill was first addressed by the New Jersey courts.[26] Celebrity goodwill is loosely defined as excess earning capacity attributable to one's status or fame.[27] Joe Piscopo is a comedian and entertainer who became famous while appearing as a headliner on Saturday Night Live from 1980 to 1984.[28] The superior court, Chancery Division, determined that his celebrity goodwill was indeed marital property to be included in the equitable distribution calculous, and he appealed.[29] The New Jersey Appellate Division affirmed the trial court's holding that a celebrity's goodwill, attributable to his or her celebrity status, is an asset subject to equitable distribution.[30] The Appellate Division reiterated the trial court's ruling that valuation of goodwill is not based on future earnings, but rather on past earning capacity, and the probability that such earnings would be realized in the future.[31]

In 1983, in *Dugan v. Dugan*, the goodwill of a law practice was reviewed for purposes of equitable distribution under N.J.S.A. 2A:34–23, with respect to attorneys, and in particular individual practitioners, by the New Jersey Supreme Court.[32] The *Dugan* Court stated that the evaluation of the existence of goodwill is centered on "reputation," and that goodwill "does not exist at the time professional qualifications and license are obtained."[33] "A good reputation is earned after accomplishment and performance."[34] The Court went on to state that "future earning capacity has been enhanced because reputation leads to probable future patronage from existing and potential clients, goodwill may exist and have value."[35] And, "[w]hen that occurs the resulting goodwill is property subject to equitable distribution."[36]

Conclusion and Recommendations for Practitioners

As a result of the emphasis on mediation and arbitration, fewer cases are being litigated in the court system. This decisional guidance may be lacking. As a result, family law practitioners must devise a methodology to utilize in effectuating the valuation and division of these intangible assets. Therefore, the author proposes the following methodologies for handling the division of IP in divorce cases.

1. When the value of the asset is being paid out, assuming it is a valid representation of value, that value should be accepted.
   - **a.** If an IP asset is sold, the sales price will presumptively reflect the value. This works when an IP asset is sold as part of a transaction, for example, a beverage company sells the product and the drink formula, a trade secret. If a specific value is assigned to the trade secret that value should be used as in *Teller*.
   - **b.** If payments are made for the use of the entity, such as royalty streams that can substantiate value, the payments may be distributed between the parties, net of taxes. This works for recordings, television, etc.
2. Where the IP asset is quantifiable, a fair value analysis may be used. This is appropriate when the asset is ripe for valuation but has not been sold, or has created a stream of income such as the payout or royalties. An example would be a computer app that addresses a novel issue. The traditional accounting analysis can be used as to cash flow, risk, possibly life span, costs, characteristics of uniqueness, and whether the spouse is the sole creator. These are not marketability discounts but factors to be weighed.
3. When the IP asset is incomplete at divorce, such as a book that has been written and is under negotiation

to be published or a sculpture has been created and is in a gallery for sale but has not sold, a formula needs to be in place. A hybrid model utilizing certain aspects of the approach used in the division of unvested stock options and the division of retirement assets not in payout status should be utilized. A constructive trust should be imposed over the asset. A formula should be used similar to the coverture fraction establishing the marital portion of the asset. From the value of the marital portion, costs should be deducted. For example, when husband and wife meet, she is working on creating a book. The work continues throughout the marriage, and at time of complaint she has not sold the rights to the book, but is in negotiations with publishing companies. She sells the book after the divorce and receives a payout over several years and has had marketing expenses. If the before-marriage period of work is two years, the marriage was five years and the period after complaint was three years, one half of the total net value would be subject. A percentage of the half could be determined less actual cost and taxes at the time. The percentage could be less as the post-complaint time increases. All of this would be fact sensitive. A post-divorce analysis by an expert would be necessary. The asset would be preserved and subject to the formula set forth in a judgment of divorce. The formula would not be able to be fixed from the duration when economic realization is established. This approach avoids the unanticipated windfall if the book becomes a hit. A potential malpractice claim is avoided and rights are preserved. There can be an annual review. After some period of time the parties or a court may determine the distance between the award and the post-divorce success is too great, and the constructive trust may be dissolved. An entity life span may be imposed upon the plan.

The approach and the formula utilized must be tailored to each case. Significant focus must be placed on the development of all relevant facts with regard to IP assets and then the utilization of expert accounting analysis utilizing the appropriate methodology. The IP asset requires in-depth investigation to achieve a fair result addressing all the issues presented by the IP asset. ■

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Tech Tips for Family Lawyers

by Sandra Starr Uretsky and Cassie Murphy

Lawyers are consistently called upon to adapt to changes impacting their practice. These changes may result from modifications to substantive New Jersey law (such as the amendments to the alimony statute made in Sept. 2014); legal procedure and practice (as occurs every year with amendments to the Court Rules); and societal standards and norms (such as the drastic reduction in homemaking and the rise of women in the workforce). In the modern era, the constant evolution of technology likewise routinely impacts legal practice, and requires lawyers to be both flexible and facile with technology.

Below is a compilation of technology tips relative to the interplay between technology and family law that may be helpful to readers in their practice. The article is not intended to endorse any specific products, but is designed to provide examples of the technology available to practitioners.

Technology's Impact on Parenting Time

There are many obstacles to overcome when parties divorce or separate, but one of the biggest is how to care for children of the relationship going forward. Divorce can be especially hard on children, but parents can reduce children's potential pain and exposure to negative feelings if parents work together to co-parent. Miscommunication and disagreements are a reality of co-parenting, but having the right systems in place can create healthy communication so children are never responsible for facilitating the dialogue between co-parents.

There are several different products available for clients who have difficulty communicating with their child's other parent. Our Family Wizard[1] is one such product, available via mobile app or website, which is designed to help reduce the stress of managing communication and family plans across separate households. The application promotes several tools to assist in that regard, including, but not limited to: 1) one shared parenting time calendar where co-parents can make clear requests for modifications and share details about family activities, events, holidays, etc.; 2) the ability to send and receive secure messages to each other, professionals, and the children, which cannot be edited or lost; 3) the ability to manage and share family information, including medical details, insurance information, school schedules, emergency contacts, etc.; 4) the ability to upload files and photos; and 5) the ability to track and organize shared expenses for unreimbursed medical costs, child support and, extracurricular activities.

A similar but different product on the market is 2houses.[2]

In some cases, a lack of trust and communication stems from substance abuse issues on the part of one parent. Soberlink[3] is an alcohol-monitoring system that is designed to make parenting time safer with discreet and convenient alcohol testing. The remote cellular device uses facial recognition technology to confirm identity during each breath test. The results are then wirelessly transmitted in real time to Soberlink's cloud-based recovery management software, accessible to the other parent and counsel. SCRAM Systems[4] is a similar product available to parents, and can be either court ordered or voluntary.

Technology's Impact on the Presentation of Evidence

Technological advancements in both the creation and management of data has materially modified legal practice, from a macro to a micro level. For example, an app called CamScanner[5] (downloadable for free through the app store) permits a user to convert a cellphone into a personal scanner. Through his or her cellphone camera, the user can take a picture of any paper document, then enhance or crop the image through the CamScanner app and create a PDF file. The PDF file can then be emailed, sent via text message, or uploaded. No longer does a client need to return a signature page for a case information statement via fax or regular mail; instead, he or she can use the app to return the signature page to his or her attorney without leaving home.

Similarly, text messages are quickly becoming the most common form of communication between people,

including clients. One need go no further than the Judge Lawrence Jones's unreported decision, *E.C. v. R.H.*, to confirm this fact.[6] *E.C. v. R.H.* addressed the procedure for the introduction of text messages, emails, photographs, and social media messages as evidence at a trial. Judge Jones concluded that such items should be printed on paper and furnished to the adverse party and the court for ready use at trial.[7]

The app Tansee[8] allows a user to do so. Through the app (a free version of which currently exists), the user can upload his or her SMS, MMS, and iMessages, as well as Facebook Messenger messages; save them in the app; organize them by date, sender, and receiver; and print them. This approach is preferable to the utilization of screen shots of text messages, as the screen shots do not provide a clear running dialogue and may not identify the sender/receiver/date/time in a clear and concise format.

Finally, Adobe Acrobat is a program that allows the user to review PDF documents. Different versions of Adobe have varying forms of bells and whistles. Some versions may be free, while others require a charge. By way of example, Adobe Acrobat X Pro allows the user to manipulate and modify PDFs, to include page numbers at the bottom of the document; to include headers and footers; and to conduct an internal search of documents for a key word or phrase. These tools may be helpful to assist a witness being asked to testify regarding a several-page document, to pre-mark trial exhibits by number, or to search voluminous documents quickly and easily.

In closing, advancements in technology can assist both practitioners and clients in the ever-changing field of family law. Attorneys who stay abreast of these advancements may have an advantage in the courtroom, and will be able to help their clients come up with creative and new ways to tackle the challenges that come with divorce and maintaining two households. ■

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