YUDES CONSUMER GUIDE

TO A

NEW JERSEY DIVORCE

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MEMBERS OF THE FIRM

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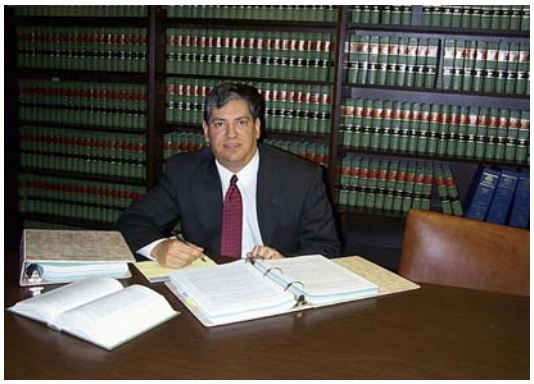

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CHAPTER I

ALIMONY

Alimony is the term used for payments made by one spouse to the other spouse after a marriage has been dissolved. It is an antiquated notion that only wives may receive alimony. The Supreme Court has held that pursuant to the Equal Protection Clause of the Constitution, husbands and wives are both entitled to receive alimony.

Alimony is distinguishable from the equitable distribution of marital property. Equitable distribution looks retrospectively at what property the parties acquired during the marriage and involves decisions about how the parties will divide the "marital pot." Alimony, on the other hand, is prospective and is used to balance the inequities in the parties' earning capacities. Alimony is not designed to punish the payor spouse nor is it a reward to the payee spouse. Rather, the purpose of alimony is to permit both parties to continue to live, to the extent possible, according to the standard of living to which they became accustomed during the marriage due to their combined efforts, both inside and outside of the home. Parties are not taxed by the government on the equitable distribution of marital property. Alimony payments are, however, tax deductible by the payor spouse and taxable income to the payee spouse.

Although alimony and equitable distribution are defined differently, the two concepts are inter-related. For example, the courts try to avoid "double dipping" when determining the amount of alimony. Retirement benefits such as pensions acquired during the marriage are considered marital assets subject to equitable distribution. If those retirement benefits are equitably distributed at the time of the divorce, those benefits cannot then also later be considered for alimony purposes because that would be double dipping. The New Jersey statute governing equitable distribution states:

> "When a share of a retirement benefit is treated as an asset for purposes of equitable distribution, the court shall not consider income generated thereafter by that share for purposes of determining alimony." (*N.J.S.A.* 2A:34-23).

Consequently, if a spouse receives an asset for his or her share under equitable distribution, the same asset cannot be used again to determine cash flow in calculating alimony. According to the New Jersey Supreme Court in *Miller v. Miller* 160 NJ 408 (1999), alimony is also related to equitable distribution because income may be earned by the investment of an asset, and the income that one spouse could or did earn on an asset may be considered part of the alimony calculation as well.

Before the final judgment of divorce is entered, the court may order that the supporting spouse pay an interim form of support during the litigation, commonly referred to as *pendente lite* alimony. This form of alimony is modifiable at any time up to the final judgment of divorce. Sometimes in this phase of the case the court orders the supporting spouse to pay *pendente lite* support, but does not distinguish between alimony and child support, making it unallocated interim support. *Pendente lite* alimony is distinguishable from alimony received as part of divorce judgment or settlement. The goal of *pendente lite* support is to attempt to maintain the status quo. The goal of alimony as part of a divorce is generally to permit the dependent spouse to live a lifestyle that is at least reasonably comparable to the marital lifestyle, to the extent possible.

As part of a divorce, there are several different types of alimony that the family court can award. One type is called **permanent alimony**. This is alimony that is paid to the dependent spouse without any final term. It ends when the dependent spouse dies or remarries, or if the supporting spouse dies. Permanent alimony is particularly common in long-term marriages where there is unequal earning capacity between the spouses, and the dependent spouse is unable to earn sufficient income to maintain a reasonably comparable marital lifestyle. This form of alimony may be modifiable based on a change in circumstance.

In recent years, the Legislature chose to modify New Jersey's alimony statute to permit an award of **limited duration alimony**, which is also sometimes called term alimony. This is alimony that is payable only for a specific term or period. This form of alimony is particularly useful where alimony seems appropriate or necessary but the marriage was not of such a duration that an award

of permanent alimony is appropriate. It is generally not appropriate in long term marriages. Like permanent alimony, it may be modified if there is a change in circumstance. However, while the amount may be modified, it is more difficult to obtain a modification of the term of alimony.

Like limited duration alimony, **rehabilitative alimony** is payable for a specific term. However, the purpose of this form of alimony, is to provide support to a dependent spouse while he or she acquires education or training to permit him or her to obtain employment that would allow this spouse to be self-sufficient. If, however, at the end of the term the dependent spouse seeks to extend alimony, this spouse must demonstrate what efforts were made to become rehabilitated and why those efforts failed. Unlike limited duration alimony, rehabilitative alimony may be awarded in combination with permanent alimony. Rehabilitative alimony normally does not terminate if the supported spouse remarries.

Reimbursement alimony compensates a spouse for economic sacrifices made during the marriage, where that spouse's sacrifices helped to enhance the other spouse's earning capacity. In general, the courts do not embrace the concept of spouses reimbursing one another because marriage is widely considered akin to a partnership, a joint enterprise. However, if one spouse supports the other so that he or she can obtain a professional degree with the understanding that both spouses will materially benefit from one spouse having obtained that degree in the future, the court may find it unfair for the spouse with the degree to retain not only the degree, but all of the financial benefits the degree has brought. The reimbursement generally covers all financial contributions toward the former spouse's education, including household expenses, educational costs and any other contributions made to help the supported spouse earn his or her degree. Reimbursement alimony does not terminate if the supported spouse remarries.

In some cases, the parties may agree that alimony will be paid in a lump sum instead of specific payments made over a period of time. The purpose of alimony remains the same, but instead of receiving periodic payments, the present value of the future stream of payments is calculated and this value is paid to the dependent spouse presently.

Under the Rules of Court, alimony payments are to be paid through the Probation Division of the county. However, direct payments to the dependent spouse may be made instead if "good cause" can be shown. If a payor spouse cannot obtain a money order or certified check, he/she may make direct payment.

Determining Alimony

It is important to understand that in calculating the amount of alimony, the family courts have a fair amount of discretion. The Supreme Court has established specific guidelines and formula for calculating child support based on the parties' incomes, but when it comes to alimony, there are no such guidelines or formulas. New Jersey has case law and an alimony statute that requires the courts to consider specific factors when calculating alimony, so there are some guidelines and objective standards for the courts to consider, but there is no specific formula for the family court to calculate alimony.

In general, New Jersey case law states that the courts must consider the marital lifestyle, the supporting spouse's ability to pay, and the dependent spouse's ability to contribute to his/her own support. The alimony statute, *N.J.S.A* 2A:34-23(b) states that the court must consider the following thirteen specific factors: the actual need and ability of the parties to pay; the duration of the marriage; the age, physical and emotional health of the parties; the standard of living established during the marriage and the likelihood that each party can maintain a reasonably comparable standard of living; the parties' earning capabilities, education and employability; length of absence from the job market; parental responsibilities for the children; the time and expense needed to acquire education or training to enable a dependent spouse to obtain appropriate employment; the financial and non-financial contributions of each spouse to the marriage; equitable distribution; income available through investment of any assets; the tax consequences of alimony; and any other factors which the court deems relevant.

As previously stated, the purpose of alimony is to permit the dependent spouse to live a lifestyle after the divorce that is reasonably comparable to the marital lifestyle. It should be

remembered, however, that alimony is not an absolute right. An award of alimony is within the discretion of the family court and it depends on numerous factors.

Earning capacity

In calculating alimony, the actual income of the supporting spouse is not necessarily completely determinative of the amount of alimony. The court will examine a spouse's earning capacity. If a spouse is not earning as much as he/she is capable of, this may affect the alimony award. If the family court finds that the spouse is intentionally earning less to avoid paying alimony or to increase the award of alimony for oneself, the court may impute income to that spouse based on what the court finds that spouse is capable of earning. For instance, in one case, the husband claimed to be earning $331.00 per week, even though he had earned as much as $400 per week during the marriage. The court found that the husband had a superior earning capacity to the wife because of his greater employment skills, and that he was voluntarily under-employed and would not be permitted to "benefit from his own inertia." Therefore, the court imputed an income of $400 per week to the husband in calculating his alimony obligation to the wife, thus treating him as though he was earning $400 because that was what he was capable of earning, rather than the $331 that he was actually earning at the time.

Although a professional degree is not marital "property" to be equitably distributed during a divorce, it may be considered when determining alimony. For instance, reimbursement alimony may be awarded to the non-degree holding spouse if that spouse accepted a lower standard of living while the other spouse was in school earning that professional degree. However, reimbursement alimony is only awarded to the spouse who made those monetary sacrifices if it can be demonstrated that there was an expectation that the marital partnership would derive an increase in income from that enhanced degree.

If there is an issue as to whether a dependent spouse who has been out of the work force for a time or may have to change careers is underemployed, that spouse may have to be evaluated by an employability expert to assist the court in determining what an appropriate level of income to

impute to that spouse may be. This is because the court must consider the dependent spouse's ability or inability to contribute to his/her own support.

Post Judgment Application for Alimony

As previously stated, the purpose of alimony is for the dependent spouse to receive financial support from the supporting spouse that permits him/her to live a lifestyle reasonably comparable to the marital lifestyle. Alimony is modifiable after a divorce if the moving party can show that there was a change in circumstance since the divorce that warrants either an increase or decrease in alimony. The moving party bears the burden of demonstrating a threshold showing of a change in circumstance (i.e., an increase in the dependent spouse's income, or a non-temporary decrease in the supporting spouse's income) This must be done before the court will order discovery or financial disclosure from the other spouse. If there is a genuine dispute as to a material issue, the court may order a post-judgment plenary hearing.

In some cases, neither party requests alimony. This is because neither party is a dependent spouse and has sufficient income to maintain the marital lifestyle without an award of alimony. However, unforeseen circumstances may change after the divorce to warrant a modification of alimony (i.e., a serious illness or inability to work). The court will examine the financial situation of both parties, the standard of living enjoyed by the parties during the marriage, the injured spouse's current prognosis and earning potential, and other relevant factors in deciding whether to award alimony at this date.

Modification of Alimony

Alimony is always subject to review and modification upon a showing of changed circumstances. A change in alimony is not limited to events that were unforeseeable at the time of the divorce. The party seeking a modification in alimony bears the burden of proving a change in circumstances such that would warrant relief from the current obligation. The party must show how the changed circumstances have sufficiently impaired his or her ability to support himself or herself.

This requires full disclosure of the moving party's financial status. The following are common examples of some factors which may result in alimony modification.

Remarriage

If the spouse paying alimony remarries, this remarriage alone does not terminate his/her alimony obligation to support the dependent former spouse. For example, if the payor spouse remarries and claims that he or she can no longer support the payee former spouse, that alone will not be sufficient to show changed circumstances which would warrant a decrease in alimony. Some other change in circumstance must be present.

If the spouse receiving alimony remarries, permanent or limited duration alimony will terminate regardless of the parties' financial circumstances. This is because the payee spouse has entered into a new marital partnership that the former spouse is not required to financially support. If the subsequent marriage ends in marriage or divorce, the payee spouse cannot ask that the former spouse's alimony obligation be reinstated. The former payor spouse is considered to be entitled to rely on the payee spouse's remarriage when forming his or her finances. However, if the subsequent marriage is deemed to be void, meaning that it is considered not to be a marriage at all, then alimony from the previous marriage may be reinstated.

Bankruptcy

Some debts are not dischargeable in bankruptcy. If a payor spouse files for personal bankruptcy under Chapter 7 of the U.S. Bankruptcy Code, alimony, maintenance or support obligations paid to a former spouse under a separation agreement or divorce decree are not dischargeable. This means the debtor spouse must continue to pay alimony to the payee spouse even if the payor spouse declares bankruptcy.

Sometimes there is confusion as to whether a payment to a former spouse pursuant to an agreement is in the nature of alimony or support. How the parties designated the payment in their property settlement agreement is not necessarily determinative as to whether the payment/debt is alimony. The question of what constitutes alimony, maintenance or support is determined under

federal bankruptcy law. State law is applied in the fixing of support obligations and may provide valuable guidance. The first inquiry is whether the parties intended to create a support obligation. If they did, the court must decide whether the obligation has the effect of providing support necessary to insure that the needs of the former spouse are satisfied. In a 1995 case, the Appellate Division held that a former husband's obligation to pay his former wife's mortgage was in the nature of support even though it was not specifically called "alimony" and was not thereafter dischargeable in bankruptcy. In another 1998 case, the parties' agreement called for the husband to pay $7,500 for the wife's counsel fees and for the husband to assume all marital debt of approximately $100,000. Furthermore, the agreement contained a hold harmless clause where the husband agreed to indemnify the wife if she was ever called upon to pay any of those marital debts. After he filed for bankruptcy, the wife was sued by one of the creditors. The court determined that the hold harmless clause and the defendant's obligation to pay counsel fees were intended by the parties to be a form of support, therefore, this obligation was not dischargeable in bankruptcy. If a financial obligation to a former spouse is not related to alimony and support, then this obligation shall be discharged in bankruptcy, and the payor spouse will not have to pay it.

By New Jersey statute, a spouse may receive attorney fees if they can prove that their former spouse exercised bad faith in refusing to provide alimony. Filing for bankruptcy to avoid such an obligation would be an exercise of bad faith. Court's define bad faith as an intent to mislead or deceive another, or a neglect or refusal to fulfill some duty or contractual obligation.

Changes in Income

As previously stated, the courts will examine a payor spouse's ability to pay alimony and the payee spouse's need for alimony. If a payee spouse is already receiving sufficient alimony to maintain the marital lifestyle, then post-judgment increases in the payor spouse's income are generally not a reason to increase alimony. However, if the payee spouse is not receiving sufficient alimony to maintain the marital lifestyle, then a post-judgment increase in the payor spouse's income may warrant an increase in alimony due to the payor spouse having a potentially greater

ability to pay. The party seeking to have alimony modified bears the burden of proof to demonstrate a change in circumstance.

In some cases, courts will examine not only the parties' historical standard of living during the marriage, but they may examine the parties' potential lifestyle had they remained married, if it can be shown that the payor spouse's post-judgment increase in income is derived from marital momentum. It is possible for one spouse to earn more money after the divorce due to the other spouse's sacrifices during the marriage. Therefore, if the supporting spouse receives an increase in income, the dependent spouse may be entitled to share in the benefit.

If a payor spouse's income decreases, and he or she can demonstrate that the decrease was bona fide, in good faith, and not reduced in order to avoid or limit an alimony obligation, then the payor spouse may be entitled to a reduction in alimony. If the payor spouse is voluntarily unemployed or underemployed, the court may impute an income. Keep in mind that a payor's spouse income alone is highly relevant but not alone determinative of alimony. The court may look to unearned income and assets and may inpute a reasonable income on those assets in determining the ability to pay alimony, even if some assets are not invested in an income producing manner.

The same holds true for a payee spouse seeking a post-judgment increase in alimony due to a reduced income. If the payee spouse's income declines and he/she seeks an increase in alimony, he/she has to demonstrate that he/she is not voluntarily unemployed/underemployed, that the reduction is bona fide and in good faith and not designed to increase alimony, then the payee spouse may be entitled to an increase in alimony. If a payee spouse's income increases, that does not automatically mean a termination of alimony, but it is relevant to the court's consideration of that spouse's need for alimony.

Retirement

Good faith retirement at age 65 may constitute a change in circumstances such that alimony may be modified. The court will consider several factors: the age between the parties, whether at the time of the alimony award any attention was given to retirement, the financial impact the

retirement will have upon the parties, and whether the retirement was reasonable or whether it was motivated to reduce alimony payments. Our New Jersey courts have held that when one retires in good faith, he or she is entitled to a hearing regarding a change in circumstances.

If the payor spouse retires before age 65, he or she is subjected to a more stringent test. The court will have to test whether this retirement is bona fide and in good faith. The court balances the benefit to the payor spouse against the disadvantage to the payee spouse. Only if the advantage to the retiring spouse substantially outweighs the disadvantage to the payee spouse will the court view the retirement as a legitimate change of circumstances which would warrant a modification in support.

If the parties' interests are equal, the application for modification will fail. Courts also consider whether it is reasonable for the former spouse to elect early retirement. Other factors a court will consider are the age and health of the party, his or her motives in retiring, his or her ability to pay support, and the ability of the other spouse to provide for him or herself. Such an issue of early retirement should be addressed during the divorce settlement by both party's attorneys.

Cohabitation

A payee spouse's cohabitation with a romantic partner may constitute a change in circumstances. If the payee spouse becomes romantically involved and chooses to live together in the same household with that person, the court may reduce the amount of alimony paid to the payee spouse. Cohabitation alone is not enough to reduce alimony. Cohabitation must be coupled with economic consequences in order to modify alimony. If there is a modification, it may be made retroactive to the start of the cohabitation.

Courts use an economic contribution test to determine whether an alimony award to a dependent spouse should be reduced. Such a test looks to see if the cohabitation is similar to a permanent household situation or a marital like relationship. If the dependent spouse's new boyfriend or girlfriend reduced the dependent spouse's financial needs, then alimony shall be

reduced. Similarly, if the dependent spouse is using alimony to support the live-in boyfriend/girlfriend, then the payor spouse has a potential claim to reduce alimony.

The payor spouse has the burden of showing a threshold prima facie showing of cohabitation. Cohabitation triggers a showing of changed circumstances, which justifies discovery and a hearing as to whether the alimony should be changed. The burden shifts to the payee spouse to demonstrate that there is no economic consequence from cohabitation. This is reasonable because it is the payee spouse and the paramour who have all the information regarding the nature of their relationship and their financial circumstances.

Property settlement agreements often make provision for cohabitation if there is a provision for alimony in the Agreement. Our courts have enforced property settlement agreements that provide for the automatic termination of alimony regardless of the economic circumstances should the payee spouse cohabit. Courts will not, however, uphold an agreement which attempts to control a former spouse's social activities through the suspension of alimony. If the agreement places conditions on a spouse that have nothing to do with his or her financial status, then said agreement would be contrary to the purpose of alimony.

Inheritance

Although an inheritance is not subject to equitable distribution, income from the inheritance may be considered in the decision to award or modify alimony. It may be used to determine changed circumstances, since it will constitute an increase in the spouse's income. The courts have also noted that they will consider the inheritance even if the spouse chooses not to receive the money, but instead invests it in a non-income producing assets, such as a house. The issue is not receipt, but access to funds. An inheritance that does not generate income because it was altered may still be considered in calculating alimony. The inheritance's potential ability to generate income is what matters.

Anti-Modification Clauses

Parties can include a clause in their property settlement agreement which would prevent

modifying alimony even if there is a potential change in circumstance in the future. Such anti-modification clauses have been upheld, but contracting parties are not permitted to bargain away a court's equitable authority. Courts will permit modifications to such agreements if failure to do so would be unreasonable and unjust. These agreements are frequently upheld when the level of support is not based upon both parties' incomes and needs. For example, in one New Jersey case, the parties specifically agreed in the property settlement agreement that the principles of changed circumstances would not apply. The wife waived her right to all marital assets and, instead, she was to received $35,000 per year in alimony. This level of support was far below what she had grown accustomed to during the marriage. The husband's finances had plummeted, however, and so each had negotiated the agreement with the knowledge of those circumstances. After the husband sought a reduction in his alimony obligation, the court pointed out that if the husband's income had increased, instead of having decreased, the wife would not be allowed to seek a modification. Thus, the husband must accept the benefit and burden of the agreement. However, the court noted that if these same parties failed to include a physical disability provision in their agreement, and the payor spouse becomes very ill with limited income, the court would modify the support in light of circumstances. Therefore, modifications are permitted where the failure to modify would be unfair and inequitable.

Alimony and Child Support

In calculating child support, the court will deduct alimony payments from the payor spouse's income and consider alimony income to the payee spouse in calculating child support. Frequently, if the spouse receiving alimony is the non-custodial parent, this spouse still has to bear his or her fair share of the obligation to support the parties' child and will have to pay child support from that alimony. Courts in the past have not viewed this situation as a contradiction. Unlike alimony, the Supreme Court has adopted specific guidelines to assist judges in determining how much child support each parent should pay. These guidelines are premised on the philosophy that both parents must contribute to their child's support. A transfer of custody does not automatically create a

responsibility on the part of the non-custodial parent to pay child support. The court will consider both parties' income before deciding how much each should pay towards the child. A dependent spouse's alimony, however, is determined independent of child support.

Likewise, if the children are from a previous marriage, they will not be considered when fixing an alimony award. Child support is the obligation of the child's parents.

Extension of Alimony

Some property settlement agreements provide that a spouse may be entitled to ask for continuing alimony after a certain number of years. A decrease in the payor spouse's annual salary due to a change in circumstances will not take away that entitlement. The payee spouse has a right to apply for a modification of the alimony award. Changed circumstances do not take away that right. If a property settlement agreement states that a supported spouse has a right to make an application for continued or increased support, modifications will be determined based on the standard of living of both parties, not a change in circumstances, (i.e., income). The court makes a determination based upon the payor's ability to pay, both parties' respective incomes, and the payee's needs. Therefore, judicial review is permitted.

In addition, rehabilitative alimony can be extended beyond the expiration date based upon either a change in circumstances, or upon the non-occurrence of circumstances that the court found would occur at the time of the rehabilitative award. Rehabilitative alimony is treated the same as permanent alimony, and therefore can be modified.

Protecting the Dependent Spouse

Although alimony ceases upon the death of either one of the spouses, the Legislature has expressed an interest in protecting dependent spouses after the death of the supporting spouse. One statute specifically states that a court may order a spouse to maintain life insurance for the protection of the other spouse. Another statute states that a trust may be established to provide for reasonable foreseeable medical and educational expenses of the former spouse that would continue after the death of the debtor spouse.

Marital "Fault" and Alimony

A court will examine the proofs and determine the amount of alimony that is "fit, reasonable and just" under the circumstances. Marital fault may be considered by a court when awarding alimony. Alimony, however, may not be used to punish a payor spouse or reward a payee spouse.

Divorcing spouses often incorrectly believe that adultery is an example of marital fault that can be considered in determining alimony. Adultery, however, is no longer considered a crime. It is, therefore, unlikely that the court will consider adultery by either party as a factor in calculating alimony. For example, in one 1978 case, the court was unpersuaded by a husband's argument that his wife did not deserve alimony due to her having committed adultery. The court refused to consider adultery as a factor in alimony, since this was a lengthy marriage to which the wife had contributed by caring for the children and the household. Such contributions to the marital partnership outweighed the fact of her extramarital affair in determining her entitlement to alimony. The courts prefer to examine the duration of the marriage, the parties' contributions to the marriage, and their respective needs and abilities to pay alimony.

There are some other instances of fault that are relevant in determining an entitlement to alimony. For instance, in a 1978 divorce cases involving the heiress to the Johnson & Johnson pharmaceutical fortune, she proved that her husband had hired someone to try to kill her. Although the court felt that the husband did not need alimony, the court also stated that on a moral level he would be barred from receiving alimony because he had tried to murder her. Such misconduct is a clear and obvious example of marital fault that can affect a court's decision to award alimony.

Improper economic conduct may also be another example of marital fault which has been considered a factor in determining alimony. In one 1998 case, the Appellate Division found that a wife was not entitled to alimony because she had embezzled and misappropriated marital assets and because the marriage was not an emotional and financial partnership. Such financial dealings are an example of marital fault that are relevant in determining alimony.

Domestic Violence

Support awards may be awarded pursuant to a final restraining order following a finding of domestic violence. The rationale behind this decision is that battered spouses should not be dissuaded from filing a Domestic Violence Complaint out of fear that they will not have any means of financial support.

Antenuptial Agreements

"Antenuptial agreements" are considered valid provided there has been full disclosure of each party's financial status. If there is a finding of fraud, duress or overreaching by either party, the court will not enforce the agreement. Courts encourage such agreements since they are particularized to the parties' circumstances. Like a property settlement agreement, an antenuptial agreement is also subject to modification due to a change in circumstance. This issue is frequently addressed in the context of alimony.

In one 1985 case, a wife sought to vacate the parties' antenuptial agreement. The court found that this agreement was fair and equitable because the wife entered into the agreement with full understanding of all relevant facts. In fact, she was her husband's bookkeeper prior to the marriage and knew all about his assets. This agreement, however, said nothing about alimony, and the court found that the wife was entitled to alimony so that she could enjoy the same standard of living that the parties enjoyed during their 10 year marriage. The wife contributed to the husband's increase in income as a result of their combined efforts inside and outside the home. The court found that without an award of alimony, the wife was reduced to a "bare-bones" budget. Since the wife did not receive any of her husband's assets due to the antenuptial agreement, and looking at her earning capacity during their marriage, the court decided that the wife could not continue to exist at the level she did when she was married. The court, therefore, ordered that there be an amended judgment for the current support of the wife.

Jurisdiction

To determine financial issues, such as alimony, child support and equitable distribution, a court must have what is called *in personam jurisdiction* over both parties. This is personal jurisdiction, which means that the court has jurisdiction over the person. Since alimony is a personal obligation of the payor spouse, the court has to have jurisdiction over that person or "quasi in rem" jurisdiction over property in which the spouse has an alienable interest. Therefore, the payor spouse has to have some kind of connection to New Jersey in order for the court to create an alimony obligation, such as living in New Jersey or owning property in New Jersey.

CHAPTER II

CHILD SUPPORT

Every child is entitled to support from his or her parents. New Jersey amended its Child Support Guidelines and Appendices most recently in July, 1998 to provide fair and adequate child support awards. The Child Support Guidelines are premised upon the theory that child support is determined in proportion to the parent's income and assets as well as the child's needs. In many instances, the parents and the courts work together smoothly to ensure children receive adequate support.

All parents, whether natural or adoptive, have a financial obligation to support their child. That obligation continues and grows with the child and does not end when the parties have divorced. Normally, as a child grows older, his or her expenses increase as well. A support award can be upwardly or downwardly modified if circumstances require. In order to change the amount of the support, the movant must bring an application before the court and establish a change in circumstances. In general though, the most important factors are the needs of the child and the means of the supporting parent to pay.

The following topics will provide a basic understanding of New Jersey law regarding child support.

Obtaining an Initial Support Order

When a parent needs to obtain child support, he or she needs to make an application to the Superior Court in the county where the parent and child reside. The courts of the county where the parent and child reside have the legal authority to hear the application. While many people hire attorneys to make the applications, any parent can act on his or her own behalf. When a party acts on his or her own behalf, that party is known as a *pro se* litigant.

The application process differs slightly for parties seeking support through a divorce and parties seeking support in a case where the parents were never married. The child support order is

applied in the following actions: *pendente lite* support (temporary support), interstate support, domestic violence, foster care, divorce, non-dissolution (non-divorce) and public assistance.

Filing for Child Support in Non-Dissolution Cases

When the parents of a child have never been married, a support application is known as a non-dissolution case. This means that there is no marriage to dissolve. These cases also include applications from parties who were divorced in another state but have since moved to New Jersey.

While divorcing parties must handle child support within the confines of the divorce proceedings, non-dissolution cases may be heard on the issue of support alone. Depending on the county, support applications in these cases may be heard by a judge or by a hearing officer. A hearing officer is an officer appointed by the Chief Justice of the Supreme Court of New Jersey to assist judges in determining child support and enforcement cases. The hearing officers are directly supervised by the Presiding Judge of the County in which they work. If a support case involves a complex issue which requires judicial intervention, then a hearing officer may make a temporary recommendation and refer the case to a judge. Litigants should be notified before the time of the hearing if their case will be heard by a hearing officer. If the decision is unsatisfactory to either litigant, he or she has the right to appeal the decision to a judge. The use of the hearing officers allows the courts to move the support cases through the system much more quickly than they would be able to otherwise.

When making an application for support in a non-dissolution case, a party needs to attach a financial statement for the court to consider. The financial statement must set forth the income, assets, needs, expenses, and liabilities of the party. If the local Probation Department does not have a form for such information, it should be able to provide directions on how to obtain one.

Once a party makes an application for child support, the Family Division will schedule the case for a hearing. When that is accomplished, the court mails Notices to Appear to all parties involved in the case. The notice advises the parties that they are required to appear at the court on the assigned date, place and time.

Once a non-dissolution case reaches the court room, the factors which affect the level of support are essentially the same as those which affect a support case heard pursuant to a divorce proceeding.

Filing for Child Support During Divorce

When a support application is made before the divorce trial or hearing, it is called a *pendente lite* application. *Pendente lite* means during the litigation. Support is usually in the form of spousal maintenance and child support. *Pendente lite* child support awards can eventually become permanent, but are often temporary judicial decisions, intended to maintain the children at a standard of living to which they were accustomed while their parents were together. Parties may have *a pendente lite* support award established by making a motion to the court.

When making a *pendente lite* motion for child support, the request for relief must be accompanied by a Child Support Guidelines worksheet. A completed worksheet will contain financial information from both parents, including income, taxes withheld, prior child support orders, other deductions, work-related child care costs and health insurance for the child. The worksheet then calculates a support amount for the obligor and adjusts that amount for visitation related expenses. The Child Support Guidelines will be discussed in more detail below.

Prior to a hearing to establish or modify child support, the parties shall submit a Case Information Statement (CIS) to the court. A CIS contains the parties' financial information, such as income, assets, personal expenses for the parties and the children and each parties liabilities.

The court is required to use the Guidelines as a rebuttable presumption when it establishes and modifies child support orders. A rebuttable presumption is defined as the assumption that a child support award based on the Guidelines is correct unless a party proves otherwise. However, the Guidelines are not strictly applicable when income does not fall within a minimum or maximum amount. Currently, child support awards are limited to $150,800 net annual income. In cases when family income exceeds $150,800, the Guidelines are still applied to arrive at a minimum amount; however, the court then supplements that minimum amount with a discretionary amount.

Additionally, the court may deviate from the Child Support Guidelines in other specific circumstances. The following are examples of some of the factors which can affect the level of support that a court awards.

Criteria Considered by the Courts

When making a child support award pursuant to a divorce or in a non-dissolution case, the court must consider the following factors: (1) the needs of the child; (2) the standard of living and economic circumstances of each parent; (3) al sources of income and assets of each parent; (4) the earning ability of each parent, including educational background, training employment skills, work experience, custodial responsibility for children {including the cost of providing child care and the length of time and cost of each parent to obtain training and experience for appropriate employment}; (5) the need and capacity of the child for education {including higher education}; (6) the age and health of the child and parents; (7) the income and earning capacity of the child; (8) prior support orders for other children; (9) the reasonable debts and liabilities of each parent and child; and (10) any other relevant facts. Obviously, many other relevant factors may contribute to the award of support. The following examines how some of these facts effect support awards.

Child Support Guidelines

Ideally, a child support award allows the custodial parent to provide the child with all essentials, such as food, clothing, and shelter. In order to ensure that the courts do not differ wildly in their determinations of support, the State has enacted what are known as the Child Support Guidelines (Guidelines). These Guidelines are exactly what the name implies: a formula which guides the person considering the case through the factors which are included in the support decisions. The theory behind the Guidelines is that parents in different income levels spend a certain percentage of their combines incomes toward raising their children. The Guidelines are derived from the Consumer Expenditure Survey (ECS) which is a source of national data on household expenditures and how they vary by family, composition, size, geographic location, and socio-economic characteristics. The Guidelines take information from the Parent of Primary Residence

(PPR) and the Parent of Alternate Residence (PAR) and this information is applied to a formula to calculate a support award.

The current Guidelines provide for a self-support reserve for the obligor parent. That is, the amount of money he or she needs to meet their expenses. As of February 7, 2003, the self-support reserve is $181.00 or 105% of the poverty guideline for one person. The self-support reserve is based on the theory that if the obligor parent cannot meet their own minimum expenses, they will have no incentive to pay child support. Essentially, the Guidelines provide a weekly support range which can be found by cross referencing he number of children and the weekly available income of the obligor parent.

There are two different Child Support Guidelines Worksheets: Sole Parenting and Shared Parenting. The **Sole Parenting Worksheet** is used when any of the following occur: (1) there is no visitation from the other parent; (2) there is sporadic visitation from the other parent {which does not exceed 2 or more overnights per week}; (3) there is more than one child and at least one child resides with each parent {also referred to as a Split Parenting Arrangement}; or (4) the net household income falls below the PPR household income reserve.

The **Shared Parenting Worksheet** is used if the PAR has the child for two or more overnights a week over a year or more, excluding vacation time. An overnight visitation occurs when the child spends at least 12 hours at the alternate residence. The PAR must establish that they have provided separate living accommodations specifically for the child in the alternate residence. Under the Shared Parenting Worksheet, the PPR is the parent with whom the child spends more than 50% of his or her overnights during the year. If the time spent with each parent is equal {50% of overnights each}, the PPR is the parent with whom the child resides while attending school.

The Guidelines define gross income as any and all of the following: compensation for services; income from a business minus operating expenses; gains from property; interest and dividends; rents; bonuses and royalties; alimony or maintenance payments received from the current or other relationships; annuities; life insurance contracts; payments from retirement plans; awards

from personal injury or civil lawsuits; income from a trust; disability payments; profit sharing plans; workers' compensation; unemployment benefits; overtime, part-time and severance pay; net gambling winnings; earnings from investments; tax credits or rebates, unreported cash payments; value of in-kind benefits; and imputed income. The court also has categories for income from self-employment or sporadic income. The amount at the end of this column is the adjusted gross income.

To arrive at the parent's net taxable income, the parent's withholding tax, prior child support orders, mandatory union dues and other dependent deductions are subtracted from the adjusted gross income. If there is non-taxable income, it is then added to the net taxable income to arrive at the parent's net income. Each parent's net income is then divided by the combines net income to determine their percentage share of income. The parents are then each required to pay their percentage share of the weekly child support obligation.

Once a guideline based award amount is determined, the court may consider other factors which would warrant an adjustment to the award. For example, the Guidelines include a mechanism to apportion a parent's income to all of his or her legal dependents, regardless of the timing of their birth or family associated (i.e., if a divorced parent remarries and has children, that parent's income shall be shared by all children born of that parent). In addition, in a shared parenting plan, if one parent fails to comply with the parenting schedule which was used to determine the support award, the court may adjust the child support award to reflect the actual parenting time that is in place.

In addition to determining a straight child support award, the court may also award additional expenses with respect to the parties' basic child support obligations, including child care expenses, health insurance for the child, and predictable and recurring unreimbursed health care expenses in excess of $250.00 per child per year. Qualified child care expenses are those incurred to care for a dependent who is under the age of fifteen (15) or is physically or mentally handicapped. These expenses must be necessary for the employment or job search of the parent. The child care expense is calculated on a separate Net Child Care Expense Worksheet. The net cost (after tax credits) of work related child care is then added to the basic child support obligation. In addition, the parent's

marginal cost of adding a child to a health insurance policy (medical and dental) is added to the basic obligation if incurred. Unreimbursed health care expenses (medical and dental expenses not covered by insurance) up to and including $250 per child per year are included in the Child Support Guidelines and are assumed to be paid by the custodial parent. Unreimbursed health care expenses in excess of $250 per year per child that are predictable and recurring (after considering the duration and recurring nature of these expenses) are also added to the basic child support amount.

Modifying the Support Award

When circumstances require, a child support obligation may be modified. The law requires that a party seeking to modify a support award prove that there has been a change in circumstances since the entry of the current award. The phrase "change in circumstances" is very broad and can be proven in many various ways. Either the custodial parent or the payor may make an application to the court by way of filing a motion for modification. Once again, the parties must submit a Child Support Guidelines Worksheet and a CIS along with their papers. Once a change is established, the parties must exchange updated financial information to determine what the appropriate amount of support should be.

Some of the most common changes requiring modification of support are the increase in the cost of living and the increase or decrease in the paying spouse's income. All child support orders or judgments entered or modified on or after September 1, 1998 will be adjusted every two years to reflect any increase in the cost of living. The cost of living adjustment will be based on the average change in the Consumer Price Index (CPI) for our region. The most current CPI figures can be obtained from the U.S. Department of Labor, Bureau of Vital Statistics, or from the *New Jersey Law Journal*.

A decrease in available income is not a guarantee that the support obligation will be decreased. In order to warrant a downward modification, the decrease must be of a permanent nature. For example, it is insufficient to make an application to reduce child support the day after

losing a job. A support payor must be able to show that after numerous attempts and the passage of time, he or she could not obtain a job earning the same salary.

Furthermore, in order to obtain a child support reduction, a support payor must be able to prove that the decrease in income was involuntary. A parent cannot voluntarily remain under employed. For example, if a father loses his job as an executive accountant, he cannot wait an extraordinary amount of time for another executive position, particularly if other jobs are available. If the new job pays less, then the father can make an application based on his new salary. He cannot, though, make an application to terminate support while he is temporarily between jobs. In addition, a parent cannot voluntarily retire or rake a much lower job than he or she is qualified for in order to purposely avoid paying the support to which the child is entitled.

If a court feels that a parent is purposely under employed or purposely unemployed, the court can impute income to that parent. Imputed income is the court's estimation of what the parent should be earning. The new Child Support Guidelines require income imputation to be based on the potential employment and earning capacity using a parent's work history, job qualifications, educational background and regional opportunities. Usually, the court imputes income based on the parent's former job as reported by the New Jersey Division of Labor. Under special circumstances, the court may also impute income based on full time employment (40 hours per week) at New Jersey minimum wage (presently $5.15 per hour). The court will determine the appropriate child support award using the imputed income figure.

Finally, the Probation Division may also initiate child support modification proceedings for cases enforced under Title IV, Part D of the Social Security Act. In these cases, the court may modify child support orders based on the Child Support Guidelines or other relevant factors.

When Child Support Will Terminate

A child support order ends when the child becomes emancipated. Emancipation literally means to set a person free. In terms of child support, emancipation occurs when the child becomes self-reliant. Because self-reliance can occur at any given age and under any given factors, there is

no particular age outlined by the law as to when a child definitely becomes emancipated. Emancipation depends on the totality of the facts and circumstances of each individual case. Due to the uncertainty surrounding emancipation, in many cases, particularly in divorce cases, parents will create a written agreement which actually defines the circumstances which will emancipate a child. For example, an agreement might state that a child will become emancipated upon completion of college or upon reaching age 25, whichever comes first.

When an agreement does not exist, the courts generally presume that a child becomes emancipated at the age of eighteen. The Child Support Guidelines do not apply to a child who is 18 or older and no longer in high school or other secondary educational institution. However, such a presumption can easily be overcome by proving that the child is still justifiably dependent. For example, continuing attendance at high school and, in many cases, college is proof that a child is still dependent. Also, when a child becomes incapacitated or seriously debilitated before reaching the age of eighteen, that child could possibly remain dependent for many years. On the other hand, a child may be declared emancipated when the child marries or if the child has his or her own child and begins receiving child assistance. In addition, a child may be declared emancipated if he or she enters into the military.

A support obligation may also end if the custody arrangement between the parents is changed. For example, a child living with his mother may wish to go live with his father. Upon the transfer of custody, the father's support obligation will likely be terminated upon application to the court, unless other children of the marriage or relationship continue to live with the mother. The mother may also be required to pay child support to the father, even if the mother has a much lower income and receives alimony from the father. However, when a change of custody involves a teenager, courts may wait before establishing a new support obligation in order to protect against another quick change in the custodial arrangement.

In addition to emancipation or a change in custody, the unfortunate death of a parent could also end a support obligation. Although a person might assume that a support obligation would end

upon the death of the paying spouse, that is not always the case. In a large number of cases, the courts require the paying spouse to maintain a life insurance policy which is held for the benefit of the child in the event the parent should die. In many cases, the child is made the beneficiary of the policy while the other parent becomes the trustee for the benefit of the child. If the support award is based on more than one child, the emancipation of one of the children will not result in a proportionate reduction in the support award. Instead, child support must be recalculated based on the parties' present income and the number of unemancipated children in the household.

Paying for College

Traditionally, the courts have viewed education as a necessity. The recent trend in the law has leaned towards recognizing the importance of secondary education. As the need for a college education has gained importance, the courts have been more willing to include college expenses as part of a child support award if the parents are able to afford such. The goal of the courts is to allow children to eventually become self-supporting by preparing them with an education or vocational training. In appropriate circumstances, parents should enable their children to attend college.

In making the decision of whether or not to require parents to pay for a child's college education or expenses, a court must consider the complete factual circumstances surrounding every individual case. Parents are only required to contribute if they are financially able to do so. When considering the surrounding circumstances, the court should consider the following: (1) the effect of the background, values, and goals of the parent on the reasonableness of the expectation of the child for higher education; (2) the amount of contribution sought by the child for the cost of the higher education; (3) the ability of the parent to pay that cost; (4) the relationship of the requested contribution to the kind of school or course of study sought by the child; (5) the financial resources of both parties; (6) the commitment to and aptitude of the child for the requested education; (7) the financial resources of the child, including assets held individually or in custodianship or trust; (8) the ability of the child to earn income during the school year or on vacation; (9) the availability of financial aid in the form of college grants alone; (10) the child's relationship to the paying parent,

including mutual affection and shared goals as well as responsiveness to parental advice and guidance; and (11) the relationship of education requested to any prior training and to overall long-range goals of the child.

Although courts generally apply the same factors in each case, there is no way to predict, with certainty, whether or not a support payor will be required to contribute to college education. For example, even if the parties can afford to pay for tuition and their lifestyles suggested that a college education would be provided to the children, a court may decline to award such support if the paying parent and child do not have a healthy relationship. In one New Jersey case, the court rules that the father did not have to contribute to his daughter's college expenses because the daughter purposely blocked her father from participation in her decisions as to where she would attend school. In that case, the court had, on a number of occasions, ordered the mother and daughter to include the father in decision-making and information sharing regarding the daughter's choice of schools and her progress. The mother and daughter refused to abide by the court's orders. However, it is important to note that a parent will not be able to avoid college costs by failing to maintain a relationship with the child.

As discussed above, the decision on whether or not a parent should pay for college costs rests in the court's hands. Courts, with the assistance of relevant case law and statutes, will strive to make a decision that meets the individual needs of each case. Therefore, although there is a general trend towards requiring parents, who are financially capable, to pay for college, there is no guarantee that such an outcome will result. Child support for the parties' remaining children, if any, takes precedence over college expenses. Courts are instructed to apply the Child Support Guidelines for the remaining children before calculating the parties' obligation for the college student.

Emancipation

Support does not automatically terminate upon the child's attainment of the age of eighteen. A support payor must make an application to the court to have the child declared emancipated. The support obligation will end once a court enters an order of emancipation, provided that all arrears

are paid in full. It is important that a paying parent make an application to terminate support before stopping payment under the assumption that the child is emancipated. Without a new court order, arrears will accrue. Courts to do not have the power to retroactively change the amount of support a parent should have paid unless the payor had an application pending. However, if the court deems appropriate, a court may set a retroactive effective date for the emancipation, which will eliminate some arrears. For example, a court can declare that a child was emancipated a year before the application was made. In doing so, the court will eliminate arrears for the year since the child was emancipated. However, a support payor should not rely on obtaining a retroactive effective date. It is very important for a parent to make an application for termination of support if the paying parent believes that the child is emancipated.

Enforcing the Child Support Order When the Other Parent Does Not Pay

Unfortunately, in some cases, parents do not pay the court ordered support awards. When a parent fails to pay the support and the money becomes past due, the amount owed is called an arrearage. There are two types of arrears: fixes arrears and unfixed arrears. Fixed arrears are amounts which a court has found to be due and owing. Unfixed arrears are amounts which the support payor owes, but which have not yet been addressed by the court. An enforcement application is an attempt to get the courts to address the arrears and require the owing parent to pay.

A party or an attorney for a party may bring an application for enforcement. In addition, when the support is monitored by the local Probation Department, the Probation Officer assigned to the case may take action to enforce the support as well. If a party has failed to make payments as ordered, the Probation Department notifies the support payor by mail that continued failure to pay will result in contempt proceedings. Thereafter, once the support payor falls behind more than 14 days in payments, the Probation Department will file a statement with the court, setting forth the facts regarding the non-payment. Following that step, the Probation Department may apply to the court for relief on behalf of the party who is supposed to receive support. If Probation makes the enforcement application, there is no filing fee charged. Under non-dissolution cases there is no

charge either.

However, in dissolution cases, each motion filed with the court requires a filing fee. Once an application is received, there are a number of different methods a court or hearing officer may use to ensure payment of arrears. As motioned above, most cases are monitored by the Probation Department of the county where the action is filed. All orders that include child support are supposed to be monitored by and paid through the Probation Department via immediate income withholding from the support payor's current and future income unless the parties agree, in writing, to an alternative arrangement, or either party shows, and the court finds, good cause for allowing the support payor to make direct payments to the custodial parent.

In most of the cases handled by Probation, the child support order provides for income withholding or wage execution upon nonpayment of support. In such cases, when the support become fourteen days past due, the Probation Department sends a Notice of Income Withholding to the support payor. Income withholding can begin 10 days later unless the payor justifiably objects. If the order does not provide for the withholding, the court may make an order that the support be withheld from the payor's income upon proof of the 14 day nonpayment notice to the payor.

An order for withholding will require an employer to deduct the child support payment directly from the employee's pay checks. The employer then forwards the withheld amount to the Probation Department. Once the support is received and recorded, Probation forwards the payment to the person entitled to the support. Usually, if arrears have accrued, upon application for such, the court or hearing officer will amend the support order to require the employer to deduct the child support plus an additional amount to "pay down" the arrears. For example, an employer might deduct $100 per week for child support, plus $10 for arrears.

In addition to income withholding, the court has other, more drastic measures of enforcement. Courts have the ability to suspend a driver's license or professional license, such as a license to practice law or medicine, of deadbeat parents. The courts may also issue economic

sanctions and/or require the participation by the party in violation of a support order in an approved community service program. The courts may also issue an order permitting the issuance of a bench warrant for the arrest of the defaulting payor with or without work release. This is a remedy usually reserved for the continual failure to pay child support. The local sheriff's department is then able to make the arrest for failure to pay support. Furthermore, the court has statutory authority to award counsel fees to the party who brings an action to enforce child support against the defaulting party.

The powers of the court to enforce child support orders have been extensively amended recently, broadening the court's power. This increase in power sends a message that the courts want to ensure children receive the support they are entitled to.

Uniform Interstate Family Support Act

An important issue in child support is whether a New Jersey support award can be enforced in other states and whether out of state support awards can be enforced within New Jersey. To address these interstate child support issues, the United States Commission on Interstate Child Support, in conjunction with the National Conference of Commissioners on Uniform State Laws (NCCUSL) created the Uniform Interstate Family Support Act (UIFSA) in 1993, which replaces the former Uniform Reciprocal Enforcement of Support Act (URESA) of 1950. Subsequently, the States were required to enact UIFSA by January 1, 1998.

New Jersey's version of UIFSA is very similar to the NCCUSL model Act. Since the nature of the issues are based on the differing location of the parties, jurisdiction plays a large role. Jurisdiction refers to the place that has the authority to render decisions on a legal matter. In general, a petitioner files a UIFSA claim to enforce, modify or establish support in the tribunal with personal jurisdiction over the obligor. A tribunal is defined in New Jersey as the Superior Court, Chancery Division, Family Parl. Personal jurisdiction can be achieved two ways: first, the state in which the defendant resides has personal jurisdiction to hear the case; second, the state with long arm jurisdiction over the defendant can also hear the case. Long arm jurisdiction is established if any of the following are met: (1) the non-resident defendant is personally served with notice within

New Jersey; (2) the non-resident defendant consents to New Jersey's jurisdiction; (3) the non-resident defendant resided with the child in New Jersey; (4) the none-resident defendant resided in New Jersey and provided prenatal support for the child while here; (5) the child lives in New Jersey as a result of the acts or directives of the non-resident defendant; (6) the non-resident defendant engaged in sexual intercourse in New Jersey which may have resulted un conception of the child; or (7) any other basis pursuant to the New Jersey or U.S. Constitutions.

Under UIFSA, there is only one controlling order at a time. To enforce a support order, a variety of factors must be considered. If there is only one order, then that order controls. If there are multiple orders, the order issued from the state with controlling exclusive jurisdiction (CEJ) controls. CEJ belongs to the state that issues an order and the child and custodial parent continues to reside in that state. If there is more than one order and more than one order from a CEJ, then the order issued by a tribunal in the child's home state controls. A home state is the state in which a child has lived for the past six (6) months or more. If there are multiple orders and more than one tribunal with CEJ, but no order issued from the child's home state, then the home recent order controls.

UIFSA provides for three remedies for enforcement: (1) Direct Income Withholding (DIW); (2) Administrative Enforcement without Registration and (3) Registration for Enforcement. DIW is perhaps the most effective remedy. This authorizes a child support agency, an attorney, or either party to mail an income withholding order, issued by any state, directly to an employer in a UIFSA state. The recipient employer must honor the withholding order and provide the obligor with a copy. If New Jersey is the initiating state, the Department of Human Services shall enforce the order to the extent that their powers allow without judicial intervention. If New Jersey is the respondent state, the New Jersey support enforcement agency should use their administrative procedures to enforce the order.

To determine which jurisdiction governs modification of a support order, one must look towards the CEJ. If there is only one state with CEJ, then that is the only state with jurisdiction to

modify the child support, unless the parties agree otherwise, in writing. Similar to enforcement jurisdiction above, if there is more than one CEJ, the child's home state has modification jurisdiction. Likewise, if there is more than one CEJ and no home state, the state that issued the most recent order has modification jurisdiction. If there is only one order, but no CEJ, then the petitioner must register that order in a state with personal jurisdiction over the defendant. If there are several orders but no CEJ, the petitioner must file a petition to establish a support order in a state with personal jurisdiction over the defendant. The petitioner may also register existing orders for enforcement of arrears, if applicable.

In order to establish support, the petitioner must file claim in a state with personal jurisdiction over the non-resident. If long arm jurisdiction is not available, then the petitioner may file a claim in his or her own state, which will be transferred to the responding state with jurisdiction over the defendant. The claim must be supported by a verified Complaint; it must include information such as the names, addresses and social security numbers of the petitioner, the defendant and the child. The Complaint is then forwarded by the initiating tribunal to the responding tribunal.

If New Jersey is the responding tribunal, it must first determine whether there are any existing support orders before issuing a new one. If there are existing order, the petitioner should be filing for enforcement or modification of the order. In the absence of any support orders, New Jersey may then issue a temporary support order if it is verified that the defendant acknowledges parentage or owes a duty of support. If parentage is an issue and has not been determined by another tribunal, the defendant may raise that as a defense. If parentage has been determined by another tribunal, then New Jersey must give that tribunal's finding full faith and credit.

Filing the Proper Forms

Whether the petitioner is seeking to enforce, modify or establish a support order, he or she must complete the form, Child Support Enforcement Transmittal #1 - Initial Request. To enforce a pre-existing support order, this is the only form that is required. To modify an existing order issued by the responding state, general testimony from the petitioner is required in addition to the

above form. To modify an existing order not issued by the responding state or to establish support, the petitioner needs to submit a Uniform Support Petition, general testimony and a Registration Statement along with the above form. To establish paternity and support, petitioner needs to submit a Uniform Support Petition, an Affidavit in Support of Establishing Paternity and provide general testimony. These forms can be obtained from the Clerk's office in the Family Division, any law library or by contacting the Federal Office of Child Support in Washington, DC.

CHAPTER III

CUSTODY/VISITATION RIGHTS

Custody can be divided up into two parts, legal custody and physical custody. Legal custody refers to the power of the parents to make major decisions regarding their child's health, education, safety and welfare. Physical custody refers to the amount of time the child is in on parent's presence and the ability of that parent to supervise the child and make day to day decisions for the child.

Factors the Court Considers During a Custody Determination

The overriding concern of the court is always the question, "what is in the best interest of the child?" In making this determination, the court will consider many factors and has a wide range of discretion as to how these factors are weighed.

Some of the factors which the court has considered in making a custody determination are: (1) emotional and physical environments; (2) personal safety of the child, (3) moral atmosphere of the household; (4) the mental and physical health of the parents, (5) the age of the children; (6) preference of the child, (7) prior behavior of the parents, including histories of abuse, (8) the ability of each parent to care for the child, (9) importance of religious upbringing within the family and other factors contributing to the general welfare and happiness of the child.

Once the court decides which parent should have custody, there are several possible custody arrangements which the court may impose: (1) sole physical and legal custody; (2) sole physical custody with joint legal custody, and (3) joint custody. It should be state at the start that "joint" does not necessarily mean equally shared. When custody, either legal or physical, is referred to as "joint" it only means that both parties share privileges although not necessarily equally.

In deciding what custody arrangement to impose, the court will consider the relationship of the children to the parents and whether they would benefit from a joint custody arrangement. Joint custody is awarded when both parents are able to set any personal feelings aside and cooperate in raising their children and providing for their children's needs.

Almost no parent obtains sole physical custody of their child. The most traditional arrangement is for the parties to share joint legal custody, while one parent has primary physical custody and the other "non-custodial parent" will be awarded visitation rights. These roles are also referred to as primary and secondary caretakers. The actual amount of time spent with each parent may vary from case to case. It can range from only a few hours of supervised visitation, to frequent unsupervised visits or even an equal split.

In some cases, the court will consider the children's wishes if the court believes they are at an age where they are capable of making an intelligent decision. Courts are required to interview children age seven (7) or older, and may interview children younger that age seven (7), if asked, to determine if they have a preference with regard to custody. The courts will usually interview the children in the court room or the judgment's chambers if requested. This is called an "*in-camera* interview." The goal is to help the judge determine what the child's wishes are. Obviously, the older the child, the better able he or she will be in articulating their desires. Younger children are usually influenced by other motives in expressing their wishes to remain with one parent or the other. The desires of a child may not be the deciding factor, however, instead, the wishes of a child are just one of the many factors which the court will consider in making its determination.

The parents can also attempt to arrive at their own physical and legal custody arrangements, which the court will enter and enforce, provided it is not contrary to the best interest of the child.

Many times, custody arrangements depend upon when custody is being sought. If the parents have just separated, and the child is an infant, the courts will usually allow the mother to have custody until the divorce determination is settled. If the child is a newborn, a showing that the mother's continued custody would threaten the health or welfare of the child would be sufficient to give custody to the father. As to the ultimate determination, however, both parents are treated equally. In actuality, this is a Catch 22. Parents are to be treated equally, but the court will consider the bond which may have developed while the case was pending in deciding custody.

It is in the court's discretion to determine at what age children will no longer be subject to the court's jurisdiction. A 1991 court decision ruled that just because a minor reached the age of 18 does not deprive the court of making a custody determination. The facts of an explatory case involved an 18 year old son leaving his mother's home to reside with his 22 year old sister. It was alleged that the father consented to this move, and helped his son pay for the rent. The mother wanted the son to move back home with her. The court decided to hold a Plenary Hearing to consider what was in the boy's best interests. Therefore, the mere attainment of the age of 18 does not preclude the court from making a custody decision.

The general trend in custody disputes is that mothers retain physical custody of younger children, unless they consent otherwise, but that both parents are on an equal footing with regard to older children.

A Non-Custodial Parent's Role

Depending on the custody arrangement, a parent will have a certain amount of influence over the child. If one spouse has sole legal custody, the other spouse will have little say. However, if both spouses have joint legal custody, each will have a very strong say.

If the parties have joint legal custody, the non-custodial parent is to be notified and consulted prior to making any major decisions. There is no requirement, however, for the non-custodial parent to be consulted regarding minor or day to day decisions.

Steps to Take When Filing for Custody

The first step in seeking a resolution of a custody dispute is to file an application with the court for custody. This application can be in the form of a Complaint for Divorce, a Custody application or a Domestic Violence Order.

Once the application is filed, it will be reviewed by the court to determine if it should be sent to custody mediation. Each county has its own procedure, but almost all cases are first sent to custody mediation, where the parties work with a mediator to try to work out a mutually agreeable resolution of the custody dispute without resorting to further litigation. In addition, parents are

required to take a course prior to mediation to assist in the process. These courses are run by the county and usually meet just once. If custody mediation is unsuccessful, the court will then order a hearing to decide the issue of custody and visitation.

Custody in Non-Dissolution Cases

Custody for non-married persons is treated the same way as for married couples. If the parties are not married, a determination of paternity must be made before a custody order may be enforced.

It is necessary for the father to claim paternity of the children if he wishes to seek custody or visitation. This is not a difficult procedure and can be done at the same time as the application for custody or visitation. A father can claim paternity of a child through a court order, through providing support to the child, or through filing an acknowledgment of paternity with the local registrar of vital statistics.

Guardian *Ad Litem*

A "Guardian *Ad Litem*" is an attorney who is appointed to represent the children themselves, not the parents, in any matrimonial action. The court may appoint a guardian *ad litem* when the court has reason to believe that the children need their own representative to act in their best interest because one or both of the parents are no longer doing so. The primary concern of the court is always what is in the best interest of the children. In some divorces, the parents become so obsessed with their own wishes or desires that they lose sight of this and begin acting in a way which leads the court to believe that they are no longer capable of acting in the best interest of their child. It is at this time that the guardian will be appointed.

A guardian *ad litem* may be appointed by the court even if the parties did not request one. Once the guardian is appointed, he/she shall have the power to act as an independent investigator, interview the parents, interview the children, interview any third parties they believe will have important information, make applications to the court, and participate in all court proceedings. The

guardian is also frequently the deciding vote in cases when the parties are deadlocked on issues relating to the child.

Assessments Made by the Court of the Parents

When one parent alleges that the other parent is an unfit parent, the court may order a best interest investigation, a risk assessment or a psychological evaluation.

A risk assessment is an evaluation provided by the court on request. This method is usually used when there is a specific allegation of misconduct on the part of one of the parents such as alcohol or drug abuse. Once a party has requested a risk assessment it is then the burden of the opposing party to demonstrate that it is not necessary. These assessments are usually very inexpensive.

The best interest investigation is usually performed by the Probation Department, although in some counties, it is run by the Case Management Office and is free of charge. These investigations look into the character and fitness of both parents, the economic condition of the family, and the financial ability of the parties to pay alimony or support or both.

A psychological evaluation is exactly what is sounds like. A party can retain their own expert and request the court to compel the other party to cooperate with the evaluation or can request that the court appoint a neutral evaluator to examine all the parties involved. Whether or not a request for a psychological evaluation is granted will depend on the attitude of the judge who handling the case. It should be noted that these evaluations can become very costly. A psychologist is entitled to charge their usual hourly rate for any time they spend on a case, including the time they take to prepare a report and to appear in court.

More Than One State

If there is a custody order from a state other than New Jersey, a determination must be made as to whether the order will be enforced. In New Jersey, our courts do not always give "full faith and credit" to another state's custody decree. The rationale behind this is that custody judgments involve continuing relationships which are subject to constantly changing conditions. When

deciding whether to adjudicate a custody action, courts must look to the basis of the court's jurisdiction, the location of the child and its custodian and the court's access to necessary information about the child and its present and potential custodians. In addition, New Jersey courts do not mechanically enforce a foreign judgment if that foreign judgment is not in the best interests of the child.

In an adoption proceeding, a New Jersey court has jurisdiction even if the child comes from another state, providing that the parents are New Jersey residents. However, an out-of-state placement requires a court to consider the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnaping Prevention Act (PKPA). The purpose of the UCCJA is for states to cooperate with one another in placing children up for adoption. The UCCJA permits jurisdiction to be exercised by the home state or a state having a significant connection with the child. The PKPA permits significant connection, only if no state qualifies as the home state.

The UCCJA was enacted to avoid jurisdictional competition and conflict between courts of other states in matters of child custody. It also ensures that the litigation of a custody dispute will take place in the state in which the child has the closest connection. Under UCCJA, a New Jersey court has jurisdiction to make a child custody determination if the child resides in New Jersey at the time of the commencement of the proceeding, or New Jersey has been the child's home state within six (6) months before commencement of the proceedings. The court will also assume jurisdiction if it is in the child's best interest, if at least one parent has significant ties to the state and there is substantial evidence regarding the child's present or future care available in this state.

Provisions of the UCCJA do not empower a court to rule on permanent custody issues. A court exercising emergency jurisdiction under the act has the authority to prevent immediate, irreparable injury. In order to make a determination on custody, a state must satisfy the other requirements which include the requirement that the state is either the home state of the child or there are significant connections between the child and the state.

Under the UCCJA, the four standards for establishing alternate bases for jurisdiction are: (1)

the state is or has been, within six months of the proceeding, the "home state" of the child; (2) it is in the best interest of the child to proceed in the former state because the child and family have a significant connection to the former state; (3) the child is present in the jurisdiction and is abandoned or threatened with harm; and (4) no other state has jurisdiction and it is in the best interest of the child that the former state entertain the dispute.

Under the UCCJA, the state court to decide custody is the one best positioned to make the decision based on the best interests of the child. The UCCJA rejects a rigid rule vesting jurisdiction automatically in the home state. The Parental Kidnaping Prevention Act permits a home state to defer jurisdiction to another state on the grounds that the other state is a more appropriate forum.

More Than One Country

The UCCJA also applies to international custody disputes in cases where a child has been removed from the country. If your child is removed, you may apply to have the issue determined by a New Jersey Court. However, having the order enforced in a foreign country is another matter.

On October 25, 1980, there was an international convention held at the Hague, which adopted resolutions pertaining to the wrongful removal of children from their habitual residence. The resolution of the Hague Convention was ratified by the U.S. in 1988. A parent has one year, by United States Law, to proceed under the Hague for wrongful removal.

Under the Hague Convention, a parent may also oppose the return of a child. The parent has the burden of establishing, by clear and convincing evidence, that one of the following exceptions apply.

1. The person was not actually exercising custody rights at the time of the removal or retention or had acquiesced to the removal or retention;

2. There is a grave risk that his or her return would expose the child to physical or psychological harm and place the child in an intolerable situation;

3. The child objects to being returned.

If one spouse has consent from the other spouse to move to another country, it is still possible for one spouse to compel the other to move back into the United States.

The party remaining in the United States will have to apply to the court for a modification of the custody arrangement. Before they can apply, however, they must show that the four requirements of the Hague Convention are met. This would entail that the party remaining in the United States show that (1) both countries participated in the convention; (2) that the child was habitually a resident of the United States immediately before removal; (3) that the child is under the age of 16; and (4) that the removal of the child was wrongful. If the party remaining in the United States is unable to demonstrate all four of these things, he/she will have to make an application in the country in which the child is residing for custody.

New Jersey courts will recognize a foreign country's decision regarding custody, provided that the foreign court had jurisdiction over the subject matter and there was notice to the spouse residing in New Jersey and the other country considered the "best interest" of the child. New Jersey courts have the authority to enforce an order against a parent who has removed children out of the state and is living overseas if the children are natives of New Jersey, or have resided for five years within its limits. According to statute, a New Jersey court will make an order for the care, custody, education and maintenance of the children. A New Jersey court has statutory authority to determine whether the removal violates a joint custodial agreement, or if the children's interests are being met or establish a visitation schedule.

Modification

Once a custody arrangement is established, either party may request to modify the custody arrangement due to a change in circumstances which occurred from the time of the original custody decision. The party applying to modify the custody arrangement will have the burden to show how the change affects the child's welfare. Keep in mind that a personal belief that it would be in the child's best interest to be in your custody is not sufficient. The court already determined that it was in the child's best interest to be in the custody of your former spouse. The moving party must show

that something has happened which the court did not consider when it made its original determination.

Modification of visitation follows the same test as modification of custody. You must show a change in circumstances. In some cases the court will modify the visitation schedule if the custodial parent is suing their time to turn the child against the other parent. The courts may also modify custody if it finds a parent is not complying with the parenting plan which was put in place.

If a court order was never entered regarding custody of the children and the non-custodial parent now seeks a change in custody, he or she must show that it would be in the children's best interest to be in their custody. Since there is no prior order, there is no need to show changed circumstances.

Moving to a New State

When a custodial parents wants to move out of state with the child, that parent must have either consent of the former non-custodial spouse or the court's permission. It is only when the non-custodial parent does not consent to the relocation that the court becomes involved. If the non-custodial spouse does not consent to the child's relocation, the custodial spouse has to make an application to the court to relocate. If the custodial parent ties to move without the consent of the non-custodial spouse or the court's permission, he/she could be breaking the law.

To obtain consent from the court to remove the child from the state, you must be able to show (1) a good faith reason for the move; (2) that the move will not adversely affect the non-custodial parent's visitation, and (3) that it is in the best interest of the children to remain with the custodial parent and move out of the state. Not every relocation adversely affects the visitation of the non-custodial parent. For instance, if the non-custodial parent has already moved out of New Jersey, or has not been exercising visitation, there would be little to no impact on his/her visitation should relocation be permitted. Also, an adverse affect on visitation is not a good enough reason

to deny the custodial parent's request to relocate. The court has to weigh the advantages of the moves, the motives of the parties, and the ability to develop a reasonable alternative schedule.

In addition, if moving to a new state would affect the existing custody arrangement, the parent seeking to remove the child must also show it is in the child's best interest to move. This is much more difficult than a normal removal case in which the custodial designations remain the same. This situation should only arise in cases in which there is a true joint custody arrangement an the moving parent is seeking to be designated as the primary care giver.

If a spouse in New Jersey is exercising visitation with their out-of-state children and then decides to make an application for custody at the end of the children's visit, under New Jersey statute, a New Jersey court will decline to exercise jurisdiction if you are wrongfully retaining the children in this state. If you and your spouse agreed that the children would return back to your former spouse, and your former spouse has custody, in all likelihood, a New Jersey court would see your actions of retaining the children as improper. Under New Jersey statute, a court will decline jurisdiction if the litigant wrongfully took the children from another state or has engaged in similar reprehensible conduct.

On the other hand, if one spouse seeks to modify a custody order, but the former spouse does not live in New Jersey, as long as notice of the proceedings is provided to your former spouse and he/she has an opportunity to be heard concerning the custody issue, the courts will hear the matter. Furthermore, a New Jersey court must have jurisdiction to alter the custody decree.

Moving to New Jersey

If another state initially exercised jurisdiction in a custody dispute, but now the children are living in New Jersey, a New Jersey court can exercise jurisdiction. This is pursuant to the UCCJA, where a court which exercised initial jurisdiction must decline to continue if the child and his/her family have a closer connection with another state. A New Jersey court must consider certain

factors in modifying a sister state's custody order. Part of the rationale behind the UCCJA is to limit the ability of the sister state to modify custody decrees. Both statutes permit modification only if the former has jurisdiction, and the rendering state has lost jurisdiction and has declined to exercise it.

The UCCJA will allow a New Jersey court that does not ordinarily have jurisdiction to exercise jurisdiction if there is a question of irreparable harm. For example, if the children are residing in another stat with a former spouse who has custody, but during the other spouse's visitation with the children in New Jersey, he/she realizes that there is a danger of irreparable harm to the children, a New Jersey court can exercise emergency jurisdiction. A Plenary Hearing will be conducted to weigh all of the evidence on the alleged mistreatment or abuse of the children.

Visitation

A parent's right to see his/her children is constitutionally protected. Very rarely will a parent be denied visitation privileges with his/her child. Before a parent is denied visitation rights, it must be shown having the child in that parent's presence would cause physical or emotional harm to the child and that there are no other alternatives than completely terminating one's ability to see one's child. However, this does not mean that visitation cannot be restricted to certain conditions or times. A visitation schedule will be set with the best interest of the child in mind. This may require that visitation be restricted to certain locations, or times, or that the overall amount of visitation be limited.

The variety of visitation schedules is endless. Each couple can arrange for whatever visitation schedule they believe will best serve their child's needs. Some of these schedules may include supervised visitation, unsupervised visitation, non-overnight visitation, overnight visitation, vacation periods, holiday visitation, summer visitation, etc. These schedules are set either by consent of the parties, or a showing that the proposed schedule is in the best interest of the child.

However, courts frown upon agreements which place children in the middle, i.e., they do not have to go to visitation if they don't want to or they can choose when to go. This places too much pressure on the children.

The court can place many requirements on a parent's conduct during visitation if they believe those conditions are necessary to protect the safety and well-being of the child. These conditions can range anywhere from the location of visitation, to the presence of other persons.

When one parent starts a new romantic relationship after the divorce, the former spouse may attempt to have visitation modified so that the new companion cannot spend the night where the children are located. As with all other issues, the main concern of the court is what is in the best interest of the children.

The issue in this case is, would it be more harmful to expose the children to the presence of the new companion, or to modify the visitation schedule. In some cases, the courts have considered the time since the divorce, the stability of the new relationship, the ages of the children and the relationship of the children with the new companion in making this determination. The court will also consider the impact that this condition will have on the parent's visitation. If the new companion is already living with the parent, then obviously, there will be a substantial impact on visitation. If the parties are still only dates, there may be very little affect on the visitation schedule and the court may be more inclined to modify it.

A common problem with visitation is when one party fails to comply with the visitation schedule. It is important to remember that visitation schedules are enforceable by the court. The non-custodial spouse can go to court and obtain a court order directing the custodial spouse to comply with the visitation schedule and sanctioning the custodial spouse for failure to comply. These sanctions can range anywhere from a fine, to make-up visitations, to reductions in alimony, to jail time. In some circumstances, the court will even transfer custody, but only as a means of last

resort. The only sanctions which are not authorized by the court are those relating to child support. Child support and visitation are not dependent on each other. It would be unfair to penalize your child for the actions of your former spouse.

When the child does not want to see the other parent, there are a few factors to consider in pursuing visitation. If the child is old enough to make an intelligent decision, age 16, then a parent does not have to force the child into visiting with the non-custodial parent. But a custodial parent does have a duty to attempt to enhance the relationship of the child with your former spouse. As for younger children, the courts are inclined to direct the custodial parent to force the child to go for visitation with the other parent, unless it can be demonstrated that it is not in their best interest to continue with visitation as it currently stands. Keep in mind that the noncustodial spouse has a constitutional right to visitation with his/her child.. It is more likely that the court will simply modify visitation rather than terminate it entirely. It is in your child's best interest to have two parents in his/her life.

Visitation with Grandparents

Grandparent visitation is still a relatively developing area of law as our society continually redefines what constitutes a family. In general, grandparents may apply for visitation with grandchildren. If both of the grandchildren's parents are living and are adults or emancipated minors, then the children's parents have the ultimate say in whether a grandparent may have visitation with the child. If one of the parents is not living, the grandparents may seek visitation. This right to visitation will continue even if the living parent has remarried and a new spouse has adopted the child. Generally, however, it is difficult for grandparents to obtain visitation rights with grandchildren because of a parents' right to parent a child as they wish. Also, if the parents of the grandchild are minors and are not emancipated then the grandparent shall be able to apply for visitation if he/she is able to demonstrate that visitation would be in the grandchild's best interest.

Once a visitation schedule has been established, it must be modified like any other visitation schedule. It is the burden of the party seeking to modify the visitation schedule to demonstrate that there has been a change in circumstances which makes it in the best interest of the child to make the modification.

Visitation with Step-Parents and Partners

There is no statutory right of a step-parent to have visitation with their step-children. However, the court has found, in some circumstances, that visitation is warranted. It is the burden of the step-parent to demonstrate a relationship between him/her and the child which includes a reliance for financial support or love and comfort.

There is also growing case law with regard to same sex partners. In those situations, the court will examine if the partner has become a psychological parent to the child. If this bond exists, the partner will be entitled to visitation.

Visitation in Non-Dissolution Cases

Parents who are not married have a constitutionally protected right to visitation with their children, regardless of the legal relationship between them.

Termination of Visitation

Only in very rare circumstances will visitation be terminated in its entirety. Before that can happen, your former spouse must show that the state has an interest in terminating the visitation, that complete termination is the least restrictive way of meeting the state's interest, and that you were provided with due process prior to termination. Simply put, visitation will only be terminated after it has been demonstrated that your mere presence would cause extreme physical and emotional harm to the child.

Adoption

A parent's new spouse may adopt your child only if your former spouse's rights have been terminated. Termination of your former spouse's parental rights may be done by consent of the former spouse or by a court order.

If a parent is involved in a same sex relationship, their significant other may also adopt the child providing that the other parent's rights have been terminated. If it can be demonstrated that it would be in the child's best interest to be adopted, then your significant other can apply to adopt the child even though they do not fit the legal definition of a step-parent.

Foster Care

When children were previously placed in foster care and the natural parents now want the children returned to them, custody is dependent on several factors. First, the court will consider the length of time the child has been in foster care. If the child has been with his or her foster parents for an extended period of time, then a new parent/child relationship would have been formed. It would be treated like any other custody dispute. The foster parents would have to demonstrate that it would be in the children's best interest to be in their custody rather than returning to the nature parent(s). Although there is a strong presumption in favor of a natural parent retaining custody of the child, biology alone is not enough. The courts will also examine if the children would suffer psychological harm from being separated from their foster parents.

The court will also consider the age of the children and their preference. If the children are of an age where they can express their wishes to remain with the foster parents and they have sound reasons for remaining with the foster parents, the court will take this into consideration.

Kidnaping

New Jersey courts have jurisdiction if a parent kidnaps the child out of state. A New Jersey court has *parens patriae* jurisdiction over the custody and maintenance of children who have resided in New Jersey for five years or more. If the children have spent most of their lives in this state, then a New Jersey court would exercise jurisdiction in such a situation. The public policy behind such a rule precludes the removal of children from one state to another without prior judicial recourse.

Termination of Parental Rights

Termination of parental rights makes the parent and child relationship obsolete. It severs all legal ties between the parent and the child. For a person's parental rights to be terminated, there must first be a petition to the court based upon the best interest of the child. The petitioner must then show that: (1) the child's health and development have been or will continue to be endangered by the parents; (2) that the parent is unable or unwilling to eliminate that harm; (3) that there have been attempts made to correct the circumstances; and (4) that termination will not do more harm than good. These four criteria must be shown to exist by clear and convincing evidence.

Most of the time, these applications are made by the New Jersey Division of Youth and Family Services (DYFS). However, any one with a genuine interest in the welfare of the child can make an application to the court.

One parent's parental rights are independent from those of the other parent and cannot be terminated by their actions.

Conclusion

As you can see, the issues of custody and visitation can become very specific and very complex. However, there is always one thing which will remain the same. The courts will always do what they believe is in the best interest of the child.

CHAPTER IV

MARITAL TORTS

What is a "tort?" Interestingly, even leading legal treatises on the topic are not clear as to the definition of a "tort." The word "tort" is derived from the Latin "*tortes*" or "twisted." "Tort" is found in the French language, and was at one time in common use in the English language as a general synonym for "wrong." Basically, a tort is a civil wrong, for which the court will provide a remedy in the form of an action for damages. Torts may be intentional, negligent or reckless. They may result in any number of physical or emotional injuries and include injuries to property. Traditional definitions of this body of law actually exclude most, if not all, of the duties arising out of family relations. So what do they have to do with divorce law in the State of New Jersey? Quite simply, this legal concept has developed into an ever growing remedy available to spouses and/or children who find that they have a cause of action which would clearly exist but for the family setting.

In 1978, the Supreme Court of this State proclaimed that where personal injuries are tortiously inflicted by one spouse upon another, it is just and fair that compensation in appropriate circumstances be afforded the wronged and injured party and, to this end, a suit be allowed to effectuate such recovery. If the parties are divorcing, this claim must be raised in the divorce complaint itself or be lost. Therefore, in one swift stroke, our Supreme Court eliminated the restrictions against one spouse suing another known as "spousal immunity." From that time forward, spouses have had virtually the same rights to sue or be sued by their spouse for civil wrongs, (i.e., torts) as any two strangers meeting on the street.

Society's awareness of the existence of family violence is not limited to the enactment of protective legislation such as the Domestic Violence Act, but also extends into the realm of tort litigation where there are ever expanding remedies available to an abused spouse or a spouse who

has a claim based upon some tortious conduct of his or her spouse. Reported tort cases throughout the country for physical or psychological spousal abuse are growing rapidly. Examples of such cases include assault and battery; transmission of a sexual disease, marital rape, Battered Woman's Syndrome; wrongful death; intentional infliction of emotional distress; false imprisonment; use of excessive force (as when a battered wife retaliates and unjustly escalates the conflict); negligent infliction of emotional distress; simple negligence; defamation; wiretapping; negligence *per se* and an implied cause of action for the violation of a criminal statue. Claims may also lie in actions which occur after a Complaint for divorce has been filed, such as dissipation of marital assets, fraudulent conveyance of marital assets, invasion of privacy and interference with custodial rights, suits may also arise on behalf of minors against one or both parents or third parties associated with one or both parents.

The abolition of inter-spousal immunity, the growing recognition of the extent and seriousness of domestic violence, in conjunction with the increasing flexibility of tort concepts, have led to the application of these numerous pre-existing and novel theories of tort to the arena of inter-spousal litigation. The greater the awareness of the evil of domestic violence and the emergency of these "domestic torts" have imposed new legal standards of accountability on spouses and have required increased court involvement to protect the spouses and children in the family setting.

This chapter will address only a limited number of the above referenced torts. Specifically, the torts of Battered Woman's Syndrome; assault and battery, negligent and intentional infliction of emotional distress, fraudulent conveyance, wiretapping, interference with custodial rights, and malicious "abuse" and "use" of process. Further, this chapter will also address a matrimonial tort litigant's right to a trial by jury.

Battered Woman's Syndrome

As previously indicated, inter-spousal tort immunity no longer exists to bar the suit of one

spouse against another for injuries sustained by one spouse due to the tortious conduct of the other. If the circumstances surrounding a domestic tort and a claim for monetary damages are relevant to a divorce proceeding the domestic tort must be joined with the divorce proceeding under the "Entire Controversy Doctrine" in order to avoid protracted and repetitious fractionalized litigation. Under the laws of this State, every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within the State must be commenced within two (2) years after the cause of any such action occurred. However, in a 1995 case, the Appellate Division the concept of the Battered Woman's Syndrome was introduced and recognized as a method to circumvent this two year statute of limitations.

The Battered Woman's Syndrome was first recognized by the Supreme Court of this State in the criminal case of *State v. Kelly*, 97 N.J. 178 (1984). In *Kelly*, the Supreme Court, relying in part on the research of Lenore E. Walker (*The Battered Woman*, 1979), noted that Battered Woman's Syndrome is a recognized medical condition. By definition, a battered woman is one who is repeatedly physically or emotionally abused by a man in an attempt to force her to do his bidding, without regard for her rights. According to experts, in order to be a battered woman, the woman and her abuser must go through the "Battering Cycle" at least twice. The Battering Cycle consists of three stages. Stage one, the "Tension Building Stage," involves some minor physical and verbal abuse while the woman tries to prevent an escalation of the abuse by assuaging the abuser with her passivity. Stage two, the "Acute Battering Incident," is characterized by more severe battering due to either a triggering event in the abuser's life or the woman's inability to control the anger and fear she experienced during stage one. During stage three, the abuser pleads for forgiveness and promises that he will not abuse again. This stage is sometimes referred to as the "Honeymoon Stage." This period of relative calm and normalcy eventually ends when the cycle begins anew.

The cyclical nature of battering behavior helps explain why more women simply do not leave

their abusers. The caring and attentive behavior of the abuser during stage three fuels the victim's hope that her partner has reformed and keeps her tied to the relationships. In addition, some woman who grow up in violent families do not leave abusive relationships because they perceive their situation as normal. Others cannot face the reality of their situations. Some victims "become so demoralized and degraded by the fact that they cannot predict or control the violence that they sink into a state of psychological paralysis and become unable to take any action at all to improve or alter their situation." Victims are often afraid to seek help out of shame, fear that no one will believe them, or fear of retaliation by their abusers. "They literally become trapped by their own fear."

In *Kelly*, the Supreme Court held that expert testimony on Battered Woman's Syndrome was admissible to show that a woman on trial for murder who was repeatedly beaten during her marriage honestly believed that she was in imminent danger of death when she stabbed her husband, and therefore, she acted in self defense.

Because the Battered Woman's Syndrome is the result of a continuing pattern of abuse and violent behavior that causes continuing damage, one trial court of this State held that it must be treated in the same was as a "continuing tort." Said judgment found that it would be contrary to the public policy of this State, not to mention cruel, to limit recovery to only those individual incidents of assault and battery for which the applicable statute of limitations had not yet run. This Judgment also found that the mate who is responsible for creating the conditions suffered by the battered victim must be made to account for his actions - - all of his actions. "Failure to allow affirmative recovery under these circumstances would be tantamount to the court's condoning the continued abuse of treatment of women in the domestic sphere. Said court found that the courts of this State cannot and will never do so."

The trial judge in *Cusseaux v. Picket*, 279 N.J. Super. 335 (Law Div. 1994) established a four part test to state a cause of action for Battered Woman's Syndrome:

1. Involvement in a marital or a marital like intimate relationship;

2. Physical or psychological abuse perpetrated by the dominant partner to the relationship over an extended period of time;

3. The afore stated abuse has caused recurring psychical or psychological injury over the course of the relationship; and

4. A past or present inability to take any action to improve or alter the situation unilaterally.

New Jersey's Appellate Court in *Giovine v. Giovine* agreed with the premise contained in the trial level decision of *Cusseaux* and concluded that a wife diagnosed with Battered Woman's Syndrome should be permitted to sue her spouse in tort for the physical and emotional injuries sustained by the continuous acts of battering during the course of the marriage provided that there is medical, psychiatric, or psychological expert testimony establishing that the wife was caused to have an "inability to take any action to improve or alter the situation unilaterally." In the absence of such expert proof, a wife could not be deemed to be suffering from the Battered Woman's Syndrome, and the courts of this State would view each act of abuse during the marriage as a separate and distinct cause of action in tort, subject to the two year state of limitations.

Assault and Battery

Two of the more basic personal injury torts are "assault" and "battery." Battery is define as a harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent. Battery, stands in contract with "assault," a term ordinarily used to refer to apprehension of imminent contact rather than the contact itself. "Assault" is more fully explained as one's interest in freedom from apprehension of a harmful or offensive contact with a person, as distinguished from the contact itself, and is protected by an action for the tort known as assault. No actual contact is necessary, and the plaintiff is protected against a purely mental disturbance. This action, which developed very

early as a form of trespass, is the first recognition of a mental, as distinct from physical kind of injury. This is a "touching of the mind, if not the body."

The court's original purpose in providing a cause of action for battery undoubtedly was to keep the peace by affording a substitute for private retribution. The element of personal indignity involved has always been given considerable weight. Consequently, the defendant is liable not only for contacts which do actual physical harm, but also for those relatively trivial ones which are merely offensive and insulting. Spitting in the face is a battery, as is forcibly removing a plaintiff's hat, or any other contact brought about in a rude and insolent manner. As quoted by Chief Justice Holt, "The least touching of another in anger, is a battery" and no harm of or actual damage of any kind is required. The plaintiff is entitled to demand that the defendant refrain from the offensive touching even though the contact results in no visible injury.

Since assault, as distinguished from battery, is essentially a mental rather than a physical invasion, it follows that the damages recoverable for it are those for the plaintiff's mental disturbance, including fright, humiliation and the like, as well as any physical illness which may result from them. The establishment of the technical cause of action, even without proof of any harm, entitled the plaintiff to vindication of the legal right by an award of nominal damages. Like battery, assault frequently arises out of the worst intentions, and in such cases is an appropriate tort for punitive damages. Punitive damages are not allowed, however where it is committed because of an innocent mistake.

Any act of such a nature as to excite an apprehension of a battery may constitute an assault. It is an assault to shake a fist under another's nose, to aim or strike at another with a weapon, or to hold it in a threatening position, to rise or advance to strike another, to surround another with a display of force, to chase another in a hostile manner, or to lean over a woman's bed and make

indecent proposals, in such a way as to put her in fear.

Therefore, spouses are permitted to sue each other for the torts of assault and battery which are intentional torts. In 1979, our Supreme Court would have permitted, but for the Statute of Limitations, a wife to sue her husband for a physical beating which occurred during the marriage. The Supreme Court disallowed the suit because the wife had failed to bring the action in the course of a previously filed divorce matter that had been initiated and due to her failure to bring the action within the two year Statute of Limitations. However, notwithstanding the disallowance of the suit, our Supreme Court, in *Tevis v. Tevis*, 79 N.J. 422 (1979) heralded the commencement of a long line of inter-spousal tort cases premised upon not only negligent but also intentional acts.

Intentional and Negligent Infliction of Emotional Distress

Not until comparatively recent decades has the infliction of mental distress served as the basis of an action, apart from any other tort. In this respect, the law is clearly in a process of growth, the ultimate limits of which cannot yet be determined.

Various reasons have been advanced for this reluctance to redress mental injuries. One is the difficulty of proof, or of the measurement of the damages. "Mental pain or anxiety," said Lord Wensledale in a famous English case, "the law cannot value, and does not pretend to redress, whether the unlawful act causes that alone." It was regarded as something "metaphysical, too subtle and speculative to be capable of measurement by any standard known to the law." But mental suffering is scarcely more difficult to prove, and certainly no harder to estimate in terms of money, than the physical pain of a broken leg, which never has been denied compensation. Indeed, long after the dramatic inflation of the 1970's had its impact, courts were quite willing to allow very substantial sums as damages for such "mental anguish" itself, where it accompanied a slight physical injury. Any it is well recognized that mental anguish may be a substantial element in an award for

severe injury.

Medical scientists recognize that no only fright and shock, but also grief, anxiety, rage and shame, are in themselves "physical" injuries, in the sense that they produce well marked changes in the body, and symptoms that are readily visible to the professional eye. Such consequences are the normal, rather than the unusual, result of a threat of physical harm, and of many other types of conduct; if they are held to be beyond the scope of legal cause, the reason must be something other that unforeseeability.

In 1991, a New Jersey trial court in *Ruprecht v. Ruprecht*, 252 N.J. Super. 230 (Ch. Div. 1991) addressed the issue of whether there should be a cause of action between spouses based upon emotional distress which was unaccompanied by any physical injury in the divorce case. During the course of the parties' marriage in this case, the wife returned to work. The husband alleged that it was after this time that problems in the parties' marriage started to develop. The husband suspected that the wife may be having an extramarital affair, which suspicions were repeatedly denied by the wife. Due to their marital difficulties, the parties separated and reconciled on several occasions during the next 10 or 11 years. At one point, an action for divorce was initiated, but later dismissed. However, when the wife subsequently left the husband, he learned that the wife had an adulteress relationship with her employer during all of the time of her employment. The husband then filed a Complaint for Divorce which was thereafter amended to include a count for intentional infliction of emotional distress. The wife moved to dismiss the claim. Because the case was one of first impression in the New Jersey courts, the trial judge drew on related out-of-state cases. In doing so, the trial court found that there was no valid policy interest nor logical reason to allow one spouse to sue the other for physical injury, but not for emotional distress absent physical injury. The trial judge rejected a "flood gates" argument (that this would open a door to extensive and frivolous

litigation) submitted by the wife. The court held that an independent cause of action between spouses for emotional distress without physical injury should exist in a divorce case.

The New Jersey trial court found that the cause of action required the husband to show "outrageous" conduct by the wife and that the husband must also show that the act was intentional on the part of the wife and that the act was the proximate cause of the husband's distress. Finally, the husband must show that the distress was severe in order to establish a claim for intentional infliction of emotional distress.

In the above referenced New Jersey case, the court found that the conduct of the wife did not reach the level of outrageousness necessary for liability under the tort of intentional infliction of emotional distress. It is generally held that there can be no recovery for mere profanity, obscenity, or abuse, without circumstances of aggravation, or for insults, indignities or threats which are considered to amount to nothing more than mere annoyances. A plaintiff cannot recover merely because of hurt feelings. However, as cases began to develop which could not be placed into traditional theories of tort, in or about 1930, it began to be recognized that the intentional infliction of mental disturbance by extreme and outrageous conduct constituted a cause of action in itself. Thus, such claims are part and parcel of the causes of action which one spouse may have against another. The rule which seems to have emerged is that there is liability for conduct exceeding all bounds usually tolerated by decent society of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind. Requirements of the rule are rigorous, and difficult to satisfy. Yet, such extreme outrage has been found, including in such cases where a wife suspected of insanity was decoyed to a hospital by a concocted tale of an injured husband and child; in a case where an individual spread a false rumor that the plaintiff's son had hanged himself; in bringing a mob to a plaintiff's door at night with a threat to lynch unless he left town; and in

wrapping up a very gory dead rat instead of a loaf of bread, for a sensitive soul to open.

While it is generally held that the fact that one spouse has an extramarital affair is not conduct so outrageous as to constitute a cause of action against the adulterous spouse or the paramour for intentional infliction of emotional distress, one trial court has recently held that a certain husband did have a cause of action for intentional infliction of emotional distress against his wife's paramour after the husband discovered that the children he had been led to believed he father were, in fact, the children of his wife and her paramour. The Complaint did not run afoul of the Heart Balm Act, which prohibits complaints against third parties for criminal conversation, seduction, alienation of affections and breach of promise to marry because all of the allegations in the Complaint occurred after the adultery and because the husband was suing the paramour for the damage to his relationship with his children, not his wife. The court found that keeping the duration of the affair secret from the husband and suppressing the true paternity of the children without regard to the high degree of probable harm to the husband, would lead to the average member of the community to exclaim, "outrageous!" and therefore, is conduct severe enough to state a cause of action for intentional infliction of emotional distress.

In 1948 a section of the Restatement of Torts was amended to reject any absolute necessity for physical harm as a result of the mental distress. Probably, the conclusion to be reached is that where physical harm is lacking, the courts will properly tend to look for more in the way of extreme outrage as an assurance that the mental disturbance claimed in not fictitious; but that if the enormity of the outrage itself carries conviction that there has in fact been severe and serious mental distress, which is neither feigned nor trivial, bodily harm is not required.

In addition to intentional infliction of emotional distress is the tort of "negligent infliction of emotional distress." Negligent infliction of emotional distress is a case where a close relationship

exists incident to a family connection between the plaintiff and the physically injured individual who is injured as a result of the negligence of another person (i.e., tortfeasor). This injury to the motional tranquility of the family member may be viewed as so serious and compelling as to be compensable. The Supreme Court has sated that a cause of action for negligent infliction of emotional distress could result if four (4) elements are proven: (1) the death or serious bodily injury of another was caused by the tortfeasor's negligence; (2) a marital or intimate familiar relationship exists between the plaintiff and the injured person; (3) the plaintiff must witness the incident which resulted in the death or serious injury of the injured person; and (4) the plaintiff must suffer emotional distress in witnessing the incident. Therefore, the emotional harm following the observation of a death or serious injury to a loved one is subject to recovery.

Fraudulent Conveyance

In the context of a matrimonial litigation, circumstances arise quite often involving valuable marital estates where one spouse may have attempted to dissipate the estate prior to or after the filing of a Complaint for Divorce. In such circumstances, where assets are wrongfully transferred to a third party for no or insufficient consideration, cause of action may lie against not only the spouse but also the aforementioned third party based upon fraudulent conveyance.

In 1992, New Jersey's Appellate Court upheld a trial level decision rejecting a husband's proposition that the dissipation of marital property can only occur after the filing date of the divorce complaint. In that case, a husband appealed a Judgment of Divorce entered August 9, 1990 which determined that certain monies that he had paid during the marriage to his parents and other monies spent on his own personal requirements should be included within the marital estate to be distributed between the parties. The Appellate Court explained the factors to be considered by a court when considering the issue of whether the purpose of the expenditure in issue "amounted to dissipation under the circumstanced." The question to be ultimately answered by a weighing of the factors

delineated within the opinion is whether the assets were expended by one spouse with the intent of diminishing the other spouse's share of the marital estate.

The New Jersey Appellate Court found that the expenditures of the husband in that case were clearly not made to benefit the marital enterprise. They served only defendant's personal interest and were designed to divert from the plaintiff her equitable share of the marital assets. The court's findings that the husband was at all times thinking about and planning for a divorce was demonstrated not only by his total abandonment of the wife and their child, but his institution of a divorce action on three different occasions between August of 1985 and July of 1988.

The Appellate Court found the power to order equitable distribution does not depend upon the "existence" of marital property on the filing date of the divorce complaint. The court found that where property had been dissipated during the marriage, the assets subject to distribution may take the form of a cash indebtedness to be imposed by the court upon the one spouse in favor of the other.

The Appellate Court also found that the trial court was free to take into account the husband's abandonment and callous disregard of his family, not because they reflected matrimonial "fault" but because they revealed in the expenditures an intent to deny the wife her share of the marital assets.

The Appellate Court noted that reference to various factors are to be considered when addressing the issue of dissipation of marital assets:

1. The proximity of the expenditure to the parties' separation;

2. Whether the expenditure was typical of expenditures made by the parties prior to the breakdown of the marriage;

3. Whether the expenditure benefitted the "joint" marital enterprise that was for the benefit of one spouse to the exclusion of the other; and

4. The need for and the amount of the expenditure.

Cases involving fraudulent conveyance and/or claims of dissipation of marital assets predate

the enactment of New Jersey's equitable distribution statute, to wit, N.J.S.A. 2A:34-23, et seq. Therefore, it is clear that spouses may seek redress for the intentional dissipation and/or fraudulent conveyance of marital assets either during the marriage or after the Complaint for Divorce is filed.

Wire Tapping

Pursuant to federal and state wire tapping statutes, it is permissible to record or otherwise tape a conversation only if the person doing the recording or taping is a party to the conversation. Any other taping or recording of another person's conversations is dangerous both from the standpoint of criminal and civil culpability. Parties who have seen fit to tape their spouse's telephone conversations have found additional counts in divorce Complaints requesting compensatory and punitive damages based on this act.

In 1991, a New Jersey trial court decision in *M.G. v. J.C.*, 254 N.J. Super. 470 (Ch. Div. 1991) addressed the issue of whether a husband violated the wire tapping statute by taping his wife's telephone communications in the marital home, and whether such conduct resulted in actionable damages. The facts of that case were that during a period of marital discord, when the parties still lived together, the husband installed a recording device on the telephone and secretly recorded eight hours of his wife's conversations. The tapes revealed that the wife was having a same sex relationship. The husband confronted the wife with the tapes and threatened to use them in a custody battle and to destroy her reputation with friends, family and co-workers. The husband further threatened to play the tapes to several close family members and to friends and did, in fact, play them for the wife's sister.

The New Jersey trial court examined whether this inter-spousal wire tapping was criminally or civilly actionable under the New Jersey statue which makes it illegal to wire tap under any circumstances, with limited exceptions. Since this was a case of first impression in New Jersey, the court referred to and relied upon the decisions of the Federal courts. The court noted a split in

federal decisions on this issue, where one line of cases held that inter-spousal taping does not violate the statute, while the other line of cases rejected the holdings in the former line of cases.

The New Jersey court did not follow the line of federal cases holding that such recordings did not violate the statute because the New Jersey Wire Tapping Act contained in explicit exception for wire tapping by aggrieved spouses. Since the Legislature did not see fit to provide for such an exemption, the court decided it was not its function to create one. Furthermore, the court noted that since New Jersey had abolished spousal immunity for tortious conduct, given the concern voiced in the line of federal cases holding that wire tapping was not illegal between spouses (that court not wishing to create a federal remedy for marital grievances and thereby overriding the inter-spousal immunity for personal torts accorded by certain states) was not applicable. The court also analyzed the purpose of the wire tapping statute, given the inclusion of a civil remedy that included punitive damages, and concluded that the rights of victims are paramount, not the dubious property rights of a spouse who taps his own telephone line.

The court also stated that it did not matter whether the recording had been done by a spouse or a third party hired by the spouse. The invasion of privacy is severe regardless of the identity of the tapper. The court found that the secretive taping of a spouse's telephone calls under those circumstances as an egregious invasion that warranted both compensatory and punitive damages. However, a note of caution: neither the Appellate Division nor the New Jersey Supreme Court has addressed this issue, therefore, this trial level decision may change.

Therefore, although both New Jersey and Federal Wire Tap Laws permit the taping of a conversation to which an individual is a party, any other form of taping or recording of another person's conversations is dangerous both from the standpoint of criminal and civil culpability. Since the decision in *M.G. v. J.C*, supra, parties who have seen fit to tape their spouse's telephone conversations have found additional counts in Complaints for Divorce requesting compensatory and

punitive damages based upon such an act.

The courts have found an exception that permits a custodial spouse/parent to tape the telephone conversation of the other spouse/parent and the minor child in an attempt to protect the minor child from abuse. The courts have utilized the Doctrine of Vicarious Consent, which permits the parent to tape the child's conversation on the theory that the parent could authorize the recording of his or her minor child's conversations if there was an objective good faith basis to do so in order to protect the best interests of the child. Thus, the taping of conversations done by a custodial parent in an attempt to protect the safety and health of the parties' minor child may not be viewed as a violation of the New Jersey or Federal Wire Tap laws. The court in *Cacciarelli v. Boniface,* 325 N.J. Super. 133, 140 (Ch. Div. 1999), stated that while a parent may not decide to tape record a child's conversations merely by stating that it was done in the child's best interest, that there are situations such as where there is verbal, emotional or sexual abuse by the other parent that makes it necessary to tape record the child's conversations to protect him/her from harm, especially when the children are very young.

Interference with Custodial Rights

In New Jersey, it is a crime to interfere with another individual's custody or visitation rights with a child. Therefore, violation of the custodial rights of another person, which are viewed as constitutionally protected, can also be viewed as a personal injury and therefore rising to the level or tortious conduct permitting the injured party to recover monetary damages.

The law of torts is concerned not only with the protection of interests of personalty and of property, tangible or intangible, but also with what may be called "relational" interests, founded upon the relation in which the plaintiff stands toward one or more third persons.

An interference with the continuance of a relation may be redressed by a tort action. The relations of the family are a conspicuous example. In this field the law is "rather ragged in form,"

with a certain amount of dead timer to be cleared away before it becomes very intelligible. It developed in the beginning as an off chute of the action for enticing away a servant and depriving the master of the quasi-proprietary interests in his services. Since the status of a wife, as well as that of minor children, under the early common law, was that of more or less valuable superior servants of the husband and father, that action was extended to include the deprivation of their services. Thus, the laws of services became the gist of this action and remains indispensable to it until comparatively recent years. There has been a gradual shift of emphasis away from "services" and toward a recognition of more intangible elements in the domestic relations such as companionship and affection.

The law has been somewhat more reluctant to protect the relation of parent and child than that of husband and wife. So far as abduction is concerned, there is an old writ giving an action for the taking away of an heir, which apparently was based upon the pecuniary loss to the parent of the heir's marriage prospects, and so did not apply to any other children. When this became obsolete, it was superseded by an action for loss of services of the child, similar to that of any other master. For this, some actual loss of services was essential in the beginning, and there could be no recovery when the child was too small to render services or when the child had been contracted away to another. Likewise, while anyone standing in the place of the father might maintain the action, the mother, who had no legal right to the child's services while the father was living with her, could not do so unless the child was illegitimate or the father had died or abandoned the child.

From this position, the law has moved slowly and incompletely toward a recognition of something like the "consortium claim" found in the relation of husband and wife. While about half of the courts still appear to require a loss of "services" as the foundation for the action, most of them are willing to find a "constructive" loss whenever the plaintiff has a right to services, although none are being rendered, as in the case of the kidnaping of a four (4) month old child. Once loss of

services is established, the parent is allowed to recover damages for deprivation of the child's society, expenses to which he/she has spent in recovering it, and the wound to his/her own feelings. A few courts, recognizing that the real cause of action is the interference with the relation, have adopted the "modern view" that loss of services is not essential where a child has been taken from its parent, and that such other damages are a sufficient basis for the action.

With these qualifications, the defendant may be liable for abducting the child by force, for enticing the child away from his/her parent, or for "harboring" the child, in the sense of inducing or encouraging the child to remain away from home, or even for providing the means by which the child was carried off in violation of a court order.

The consent of a child is, of course, no defense to the parent's action. The case of husband and wife, the interference with the relation must be a deliberate one although not necessarily motivated by ill will or anything other than kindness or affection toward the child. Thus, there is no liability for harboring or employing a minor unless there is reason to believe that it is without the parent's consent. However, no special privilege has been recognized in the other parent to interfere with legal custody of the child and there is authority that one parent may be held liable for abducting his own child, as where he refused to respect court custody orders.

Presumably, even a stranger, and certainly the non-custodial parent, could step in to protect the child from physical violence in excess of the parental privilege of discipline.

Damages in these cases include not only the traditional award for loss of services and society and the cost of locating and recovering the child, but also punitive damages and an award for emotional distress where the facts warrant. Presumably, an injunction will issue in an appropriate case as well, though this remedy may be excluded in Federal diversity cases under the "domestic relations" exception to Federal jurisdiction.

Malicious Abuse of Process/ Malicious Use of Process

An action for malicious abuse of process is distinguished from an action for malicious use of process in that the action for abuse of process lies for the improper, unwarranted and perverted use of process after it has been issued while that for the malicious use of it lies for causing process to issue maliciously and without reasonable or probably cause. Thus, it is said, in substance, that the distinction between malicious use and malicious abuse of process is that the malicious use is the employment of process for its ostensible purpose, although without reasonable or probable cause, while malicious abuse is the employment of a process in manner not contemplated by law.

Courts to do favor actions for malicious use of process because of traditional indulgence accorded a person who resorts to court process for its intended purpose even though he did not have probable cause to do so. Because it is often difficult to distinguish between a plaintiff who is naive and a plaintiff who is a knave, courts require a plaintiff bringing an action for malicious use of process to prove not only that the defendant brought the underlying action without probably cause, but also that it was actuated by malice, has been terminated favorably to plaintiff, and that the plaintiff suffered a special grievance.

It is important to distinguish the tort of malicious use of process from the tort of malicious abuse of process because the latter does not require a plaintiff to prove the elements of the former.

To preserve the distinction between the two torts, our New Jersey Appellate courts have emphasized that process has not been abused unless, after its issuance, the defendant reveals an ulterior purpose he had in securing it by committing "further acts" whereby he demonstrably uses the process as a means to coerce or oppress the plaintiff.

Where there is a genuine issue as to whether a defendant's "further acts" were maliciously intended as an abuse of process, the plaintiff may demonstrate that the defendant had secured issuance of the process without reason or probable cause as evidence that his ultimate intent was to use it for a purpose ulterior to the one for which it was designed.

Trial By Jury

The New Jersey Constitution states that "the right of trial by jury shall remain inviolate." This constitutional provision, however, has been held not to apply to equitable actions in the Chancery Division, which has jurisdiction over matrimonial disputes. The New Jersey Supreme Court permits a married person to sue a spouse for damages attributable to tortious conduct. However, a doctrine called the Entire Controversy Doctrine requires all claims between parties arising out of or relating to the same transactional circumstances be joined in a single action. Further, the Supreme Court in *Tevis v. Tevis*, 79 N.J. 422 (1979) held that marital tort claims must be joined with a pending action for divorce.

The fact that several claims between the same parties must be joined in the same action does not, however, resolve the question of whether the claims should be tried before a judge or jury. Due to the Doctrine of Ancillary Jurisdiction, there was a split in the case law on whether this doctrine should be applied to marital torts joined with divorce actions, such that the family courts would be permitted to grant full legal relief to a tort claimant's action for damages without a jury trial. In order to determine whether the tort litigant had a right to a jury trial, it was necessary to determine which dispute was the primary dispute between the parties and which dispute was incidental or

ancillary. If the tort claim was determined to be ancillary and incidental to the divorce proceeding, then the tort claim was to be heard by the family court, without a jury. This doctrine led to confusion and inconsistent results in the trial courts about whether a marital tort claimant is entitled to a jury trial. For example, the trial court in *Davis v. Davis*, 182 N.J. Super. 397 (Ch. Div. 1981), held that a tort claim is ancillary to a divorce action and thus, denied the tort claimant's right to a jury trial. In *Tweedley v. Tweedley*, 277 N.J. Super. 246 (Ch. Div. 1994) however, the court held that a wife's tort claim was not ancillary to her husband's divorce action and thus, a jury trial was required.

It was not until August 1995 that there was any clarity in whether a matrimonial litigant who raised a tort claim, incident to the divorce action, has the same right to a jury trial as any other tort litigant. In 1995, in the matter of *Giovine v. Giovine*, 284 N.J. Super. 3 (App. Div. 1995), a divided Appellate Court held that it would be unreasonable to give a jury trial to a tort claimant who was not suing for divorce while denying this right to an injured spouse who seeks a divorce in the same action. The Appellate Division held that certain marital tort plaintiffs have a right to a jury trial when their claims are joined to a matrimonial action pending in the Chancery Division. The court also noted that in New Jersey, fault is not one of the criteria a court should consider in resolving issues of support and equitable distribution. The court explained that it was substantively and procedurally feasible for the Family Court judgment to hear the divorce action while permitting a jury to determine the issues of damages and fault, which are essential to a domestic tort claim. The Appellate Division stated that in order to qualify for a jury trial, the claimant must establish, by written expert opinion, that proofs will be introduced at trial that will demonstrate that the plaintiff suffered a serious and significant, permanent physical or psychological injury or that the plaintiff must establish that the nature of the injury requires complex medical evidence.

The Supreme Court, however, in *Brennan v. Orban*, 145 N.J. Super 282 (1996) set the

modern standard for determining whether a marital tort claimant is entitled to a jury trial if the tort claim is brought along with a divorce claim. The court eliminated *Giovine's* focus on the seriousness of the injury. It is, therefore, no longer necessary to present preliminary proofs that the plaintiff suffered a serious injury in order to have a trial. The *Brennan* court found no distinction between serious and non-serious injuries in New Jersey constitutional doctrine, noting that every act of domestic violence is serious and the problem is epidemic. The court also noted the theme of the law is the preservation of the family and that the Constitution was amended in 1983 to create a Family Court to handle virtually all family related disputes and that the Family Courts were given jurisdiction over subjects that the Chancery Courts did not have before, including juvenile delinquency and certain forms of criminal conduct. The idea was that the family court would specialize and uniquely understand the problems of families or family-type relationships. The court held that the major factor in deciding whether a jury trial will be given for a marital tort action is the divisibility of the tort claim from other matters in controversy between the parties, not the seriousness of the injury. The court also ruled that every tort claimant should be entitled to demand a jury trial in the first pleading filed asserting such claim in a matrimonial dissolution proceeding. If issues of child welfare, child support and child parenting are intertwined with the dissolution of the marriage and the marital tort, the family court may conclude that the marital tort should be resolved in conjunction with the divorce action and may retain jurisdiction to try the tort matter without a jury to resolve all legal differences in one proceeding and to avoid prolonged and fractionalized litigation. If, however, the family court is convinced that society has a dominant interest in vindicating the marital tort through the jury process, the family court may order a jury trial. The decision as to whether the jury trial will take place in the Law Division or the Family Division rests within the sound discretion of the Family Part judge.

CHAPTER V

EQUITABLE DISTRIBUTION

Since divorcing couples rarely agree as to what caused the demise of their marriage, they would likely disagree as to who takes what from the marital estate. Initially, there is a lot of finger pointing as to who is to blame for the break up. Each person possesses an unwavering conviction that dissolution is the other person's fault. Yet, it is not long before the birth of a second conviction frequently over shadows the first. Both parties are certain that they have a right to a greater share of the marital property than their former partner. What starts off as a "this is your fault not mine" soon transcends to "this property is mine, not yours."

The distribution of marital assets is hotly debated and emotionally charged. The division of the property includes a host of complicated factors from pension funds and employment benefits, to pre-marital property to potential payments of alimony.

Since deciding what will be yours and what will be his or hers when getting a divorce can seem muddied and unclear, it is best to first understand the rational and philosophy behind the law of equitable distribution. The theory recognizes marriage as an economic partnership which means the courts realize that each party expended efforts to acquire what is now considered part of the marital estate. Therefore, each spouse is entitled to a share of the marital property. How much each takes away from the marriage is dependent upon a number of factors which include the following:

1. The duration of the marriage;
2. The age, physical and emotional health of the parties;
3. The income of property brought to the marriage by each party;
4. The standard of living established during the marriage;
5. The existence of any written agreements made by the parties before or during the marriage concerning an arrangement of property distribution.

6. The economic circumstances of each party at the time the division of property becomes effective.

7. The income and earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children, and the time and expense necessary to acquire sufficient educational training to enable the party to become self supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

8. The contribution by each party to the education, training or earning power of the other;

9. The contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation of the amount or value of the marital property, as well as the contribution of the party as home maker.

10. The tax consequences of the proposed distribution to each party;

11. The present value of the property;

12. The need of a parent who has physical custody of a child to own or occupy the marital residence and to use or own the household effects;

13. The debts and liabilities of the parties;

14. The need for creation, now or in the future, of a trust fund to secure reasonable foreseeable medical or education costs for a spouse or child;

15. The extent to which a party deferred achieving their career goals;

16 Any other factors which the court may deem relevant.

Before 1971, the title holding spouse took all the marital property. In most instances, this was the husband who had complete control over the property of the marriage since the property was titled in his name. The former divorce act only provided alimony for a wife to care, educate and provide for the children. Without an agreement between the parties, the courts could not transfer marital property from one spouse to another in a divorce judgment.

The inequities inherent in this practice prompted the legislature to explore other wise of distributing marital property. By the time the divorce act was amended in 1971, marriage was

recognized as an economic partnership. The theory of "equitable distribution" was born. "Equitable distribution" states that each spouse is entitled to a portion of the marital property in relation to his/her contributions during the marriage.

Distribution calls for a judge to apportion the marital assets in such a manner that will be equitable and just to both parties under all circumstances. Only in unusual circumstances will the court allow equitable distribution issues to be resolved following the entry of divorce.

Equitable distribution does not mean an equal division of marital assets: the court cannot mechanically divide assets 50/50. When determining equitable distribution, the extent of each parties' contribution to the marriage is not measured solely by the amount of money contributed to the marriage. The court evaluates all the financial and non-financial components of a marriage. Therefore, the efforts of raising children, making a home and providing emotional support are as essential to the maintenance of the marriage as the economic factors. Under equitable distribution, each case is examined on its own merits. The trial judge considers the factors mentioned earlier to help determine how much or how many of the assets should be allotted to each party. In terms of determining what assets are subject to equitable distribution, the judge looks at property "acquired during the marriage." The judge must, in each case, study all of the particular circumstances of the parties. Then, after evaluating each spouse's situation, the judgment must determine how to best distribute the marital property.

"During the marriage," is frequently interpreted as beginning the day the marriage ceremony took place and ending on the day the divorce Complaint was filed. However, you will recall the philosophy of equitable distribution which views marriage as a partnership. Therefore, "during the marriage" is defined as the time the couple acted as "partners." For example, if the parties have a separation agreement before the Complaint for Divorce is filed, the partnership died on the date of the separation agreement, rather than the filing date of the Complaint. Assets acquired during the

marriage would be considered under equitable distribution up to the date of the separation agreement.

Categories of Assets

Another issue that arises is how to treat an asset that has enhanced in value after the filing of the divorce Complaint but, before the distribution of assets. Courts have decided that if the asset increases in value due to market forces, the net increased value should be considered under equitable distribution. If, however, the asset increases in value due to the sole efforts of one party, that party should receive the increased value of the asset.

To help a litigant understand the way assets are distributed, the following is a list with an explanation of the different categories of assets and the way they are divided.

Passive Immune Assets. A passive immune asset is one who's value fluctuates based on market conditions. It is immune from equitable distribution if it was not acquired during the marriage. (For example, it is an asset acquired prior to the marriage or it was acquired by one spouse by way of inheritance or gift.

Active Immune Asset. An active immune asset requires contributions and efforts towards its growth with resulted in its increased value. If the increase in value is brought about solely through the efforts of the owner, then the asset is not distributable. However, if it increased in value partially because of the non-owner, then the asset is distributable as of the date of the distribution.

Active joint asset acquired during the marriage. The incremental value is determined at the date of the distribution unless the increment is the result of the active management of one party. That party then benefits from his or her efforts, and the valuation of the asset, for equitable distribution purposes, is determined at the date of the Complaint.

Active asset acquired during the marriage in one name. This asset is determined at the date of the Complaint. The rationale here is that once the marriage breaks down, the spouse's name the asset

is under will continue to devote time and energy to the value of the asset. Meanwhile, the estranged spouse will no longer do so.

Passive asset acquired during marriage in one name. This asset is distributable and the incremental value is determined at the time of distribution.

Property Subject to Equitable Distribution

Generally, only property acquired during the marriage is subject to equitable distribution. However, property acquired by one party **in contemplation of their marriage** before the date of the marriage is still subject to equitable distribution. Courts recognize that the "partnership" of marriage may begin even before the actual marriage ceremony through the purchase of an asset, such as a home. A litigant should show the court that both parties intended the house to be the marital home at the time of purchase. Litigants who do not have their names on the Deed may need to show that they were actively involved in making improvements to the home before and after the marriage.

In addition, all property acquired **during the course of the marriage** is subject to equitable distribution. This includes real estate, homes, pension proceeds and any other tangible or real property asset. Even if the property was acquired in one spouse's name, it is subject to equitable distribution as long as it was acquired **during the marriage**.

Property that is not considered under equitable distribution includes assets acquired before the marriage, such as an engagement ring, or after the date the Complaint for Divorce was filed. Gifts and inheritance are also excluded. The same holds true of property owned by a husband or wife before the marriage, as well as interest earned from that property. Likewise, if the "separate property" is later sold, the proceeds from the sale are considered separate property. Unless, however, the "separate property" increases in value due to the efforts of either spouse.

Similarly, although the equitable distribution statute exempts gifts from inheritance, if the gift is inter-spousal in nature between a marriage relationship, the gift would be up for grabs unless the litigant could show the transfer was not a gift. There is a presumption of a gift when a spouse transfers one asset to the other spouse during the marriage.

For example, there was 1989 case that involved a couple from Iran. The wife received money from her family and used it to purchase $407,000 in marketable securities. The wife then transferred the assets to her husband. The husband made all the investment decisions, and thereby "managed the assets." The tax court correctly presumed this was a gift from the wife to the husband. However, the wife was able to show that she never intended to transfer the asset to her husband. Rather, his management of the securities was in keeping with Iranian custom whereby a husband may manage an asset that was in the wife's name, yet the management of the asset was for her benefit.

In rare instances, the parties will own property acquired by funds obtained illicitly during a marriage. The court would rule that property acquired with illicit or illegal funds is not subject to equitable distribution. Legally, on one is allowed to benefit from their own wrong doings or enrich themselves from criminal acts. The family judge would notify the appropriate authorities of possible fraud within the marital estate. Such fraud often encompasses money earned through illegal activities or the un-reporting of income on one's tax returns.

After the Judgment is entered and there is an element of fraud discovered upon which said judgment was based, a party may seek to re-open that judgment after learning of the fraud. The unjust equitable distribution judgment obtained by fraudulent means demands a re-opening of the distribution of the property. A spouse should not be permitted to hide assets and deprive the other spouse of knowledge of the true worth of the marital estate.

Mental Capacity

When a person suffers from a mental incapacity, he or she will not lose his or her rights in equitable distribution. The person may be unable to work, and therefore, may rely upon those assets for income. However, what constitutes a fair division of property under these circumstances is left to the discretion of the trial judge.

Equitable Distribution and Support Obligations

Assets subject to equitable distribution may not be used by that spouse to defray his or her support obligations. A party can not use assets eligible for equitable distribution for support payments, and then claim those assets are no longer eligible under equitable distribution. Likewise, a spouse cannot sell assets, and then claim he or she no longer has the same income earning potential to pay support as she or he did before the sale.

For example, a 1979 case involved a husband who specialized in hematology and earned $110,000 in 1976. The following year, he sold his medical practice and made only $17,000 in his psychiatry residency. The court found that the doctor changed his medical practice in good faith. However, the court ruled that the proceeds from the sale of the medical practice were to be held in trust and used for the support of his children until he finished his residency. The rationale was that the doctor's decision to change his medical career and standard of living should not negatively effect his children. Therefore, he could not defray his child support obligations by selling his practice and arguing that he only earned $17,000 per year.

Death and Equitable Distribution

If one spouse dies during the course of the divorce proceedings, under New Jersey statute, the surviving spouse would not be eligible for equitable distribution or an elective share of the assets of the deceased former spouse. Equitable distribution is only operable upon divorce. If the parties and/or if one spouse dies during the pendency of the proceeding, there is no need for a divorce. In

the past, courts have recognized the precarious situation this places the surviving spouse in. A constructive trust may be invoked, which is a trust created by operation of law to prevent someone from being unjustly enriched. The trust would be placed in the control of the executor of the deceased spouse's estate.

Distribution of Assets Pursuant to a Divorce

A court is authorized to determine not only which assets are eligible for equitable distribution, but how the allocation of the assets is to be made. Courts can order distribution in kind, or a monetary equivalent. For example, if a judge is asked to distribute stock of one spouse's business, it may be better to award the cash value of that stock versus the actual stock if it is not in the best interest of the parties to be business partners. However, a judgment may make a distribution of the assets in kind so as to avoid a change of one party receiving a loss in the worth of an asset, and the other party receiving a gain.

Judges now also resort to implementing a trust for the benefit of one's spouse. This would happen in a case where one spouse has sole authority to receive proceeds from an asset. For example, a husband may own stock options through his employment. Only he can convert the stock options to stock. Courts have rules these stock options are to be considered under equitable distribution. Therefore, a court will grant a wife, even if stock options are not in her name, a specific interest in those options with the husband acting as trustee. The husband must exercise the wife's share of options at her direction, and she is to give him the funds necessary to make the purchase. Once the option has been exercised, the stock is held in trust for the wife. She may ask the husband to transfer the stock to her or sell it on the market and give her the proceeds. The wife's rights to the proceeds will be subject to tax consequences and to the rules of the Security Exchange Commission.

Enforcement of the Judgment of Divorce

Once a litigant accepts the benefits of a Judgment of Divorce, he or she cannot later turn around and argue that it is erroneous. It is important to make sure that when you accept the benefits of a judgment, you know what you are consenting to.

The equitable distribution statute was amended in 1971. The Supreme Court has determined that an agreement that predates 1971 will be subject to equitable distribution only if it can be show that the agreement qualifies as a Property Settlement Agreement, and that it can be shown to be fair and equitable. Therefore, if an agreement only deals with support of a wife and child, a court may interject and make allocations of property under equitable distribution as well as review the support agreement.

Settlement Agreements

New Jersey has a public policy of encouraging settlements between parties. Our courts have held that settlement agreements, whether written or oral but having been entered on the record with the consent of the parties, are binding. Furthermore, courts have found that when both parties agree to a settlement through their attorneys, the settlement is binding, even when it has not been placed on the record.

The settlement agreement will be enforced provided the court finds mutuality of agreement and the agreement is complete in its terms. Even if there are gaps in the agreement, the court will instruct the parties to address the gaps, setting aside what has already been agreed upon. Courts do not require agreements to be in writing, provided it is clear at the time of a conference that the parties have come to a final settlement. However, if there is a dispute between the parties as to whether there was a final agreement, then the court may order a "Plenary Hearing" on the issue.

Modification

A property division may not be adjusted based upon future changes. For instance, if a spouse receives a professional degree with the help and assistance of the other spouse, (through either tuition payments or household expense payments), the court will decide whether the professional degree will be regarded as "property" and, therefore, subject to equitable distribution. It would be too difficult to place a value on a professional degree. A degree holder may choose not to practice the profession or he/she may fail at the profession or may choose a specialty or location which generates less than the average income. Thus, the earning capacity from a degree is not considered "property," and usually is not considered under equitable distribution. However, if the degree holder earns more than expected, a court will adjust alimony accordingly, but a spouse can only seek redress for his or her contributions toward that degree.

Reconciliation

Spouses have been known to reconcile after initiating divorce proceedings. Reconciliation is when spouses resume living together for a sufficient period of time, which leaves the court to conclude that the parties resolved their differences and agree to resume their marital relationship. Sometimes, reconciliation agreements may include scenarios in which a spouse agrees to reconcile provided the other spouse does something in return. For example, a wife may consent to reconcile if her husband puts her name on the Deed to their house. In such an instance, provided the parties were on the brink of divorce, the court will view the reconciliation agreement as valid. The rational is that both sides have given something up to enter into the agreement. The wife has abandoned her plans to divorce the husband and the husband has erased his name on the Deed and placed hers on it instead.

As for reconciliation agreements effect on a Property Settlement Agreement, courts view the executory provisions of a Property Settlement Agreement (those portions which have yet to be performed) as abrogated unless the parties intended otherwise. However, the executed portions of

the Property Settlement Agreement (those portions which have been performed) are unaffected by a reconciliation and therefore upheld.

"Mid-Marriage" Agreements

The issue of enforceability of a "mid-marriage" agreement was addressed in a 1999 case of first impression where the Appellate Division reversed a trial court decision to enforce a mid-marriage agreement that the parties had entered into during the marriage which purported to equitably distribute assets in the event of a divorce. The court analyzed the nature of a mid-marriage agreement in the context of a premarital agreement and a property settlement agreement. The court found that a mid-marriage agreement is different from each other type of marital agreement in the sense that a mid-marriage agreement is entered into "before the marriage {loses} all of its vitality and when at least one of the parties, without reservation {wants} the marriage to survive." It found that such an agreement more closely resembles a reconciliation agreement. In order to be enforced, such agreements must be carefully evaluated to determine that the terms are fair and just when it was signed and when enforcement is sought. Among other unconscionable aspects of the purported agreement, the court found that the husband's insistence that his wife sign the agreement or he would divorce her was "inherently coercive." In addition, the court found the agreement to be unfair since it would not provide for the parties to benefit from post-agreement prosperity.

Ante-Nuptial Agreements

An ante-nuptial agreement is one made prior to the parties' marriage. It disposes of property and alimony rights to a spouse in the event that a marriage should fail. Normally, the intent of an ante-nuptial agreement is to deny a spouse an interest in assets held in the full name of the other at the time of the marriage. By executing an agreement, the parties have agreed not to allow the court to resolve questions of alimony and equitable distribution. Such agreements are enforceable provided that there is full disclosure by both parties as to their financial conditions, including assets

and income. The agreement is null if one spouse is left destitute. An agreement which leaves one spouse with a standard of living far below that which was enjoyed during the marriage may not be upheld by the courts. The courts will also make sure there is no fraud or duress in the execution of the agreement.

Marital Debt

Frequently, the debts incurred in obtaining assets will also be allocated between the parties. However, a court may consider who has a greater income and proportion the debts accordingly.

A court, however, cannot order a party to file a joint tax return with his or her spouse. A joint tax return treats the couple as one taxable unit. There are several consequences to consider when parties file jointly. For example, married individuals expose themselves to liability for any fraud or errors in tax returns. Divorce proceedings are adversarial in nature, so it would not make sense to file a joint return and be subject to possible consequences later.

If a spouse clearly owned a piece of property prior to the marriage but mortgage payments were made on that property from marital income or with assets during the course of a marriage, the non-owning spouse has a claim. The same philosophy is used here as with an asset in which both spouses increase its value. Since the mortgage payments were made from joint funds, the non-owning spouse has a right to the increase in value to which he/she contributed.

If a spouse dissipates assets either before or after a Complaint for Divorce is filed, the deciding factor is whether the assets were expended by one spouse with the intent of diminishing the other spouse's share of the marital estate. When property has been dissipated during the marriage, a court may mandate that a spouse pay in cash the value of the assets he or she dissipated to the other spouse. Dissipation of assets can take the form of one spouse funneling money to relatives so that the money will not be subject to equitable distribution. It can also take the form of spending marital money on one's own needs.

Bankruptcy

The Bankruptcy Reform Act which was signed into law in 1994, contained provisions which affected a state's divorce law. Now, the filing of a Petition for Bankruptcy does not operate as a stay for the commencement or the continuation of a proceeding for the establishment of an order for alimony, maintenance or support. Therefore, the dependent spouse can still file an action for support in the state court, despite the spouse having filed for bankruptcy. The new Act also impacts on equitable distribution obligations. Prior to the enactment of the amendment, the law clearly stated that if one spouse owed the other a debt based upon equitable distribution of property, then the debt was discharged under the bankruptcy code. Now, there is no more automatic discharge. The dependent person must object to the discharge of a non-support related debt in bankruptcy court. The bankruptcy court will hold a hearing to determine the dischargeability of debts. It will consider whether the debtor has the ability to cover the debt with income of property which is not necessary for his or her support or the support of the dependent, such as a spouse or child. Furthermore, the bankruptcy court will balance the benefit of paying the debt with the detrimental consequences of not paying the debt.

Lottery Winnings

Lottery winnings are subject to equitable distribution. For example, during one couple's sixteen year marriage, they co-mingled their earnings and assets. Both parties deposited their earnings into a joint checking account, leaving the remaining balance in a cash draw. The parties used these funds for the purchase of household expenses, including lottery tickets. The wife purchased the winning ticket, which was worth $3.6 million. Although the wife purchased the ticket, she purchased it with marital funds. It was distributed based on "equitable distribution" practices.

Professional Degrees

A medical degree and license or other professional degree is not an asset subject to equitable distribution. Courts deal with this issue in the context of alimony rather than in equitable distribution. The courts realize that there are too many problems associated with value and worth of a professional degree. Professional degrees, for purpose of property distribution, are nothing more than a possibility of enhanced earnings. It is not considered property because it cannot be sold. Its value cannot be readily determined. Instead, the court will consider the needs of the spouse who does not hold a degree and the ability of the other spouse to pay alimony.

In addition, a person's earning capacity, even where its development has been aided and enhanced by a spouse, is not recognized as a separate piece of property subject to equitable distribution. The rationale behind this rule of law is that earning capacity is income that a degree holder may never acquire. The amount of future earnings would be speculative. Therefore, it would be impossible to place a value on this asset and therefore earning capacity cannot be considered property.

Pensions

The funds from a pension that are acquired during the course of marriage are subject to equitable distribution regardless of when they vest. Public policy states that to insure the support of a financially dependent spouse, a statute prohibiting attachments should not intervene in providing support for a dependent spouse.

The issue of whether the pension interests constitutes property acquired during the marriage is a highly relevant issue to equitable distribution. Both parties contribute to the earnings of one spouse's pension by their participation in the marriage and both expect to share in the future enjoyment of that pension benefit. This represents a significant part of the marital estate. The only

relevancy a non-vested pension would have is in the issues of valuation and distribution. This is because pensions which have not vested are more difficult to quantify and divide.

There are essentially two methods of distribution, which are equally applicable to vested and non-vested pensions, i.e., (1) deferred benefit sharing and (2) immediate off-set distribution against other assets. Deferred benefit sharing postpones distribution until a pension comes into pay status. Off-set distribution trades off the present value of the pension interest against a current asset which is given to him/her in satisfaction of his/her share of a pension.

The deferred benefit sharing method involves applying a coverture fraction multiplied by the non-employee spouse's share. The coverture fraction is calculated as follows: the numerator of the fraction is the period of the pension plan participation during the marriage; the denominator is the total period of plan participation needed to receive benefits. For example, if the parties were married sixteen years, then sixteen would be the number attributable to the marriage (the numerator). If participation was twenty years before the pension vested, that would be the total period of plan participation needed to receive benefits (the denominator). Finally, one must determine the percentage to which a spouse is entitled considering the several factors under equitable distribution. For example, assume the parties were married sixteen years; assume further that the pension vests after twenty years of participation and the spouse is entitle to 50% so then you say 16 over 20 times 50% equals 40% share of the pension. Applying the other method of distribution, the immediate off-set method of distribution, the pensioner can buy-out the other spouse's claim for cash or asset credit at the time of the divorce. This can only be done if there is consent between the two parties. Under this method, the value of the pension is determined by an actuary or benefits evaluator.

In addition, in 1989, the Supreme Court held that cost-of-living increases should be included in equitable distribution even considering their speculative and contingent nature. The policy behind this law is that non-employee spouses should be entitled to share in the increase in value to a pension

due to cost-of-living increases because these increases reflect the joint, past efforts of both parties rather than the sole efforts of the employed spouse.

Among the different types of pensions, the Uniform Service Former Spouses Protection Act, provides that a court may treat a military pension as includable in the marital estate for purposes of equitable distribution in accordance with the law of each state. New Jersey allows equitable distribution of pensions, so a military pension would be included in the marital pot for equitable distribution purposes.

Severance Package

A pre-retirement benefit package received by a spouse after a divorce complaint was filed, but representing in whole or in part a deferred compensation for services provided during the course of the marriage, is subject to equitable distribution. The key question to ask here is whether the "benefit" represents deferred compensation based upon the spouses previous endeavors during the marriage. For example, severance pay may be determined by an employee's skills during his/her employment at a company. This , then, would be up for grabs because both parties would have contributed to the employed spouses success in his or her career. Severance pay may be considered compensation for past labor. Payment for vacation days may accrue during the marriage in which case it must be considered under equitable distribution. Commissions upon departure from a company would be considered deferred compensation for previous endeavors.

Goodwill

The intangible asset of goodwill, such as in a law practice, is subject to equitable distribution. Goodwill is essentially reputation that will probably generate future business. It can be defined as follows:

> Goodwill is generally regarded as the summation of all the special advantages, not otherwise identifiable, related to a going concern. It includes such items as a good name, capable staff and personnel, high credit standings, reputation for superior

> products and services and favorable location: (*J.M. Smith and K.F. Skousen Intermediate Account*, 283 7th Ed. Standard Vol. (1982) From an accounting prospective, goodwill is the extent to which future estimated earnings exceed the normal return on the investment. When goodwill exists, it may be the most lucrative asset of some enterprises. Goodwill will enhance future earnings and when it exists it is property subject to equitable distribution.

One appropriate way to value goodwill of a practice can be determined by fixing the amount by which the attorney's earnings exceed that which would have been earned of an employee by a person of similar qualifications and education, experience and capability in the same general locale.

A celebrity's goodwill attributable to the celebrity's status and asset is also subject to equitable distribution. It is a separate entity because it is the probability that one will earn more than the average in one's area of expertise because of his or her reputation.