DIVORCE AND SEPARATION—ALIMONY AND MAINTENANCE—STANDARDS AND PROCEDURES FOR MODIFYING SUPPORT AND MAINTENANCE ARRANGEMENTS FOLLOWING A FINAL JUDGMENT OF DIVORCE—*Lepis v. Lepis*, 83 N.J. 139, 416 A.2d 45 (1980).

The frequency with which married couples have entered into separation agreements during marriage[1] has given rise to a number of perplexing legal questions over the past several years. The most persistent of these questions have been whether and to what extent such agreements may be modified following a final judgment of divorce.[2] In *Lepis v. Lepis*,[3] the Supreme Court of New Jersey defined the circumstances under which modification is permitted and outlined the procedural guidelines for modification. A unanimous court found that "whenever changed circumstances substantially impair the dependent spouse's ability to maintain the standard of living reflected in the original . . . agreement . . . the court must consider the extent to which the supporting spouse's ability to pay permits modification."[4] These changed circumstances, moreover, are no longer limited to unforeseeable events.[5]

From the date of its inception in 1961, the thirteen year marriage of James and Cabrini Lepis resulted in the birth of three children.[6] On January 8, 1974, Mrs. Lepis obtained a divorce on

---

[1] In recent years the matrimonial dockets have exploded. In Turner v. Turner, 158 N.J. Super. 313, 385 A.2d 1280 (Ch. Div. 1978), the court observed that "today our courts are deluged with an avalanche of divorce suits. It is said that out of every 1.8 marriages in New Jersey today, one ends in divorce." *Id.* at 316, 385 A.2d at 1281. A large percentage of these couples probably enter into separation agreements.

[2] In Schiff v. Schiff, 116 N.J. Super. 546, 283 A.2d 131 (App. Div. 1971), *certif. denied*, 60 N.J. 139, 286 A.2d 512 (1972), the appellate division held that modification of a separation agreement required a greater showing of changed circumstances than modification of a court order for alimony or support. The standard adopted therein was the same as is applied in determining an action for specific enforcement of contracts: the changed circumstances must convince the court that enforcement would be unconscionable. 116 N.J. Super. at 561, 283 A.2d at 139. Five years later, the supreme court, in Smith v. Smith, 72 N.J. 350, 371 A.2d 1 (1977), rejected the *Schiff* rule. *Id.* at 360, 371 A.2d at 6-7. *See* notes 23-31 *infra* and accompanying text.

[3] 83 N.J. 139, 416 A.2d 45 (1980).

[4] *Id.* at 152-53, 416 A.2d at 52. Inexorably intertwined in this area of Justice Pashman's opinion is a distinction between the standards germane to applications seeking to modify an alimony award and those seeking to modify child support. The *Lepis* court held that the "best interests of the child" is the standard by which motions for post-judgment modification of child support should be adjudicated. 83 N.J. at 151-52, 416 A.2d at 51-52. The court, in its opinion, noted that "[w]hen children are involved, an increase in their needs—whether occasioned by maturation, the rising cost of living or more unusual events—has been held to justify an increase in support by a financially able parent." *Id.* at 151, 416 A.2d at 51-52.

[5] *Id.*

[6] *Id.* at 143, 416 A.2d at 47.

grounds of desertion. As part of the divorce decree, the court incorporated a detailed separation agreement governing the distribution of property, as well as alimony, child support and custody.[7]

Four years later, Mrs. Lepis moved to modify the agreement and to compel her ex-husband to produce copies of his income tax returns for the preceding two years.[8] This motion was primarily based upon the plaintiff's allegation that her needs had increased by approximately forty percent due to a rise in the cost of living.[9]

The trial court denied the motion and the plaintiff appealed. The appellate division, in an unpublished opinion, reversed the decision of the trial judge on the ground that denying plaintiff's motion for discovery, despite her showing of increased need, "effectively denied her any opportunity to prove changed circumstances."[10] The court remanded the case and ordered production of the defendant's income tax returns for the years 1973 through 1977.[11]

The supreme court, in affirming the action taken by the appellate division, discussed the effect of consensual agreements upon the court's power to modify support obligations.[12] Justice Pashman noted that the courts have an equitable power pursuant to section 2A:34-23 of the New Jersey Statutes Annotated to modify alimony and support orders at any time "as circumstances may require."[13] Relying on its

---

[7] *Id.* at 143, 416 A.2d at 47. The parties executed a detailed property settlement and support agreement on December 7, 1973. This agreement was subsequently incorporated into the divorce judgment entered on January 8, 1974.

The agreement provided that Cabrini Lepis was to receive $330 per week for the support of herself and the children. She also received the marital premises located in North Bergen, $22,000 that had been accumulated in a joint savings account and a 1971 Pontiac. The defendant, James Lepis, received $15,000 in stocks and bonds along with title and all rights to his partnership law practice which was located in Jersey City, New Jersey. In addition to the aforementioned, James Lepis was to maintain full medical insurance for the children and pay a portion of the plaintiff's medical expenses as well. Brief for Plaintiff at 4, Lepis v. Lepis, 83 N.J. 139, 416 A.2d 45 (1980) [hereinafter cited as Brief for Plaintiff].

[8] 83 N.J. at 144, 416 A.2d at 48. In a motion filed February 1, 1978, plaintiff sought increased alimony and a lump sum payment of $1,500 for household maintenance, furniture and counsel fees. *Id.*

[9] At the time the separation agreement was entered into plaintiff's monthly needs were $1,529. At the time the motion for modification was filed her estimated monthly needs were $2,104.30. Brief for Plaintiff at 5.

[10] 83 N.J. at 144-45, 416 A.2d at 45.

[11] *Id.*

[12] *Id.* at 145-49, 416 A.2d at 48-50.

[13] *Id.* at 145, 416 A.2d at 48. The statute reads as follows:

> Pending any matrimonial action brought in this State or elsewhere, or after judgment of divorce or maintenance, whether obtained in this State or elsewhere, the court may make such order as to the alimony or maintenance of the parties, and also as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit,

1977 decision in *Smith v. Smith*,[14] the court stated that the extent of changed circumstances necessary to warrant modification is the " 'same regardless of whether the support payments being questioned were determined consensually or by judicial decree.' "[15] The court adverted to the fact that if consensual agreements were subject to a lesser standard of judicial review, an unwary spouse might easily be bound by the terms of an inequitable contract.[16]

Contrary to what was perceived to be the general rule,[17] the court held that changed circumstances include events that were foreseeable at the time the agreement was made.[18] In apparent acceptance of the argument that all contingencies cannot be provided for in a settlement agreement,[19] Justice Pashman instructed the lower courts to determine, first, whether the alleged change in circumstances was "substantial and continuing" and, second, whether the agreement or decree "made explicit provision for the change."[20] The focus of the inquiry was on if, in fact, the "changed circumstances substantially impair[ed] the dependent spouse's ability to maintain the standard of living reflected in the original decree or agreement."[21] Thus the

---

> reasonable and just, and require reasonable security for the due observance of such orders. . . . Orders so made may be revised and altered by the court from time to time as circumstances may require.

N.J. STAT. ANN. § 2A:34-23 (West 1971).

[14] 72 N.J. 350, 371 A.2d 1 (1977).

[15] 83 N.J. at 147-48, 416 A.2d at 49 (quoting Smith v. Smith, 72 N.J. 350, 360, 371 A.2d 1, 6-7 (1977)).

[16] 83 N.J. at 148, 416 A.2d at 50.

[17] *See, e.g.*, Schiff v. Schiff, 116 N.J. Super. 546, 283 A.2d 131 (App. Div. 1971), *certif. denied*, 60 N.J. 139, 286 A.2d 512 (1972) (restricting changed circumstances to unforeseeable events).

[18] *Id.* at 152, 416 A.2d at 51-52. The appellate division in Schiff v. Schiff, 116 N.J. Super. 546, 283 A.2d 131 (App. Div. 1971), *certif. denied*, 60 N.J. 139, 286 A.2d 512 (1972), had limited grounds for modifications to events that were unforeseeable at the time the agreement was made. Therefore, if an event was foreseeable, even though not provided for in the agreement, it could not form the basis for a motion for modification. 116 N.J. Super. at 561, 283 A.2d at 139. The court in *Lepis* appeared to be of the opinion that the *Schiff* doctrine failed to provide a workable formula for solving matrimonial disputes. This doctrine would require attorneys to provide for all possible contingencies "or risk being barred from . . . seeking modification." As a result, "matrimonial practitioners opted for litigated conclusions to their cases." Skoloff, Schiff—*Unconscionable Obstacle to Matrimonial Settlements*, 99 N.J.L.J. 553 (1976). In the event that the litigation did not yield the desired results, the losing party would relitigate at a later date. Litigation was more viable after judgment than after agreement. *Accord*, Meth, *Matrimonial Arbitration*, 99 N.J.L.J. 409 (1976).

[19] *See* note 40 *infra*.

[20] 83 N.J. at 152-53, 416 A.2d at 52. Although the agreement in *Lepis* did not explicitly provide for inflation, it did contain a provision allowing modification only upon the mutual consent of the parties. For a discussion of the presumed effect of such a clause, see Ackerman & Skoloff, *Equitable Distribution Expanded*—Smith *and* Carlsen: *The Doctrine of* Schiff *Overruled*? 100 N.J.L.J. 169 (1977).

[21] *See* 83 N.J. at 152-53, 416 A.2d at 52.

court indicated that in determining whether a motion for modification should be granted, the showing of substantial impairment should be balanced against the "supporting spouse's ability to pay."[22]

In eliminating foreseeability from consideration in motions to modify consensual agreements, the court found it necessary to announce new procedural guidelines governing modification motions. The court placed the burden of proving changed circumstances on the party seeking relief and also held that before allowing discovery of an ex-spouse's financial status, the plaintiff will be required to make a prima facie showing of changed circumstances.[23] Absent evidence of the defendant's financial status, the court reasoned, it would be impossible to reach an equitable determination.[24] Finally, and probably with an eye toward a deluge of modification motions, the court noted that before a hearing will be ordered the party seeking modification must make a clear showing of a genuine issue of material fact.[25]

The opinion in *Lepis* graphically illustrates many of the problems facing matrimonial courts in the context of contemporary divorce litigation. Moreover, notwithstanding the court's disclaimer,[26] the rationale of the decision will support numerous claims for post-

---

[22] *Id.* In Martindell v. Martindell, 21 N.J. 341, 122 A.2d 352 (1956), the husband argued that the court should concern itself solely with the wife's increased needs and not with the husband's increased wealth and/ or income potential. Justice Jacobs, writing for the court, held that when motions seeking to modify alimony are presented, the court should look to the totality of the circumstances, including fluctuations in the needs of the former wife and increases or decreases in the former husband's resources. Justice Jacobs noted that if the husband's resources had declined he may have been able to seek a reduction based on that ground alone or in conjunction with other pertinent grounds. However, if the husband's financial resources had substantially increased, then the former wife would have been permitted to seek an upward modification of her alimony award, provided she could show that the increase sought was " 'fit, reasonable and just' " in view of the prevailing circumstances. *Id.* at 355, 122 A.2d at 359.

The importance of the court being fully informed as to the parties' financial statuses on applications involving support is amplified by the court rules and recent case law. Rule 4:79-4 requires that affidavits detailing each of the parties' needs, incomes and assets be submitted on pendente lite applications. In Grayer v. Grayer, 147 N.J. Super. 513, 371 A.2d 753 (App. Div. 1977), Judge Pressler reversed and remanded a trial court's determination of alimony and child support due to the trial judge's failure to make "express findings as to the parties' respective needs and reasonable financial expectations." *Id.* at 518, 371 A.2d at 755.

[23] 83 N.J. at 157, 416 A.2d at 54. New Jersey case law has long adhered to the doctrine that the party seeking modification of an alimony order has the burden of proving changed circumstances. *See* Boorstein v. Boorstein, 142 N.J. Eq. 135, 136, 59 A.2d 247, 248 (E. & A. 1948); McLeod v. McLeod, 131 N.J. Eq. 44, 46, 23 A.2d 545, 547 (E. & A. 1942); Storch v. Storch, 7 N.J. Super. 97, 99, 72 A.2d 211, 212 (App. Div. 1950); Herman v. Herman, 17 N.J. Misc. 127, 129, 5 A.2d 768, 769-70 (Ch. Div. 1939).

[24] 83 N.J. at 157-58, 416 A.2d at 54-55.

[25] *Id.* at 159, 416 A.2d at 55. *See also* Shaw v. Shaw, 138 N.J. Super. 436, 351 A.2d 374 (App. Div. 1976).

[26] *See* 83 N.J. at 156, 416 A.2d at 54.

judgment modification of both alimony and child support arrangements.

Unlike court decrees, separation agreements and property settlements are contractual in nature.[27] Prior to *Lepis* such agreements were frequently employed to remove disputes over marital assets from the statutory power of distribution given to the courts.[28] Provided that they were voluntarily entered into, fair and equitable, the courts would not modify spousal agreements.[29] Rather, they acquiesced in the notion that the "structural integrity of such agreements must be preserved."[30]

The enforceability of spousal support agreements reached its pinnacle in the 1971 case of *Schiff v. Schiff*.[31] The appellate division in *Schiff* determined that in order to obtain modification of a duly executed equitable property settlement agreement, it was necessary for the plaintiff to prove that continued enforcement of the agreement would be unconscionable.[32] This standard was adapted from the law of contracts.[33] In addition, the court held that the circumstances that gave rise to the unconscionability had to be such that they were not, and could not reasonably have been, within the contemplation of the parties at the time of execution of the original agreement—hence, the requirement of unforseeability.[34] This approach to separation

---

[27] A court of equity could exercise continued supervisory control over such contracts, Schlemm v. Schlemm, 31 N.J. 557, 580, 158 A.2d 508, 521 (1960), as well as direct specific performance of their terms when the agreements were fairly arrived at and when, within the court's discretion, it was equitable to do so. *Id.* at 581, 158 A.2d at 522. *See* Schiff v. Schiff, 116 N.J. Super. 546, 560, 283 A.2d 131, 138 (App. Div. 1971), *certif. denied*, 60 N.J. 139, 286 A.2d 512 (1972).

[28] In Apfelbaum v. Apfelbaum, 111 N.J. Eq. 529, 162 A. 543 (E. & A. 1932), the court withdrew from Chancery the equitable power to grant specific performance of support agreements. However, this view was rejected in *Schlemm*. 31 N.J. 557, 580-81, 158 A.2d 508, 521 (1960).

[29] Smith v. Smith, 72 N.J. 350, 359, 371 A.2d 1, 5 (1977).

[30] *Id.* at 360, 371 A.2d at 6-7.

[31] 116 N.J. Super. 546, 283 A.2d 131 (App. Div. 1971), *certif. denied*, 60 N.J. 139, 286 A.2d 512 (1972).

[32] *Id.* at 561, 283 A.2d at 139. *See also* Berkowitz v. Berkowitz, 55 N.J. 564, 264 A.2d 49 (1970).

[33] 116 N.J. Super. at 561, 283 A.2d at 139.

[34] The *Schiff* court stated that "[s]ubsequent events which should have been in contemplation of the parties as possible contingencies when they entered into the contract will not excuse performance." *Id.* at 561, 283 A.2d at 139. The court, however, cited authorities from contract law for support of this proposition rather than authorities from the law of domestic relations. *Id.* In order to bridge the gap between these distinct areas of the law, the opinion in *Schiff* stated:

> It is apparent that *Schlemm v. Schlemm*, [31 N.J. 557, 158 A.2d 508 (1960)] revived the earlier cases holding that courts of equity could specifically enforce a husband and wife support agreement. Those cases indicate that while the specific performance was conditional, the enforcement should be governed by the law of specific performance relating to contracts.

agreements dominated family law practice in New Jersey until the decision in *Smith*.[35]

The supreme court in *Smith* equalized the quantum of proof necessary to modify spousal agreements and court decrees.[36] After ruling that the agreement in question was a separation agreement,[37] the court balanced the *Schiff* line of precedents surrounding such agreements against the dictates of equitable distribution, and struck down the *Schiff* unconscionability rule.[38] Equity and fairness were adopted as the standards for modification of both consensual and judicial decrees.[39]

The *Schiff* doctrine of unforeseeability, however, remained operative. Although the agreement no longer had to be unconscionable, the alleged changed circumstances could not have been reasonably within the contemplation of the parties at the time the agreement was entered into.

The *Lepis* court unequivocally rejected the entire *Schiff* standard, including the requirement of unforeseeability.[40] Justice Pashman characterized objective notions of foreseeability as "all but irrelevant" in arriving at a determination of changed circumstances.[41] Thus, the court adopted the position that matrimonial judges should have the power to modify inequitable support arrangements whenever necessary, regardless of whether consensually or judicially determined. Nonetheless, the court, in the hope of eventually reducing the number of modification motions, invited judges and attorneys to

---

Id. at 560, 283 A.2d at 138. This rationale obviously prompted Justice Pashman to state in *Lepis* that "contract principles have little place in the law of domestic relations." 83 N.J. at 148, 416 A.2d at 47.

[35] 72 N.J. 350, 371 A.2d 1 (1977).

[36] *Id.* at 360, 371 A.2d at 6-7. *See also* Ackerman & Skoloff, *Equitable Distribution Expanded*—Smith *and* Carlsen: *The Doctrine of* Schiff *Overruled?* 100 N.J.L.J. 169 (1977).

[37] 72 N.J. at 358, 371 A.2d at 5. *Smith* involved the construction of a marital agreement—alternatively called a property settlement agreement by the husband and a support agreement by the wife, *id.* at 354, 371 A.2d at 3, in light of New Jersey's equitable distribution statute, N.J. STAT. ANN. § 2A:34-23 (West 1971)—and the supreme court's construction thereof in Painter v. Painter, 65 N.J. 196, 320 A.2d 484 (1974).

[38] 72 N.J. at 360, 371 A.2d at 6.

[39] *Id.*

[40] In reality, the unforeseeability standard lacked social utility in that it penalized spouses for failing to provide for speculative changes in need. One commentator noted that "it is impossible to contemplate all the contingencies of any given factual situation." Skoloff, Schiff—*Unconscionable Obstacle to Matrimonial Settlements*, 49 N.J.L.J. 553 (1976) (emphasis supplied). Furthermore, public policy dictates that controversies be settled so as not to thwart the administration of justice. Judson v. Peoples Bank & Trust Co., 25 N.J. 17, 134 A.2d 761 (1957); DeCaro v. DeCaro, 13 N.J. 36, 328 A.2d 625 (1953).

[41] 83 N.J. at 152, 416 A.2d at 52.

"make greater efforts to provide in advance for change" when negotiating divorce settlements.[42] The importance of anticipating changes in circumstances derives from the court's recognition that it will "not ordinarily be 'equitable and fair' to grant modification " where a support agreement "provide[s] for the circumstances alleged as changed."[43]

The *Lepis* opinion catalogued seven specific species of changed circumstances including illness, cohabitation of the dependent spouse, and loss of residence.[44] However, *Lepis* explicitly involved only one of the areas that the court cites in its opinion, that of a cost of living increase. Even so, this was not a pure "cost of living" case. The court dealt peripherally with changes in the supporting spouse's income coupled with the possibility of subsequent employment by the dependent spouse.

Mrs. Lepis' main contention was that, due to inflation, her needs had increased to such an extent as to constitute a change in circumstances sufficient in character to permit modification.[45] In recent years the appellate division in several unreported opinions had decided various post judgment motions involving inflation and discovery with differing results.[46] Although it had been successfully argued on at least

---

[42] *Id.* at 154, 416 A.2d at 53. *But cf.* Arnold v. Arnold, 167 N.J. Super. 478, 480, 401 A.2d 261, 263 (App. Div. 1979) ("an advance determination that alimony shall cease because of the passage of . . . time is a fortiori frustration of established principles relating to alimony and its modification for change of circumstances"); DiTolvo v. DiTolvo, 131 N.J. Super. 72, 77, 328 A.2d 625, 630 (App. Div. 1974) (reversing trial court holding that provided for "automatic percentage distribution of husband's increase in future earning by way of proportionate increase in alimony").

[43] 83 N.J. at 153, 416 A.2d at 52-53. The *Lepis* court, in citing Peterson v. Peterson, 172 N.J. Super. 304, 411 A.2d 1165 (App. Div. 1980), appears to adopt much of its ideology. In *Peterson* the appellate division suggested that there is

> nothing inherently inimical in the enforcement of an escalation clause for alimony or child support when the clause is the product of a freely negotiated and counselled marital settlement. Indeed, such clauses, when voluntarily agreed upon in appropriate situations, may be very useful tools in drafting a fair settlement of the economic issues in a marital dispute.

Id. at 307, 411 A.2d at 1166. By utilizing this approach courts will be able to build provisions for automatic increases based on changed circumstances into spousal agreements.

[44] Justice Pashman also referred to the dependent spouse's loss of a house or apartment and changes in the federal income tax law as examples of changed circumstances. 83 N.J. at 151, 416 A.2d at 51.

[45] *Id.* at 159, 416 A.2d at 55.

[46] In Schreiber v. Schreiber, No. A-3062-76 (App. Div. N.J. Oct. 18, 1978), the appellate division denied a motion to modify a support agreement based solely upon inflation and the increased cost attendant upon the maturation of two children. In dicta, however, the court noted that the moving party had the right to serve interrogatories to determine whether there had been an increase in the defendant husband's income. No. A-3062-76, slip op. at 2.

two occasions that inflation was not a change in circumstances sufficient to warrant modification,[47] the elimination of the unforeseeability requirement was apparently enough to overcome this argument in *Lepis*.

In holding that a showing of changed circumstances must be balanced against the supporting spouse's ability to pay, the Lepis court considered the case of *Martindell v. Martindell*.[48] *Martindell* did not involve an attempt to modify a comprehensive property settlement agreement; rather, it concerned a motion to increase an alimony award. The court found that the plaintiff had established changed circumstances, since the original alimony award and two subsequent reduction orders were sufficient factors along with the increased wealth of the defendant to warrant modification of the wife's decree.[49] In describing the plaintiff's situation, the court stated that "[t]he costs of living were persistently rising and [the wife's] living facilities were decreasing with equal persistency."[50]

Noticeably absent from this portion of the *Lepis* opinion is any reference to the case of *Gulick v. Gulick*.[51] In this case, Judge Fritz, writing for the chancery court, firmly held that an increase in the cost of living alone would not constitute a change in circumstances sufficient to require modification.[52] The absence of any reference to the

---

In Lawless v. Lawless, No. A-2853-76 (App. Div. N.J. Oct. 18, 1978), the appellate division affirmed a trial court determination that inflation and maturation of children are so fundamental that they should have been anticipated and, therefore, did not constitute a change in circumstances. No. A-3062-76, slip op. at 3. The court required that a prima facie case be established before an ex-spouse was subjected to post-judgment discovery. In *Lepis*, the appellate division found an increase in the supported spouse's needs caused by inflation was a prima facie element of changed circumstances which automatically entitled the moving party to full disclosure and discovery of an ex-spouse's finances. Lepis v. Lepis, No. A-3231-77, A-4597-77, slip op. at 2 (App. Div. N.J. Mar. 14, 1979).

[47] Schreiber v. Schreiber, No. A-3062-76 (App. Div. N.J. Oct. 18, 1978); Lawless v. Lawless, No. A-2853-76 (App. Div. N.J. Oct. 18, 1978).

[48] 21 N.J. 341, 122 A.2d 352 (1956).

[49] *Id.* at 353-54, 122 A.2d at 358.

[50] *Id.*

[51] 113 N.J. Super. 366, 273 A.2d 792 (App. Div. 1971). Plaintiff in *Gulick* sought to modify a judgment *nisi* for divorce with respect to specified support provisions which were the result of an arms-length agreement between the parties. *Id.* at 367, 273 A.2d at 793.

[52] Judge Fritz, writing for the court, reasoned:

> As far as change of circumstances is concerned, plaintiff's proofs on this motion demonstrate only her assertion that cost of living, including income taxes, has increased since the time of agreement as to support and the entry of the judgment *nisi* and that she is thereby required to bear a disproportionate share of the support burden. I do not believe this to be the type of "changed circumstances and new facts" which *Boorstein* contemplates. Were the rule to be to the contrary, except in the most unlikely event of a period of unwavering stability in the economy, one

Gulick decision in *Lepis* raises considerable doubt as to the continued viability of the *Gulick* standard. If *Lepis* has, in fact, overruled the *Gulick* standard, the matrimonial courts should be prepared for the deluge of motions ahead.

In reviewing statutory along with caselaw from other jurisdictions, it is apparent that the concepts set forth in *Lepis* are not universally followed.[53] Many jurisdictions still follow the *Schiff* approach and hold that spousal agreements should not be set aside unless found to be unconscionable.[54] Other jurisdictions statutorily require that in order for a spousal agreement to be modified it must be stipulated within the agreement or mutually consented to by the parties involved.[55]

Other states buttress the views adopted in New Jersey as exemplified in *Smith* and *Lepis*.[56] Indeed, the majority view is that courts should retain the power of modification.[57] Behind this viewpoint is the belief that judicial modification powers should be retained so as to protect unwary litigants who may have entered into spousal agreements in order to avoid stressful divorce litigation.[58]

In redefining the elements of changed circumstances, the *Lepis* court categorically approved the concept of rehabilitative alimony.[59] The court, placing a flexible limitation upon the duration of support payments, stated that both the amount and the duration of such payments are contingent upon the "extent of actual economic dependency."[60] Justice Pashman rejected "the view that only unusual

---

> party or the other would be in a position frequently and continuously to seek a modification. If the cost of living went up, the application would be by the supported. If it went down, it would be by the supporter. In addition to this practical view, there is no reason why the parties should not be presumed to have considered at the time of entry of judgment the likelihood of general economic change, a real fact of life in our present economy. To permit relief on this basis would be no different from sanctioning a modification of a prior agreement solely on the basis that the support sought and agreed upon proved to be less adequate when it arrived than it did when the agreement was entered into.

Id. at 370, 273 A.2d at 794.

[53] *See Modification of Spousal Support: A Survey of a Confusing Area of the Law*, 17 J. FAM. L. 711, 722-28 (1978-79); Annot., 61 A.L.R.3d 520 § 2 (b), at 530 (1975).

[54] *See, e.g.*, COLO. REV. STAT. § 14-10-112 (1963); KY. REV. STAT. § 403.180 (1972).

[55] *E.g.*, KAN. STAT. ANN. § 60-1610 (1976).

[56] *See, e.g.*, Goldman v. Goldman, 13 N.Y.S.2d 960, 26 N.E.2d 265 (1940); Waldman v. Waldman, 13 Misc. 2d 365, 178 N.Y.S.2d 358 (Sup. Ct. 1958); Commonwealth v. Hall, 243 Pa. Super. Ct. 162, 364 A.2d 500 (1976).

[57] *See* Annot., 61 A.L.R.3d 520, § 3(a), at 533-39 (1975).

[58] *See, e.g.*, 83 N.J. at 148, 416 A.2d at 49-50.

[59] *Id.* at 155, 416 A.2d at 53. *See* Finnerty, Lepis v. Lepis: *New Perspectives on Support Rights and Obligations*, 106 N.J.L.J. 405 (1980).

[60] 83 N.J. at 155, 416 A.2d at 53.

cases will warrant the 'rehabilitative alimony' approach."[61] He reasoned that the law must conform to the "economic realities" of contemporary life, rather than a nineteenth century "model of domestic relations."[62]

Other states have already provided statutory guidelines by which support will be monitored or withheld according to the dependent spouse's earning capacity and ability to support his or herself.[63] Although the New Jersey legislature has not acted with regard to the issue of rehabilitative alimony, the court in *Lepis* suggested that careful attention should be paid to the supported spouse's ability to contribute to his or her own maintenance,[64] not only at the time of the original judgment but on subsequent applications for modification as well.[65]

Perhaps the court's most ambiguous pronouncement with respect to inflation as a prima facie element of changed circumstances for purposes of discovery lies in its failure to specify how extensive the discovery should be.[66] Although financial information as to the supporting spouse's income may be necessary, courts should not allow carte blanche discovery of the supporting spouse's income.

---

[61] *Id.* at 155 n.9, 416 A.2d at 53 n.9. Arnold v. Arnold, 167 N.J. Super. 478, 401 A.2d 261 (App. Div. 1979), was the most recent case to disapprove of rehabilitative alimony. The court in *Arnold* rejected the general rationale enunciated in Turner v. Turner, 158 N.J. Super. 313, 385 A.2d 1280 (Ch. Div. 1978), "which would permit 'rehabilitative alimony' as an available viable technique for the avowed purpose of encouraging a spouse to seek employment." *Id.* at 480, 401 A.2d at 263. In *Turner*, Judge Imbriani had not only defined the rehabilitative alimony process but also reviewed its effectiveness. "Rehabilitative alimony is alimony payable for a short, but specific and terminable period of time, which will cease when the recipient is, in the exercise of reasonable effort, in a position of self support . . . . Its purposes are multifold." 158 N.J. Super. at 314-15, 385 A.2d at 1281. The court reasoned that by adopting a rehabilitative alimony formula, the supported spouse will be encouraged to develop skills that will enable him or her to obtain employment. It is also intended to provide the supporting spouse with some insight as to the amount and duration of the obligations imposed by the court. Finally, by considering future events, a possibility exists that the alimony payments will be discontinued. *Id.*

[62] 83 N.J. at 156, 416 A.2d at 54. *See generally* Comment, *Rehabilitative Spousal Support: In Need of a More Comprehensive Approach to Mitigating Dissolution Trauma*, 12 U.S.F. L. REV. 493 (1978).

[63] *See* 83 N.J. at 155 n.9, 416 A.2d at 53 n.9. The *Lepis* court cited the following examples of statutory enactments relating to rehabilitative alimony: CAL. CIV. CODE § 4806 (West Cum. Supp. 1981); FLA. STAT. ANN. § 61.08 (West Cum. Supp. 1981); HAWAII REV. STAT. § 580-47 (Supp. 1978); IND. CODE ANN. § 31-1-11.5-9 (Burns 1980).

[64] 83 N.J. at 156, 416 A.2d at 54. Thus, the dependent spouse's earning power, both present and prospective, must be considered by attorneys when drafting spousal agreements as well as by judges when rendering divorce decrees and ruling on modification motions.

[65] *Accord*, McDonald v. McDonald, 368 So.2d 1283 (Fla. 1979); Lumsden v. Lumsden, 603 P.2d 564 (Hawaii 1979); Carty v. Carty, 87 Wis. 2d 759, 275 N.W.2d 888 (Wis. 1979).

[66] As recognized by the appellate division in DeGraaff v. DeGraaff, 163 N.J. Super. 578, 395 A.2d 530 (App. Div. 1978), trial courts should restrict the scope of discovery through the use of in camera inspections.

Courts should be aware that "in the context of [a] matrimonial dispute, discovery is a process easily subject to 'abuse as a device by which one spouse harasses the other.' "[67] If broad-based discovery is permitted, abuse of the process will become pervasive. Only upon a showing of good cause should an ex-spouse be allowed post-judgment discovery, and only limited discovery should be allowed.[68] Discovery should be further confined to situations where the supporting spouse's inability to pay is advanced as a defense.

The newly announced procedural guidelines will also affect modification proceedings insofar as the volume of plenary hearings is concerned.[69] A hearing will be required only after the parties have demonstrated the existence of a material question of fact.[70] Given the suggested curtailment of the plenary hearing process, the preparation of pleadings has become more important. Lawyers and judges will now have a Samsonian job in preparing and reviewing the moving papers and affidavits of the parties.

Although not specifically discouraging spousal agreements, the *Lepis* court significantly tempered the degree of their importance. As a result of *Lepis*, spousal agreements can only be looked to as a starting point until such time as circumstances dictate modification. It is suggested, however, that given the broad discretion afforded trial judges in fashioning settlements for parties without agreements and the likelihood, in light of the scope of appellate review, of an unsuccessful appeal,[71] that spousal agreements are still a valuable tool in matrimonial litigation.

---

[67] The *Lepis* court said only that "without knowledge of the financial status of both parties, the court will be unable to make an informed determination as to what . . . is equitable and fair." 83 N.J. at 158 n.10, 416 A.2d at 55 n.10.

[68] The *Lepis* court, though not discussing the parameters of such discovery, recognized that inspection of income tax returns should only be permitted for good cause. 83 N.J. at 157, 403 A.2d at 54. *See* PRESSLER, CURRENT N.J. COURT RULES, R. 4:79-5, Comment, at 982 (1980). N.J. Ct. R. 4:79-5 provides: "Interrogatories as to all issues in all matrimonial actions may be served by any party as of course pursuant to R. 4:17. All other discovery in matrimonial actions shall be permitted only by leave of court for good cause shown."

It is interesting to note that despite the reading of N.J. Ct. R. 4:79-4(a), which requires both parties to disclose needs, income and assets upon a pendente lite application for support, there is no similar rule applicable to post judgment motions for modification of support.

[69] Plenary hearings were once freely granted in New Jersey. Thus, in Halberg v. Halberg, 113 N.J. Super. 205, 273 A.2d 389 (App. Div. 1971), the court held that there should be a plenary hearing where there are "contested issues of fact." *Id.* at 208, 273 A.2d at 391. The rule set forth in *Halberg* was eventually tempered in Shaw v. Shaw, 138 N.J. Super. 436, 440, 351 A.2d 374, 376 (App. Div. 1976). Here Judge Michels held that: "It is only where the affidavits show that there is a genuine issue as to a material fact, and that the trial judge determines that a plenary hearing would be helpful . . . that a plenary hearing is required . . . ." *Id.*

[70] *See* note 21 *supra* and accompanying text.

[71] *See* Stout v. Stout, 155 N.J. Super. 196, 205, 382 A.2d 659, 662 (App. Div. 1977); Fern v. Fern, 140 N.J. Super. 121, 355 A.2d 672 (App. Div. 1976).

Justice Pashman's references to cost of living and increases or decreases in the supporting spouse's income will provide the fulcrum for a great deal of litigation. It should be recognized, however, that an increase in the cost of living, unless accompanied by an increase in the supporting spouse's earnings, will operate as a conduit for sustaining the existing agreement.[72]

John Drew Frederickson

---

[72] *See* 83 N.J. at 152, 416 A.2d at 52.