

# COMMENTS ON THE NEW JERSEY SUPREME COURT REPORT ON MATRIMONIAL LITIGATION

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In the past, it appeared to many matrimonial litigants that instead of fulfilling its obligation to dispense justice, the court dispensed with justice. With the advent of equitable distribution in 1971,<sup>1</sup> matrimonial adjudication became more complex and, hence, more protracted.<sup>2</sup> The escalating volume of divorce petitions similarly impeded the courts' ability to render fair decisions expeditiously.<sup>3</sup> Dissatisfaction was expressed by litigants, lawyers, and judges alike. In 1978, even the New Jersey Bar Association labeled the matrimonial court as a "ship head[ing] for disaster."<sup>4</sup> Visions of the Titanic flashed across people's minds, yet little was done to steer the ship onto the elusive course of dispensing justice.<sup>5</sup>

Over one-third of all divorce cases were taking more than a year to process.<sup>6</sup> As matrimonial litigants awaited trial, high emotional levels could not be contained and residual bitterness rose to the surface when seemingly needless delays added backlog to the courts' calendars. Securing a trial date was like finding gold, and once fixed, the trial would likely be adjourned because either the lawyers were un-

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<sup>1</sup> N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1980-1981).

<sup>2</sup> Prior to the institution of the equitable distribution statute, the major issue in a divorce case was fault. Now litigation often concerns an aggregate of complex property interests. See M. PASHMAN, W. MOUNTAIN, S. SCHREIBER, INTERIM REPORT OF THE SUPREME COURT COMMITTEE ON MATRIMONIAL LITIGATION 2-3 (July 20, 1979), reprinted in 104 N.J.L.J. 97 (Aug. 2, 1979) [hereinafter cited as INTERIM REPORT].

<sup>3</sup> One judge has observed that "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." Turner v. Turner, 158 N.J. Super. 313, 316, 385 A.2d 1280, 1281 (Ch. Div. 1978).

Between 1971 and 1979, the number of divorce filings in New Jersey doubled from approximately 13,000 to 26,000 per year. See INTERIM REPORT, *supra* note 2, at 2. See also ADMINISTRATIVE OFFICE OF THE COURTS, STATE OF NEW JERSEY, STATISTICAL REPORT 57 (Sept. 1, 1979-Aug. 31, 1980).

<sup>4</sup> The characterization was proffered at the New Jersey State Bar Association Annual Delegate's Convention of Sept. 29, 1978.

<sup>5</sup> The ideal of "doing justice" through the matrimonial system was the goal of the Supreme Court Committee on Matrimonial Litigation. See SUPREME COURT COMMITTEE ON MATRIMONIAL LITIGATION, PHASE-TWO, FINAL REPORT 5 (June 10, 1981), reprinted as a supplement to 108 N.J.L.J. 41 (July 16, 1981) [hereinafter cited as FINAL REPORT].

<sup>6</sup> INTERIM REPORT, *supra* note 2, at 2.

prepared or the court had scheduled ten other cases for the same date. Phrases like "bifurcating" and "truncating" arose as cases were heard one day in July, one day in November, and finally decided in February. Indeed, the matrimonial bench was considered to be at the bottom of judicial hierarchy.<sup>7</sup> The system was muddled in a maze of emotional and administrative conflict.

Cognizant of this grave situation, Chief Justice Richard J. Hughes created the Supreme Court Committee on Matrimonial Litigation in December of 1978 to inquire into all aspects of matrimonial procedure, and to recommend appropriate reforms. Solution, not criticism, was the goal of the Committee. The study was divided into two phases, the first of which resulted in an interim report which identified the major concerns of the public, the bar, and the judiciary.<sup>8</sup> This report was the product of Associate Justice Morris Pashman, who acted as chairman of the Committee, and Associate Justices Worrall F. Mountain and Sidney M. Schreiber.

After intensive work by a committee expanded to additionally include seven judges and thirteen attorneys, a final report was submitted on June 10, 1981.<sup>9</sup> Addressing the problems brought to light by the phase one Committee, the final report responded to the need for reform by offering concrete proposals founded upon the fair and expeditious deliverance of justice. A review of certain recommendations contained in the report discloses an emphasis on ameliorating the efficiency of matrimonial procedures.<sup>10</sup>

### I. SETTLEMENT PROGRAMS

Although only a minority of matrimonial cases are actually litigated,<sup>11</sup> the judicial system was geared to the trying of cases. Matrimonial judges were not allotted bench time for settlement conferences. Recognizing settlement as an effective tool of judicial management, the Committee urged the use of early settlement programs.<sup>12</sup> Involving the court in the case from its commencement

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<sup>7</sup> See *id.* at 9.

<sup>8</sup> *Id.* at 5.

<sup>9</sup> FINAL REPORT, *supra* note 5.

<sup>10</sup> Much of the FINAL REPORT is directed towards ensuring the prompt administration of justice. This article will be concerned with that facet of the committee's work. However, the committee was concerned with all aspects of matrimonial litigation. The FINAL REPORT suggests important reforms in other areas as well.

Especially noteworthy, and indicative of a prevailing concern for this sensitive area of the law, is the recommendation to modify the philosophy underlying child custody in order to account for changes in the structure of the modern family unit. See *id.* at 49-53.

<sup>11</sup> *Id.* at 13.

<sup>12</sup> See *id.* at 7-16.

would avoid delays and nurture resolution.<sup>13</sup> No longer would judicial intervention be crisis oriented, through motion or order to show cause. Rather, action would be initiated by the court at a time when the case may be ripe for settlement.

The Committee proposed the implementation of experimental settlement programs consisting of two factors: a four-way conference between the litigants and attorneys within two months after issue has been joined, and a mandatory judicial conference within six months.<sup>14</sup> Additionally, to promote the advantages of continuing case familiarity, the Committee recommended case calendar management on an individual basis.<sup>15</sup> The expected judicial alacrity would not only promote settlement, but facilitate issue identification.

The Committee also advocated greater participation in the early settlement programs established through county bar associations.<sup>16</sup> These programs typically consist of two or three attorneys who meet with the litigants after completion of the discovery period. At this point an attempt is made to settle, or at least narrow, the issues in dispute. Although acknowledging that the success of these programs comes at the sacrifice of the bar, the Committee commended those participating attorneys and called for expanded involvement.<sup>17</sup> It proposed the adoption of a rule authorizing judges to require attendance at early settlement programs,<sup>18</sup> preferably within four months after issue has been joined.<sup>19</sup> To decrease administrative costs, the Committee suggested that the panels be composed of only two attorneys;<sup>20</sup> and to enhance the program's credibility, the Committee suggested that only experienced matrimonial attorneys serve on the panels.<sup>21</sup> Expanded use of this program will lessen the judicial case-load and free matrimonial judges for other matters.

## II. PRELIMINARY DISCLOSURE STATEMENT

Complete disclosure of all relevant information is essential to the expedient resolution of marital disputes. Usually the most pertinent facts are those bearing upon the financial status of the litigants. Unfortunately, information voids have punctuated matrimonial liti-

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<sup>13</sup> *Id.* at 13.

<sup>14</sup> *Id.* at 14-15.

<sup>15</sup> *Id.* at 13.

<sup>16</sup> *See id.* at 7-8.

<sup>17</sup> *See id.* at 8.

<sup>18</sup> *Id.*, app. B.

<sup>19</sup> *Id.* at 9.

<sup>20</sup> *Id.* at 11.

<sup>21</sup> *Id.*

gation with appraisals, bank records, or earning statements being unavailable from either side even on the day of trial. Despite this lack of information, the judge is supposed to equitably distribute the assets. Incomplete discovery often results in an adjournment, or when the case is tried, in an appeal.

The interim report identified confusion over the application of section 4:79-1 of the New Jersey Court Rules<sup>22</sup> as being one source of the problem. The rule commonly is utilized by judges to ascertain which assets are subject to equitable distribution in accordance with *Rothman v. Rothman*.<sup>23</sup> Stressing the importance of complete disclosure at an early stage in the proceedings, the final report recommended replacement of the current rule with one requiring the submission of a comprehensive preliminary disclosure statement<sup>24</sup> of a prescribed form in all divorce cases.<sup>25</sup> This proposal has basically been adopted by section 4:79-2 of the New Jersey Court Rules.<sup>26</sup> Filing of a disclosure statement must occur within forty-five days of issue being joined,<sup>27</sup> and if application is made earlier for *pendente lite* relief, the application must be accompanied by a disclosure statement.<sup>28</sup> The information contained in the statement must be updated until twenty days before trial.<sup>29</sup>

The advantages of the preliminary disclosure statement are multifarious. Its preparation will induce prompt issue identification; the information will facilitate the processing of *pendente lite* applications and provide criteria for referring cases to the early settlement program; and the statement may also assist the court in determining whether an award for counsel fees is proper.<sup>30</sup> It is not intended to be simply additional paper work for the attorney's file.

### III. MOTIONS

The Committee was aware that the status of motion practice has also obstructed time-efficient case administration. Therefore, it initially suggested that strict limitations be placed on the granting, sub-

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<sup>22</sup> INTERIM REPORT, *supra* note 2, at 36-37.

<sup>23</sup> 65 N.J. 219, 320 A.2d 496 (1974).

<sup>24</sup> FINAL REPORT, *supra* note 5, at 18.

<sup>25</sup> *Id.* In Appendix D to the FINAL REPORT, the committee provided a standard form to which there must be compliance. For example, the submitted information would have to include a copy of the last filed income tax returns, a balance sheet, and a budget. *Id.*, app. D.

<sup>26</sup> N.J. CT. R. 4:79-2.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See FINAL REPORT, *supra* note 5, at 19.

stance, and length of oral argument.<sup>31</sup> The Committee also suggested that all discovery motions be submitted without the benefit of oral argument.<sup>32</sup> These suggestions were ultimately endorsed by the supreme court in its comments on the interim report.<sup>33</sup> In the final report, however, the Committee modified its position to suggest that all motions be decided on the papers except for a showing of good cause.<sup>34</sup> Furthermore, it explained that because discovery motions often present the pivotal issues of matrimonial litigation only routine discovery motions in a matrimonial case should be subject to a rule against oral argument.<sup>35</sup> The final report recommends that the Chief Justice circulate a directive clarifying the use of oral argument in motion procedure.<sup>36</sup>

At present, there is a lack of uniformity in the state's motion practice. Individual counties determine different procedures in attempts to expedite the hearing of motions. Many counties have adopted the civil motion practice procedure by scheduling motion dates every two weeks. Other counties adhere to the traditional weekly scheduling. To prevent argument on state moving papers, some judges have instituted a "one adjournment" rule, while other judges have instituted "no adjournment" rules.<sup>37</sup> By propagating more stringent motion rules, the Committee attempts to free additional time for judges to hear pending litigation and to allow cases to be completed within shorter time periods.<sup>38</sup>

Eliminating unnecessary oral argument can be a cardinal means of improving the pace of the court calendar. The underutilization of section 1:6-2 of the New Jersey Court Rules<sup>39</sup> was cited by the Committee as a prime reason for mounting delays.<sup>40</sup> The rule provides

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<sup>31</sup> INTERIM REPORT, *supra* note 2, at 32.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 22.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 23-25. The committee distinguished the peculiarity of matrimonial discovery motions as compared to other civil discovery motions. "The fruits of discovery form the primary basis for decisions concerning equitable distributions." *Id.*

<sup>36</sup> *Id.* at 25.

<sup>37</sup> Motion days have traditionally consumed Friday of each week for argument, and an additional half day, if not a full day, of preparatory time by the judge to review the filed pleadings to formulate an order granting or denying the relief sought. N.J. Ct. R. 1:6-7 directs judges to read moving papers in advance of the hearing. A lawyer respects and appreciates the judge who has read the pleadings, yet that respect is hard earned when multiplied by sixty motions and cross-motions each week. It is not uncommon for matrimonial judges to spend Thursday evening reviewing motions for the following day.

<sup>38</sup> As a general guideline, the committee indicated that contested cases should be resolved within one year of joinder of issue.

<sup>39</sup> N.J. Ct. R. 1:6-2.

<sup>40</sup> See INTERIM REPORT, *supra* note 2, at 26.

that an attorney may request that a motion be decided on the papers. If the opposing party consents, or does not offer a timely objection, oral argument on the motion is waived.<sup>41</sup> Active use of the rule by attorneys, whenever practical, would help unclog congested court calendars.<sup>42</sup> Additionally, the Committee recommends the use of preliminary determinations as a means of eliminating other unrequired oral arguments.<sup>43</sup>

#### IV. PENDENTE LITE GUIDELINES

In states such as Arizona, fixed percentages of earnings are set as support obligations according to charts established by the court. Similar to tax tables, the payor is directed to his earning level under the column for his dependents, and a fixed amount would be set according to percentage tables also established by the court.<sup>44</sup> It was noted in the Committee's interim report that much concern has been voiced about the establishment of guidelines for the court's use in setting support and alimony figures. Proponents of this approach favor the consistency which such a system would offer. On the other hand, its detractors find it an improper invasion of the judge's discretion.<sup>45</sup> The Committee's objective was to achieve uniformity and predictability, while not sacrificing judicial discretion.

The unique circumstances of every case preclude the decisions in *pendente lite* applications from being absolutely uniform. The establishment of optional guidelines, however, would promote predictability, discourage unnecessary motions, and assist in settlement.<sup>46</sup> In the final report, the Committee suggests the optional use of comprehensive guidelines<sup>47</sup> which would allow cases to be weighed individually but according to the same standards.

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<sup>41</sup> N.J. Cr. R. 1:6-2.

<sup>42</sup> See FINAL REPORT, *supra* note 5, at 26.

<sup>43</sup> *Id.* at 25-26. With a heightened emphasis on the moving papers, the bar must be prepared to pay stricter attention to the motion rules. For example, in *Brown v. Williamson*, 8 N.J.L. 363 (1826), the highest court in New Jersey declared that a notice which states a motion will be made on Friday, the seventh, when Friday is the eighth day of the month, is improper. The court, therefore, could refuse to hear the motion.

In another regard, the New Jersey Court Rules provides that affidavits must be made on personal knowledge, setting forth only facts upon which the affiant is competent to testify. The comments to this rule added that "[a]ffidavits by attorneys of facts related to them by and within the primary knowledge of their clients constitute, in effect, objectionable hearsay." N.J. Cr. R. 1:6-6 (comment).

<sup>44</sup> See Domestic Relations Handbook, Maricoba County Superior Court, Arizona (1980).

<sup>45</sup> See INTERIM REPORT, *supra* note 2, at 41-42.

<sup>46</sup> See FINAL REPORT, *supra* note 5, at 31-32.

<sup>47</sup> See *id.*, app. F. The guidelines are to be used in conjunction with the financial information submitted in the preliminary disclosure statement and can be used in determining *pendente*

## V. SPECIFIC ENDORSEMENTS OF SUBSTANTIVE ISSUES

The Committee undertook extensive study of a variety of substantive issues presently confronting the New Jersey judiciary.<sup>48</sup> Although many subjects were determined to be best resolved through further study or developments in case law,<sup>49</sup> the Committee did issue two pronouncements contrary to the opinions of the appellate courts in this jurisdiction.<sup>50</sup>

In *Grange v. Grange*,<sup>51</sup> the appellate division held that a trial judge does not have authority to order a pre-divorce distribution of a tenancy by the entirety.<sup>52</sup> The Committee, in its final report, concluded "that the *Grange* rule is unduly restrictive, contrary to the broad discretionary powers of the court of equity and generally unfair."<sup>53</sup> Therefore, the Committee recommended that under exceptional circumstances, a court can order a sale of marital assets and impose an order preserving the proceeds for the benefit of a litigant who is before it.<sup>54</sup>

The concept of rehabilitative alimony<sup>55</sup> also received a material endorsement in the Final Report,<sup>56</sup> although in *Arnold v. Arnold*<sup>57</sup> it had not fared as well. In *Arnold*, the appellate division observed that absent unusual facts, automatic cutoff dates for alimony should be avoided.<sup>58</sup> The phase-one Committee took an opposite stance,<sup>59</sup> and

lite applications for child support or alimony. Considerations such as the spouses' standard of living, the length of the marriage, and earning capacity form the basis from which a decision can be rendered. *Id.* The guidelines provide a specific definition as to what constitutes the needs of a spouse. See *Capodanno v. Capodanno*, 58 N.J. 113, 275 A.2d 441 (1971).

<sup>48</sup> See FINAL REPORT, *supra* note 5, at 78-81. Some of the subjects considered were the treatment of pension plans under equitable distribution and the modification of a spouse support order. See *id.*

<sup>49</sup> See *id.*

<sup>50</sup> See notes 51-62 *infra* and accompanying text.

<sup>51</sup> 160 N.J. Super. 153, 388 A.2d 1335 (App. Div. 1978).

<sup>52</sup> *Id.* at 158, 388 A.2d at 1337.

<sup>53</sup> FINAL REPORT, *supra* note 5, at 38.

<sup>54</sup> *Id.* at 38-39.

<sup>55</sup> Rehabilitative alimony has been defined as "alimony payable for a short but specific and terminable period of time, which will cease when the recipient is, in the exercise of reasonable efforts, in a position of self-support." *Turner v. Turner*, 158 N.J. Super. 313, 314, 385 A.2d 1280, 1280 (Ch. Div. 1978).

<sup>56</sup> See FINAL REPORT, *supra* note 5, at 83-85.

<sup>57</sup> 167 N.J. Super. 478, 401 A.2d 261 (App. Div. 1979).

<sup>58</sup> *Id.* at 480, 401 A.2d at 262. The holding in *Arnold* is contrary to the decision in *Turner v. Turner*, 158 N.J. Super. 313, 385 A.2d 1280 (Ch. Div. 1978), in which an alimony award was granted for only an eighteen month period. While molding the decision in *Turner*, Judge Imbriani reviewed the benefits of a rehabilitative award. In addition to defining the duration and amount of spousal obligations, the remedy encourages the development of employment skills. *Id.* at 314-15, 385 A.2d at 1281.

<sup>59</sup> See INTERIM REPORT, *supra* note 2, at 38.

afterwards, in a footnote to *Legis v. Legis*,<sup>60</sup> the Supreme Court of New Jersey stated its disagreement with the *Arnold* rationale.<sup>61</sup> In its final report, the Committee hailed the discretionary use of rehabilitative alimony as an effective judicial tool and recommended specific criteria to be considered during such a determination.<sup>62</sup>

### CONCLUSION

The Supreme Court Committee on Matrimonial Litigation was established for the purpose of easing the emotional burdens on the increasing number of litigants involved in contemporary divorce proceedings. Its commitment was to create a better system<sup>63</sup> through which litigants can solve their differences; a system which does not lose sight of the economic and emotional difficulties besetting the parties. The recommendations offered by the Committee certainly make this aspiration achievable. Because of compassionate concern, reform can now be accomplished and criticism, though constructive in the past, is well on the way to being eliminated.

Efficient judicial administration and sound discretion are the foundations upon which our court system is built. Ultimately, proper implementation of the Committee's recommendations will be incumbent upon the responsible performance of the trial judge. Competent and aggressive judicial management by the men and women sitting on the matrimonial bench will steer the system onto the intended course of dispensing justice. As the Committee recognizes, however, this cannot be attained without the assistance of attorneys and their clients.<sup>64</sup> Through cooperation, the just resolution of all cases within one year can become a reality.

As we move toward this goal, we must continue to respond with sensitivity to the problems that lie ahead. Only in this way will the matrimonial system reflect the legitimate demands of attorneys, judges, and, most importantly, litigants.

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<sup>60</sup> 83 N.J. 139, 416 A.2d 45 (1980).

<sup>61</sup> *Id.* at 155 n.9, 416 A.2d at 53 n.9. In *Legis*, the supreme court held that when a prima facie showing of changed circumstances is made, the equitable authority of a court to make appropriate modifications of support obligations is unrestricted. *Id.* at 149, 416 A.2d at 50. Justice Pashman, writing for a unanimous court, held that the duration and amount of support payments are dependent upon the "extent of actual economic dependency." *Id.* at 155, 416 A.2d at 53.

<sup>62</sup> See FINAL REPORT, *supra* note 5, at 85-86.

<sup>63</sup> In this regard, the committee urges the creation of a family court which would have jurisdiction over all disputes between members of the same family. See *id.* at 88-92.

<sup>64</sup> *Id.* at 92-94.