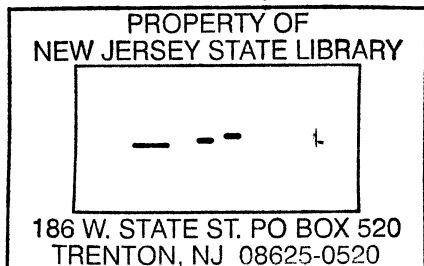


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Supreme Court Committee
on
Matrimonial Litigation

Phase Two
Final Report



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June 10, 1981

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INTRODUCTION

At first glance, "doing justice" in matrimonial cases may seem as elusive as the family stability which the court seeks to restore. The cynic may perhaps be forgiven if he holds this view. After all, the powers of judgment are never more strained than when they confront the intimacies of a family controversy. It is a marriage, a very special contract, that the matrimonial judge dissolves; it is a family, not a business, whose conduct he directs. The judge's canon must be dispassionate sensitivity; his role, that of intimate stranger. In no area of the law is there greater need for continuing reflection and openness to reform.

Here in New Jersey we have recognized that need. To discharge its constitutional responsibilities, the Supreme Court has created this Committee on Matrimonial Litigation. Its task has been to conduct and coordinate extensive, probing inquiry into matrimonial reform. This Report is the fruit of that inquiry. Its roots are in the Committee's Interim Report issued July 20, 1979. The Interim Report was the work of the "Phase One" Committee, composed of Associate Justice Morris Pashman, who served as chairman, and Associate

Justices Worrall F. Mountain and Sidney M. Schreiber. It quickly drew the attention of the Judiciary, the legal profession and the public to current problems in matrimonial litigation. Soon afterwards, the Supreme Court appointed an expanded, "Phase Two" Committee, with the same Chairman, to solicit and formulate specific proposals and recommendations.

The Committee has received assistance from the widest range of sources. The Chief Justice and the Chairman have met on several occasions with matrimonial judges to discuss in detail both the Interim Report and specific proposals for reform. Members of the matrimonial Bench have also met among themselves to continue these discussions. They have furnished invaluable aid and informed guidance to the members of the Committee.

There has been constant dialogue between Committee members and attorneys practicing family law. The Interim Report received detailed discussion at a meeting of the Family Law Section of the New Jersey State Bar Association in October, 1980, as well as at the Mid-winter meeting of the Association the following month. Since the release of the Interim Report, many meetings of family law committees of bar associations throughout the State have been devoted to the Committee's work.

Our task has been lightened by the individual and collective wisdom of the participants in this dialogue.

The development by the organized Bar of training programs for matrimonial lawyers and judges has been an impressive and salutary trend. The Institute for Continuing Legal Education, in conjunction with the Family Law Section of the New Jersey State Bar Association, has presented numerous seminars on complex and sensitive issues of family law, particularly equitable distribution and child custody. Most notable is the establishment of a Family Law Symposium, dedicated to exploring timely issues of matrimonial litigation. The presentation of this forum every two years will be a welcome vehicle for ongoing evaluation of matrimonial practice.

The public continues to display great interest in the work of the Committee and the conduct of matrimonial litigation. This has been manifested primarily by numerous written comments on the Interim Report and regular inquiries concerning the progress of the "Phase Two" Committee. The degree of public response has matched that of the Bench and Bar, and the Committee's perspective on the problems of matrimonial litigation has been broadened and deepened as a result.

A final source of guidance for the Committee has been the Supreme Court's formal comments on the Interim Report, which were issued June 26, 1980 (see Appendix A). They directed the Committee towards matters requiring additional scrutiny as well as new areas for inquiry.

The "Phase Two" Committee consisted of matrimonial attorneys, trial judges assigned to matrimonial cases, an appellate judge formerly assigned to the matrimonial trial bench, and the three Supreme Court Justices who had served on the original Committee. Its first task was to provide a forum for members of the public, in both individual and representative roles, to speak out and be heard on the problems of matrimonial litigation. The Committee met in open session for this purpose on September 27, 1980. Afterwards, the Committee held lengthy meetings between October 1980 and April 1981. Material for full Committee consideration was prepared by subcommittees whose members diligently prepared detailed findings and recommendations. All comments and proposals received from the public by the Committee's Chairman or members, the Chief Justice or the Administrative Office of the Courts were summarized and distributed for subcommittee use.

The culmination of this arduous but challenging process is this Report with its recommendations. Never has matrimonial litigation received such intensive, prolonged and deliberate examination, either in New Jersey or, to the Committee's knowledge, anywhere in the United States. Our ostensibly elusive goal has as its foundation, not merely matrimonial justice, but justice itself: the balancing of judicial discretion with rational uniformity and predictability; the government of laws administered by wise and compassionate men and women. The Committee believes its work has made this goal less elusive and more attainable in matrimonial litigation. We commend the following proposals to the careful attention of the Bench, the Bar, and all the citizens of the State. It is the Committee's firm conviction that their adoption will transform "doing justice" in family controversies from an object of cynicism to a more legitimate expectation.

I

MATRIMONIAL PROCEDURES

The Committee directed most of its efforts toward developing procedures to ensure a just, expeditious resolution of a matrimonial case. The recommendations in this area are designed to: (1) create a structured settlement process; (2) identify essential information to be submitted to the court, (3) further refine procedures for resolving motions quickly, and (4) expand, to a limited degree, the types of discovery available to parties without leave of court.

The Committee also recommends optional guidelines for pendente lite applications — particularly those seeking exclusion of a spouse from the marital home, sale of marital assets and payment of debts pendente lite — and a form of pendente lite order.

Other topics covered in this section include the use of court-appointed experts, the contents of the final judgment of divorce and the use of sanctions to enforce orders in matrimonial cases.

A. Settlement Procedures

The Interim Report¹ recognized that settlement is often crucial to the effective disposition of a matrimonial dispute. The report also acknowledged the need for each judge to conduct settlement discussions in his own fashion. To reduce delay in matrimonial cases, judges should encourage negotiations among litigants and attorneys to resolve as many disputed issues as is humanly possible.

1. Early Settlement Programs

"Early settlement programs" have been established by 11 county bar associations for the purpose of facilitating the resolution of family law disputes. Typically, the programs have involved panels of either two or three attorneys who meet after the termination of the discovery period. To date, these programs have been primarily the responsibility of the Bar, and participation by litigants has generally been on a voluntary basis. The Committee agrees that the existing programs have been successful. They have saved considerable time for matrimonial

¹ M. Pashman, W. Mountain and S. Schreiber, Interim Report of the Supreme Court Committee on Matrimonial Litigation, (July 20, 1979), page 28 (hereinafter cited Interim Report).

In the interim, the success of these programs must continue to depend on the generosity of individual attorneys.

(I)(A)(5) Panels throughout the State should be composed of two attorneys. The Committee has concluded that panels of two attorneys are sufficient to accomplish the purposes of an early settlement program. The addition of a third attorney would unduly increase administrative costs and tend to limit the number of available volunteers.

(I)(A)(6) The Supreme Court should urge the family law sections of the various county bar associations to cooperate in expanding this important program. Likewise, the New Jersey State Bar Association should be encouraged to support participation. The Committee feels it is essential that experienced matrimonial practitioners serve as panelists. Not only are their abilities crucial to the program's effectiveness, but their presence will enhance the credibility of the program in the eyes of litigants and their attorneys.

(I)(A)(7) Matrimonial judges in each of the counties should contact the local bar association, especially in those counties where early settlement programs do not exist, to encourage and facilitate their establishment.

(I)(A)(8) Matrimonial judges should refer cases in their informed discretion to early settlement programs. Both Assignment Judges and matrimonial judges should cooperate with the programs by making it possible to place a settlement on the record as soon as practicable. This will give litigants and their attorneys additional incentive to save time and resources through participation.

(I)(A)(9) In particular, matrimonial judges should forward cases involving pro se litigants to these panels. The Committee believes that litigants without lawyers should begin to handle their own cases at the earliest possible time. Pro se litigants will benefit from referral to these informal panels by receiving assistance from attorney-panelists in settling or narrowing issues for trial.

2. Judicial Settlement Procedures

Since the majority of matrimonial cases are settled before trial, the Committee urges greater emphasis on early settlement procedures. This will permit aggressive judicial management of the matrimonial calendar, for settlement procedures facilitate constant monitoring of a case's progress. Litigants, attorneys and judges should be made aware of opportunities for settlement, either with or without the assistance of the court. The goal of an official settlement process is the direct involvement of the court from the filing of the complaint to the day of trial, to avoid delay, conserve resources and encourage settlement whenever possible.

Recommendations

(I)(A)(10) The Supreme Court should require that all matrimonial calendars be managed on an individual calendar basis, whereby the judge who is assigned a case when the complaint is filed hears all motions, conducts all settlement conferences, and, if necessary, presides at the trial. The benefits of continuing familiarity with a case outweigh any

perceived disadvantages of having a judge present at both settlement conference and the trial.

It should be noted that this recommendation is not intended to abrogate or limit the application of Evid.R. 52, which provides that offers to compromise and the like are inadmissible to prove the liability of a person making the offer. Moreover, the settlement discussions themselves are not competent testimony and may not be treated as such. Judges presiding at bench trials frequently hear evidence which they declare inadmissible. The role of a matrimonial judge at trial who has been privy to settlement discussions is substantially the same.

(I)(A)(11) The following approach to judicial settlement should be adopted:

- a. Parties and their attorneys must assure the court that they have met within two months after issue is joined in a good faith attempt to either settle or narrow the issues in dispute.
- b. A mandatory judicial settlement conference shall be held within six months after issue is joined. To assure availability

of judges and attorneys, such conferences should be scheduled on the same day of the week in all matrimonial courts throughout the State. Monday is offered as the recommended day.

Judges should use the proposed case monitoring form in Appendix C to specify the status of the litigation. The information required on the form shall be obtained from the parties at the conference. Judges should also use the form of case management order in Appendix C to control discovery and other pretrial matters.

The goal of this process is a shared understanding between the court and the parties of those issues that remain in dispute.

(I)(A)(12) Every contested matrimonial case should be disposed of within one year after issue is joined.

(I)(A)(13) Each judge conducting mandatory settlement conferences should list at least 20 cases for each weekly session.

(I)(A)(14) This formal settlement program should first be implemented on a pilot basis. The commitment of judicial resources required must be justified by a substantial increase in the number of settlements. The effect of a program, of course, cannot be predicted in advance with certainty. Accordingly, the Committee recommends that these procedures be first implemented in a limited number of counties. To date, Bergen, Essex and Ocean counties, whose matrimonial judge served on the Committee, have volunteered to implement this program. Matrimonial judges in other counties may also wish to participate and should be permitted to do so. Statewide implementation of these procedures depends on the success experienced in the pilot counties.

(I)(A)(15) To assist in controlling the burgeoning matrimonial docket, the Committee endorses the use of non-matrimonial judges to hear uncontested matters and to preside when settlements are placed on the record. The Committee recommends that these cases be assigned for hearing between 8:30 a.m. and 9:00 a.m. each day so as not to interfere with other judicial business.

B. Preliminary Disclosure Statement

Accurate, complete and current information is essential at every stage of a litigated matrimonial matter. The quality of every judicial decision depends heavily on the information presented to the court. Thus, counsel's obligation and the obligation of the parties to cooperate and produce pertinent financial information should be no different at the commencement of the action than it is at other times prior to the actual trial. Cf. Rothman v. Rothman, 65 N.J. 219, 233 (1974).

Matrimonial disputes generally lend themselves to resolution by agreement. Counsel should be able in a great many cases to reach such agreement without extensive judicial intervention. Essential to such result, in addition to good faith by the parties and attorneys, is full and fair disclosure of relevant facts. In cases involving more than marginal assets and financial resources, this frequently means the uncovering, pinpointing and analyzing of a variety of assets and income sources. If full disclosure of assets and income is made early in the controversy, it will be less difficult for experienced attorneys to bring the matter to settlement.

The Committee reviewed the information currently required by the court and the proposed amendment to R. 4:79-11 contained at page 38 of the Interim Report. It has concluded that judges and litigants must have comprehensive financial information early in the proceedings. Each party should therefore be required to file a Preliminary Disclosure Statement in a prescribed form. The information submitted would include: 1) a complete copy of the last federal and State income tax returns filed; 2) a statement of year-to-date earnings and income; 3) a full and complete budget, and 4) a balance sheet setting forth all assets and liabilities.

Greater involvement of matrimonial judges prior to trial requires the early receipt of this information. Accordingly, the Committee recommends that the Preliminary Disclosure Statement should be filed within 45 days of issue being joined, or contemporaneous with any application for pendente lite support, whichever date is earlier.

There are several advantages to this approach to disclosure. First, the preparation of a disclosure statement will prompt counsel to focus on issues at an early stage. By reviewing the opposing preliminary statements, counsel will be able to determine the scope of any factual disputes. Thus, the use of preliminary statements will often encourage prompt settlement. Second, preliminary statements will supply the court with information required for all pendente lite applications. Third, they will assist the court in deciding which cases should be referred to an early settlement program. Fourth, the preliminary statement can be used by the court to determine the propriety of a counsel fee award. For example, when a comparison of preliminary statements suggests that the litigants are not far apart, that fact would be relevant in passing upon an application for counsel fees.

The Committee also proposes that counsel have a continuing duty to update the information until 20 days prior to trial.

Since this pleading would be required to be submitted in all cases, the Committee concurrently recommends the abolition of R. 4:79-11, whose requirements are encompassed in the proposed rule.

Recommendations

(I)(C)(1) All calendar motions in matrimonial cases should be determined on the papers submitted, without oral argument, except for good cause shown. These include motions pertaining to adjournment, restoration to the trial list, case management, early trial date and entry of default. R. 1:6-2 should be amended accordingly.

(I)(C)(2) No oral argument on substantive motions shall be permitted from any attorney who has not filed opposing papers.

(I)(C)(3) The use of the telephone for oral argument should be further encouraged. The Committee applauds the the experiment currently being conducted in the Atlantic Vicinage, and hopes that efforts will be made to resolve any technical problems that may arise through the use of the telephone.

(I)(C)(4) The Civil Practice Committee's proposal concerning discovery motions should be modified to apply only to routine motions. The Civil Practice Committee recommended that a rebuttable presumption against oral argument apply to all discovery motions. However, discovery motions play a unique role in matrimonial litigation, unlike that in other civil cases. The fruits of discovery form the primary basis for decisions concerning equitable distribution, which is typically the most vigorously contested issue in a matrimonial action. Thus, discovery motions on these issues are often more important than substantive motions. They frequently deal with the hiring of professionals such as accountants or appraisers, often at considerable expense. Another common subject is the inspection of books and records of closely held corporations, professional partnerships and other businesses.

In the course of oral argument on these motions, counsel are often able to reach

accommodations, sometimes with the urging of the court. Moreover, many discovery motions possess singular importance in matrimonial cases. They are generally too complex to be decided merely on written submissions. A presumption that oral argument is unnecessary, therefore, should not be universally applied. The Committee recognizes that some routine discovery matters do occur in matrimonial cases as in any type of litigation. Examples include applications for more specific answers to interrogatories, for extension of time for discovery and for inspection of the marital home by appraisers. Examples of applications that are just as clearly not routine concern production of corporate books and records, appointments of accountants and appraisers, and in more complex cases, inventories of business property.

The Committee is mindful that demands on judicial time in dealing with motions should be reduced. But the benefits of properly regulated oral argument are numerous. Not only does it afford attorneys an opportunity to be heard, it also provides a forum for the court to become more familiar with the case and identify genuinely disputed issues.

When properly employed, oral argument thus plays an invaluable role in the administration of matrimonial justice. This is particularly true when viewed through the eyes of litigants who often find it impossible to understand why matters which affect them so profoundly could not command the attention of a formal court proceeding.

Since there is a clear and undeniable distinction between discovery in matrimonial and other types of cases, it is necessary to treat them differently for purposes of oral argument. A rule restricting a presumption against oral argument to routine matrimonial discovery motions will benefit both the parties and the court.

(I)(C)(5) The Chief Justice should issue a directive clarifying his prior memorandum on the general use of oral argument. The Committee respectfully submits that a clear statement is necessary permitting oral argument on substantive motions when the complexity of the issues merits exploration in open court. The Committee also recommends that the Chief Justice urge further experimentation with the practice of issuing preliminary determinations on the day prior to the motion day in contested matters. In

the Committee's view, this procedure will help eliminate the need for oral argument in some, although not all, contested motions.

(I)(C)(6) Matrimonial judges should be encouraged to limit oral argument more aggressively, by exercising greater control over counsel's presentations and by focusing attention on the issues presently before the Court.

(I)(C)(7) Counsel should be encouraged to request a ruling without oral argument, pursuant to R. 1:6-2, as often as practicable. The Committee notes that improving the quality of written submissions along with more selective requests for oral argument are the most effective means of reducing the number of argued motions. The Committee most strongly urges continuing legal education programs to devote their resources to these topics.

(I)(C)(8) A directive should be issued encouraging judges to sign consent orders without the necessity of formal motions. The Committee feels that consent orders should be employed on as many occasions as possible to eliminate what is otherwise a waste of

counsel's waiting time, additional clerical work and the court's time in reviewing the papers.

D. Discovery

Consistent with the Supreme Court's mandate in its comments on the Interim Report (Appendix A, page 6), the Committee considered whether discovery rights of matrimonial litigants should be expanded to those available in the Law Division of the Superior Court. The Committee is satisfied that some expansion is warranted to permit depositions of parties to the litigation as to matters concerning collateral relief--child custody and support, alimony, equitable distribution and related matters. However, the Committee remains firmly convinced that discovery, other than interrogatories, relating to the underlying cause of action should not be permitted except by order of the Court.

Recommendations

(I)(D)(1) The Supreme Court should amend R. 4:79-5 to permit depositions of parties to a matrimonial action as to collateral issues without leave of court, as set forth in Appendix E. Adoption of this rule would eliminate the necessity of reviewing numerous meritorious motions for

discovery which are routinely granted. It will also save considerable time and expense on the part of attorneys and litigants.

(I)(D)(2) The Committee considered and rejected further amendment to permit depositions of non-parties in matrimonial cases. Allowing non-party discovery as of right might lead to abuse and harassment by a vindictive spouse. However, the Committee recommends that courts grant legitimate requests for non-party depositions upon a demonstration of good cause.

E. Special Master System

The Committee considered whether the Standing or Special Master system should be reinstated. The reactivation of this system was proposed in the hope that routine matrimonial matters could be resolved with minimal expense and delay. The Committee's discussion centered around the merits of and cost for reinstatement of such a system.

The Committee concluded not to recommend its reestablishment.

F. Use of Court-Appointed Experts

Consistent with the Supreme Court's mandate in commenting on the Interim Report (Appendix A, page 5), the Committee considered the appointment of independent experts by the court as an alternative to retention of experts by the parties.

Recommendations

(I)(F)(1) Where there is sharp divergence between respective party experts, the court-appointed expert can be of immeasurable value. However, there is a separate and distinct value to the retention of an expert by each party, especially in cases in which income and assets may be hidden and the discovery of truth requires great time and effort. Independent experts should therefore continue to be used by each party at the discretion of counsel.

(I)(F)(2) In each county, the local bar association's family law section should compile a list of experts available for service. Such lists should be available to all attorneys, as well as the court if it deems an independent opinion to be necessary. The Committee further urges that judges consider more frequent, use of experts, when appropriate, to evaluate reports properly.

G. Sanctions

In discussing various proposals, the Committee was continually led to the question of what to do with an attorney or party who does not comply with procedural requirements imposed by Rule or court order. While various suggestions were made concerning novel sanctions, the Committee concluded that the existing sanctions contained in the Rules of Court are sufficient. More detailed discussion of sanctions appears at pp. 65-77 of this Report.

Recommendation

(I)(G)(1) The Chief Justice should issue a directive to matrimonial judges reminding them of the existing sanctions available under the Rules of Court. The Committee urges matrimonial judges to create an assertive administrative atmosphere in their court. They should make clear to attorneys and litigants that violations of procedural rules and orders will not be tolerated. Regrettably, but necessarily, judges must be willing to exercise their discretion freely to impose sanctions, rather than permitting attorneys or litigants to impede the course of matrimonial justice.

H. Contents of Final Judgment of Divorce

The Committee considered what facts should be included in a judgment of divorce and decided that the present requirements are generally adequate, particularly in view of the Supreme Court's endorsement of the recommendation that all judgments entered contain a dispositive reference to each claim for relief in the complaint (Appendix A, page 98).

Also discussed was whether written agreements should be attached to the divorce judgment if they are incorporated in the decree. While the Committee agrees that, in general, agreements should be physically attached to a judgment of divorce, it recognizes that parties may not wish to have their agreement a matter of public record for special reasons. The court should have discretion to respect these wishes.

Recommendation

(I)(H)(1) Except in special circumstances for good cause shown, written agreements should be attached to the judgment of divorce if they are to be incorporated in the decree.

I. Pendente Lite Guidelines

At the request of the Committee, the matrimonial judges prepared a narrative describing the general approach taken by each of them in reviewing pendente lite applications.

The Committee realizes that it is unreasonable to expect absolute uniformity; each case is factually unique and the personalities and acumen of the trial judges vary. However, comprehensive guidelines and a consequent awareness by the Bar of a Judge's "rules of thumb" will aid in the predictability of such motions, help settle disputes and avoid unnecessary motions. Predictability promotes settlement; unpredictability causes disrespect for the system and is a major cause of calendar congestion.

Recommendation

(I)(I)(1) The Supreme Court should approve the guidelines as presented in Appendix F for optional use by matrimonial judges. The Committee feels that these guidelines will assist in achieving predictability and uniformity. The guidelines are consistent with information required in the preliminary disclosure statement previously discussed. When properly used, these guidelines will benefit the Bench, the Bar and, most importantly, the litigants. It will improve the appearance of matrimonial justice as well as its administration.

J. Sample Pendente Lite Order

The Committee offers a sample order contained in Appendix G for use by matrimonial judges as they deem appropriate. It is hoped that this form will save the time of

both the attorneys and the court, by providing one document with sufficient flexibility to cover most pendente lite requests.

Recommendation

(I)(J)(1) The Supreme Court should urge matrimonial judges to consider the use of a form of pendente lite order as set forth in Appendix G to eliminate needlessly repetitive work by attorneys and judges.

K. Exclusion of Spouse from Marital Residence

An application to remove or exclude a spouse from a marital home presents complex and intractable problems. Every moving spouse seeking an exclusion order wants immediate and effective injunctive relief. Naturally, not all of them are so entitled. Attorneys experience great difficulties in trying to explain to their clients that due process of law requires notice and even a hearing. Understandably, a battered spouse may not appreciate the law's concern for the right to be heard. He or she may view the request for immediate relief as a matter of right as well as survival.

In contrast, the excluded spouse may see himself or herself as victimized, deprived of a hearing by a less than objective or truthful spouse who adroitly uses the unsuspecting court as a tool. Of course, the defending spouse may indeed be

a battering spouse who raises due process claims for a hearing as another weapon to exact undeserved or unattainable concessions from the battered spouse. No one can deny that these cases involve suffering and sometimes even survival; they provide fertile ground for cultivating disrespect and distrust of the courts.

The Committee asked each matrimonial judge in the State for a statement of his or her approach to the question of exclusion of a spouse from the matrimonial home during divorce proceedings. The replies displayed a variety of opinion as to both procedural requirements and substantive criteria. Some guidance in this important area is warranted.

In ruling on a request to exclude a spouse from the marital domicile, a judge must rely on the representations of litigants, the integrity of counsel and their willingness to educate clients as to realistic options. The court can assume that the filing of this application suggests that emotional conflict between the parties has reached a crescendo. The trial judge must fashion an appropriate and creative remedy with two principles in mind: 1) a battered spouse must receive the immediate attention and protection of the court and 2) a spouse who would use the system as an extortionary tool or an instrument of punishment must be discouraged.

Recommendations

(I)(K)(1) A spouse should not be excluded from the marital residence without an opportunity for a hearing unless exceptional circumstances are present. Excluding a person from his or her home is a matter which demands an opportunity for a prior hearing unless the movant or other occupants are in imminent physical danger, or there are other exceptional circumstances.

(I)(K)(2) Judges should consider the following criteria when deciding such motions:

- a. the existence of imminent danger to person or property;
- b. the spouses' financial circumstances;
- c. the best interest of the children;
- d. corroboration;
- e. degree of fear suffered by movant or occupants;
- f. the availability of alternative housing for each spouse, and
- g. the time between the acts alleged and the application to the court.

This list should not be viewed as exclusive. The decision to exclude one spouse from the marital residence is at bottom an exercise of the equitable discretion of the matrimonial judge. Accordingly, the judge has the authority and discretion to consider all relevant matters.

(I)(K)(3) An attorney should give the closest scrutiny to the ethical obligations owed to a client who is seriously mistreating his or her spouse. As officers of the court and as intelligent, mature persons, attorneys should be sensitive to the harm to the entire family which results from one spouse's physical or mental abuse of the other or one spouse's unwarranted attempt to exclude the other from the family home. An attorney should use persuasive skills to prevent spousal abuse without unduly prejudicing the client.

L. Matrimonial Debts Pendente Lite

The Committee discussed at length the problems encountered by litigants when one spouse promises to pay marital debts or other items of expense, such as insurance premiums, incurred or arising prior to the final divorce hearing. A related problem concerns the nature and extent of restraints against creditors before final judgment.

Recommendations

(I)(L)(1) When deciding whether to order a spouse to pay any such item, the court should consider the following:

- a. The nature and purpose of goods or services for which the debt was incurred;
- b. The parties' standards of living prior to the application;
- c. The financial abilities of the parties;
- d. Whether there is a familial relationship between a party and the creditor;
- e. When the debt was incurred;
- f. The relative participation in or benefit to the parties in incurring the debt;
- g. Any other relevant economic factors.

(I)(L)(2) Judges should consider restraining creditors from obtaining execution on a judgment for a debt incurred prior to the final divorce hearing, where appropriate.

M. Sale of Marital Assets Pendente Lite

The Committee discussed this issue and the leading appellate case in point, Grange v. Grange, 160 N.J. Super. 153 (App. Div. 1978). The principal issue there was "whether in a matrimonial matter the court may make a pendente lite order relating to the equitable distribution of the marital assets and, more specifically order the sale of the marital dwelling absent the consent of the parties." Id. at 157.

In a per curiam opinion, the Appellate Division concluded "that the trial judge did not have the power to order defendant or the court's designated attorney-in-fact to execute the conveyance papers prior to the dissolution of the marriage by a Judgment of Divorce." Id. at 158-159.

The Committee concludes that the Grange rule is unduly restrictive, contrary to the broad discretionary powers of a court of equity and generally unfair.

Recommendation

(I)(M)(1) In exceptional cases, a trial court should be permitted to order the sale of any marital asset and impose protective orders to preserve the cash proceeds. The trial court should also have the

discretionary power to permit a party to utilize a portion of the proceeds when

- a. there are no other assets subject to equitable distribution;
- b. a spouse has removed other assets subject to equitable distribution;
- c. bona fide efforts to locate a spouse are unsuccessful;
- d. basic living expenses cannot be paid in any other way; or
- e. for other good and emergent cause.

II

CHILD CUSTODY

The determination of child custody issues is a matter of great public concern. It is an area complicated by dramatic changes in family structure and child-raising patterns during the last decade. The Committee approached the area of child custody in two ways. First, the Committee examined many aspects of the existing system, with particular emphasis on how custody decisions are made. Second, the

Committee gave careful scrutiny to the underlying philosophy of the child custody process, with a view towards taking account of the changing roles of family members and of the family in society. Consequently, a portion of this section describes the general direction the Committee recommends the Court should be taking.

A. Improvements in the Present System

1. Tempering the Adversarial Approach

In the course of its review, the Committee learned that several judges throughout the State have recognized the great potential of the trained psychiatrist, psychologist and social worker in aiding the court in resolving delicate issues of child custody. No area of matrimonial litigation better lends itself to fashioning ways to create a cooperative and conciliatory environment for the benefit of parents and children. Court administrators and personnel throughout the country have questioned whether the courtroom is the best forum for the resolution of child custody issues, and whether the traditional adversarial system is the most appropriate means for presenting the issues.

The use of professionals trained to assist family members to resolve their problems is, in the Committee's opinion, an idea whose time has come. The Committee is equally satisfied that the expanded use of the professional in child custody cases is justified only when coupled with close judicial supervision. Ultimately, the decision must be the court's.

The Committee learned that several judges employ experts in human relations to meet with the parties at an early stage of a case. The mandate given to these experts extends beyond the traditional investigative and reporting function. These judges actively encourage the expert to seek an accommodation among parents and children concerning their future relations after divorce. Likewise, when questions of enforcement arise, the court relies on the expert in the first instance to resolve amicably whatever differences exist.

The Committee notes that the terms "mediation" and "conciliation" have been used to describe varying degrees of involvement of experts in child custody decisions. The Committee endorses this approach while emphasizing that the trial judge must retain final decision-making authority.

The Committee reviewed the details of a planned pilot project in Morris County which will employ conciliation or mediation prior to the formal judicial involvement in a contested custody case. The Committee urges that there be a continuing review of this and any other judicial experiment in New Jersey to determine how trained specialists can best assist in custody cases.

Recommendation

(II)(A)(1) Matrimonial judges should utilize psychiatrists, psychologists and social workers in a more expanded role in custody cases. Experts should go beyond assessing the relative fitness of each parent by attempting the reconciliation of differences. They should attempt to fashion, with the participation of the parents and children, an arrangement for continuing contact with each parent. The Court should regularly evaluate the work of appointed experts to assure that only persons with a high standard of professionalism are selected.

2. Expedition of the Resolution of Child Custody Cases

The Committee recognizes the fundamental interests of parents and children in knowing, as quickly as practicable, with which parent the children will be living. Due to the high volume of matrimonial cases and the attendant delay from the filing of the complaint to judgment, the Committee recommends that the decision as to

child custody should be the first one made in any divorce proceeding. The experience of judges and attorneys has been that if child custody issues are resolved at an early stage of the proceedings, there is a greater likelihood that the parties will settle other issues.

Recommendations

(II)(A)(2) The Supreme Court should amend R. 4:79-8, as set forth in Appendix H, to provide that all issues pertaining to child custody be determined within three months after issue is joined.

To make such a determination within three months, judges should be required to resolve this issue separately. The Committee is hesitant to use a phrase such as "bifurcation of child custody issues" because it connotes delay such as that which resulted from the previous practice of granting a judgment as to the cause of action and putting aside all ancillary issues. This formerly widespread practice has come to an end; it is permitted only with the approval of the Assignment Judge, pursuant to a memorandum by the Phase One Committee published in the New Jersey Law Journal on March 22, 1979. However, the separation of the child custody issue from the other aspects of the case,

to expedite resolution, serves the best interests of families who are in the process of divorce.

3. Probation Custody Investigation

In view of the importance of expediting custody issues, the Committee proposes a time requirement within which the probation department must submit a custody investigation report. The Committee recognizes that recommendations involving additional expenditures by probation departments may be impractical in this time of local fiscal constraints. Rather than endorse the need for additional resources in departments which many feel are oversized, the Committee urges that the Chief Justice, through the exercise of his authority as administrative head of all courts in the State of New Jersey, order that all functions of probation involving family matters be performed as a first priority. This emphasis is consistent with that expressed in all other areas of matrimonial litigation, including the allocation of judicial manpower and support services.

The Committee also reviewed the scope and sources of custody investigations throughout the state as an attempt to formulate uniform standards. The Committee notes that varying approaches are utilized by probation offices at the present time. In some counties, the investigation encompasses detailed interviews of numerous individuals; in other counties,

the report does nothing more than describe the physical environment of each parent's home. Some judges expressed concern to the Committee that information contained in the custody investigation is often less than reliable. Frequently, interviews with numerous friends and relatives of the spouses form the principal bases for a report. The content of these interviews only highlights the conflict as to where the children should live. Even at a judicial hearing, testimony is often tainted by loyalty and sheds no real light on the issues at hand. These problems serve to needlessly increase the time required for a custody hearing and decision.

The Committee's recommendations seek to minimize unreliable hearsay information and unnecessary delay. To assure that information concerning each spouse is presented consistently, the Committee recommends a procedure to be followed when the spouses reside in different counties.

Recommendations

(II)(A)(4) The Supreme Court should amend R. 4: 79-8(a), as set forth in Appendix H:

- a. to require the probation department to complete a custody investigation report within 45 days of the date of the order for such report;

- b. to grant the trial judge discretion to determine when a custody investigation should be conducted. This selective ordering of investigations should ease the workload of probation and help ensure compliance with the 45-day requirement. Before ordering an investigation, the court must be satisfied that a custody claim is bona fide and not a strategic ploy to gain a negotiating advantage as to other issues.

(II)(A)(5) In cases where each of the parties resides in a different county, the entire investigation should be conducted by the probation department in the county of venue. This recommendation will assure consistency in the presentation of the facts.

(II)(A)(6) A custody investigation report should contain the following information:

- a. residential address of each party and living conditions, including number of rooms and occupants;
- b. place of employment of parties, distance from residence, time parent leaves for and returns from work, and specific days parent works;

- c. ability of each party to provide parental supervision;
- d. interviews with a person or persons entrusted with the care of child while parent works;
- e. interviews with school authorities and a summary of school records;
- f. interview with and reports prepared by any other agencies involved with the family;
- g. interviews with parties including his or her age, upbringing, education, social lives, incidents of disturbance or instability, and intent regarding the child's schooling and religious upbringing;
- h. an interview with the child including his or her age, sex, health and special needs, and describing the nature and strength of the child's thoughts, feelings and affections;
- i. investigation of time each parent spent with children previously;
- j. observations of each parent's interaction with the child or children, where feasible.

These guidelines, with their explicit emphasis on direct observation, will assure complete and uniform information in all custody matters.

4. Judicial Interviews with Children

The Committee discussed whether to recommend standards for judicial interviews with children. Discussions with matrimonial judges revealed that each judge has fashioned an individual approach towards this most delicate issue. While the Committee realizes that there may be a need for further uniformity in this area, it is convinced that detailed standards are presently best left to the matrimonial judges as a group. The sole recommendation of the Committee on this subject is that there should be a stenographic or electronic record of any interviews.

Recommendations

(II)(A)(7) A formal record should be made of all interviews between judges and children.

(II)(A)(8) The matrimonial judges should develop formal standards for these interviews. Some of the issues involve whether attorneys should be present, what the child should be told with regard to confidentiality and whether the interview should be presented on the record verbatim or in a summarized fashion. This recommendation is tempered by an acknowledgement that each judge must develop his own personal approach to interviewing children.

B. Toward a Changing Philosophy in Child Custody

The Committee held extensive discussion on whether the current approach to child custody, with its emphasis on the competing "possessory" interest of each parent, has outlived its usefulness. The very word custody is interpreted by litigants to mean ownership of the child by one parent. It is treated as an award of a prize or an absolution from marital fault. The arrogance felt by the "winner" of the child and the frustration felt by the "loser" fuel the fires of continuing conflict. A review of the historical basis of our custody laws provides insight into how the possessory notion of child custody has evolved.²

Traditionally, rights to custody were linked with property rights. The notion reaches as far back as Roman and Greek law, when the father's right to the "custody and control" of the child was absolute. One reason this "possessory" theory has persisted is that the primary goal of custody law has been to fix financial responsibility for the child. Who

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In presenting this brief history, the Committee relies upon the material presented by Professor David J. Miller in his article "Joint Custody," Family Law Quarterly, Fall 1979, p. 345.

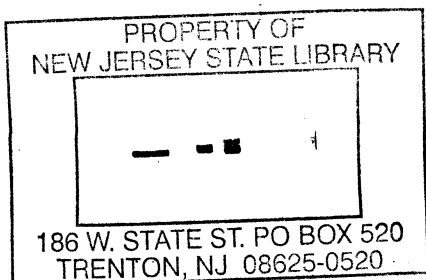
was responsible for keeping the child from becoming a public ward? Who was responsible if the child committed a tort? Since the father through history almost invariably controlled property, it was logical that custody should be awarded to the father.

Gradually, a concern arose for the quality of care provided for children. The courts began to recognize that women, in the traditional family setting, spent major amounts of their time raising children, whereas men did not. Women, it was concluded, probably had more expertise in this activity. The "Tender Years Doctrine" emerged, providing that women should have the responsibility for children until age seven or eight, at which time custody could then be transferred to the father. The emphasis is on responsibility for care with little attention to the need to preserve any emotional relationship.

Visitation, as originally perceived, also had nothing to do with the relationship between parent and child but only with protecting the child from potential neglect by the custodial parent. It gave the noncustodial parent the occasional opportunity to observe the physical, and presumably moral, condition of the child while in the care of the other parent.

During the twentieth century, society became increasingly interested in the quality of relationships, including the one between parent and child. When a couple divorced, the assignment of custody to the wife and the awarding of Saturday or Sunday visitation was appropriate since it approximated the pre-divorce family relationship. Custody battles in these years occurred when a mother was perceived as "unfit" for some reason and the struggle was thought necessary to protect the children.

In more recent years, however, the family structure has changed to such an extent that our custody law, which assigns the child primarily to one parent, often to the exclusion of the other, is no longer appropriate. In the last twenty years, the social sciences have emphasized that child-raising involves more than food, shelter and clothing. In order for the child to grow into a well-adjusted adult, capable of entering into and maintaining satisfying relationships with his or her own family, emotional and psychological factors must be fostered — a sense of security, trust and self worth. These attributes are the direct result of the relationship between the child and both parents. Contemporaneously, sex roles have been changing. Women have developed careers as well as family goals. economy has also changed — the two-income household is now quickly becoming the norm.



The result is a trend towards a typical household of two working adults, with child-raising functions allocated between them, resulting in meaningful relationships between each parent and the children. When the parents divorce, both wish to continue raising their children, thereby preserving the relationship. The children, in turn, have developed a special relationship with each parent, and may suffer if their contact with one parent is unduly restricted following a divorce.

The Committee urges that judges be sensitive to expanded roles of both the mother and the father in the family. The proper approach should allow each parent a continuing meaningful role in the life of the child after the divorce. The Committee discussed certain recommendations which would implement this new approach. One recommendation was that as a first step, the terms "custody" and "visitation" should be replaced by terms reflecting shared time and shared participation in decision making. The goal is to ensure that each parent has sufficient time with the child to develop and preserve a relationship. Some judges on the Committee, embracing this approach, have fashioned custody awards in terms of the shared time concept. When announcing the award in open court, these judges have explained to the

parties, that they should work together in spite of their obvious differences, to make joint decisions concerning the welfare of the child.

Judges report that litigants have been responsive to this approach. They particularly note that fathers who expect that the courts will allow them only token contact with their children have been pleasantly surprised at the sensitivity of the court. While this reaction is gratifying, the Committee believes the time should come soon when what now is surprising will be commonplace.

Recommendations

(II)(B)(1) The strict "possessory" notion of custody should be rejected. Any refinement of this shift in philosophy is best left to development by case law.

(II)(B)(2) The Committee recognizes that other institutions perceive the issue of custody as a possessory notion. It may be necessary, while these organizations adapt to the change in case law, for judges to award a conventional form of custody

for certain limited purposes. Accordingly, the following should be considered by trial judges when reevaluating their own approach to child custody matters:

- a. schools may require proof of custody before enrolling a child;
- b. welfare departments may also require proof of custody;
- c. the Uniform Child Custody Act uses the term "custody" throughout;
- d. joint participation in child raising does not necessarily mean that an equal amount of time must be spent with each parent, and
- e. the best interests of the child should be the major basis in determining time sharing after a divorce. Time spent with each parent during the marriage is only one factor to be considered.

III

LITIGANT REPRESENTATION

Pursuant to the Supreme Court's mandate, (see Comments of the Supreme Court, Appendix A, page 4), the Committee addressed the problem of assuring that matrimonial litigants have access to effective legal representation. A related concern is that parties who choose to represent themselves be treated in a manner which is not only fair to them but also to opposing litigants. Accordingly, this section proposes that the organized Bar continue to participate voluntarily in programs which will increase access to legal counsel in divorce proceedings. Also recommended are standards for counsel fee awards and the treatment of pro se litigants.

A. General Access to the Matrimonial Courts

The Committee considered at great length the issue of access to the matrimonial courts by indigent individuals and others of modest means. The Committee recognizes that legal services projects, while making valuable contributions, simply do not have the funds to provide counsel to all indigent matrimonial litigants. In the event of reduced federal funding for legal services projects to represent matrimonial litigants, the Committee urges that the legislature consider appropriating state money to enable the continuation of this important service to the needy.

Additionally, many persons cannot afford, yet are not sufficiently needy, to qualify for assistance by a legal services program. To ensure greater access to counsel in matrimonial cases, the Committee offers the following recommendations.

Recommendations

(III)(A)(1) The Supreme Court should urge legal services programs and the organized bar to create joint programs to make legal services available in family law cases to those who cannot afford them. These joint programs might assume one of several forms:

- a. Members of the private Bar could furnish pro bono representation, while local legal services programs screen potential clients and provide administrative services.
- b. In urban areas, the larger law firms could furnish pro bono representation and assume some administrative burdens in consultation with a legal services project.
- c. As is now the case in Camden County, legal services projects could fund reduced rate divorces handled by private attorneys with the understanding that these attorneys will also accept a number of no-fee cases.

- d. Attorneys could be encouraged to accept matrimonial cases on a reduced-fee basis.

The Committee recognizes that in many counties throughout the State, friction, in one form or another, exists between legal services projects and the private Bar. The alleged reasons for these problems are economic; however, the Committee firmly believes that upon scrutiny they become illusory and unjustified. Notwithstanding this past friction, a spirit of cooperation must be encouraged. The Committee believes that the initiative for this must come from the organized Bar, particularly at the State level.

(III)(A)(2) Trial courts should be encouraged to cooperate with these efforts to the greatest extent possible. Some examples of this cooperation are:

- a. clarifying the policy of fee waivers for indigent cases so that it will apply in cases handled by private attorneys as well as legal services projects;
- b. scheduling divorce hearings of reduced-fee cases in groups to make most effective use of an attorney's time.

C. Pro Se Representation

When a matrimonial litigant chooses to represent himself, he must attempt to learn the applicable rules of procedure, evidence and substantive law. Frequently, he will be inadequately prepared to present his own case. Judges and attorneys for the opposing party often experience unique problems.

Little uniformity exists in the treatment of pro se litigants. Many judges have developed their own methods of dealing with pro se litigants. This lack of uniformity has frustrated both opposing counsel and their clients. It is suggested that if uniformity is encouraged, greater respect will be generated for the system. A common criticism is that pro se litigants are held to a lower standard of proof and are permitted greater relaxation of the court rules. It is also claimed that judges are reluctant to regulate pro se participation in hearings. In turn, many pro se litigants complain they do not have a chance when appearing against an attorney. They believe the judge should be more sensitive to their unfamiliarity with court procedure.

Obviously a balancing is required. An individual litigant has the right to appear without an attorney in a matrimonial proceeding. To prevent this right from being an empty assurance, the courts have an obligation to simplify a

pro se litigant's involvement whenever possible. This simplification, however, should not burden those who have chosen to obtain legal representation.

The three types of proceedings in which pro se litigants become involved present different problems. One is found when a plaintiff appears pro se at a final hearing for an uncontested divorce. The others, more difficult problems, occur when pro se litigants participate in plenary hearings and contested motions.

Recommendations: Pro Se Litigants at Uncontested Final Divorce Hearings

(III)(C)(1) Matrimonial judges should cooperate as far as possible with pro se litigants handling their own uncontested divorces. The judge should pose the requisite questions in the simplest terms. Where the pro se litigant has not complied with all legal requirements, the trial judge should inform the litigant of the specific deficiencies and recommend consultation with a legal services project or an attorney's referral service, as appropriate. The judge should otherwise avoid a protracted dialogue with the pro se litigant.

(III)(C)(2) Trial judges should monitor cases involving a pro se litigant to make certain that a final judgment of divorce is filed following the plenary hearing. When a pro se litigant has failed to present a final judgment within a reasonable period of time, the court should contact him or her to assure completion of this last step. A detailed notice should be sent prior to the plenary hearing. Appendix I contains an appropriate form.

Recommendations: Plenary Contested Final Divorce Hearings Where There is Appearance by Opposing Counsel

(III)(C)(3) The judge should undertake to assure the utmost fairness to all parties in the conduct of the trial. To that end, at the outset of the trial, the judge should question the pro se litigant in detail to determine whether he or she understands the nature and purpose of the proceedings.

(III)(C)(4) To verify that comprehension, the trial judge should also ask the pro se litigant to explain his or her understanding of the proceeding. The judge should briefly describe the procedures to be followed--for example, that the plaintiff will proceed first and call witnesses,

that cross-examination will be permitted by the defendant, and that objections may be made to the admission of evidence.

(III)(C)(5) The trial judge should then determine whether the pro se litigant desires to proceed immediately or whether he or she would prefer to retain counsel. If the litigant wishes to retain counsel, only one adjournment should be permitted for that purpose.

(III)(C)(6) If the pro se litigant desires to proceed, the trial judge should permit him or her to call witnesses and to question them freely. If evidentiary objections are raised, the judge should explain the basis for the ruling as clearly as possible.

(III)(C)(7) When a pro se litigant objects to evidence, the trial judge should allow him or her ample opportunity to explain an objection whenever it would not interfere with the orderly progress of the hearing.

(III)(C)(8) Under no circumstances should the trial judge confer with counsel and the pro se litigant off the record. A record should be made of everything occurring in connection with a pro se matter.

Recommendations: Involvement of Pro Se Litigants
in Contested Motions

(III)(C)(9) Matrimonial judges should generally follow recommendations (III)(C)(3) through (III)(C)(8) when hearing motions involving a pro se litigant.

(III)(C)(10) If no responsive pleading has been filed by a pro se litigant who appears on the motion date, the judge should inquire whether he or she desires to present a response. If a pro se litigant desires to respond orally, the motion judge may permit argument. If, however, after such opportunity the judge determines that there is a need for further argument, the matter may be adjourned once to a future motion

day. If the interest of justice requires, the court should not hesitate to impose terms for any adjournments of an argument.

(III)(C)(11) The motion judge should balance tolerance for a pro se litigant's procedural unfamiliarity with the need to preserve orderly court procedure.

(III)(C)(12) An instruction sheet addressed to pro se litigants similar to that contained in Appendix J should be available in all court rooms where matrimonial motions are heard.

IV

ENFORCEMENT OF MATRIMONIAL ORDERS AND JUDGMENTS

Enforcement of matrimonial judgments, or perhaps more accurately the lack of enforcement, continues to be a major subject of criticism. Yet there is no doubt that matrimonial justice is illusive without effective enforcement. This section describes the various tools currently available to judges and recommends changes in their use to improve compliance.

Judges assigned to matrimonial cases acknowledge that enforcement is the most difficult part of their work. Litigants come to court expecting that the entry of the judgment will solve their problems. But for many it is only the beginning of what will probably be repeated, even futile, attempts to seek enforcement. Double-digit inflation has compounded the dilemmas of persons responsible for making payment and those entitled to support. Where the financially dependent spouse has been awarded custody of the children, the withholding of visitation is often used as a tool to compel payment. Bitterness and resentment may thus continue long after the judgment of divorce has been entered.

The single most important ingredient of effective enforcement is the assurance by the court at the time when the judgment is rendered that it will not hesitate to enforce its decision vigorously. The Committee does not claim that this assurance, or any of its recommendations, will completely resolve the complex problems of enforcement. But it cannot be denied that the most effective instrument of enforcement is the prompt response of a willing judge.

A. Tools of Enforcement

1. Incarceration

The Committee has discussed at length each of the techniques for obtaining compliance employed by matrimonial judges. There is no question that the imminent threat of incarceration is the single greatest incentive for compliance. While it is not always a fit tool for enforcement, judges report that when faced with the prospect of incarceration, the most intractable delinquents manage to produce money which they claimed could not be obtained.

The decision to deny a person his liberty should be made only when the court is convinced that the failure to pay is based on willful refusal rather than inability. To that end, the Committee believes that the probation departments can and should assume a wider investigative role to assist the trial court in determining the cause of a delinquency.

Recommendations

(IV)(A)(1) Matrimonial judges should consider incarceration as a possible sanction in every case

where there is a refusal by a financially able spouse to pay alimony or child support or to abide by other provisions of the judgment.

(IV)(A)(2) The probation departments should assume an expanded investigative role to provide the court with meaningful information as to whether incarceration is appropriate. The departments should verify facts alleged by both the payee and the payor. Their tasks should include close scrutiny of a payor's current expenses, verification of the payor's employment and a good faith investigation of all facts alleged by the payee. All significant allegations should be verified. Once again, in order to carry out this recommendation, it is essential that the Chief Justice urge a shift in probation resources to family matters. The Committee is confident that if more accurate information is provided for enforcement proceedings, judges will be better able to make informed decisions concerning incarceration.

2. Use of Garnishments

N.J.S.A. 2A:17-56.1 authorizes the court to issue an execution against the wages, debts, earnings, salary,

income from trust funds or profits of the payor in the event of a failure to make support and maintenance payments. This remedy is effective and relatively low in public administrative costs. It should be used more often.

Recommendation

(IV)(A)(3) Garnishments should be liberally employed to enforce matrimonial judgments. To help achieve more frequent use, probation departments should become more aggressive in attempting to verify employment or non-employment.

3. Late Payments

As an additional incentive to prompt payment, the Committee recommends that payors should be subject to an automatic interest charge on late payments. The Committee also recommends that probation departments should notify the court of delinquencies much sooner than under present practice. The Committee recognizes that in the past, allocation of court time for enforcement and limited probation department resources have resulted in months of delay between the time the probation department verifies the overdue amount and the date of

an enforcement hearing. The subsistence needs of children and spouses cannot be ignored and this delay cannot be tolerated.

Recommendation

(IV)(A)(4) Prompt attention to delinquencies by probation departments and the court is essential to effective enforcement. The Supreme Court should amend R. 4:79-9, as set forth in Appendix K, to provide that:

- a. all judgments or orders payable through a probation department shall provide for a late interest charge identical to that imposed on civil judgments pursuant to R. 4:42-11(a);
- b. where alimony or child support is not payable through probation, the court shall assess a similar interest charge as noted above upon reasonable application;
- c. the probation department should initiate enforcement proceedings upon failure of a payor to pay a total of three weeks' support, calculated either consecutively or cumulatively when, the violations occur within a one-year period. The cumulative requirement is proposed because the detriment to

dependent spouses and children may be as serious when partial delinquencies occur over a longer period of time.

4. Use of Self-Executing Orders

The Committee has learned that many judges, in an attempt to minimize repeated court appearances for enforcement of a judgment, have inserted clauses in judgments and orders providing for the automatic issuance of a warrant in the event of nonpayment. The Committee is satisfied that this measure should be utilized more frequently by matrimonial judges.

Recommendation

(IV)(A)(5) Matrimonial judges should consider more frequent use of clauses in judgments and orders providing for the automatic issuance of warrants in the event of nonpayment.

5. Scheduling of Enforcement Hearings

The Committee found that in those courts where there are repeated statements by the court of its commitment to enforce its own orders, there are fewer violators.

An effective way to communicate this commitment is to schedule enforcement hearings as an integral part of the matrimonial calendars. Litigants who observe a judge's frequent efforts at enforcement are more likely to respect the provisions thereof.

Recommendation

(IV)(A)(6) Judges should schedule enforcement hearings at more frequent intervals. For example, if a judge conducts enforcement hearings four times a month, it would be preferable to schedule them at one-week intervals rather than at four days at the end of the month.

6. Counsel Fees

The Committee recognizes that in those cases where probation departments do not initiate enforcement proceedings, litigants must incur substantial counsel fees. In these circumstances, assessment of counsel fees may be appropriate upon a finding of non-compliance.

Recommendation

(IV)(A)(7) Matrimonial judges should assess counsel fees against the noncomplying spouse to minimize financial inconvenience to a litigant seeking enforcement.

7. Withholding of Support Payments to Enforce Visitation

The Committee recognizes that frustrated spouses who are denied the adjudicated rights of visitation may withhold support payment to exact compliance. The Committee views any linkage of visitation rights with support obligations as emotionally destructive to the children involved. Yet the Committee acknowledges that in extreme cases, it may be necessary to condition receipt of support upon the granting of visitation.

Recommendation

(IV)(A)(8) Support should be predicated upon visitation rights where there is a demonstrated, strong resistance to compliance. Compare Hallberg v. Hallberg, 113 N.J. Super. 205, 209 (App. Div. 1971), with Smith v. Smith, 85 N.J. Super. 462 (J.D.R.Ct. 1964).

8. Compensatory Time

As previously indicated, the Committee is strongly committed to the use of enforcement techniques which make clear that violations of court orders will not be tolerated. The need for enforcement applies not only to matters involving support, but also to visitation. The importance of "shared time" requires that strong measures be taken when one parent denies visitation. Awarding compensatory time is one example of affirmative action that must be taken as part of the commitment to the children's welfare.

Recommendation

(IV)(A)(9) Matrimonial judges should liberally grant compensatory time in cases where one parent repeatedly denies visitation to the other. Such time may, in the court's discretion, be substantially in excess of the amount of time denied.

B. Continuing Enforcement Pending Appeal

The Committee addressed the widespread concern that a groundless appeal of a support order may effectively deprive dependents of their entitlement. Even when payments are reduced upon appeals, the dependents may lose the entire sum while the appeal is pending. Spouses who have the financial resources for the appeal often neglect support obligations

for months, even a year, with the tacit approval of the trial and appellate courts. Some judges believe they are authorized to enforce support orders during the pendency of an appeal, while others will forbear from hearing any requests for enforcement until an appeal is decided. There is sufficient confusion surrounding the interpretation of R. 2:9-1 and R. 2:9-5 to warrant a clarification that will explicitly permit enforcement by a trial court during the pendency of an appeal.

Recommendation

(IV)(B)(1) The Supreme Court should amend R. 2:9-1 as set forth in Appendix L, to provide that enforcement proceedings pursuant to R. 4:79-9 shall be heard in the trial court absent an explicit stay from the Appellate Division.

C. Removal of the Child from the Custodial Environment

Currently, when a noncustodial parent takes a child from the possession of the custodial parent, the offense charged is a misdemeanor. The Committee believes that the offense charged should be made a high misdemeanor to permit extradition of the offender and to deter such unconscionable action.

Recommendation

(IV)(C)(1) The Committee recommends legislation providing that when a parent takes a child from the custody of the other parent, the offense charged should be made an indictable offense. This is a further reflection of the importance of enforcing court orders respecting visitation and custody.

D. Expanded Use of Intake

Previous sections of this report on child custody have emphasized a more humane, less adversarial approach to resolving custody disputes. The Committee has recommended an expanded role for the expert in child custody matters. The concept of conciliation has great potential in the area of enforcement as well. The Juvenile and Domestic Relations Court has successfully employed intake procedures by professional staff at the complaint and/or enforcement stage. Such intake would involve staff members meeting informally with the parties before bringing the matter to the court for an enforcement hearing. The results have been that even at this early stage, many parties will respond to the informal intake process by complying with the provisions of the judgment, thus avoiding a formal court hearing.

Recommendations

(IV)(D)(1) The intake enforcement procedure commonly employed by the Juvenile and Domestic Relations Court should be adopted throughout matrimonial courts. Court staff, or independent experts, should bring former spouses together to negotiate a settlement of alleged violations. While additional resources will be necessary to expand existing programs, the Committee believes that the savings in judicial resources and the benefits of more effective enforcement justify the expense of intake programs.

E. Continuing Evaluation of Enforcement Procedures

Finally, the Committee urges that matrimonial judges continually meet and discuss their respective approaches to enforcement. Sharing of information will result in each judge improving his enforcement efforts.

ISSUES FOR FURTHER CONSIDERATION

After lengthy discussion, the Committee concluded that a limited number of topics were either more appropriately left to case law or required more time for a detailed study. The Committee recommends that a permanent Committee on Family Law be created to conduct further study of the following issues and to evaluate and monitor the proposals in this report.

A. Procedural Issues Regarding the Marital Tort

Tevis v. Tevis, 79 N.J. 422 (1979), involved a personal injury battery action filed in the Law Division between plaintiff-wife and defendant-husband. The Supreme Court noted that all actions for damages as a result of a marital tort should be tried as part of the divorce action to comply with the single controversy doctrine. The Committee discussed whether a right to a jury trial exists, however, for that portion of the divorce action pertaining to the marital tort. After an extensive review of cases, the Committee focused on the New Jersey rule that the inherent jurisdictional power of an equity court permits it to dispose of legal issues which are incidental and ancillary to the main dispute without the necessity to provide a jury trial. See Mantell v. International Plastic Harmonica Corp.,

141 N.J.Eq. 379 (E & A 1947); Steiner v. Stein, 2 N.J. 367 (1949); Fleischer v. James Drug Stores, 1 N.J. 138 (1948); Beekwilder v. Beekwilder, 29 N.J.Super. 351, 358 (App.Div. 1953). Since the marital tort damage claim is so closely related to the subject matter of equitable distribution, it passes the test of "incidental and ancillary." Thus, it appears not to require a jury trial.

Recommendations

(V)(A)(1) As a matter of judicial administration, no jury trial for a marital tort should be provided in an action for divorce.

(V)(A)(2) The question of whether to decide the marital tort issue before, during, or after the final hearing for divorce should be subject to further study and development in the case law.

B. Guidelines Consistent with Lepis v. Lepis

The Committee discussed various aspects of the Lepis case and the need for guidelines in several areas. These areas include, but are not limited to (1) who should be permitted to examine the tax return of a spouse in conjunction with an application

for modification and (2) provisions in judgments of divorce for automatic increases and decreases in support and alimony awards. The Committee notes generally the recent case of Petersen v. Petersen, __ N.J. __ (April 21, 1981), and agrees that refining issues raised in Lepis is best left to case law.

C. Treatment of Pensions for Equitable Distribution

The Committee concluded that the question of whether to treat pensions as income in determining alimony or equitable distribution should be left to case law development.

D. Financial Needs of the Second Family

The question of under what circumstances the trial judge should consider the needs of the supporter's second family and the existing case law were discussed by the Committee. It was agreed that matrimonial judges need guidance in this area through case law.

E. Modification of Support Order When the Spouse is Living With Another Person

The issue of modification of a support order upon a sufficient finding that a supported spouse is living with a person in the nature of a marital relationship

is an issue to be decided on a case-by-case basis. See Garlinger v. Garlinger, 137 N.J.Super. 56 (App.Div. 1979).

F. The Need for Continuing Reevaluation

Recommendation

(V)(F)(1) A permanent standing committee of the Supreme Court, composed of attorneys and judges, should be appointed to oversee implementation of this Committee's recommendations and to make further recommendations concerning all aspects of matrimonial litigation on a regular basis. Among the issues deserving further study by this proposed permanent Committee are the following topics:

a. Trial Attorney Certification

In view of the current work of the Trial Attorney Certification Board, established by the Supreme Court and staffed by the Supreme Court Clerk, the Committee agreed not to make any specific recommendations concerning certification of matrimonial trial attorneys. The Committee urges that at the appropriate time, the proposed standing committee

should work closely with the Supreme Court Clerk and with the Trial Attorney Certification Board to develop standards for matrimonial certification.

b. The Role of Courthouse Staff in Assisting Pro Se Litigants

The Committee reviewed a manual prepared by court administrative staff designed to assist pro se litigants. The whole question of involvement of courthouse administrative staff with pro se litigants should be considered in detail, with a view toward designing appropriate guidelines.

VI

RESTATEMENT OF SUPPORT: REHABILITATIVE ALIMONY,
JUDICIAL RESOURCES AND FAMILY COURT

This final section contains material on three subjects which merit special attention by the Supreme Court. The Interim Report endorsed the concept of rehabilitative alimony (see page 38); the Committee reiterates its support for this approach. The Committee also reemphasizes the need for continuing attention to the quality and quantity of judicial assignments to matrimonial cases. Finally, the Committee urges creation of a statewide Family Court.

A. Rehabilitative Alimony

The dramatic increase in the number of new matrimonial cases, the demands on court time which arise out of contested economic issues and the expected administrative burdens of post-judgment Lepis applications all support and justify the discretionary use of rehabilitative alimony. "The primary goals of rehabilitative alimony * * * are to reduce post-divorce recourse to the courts, to provide the supporting spouse with some degree of certainty as to the nature and extent of the support obligation owed to the former spouse, and to encourage a supported spouse to develop employment skills within a precise period of time so as to

become self-supporting." 3 Western New England Law Review, 127, 132-33 (1980).

The Committee believes the language of N.J.S.A. 2A:34-23 is broad enough to permit an award of alimony over a fixed period. This was recognized by the trial court in Turner v. Turner, 158 N.J.Super. 313 (Ch.Div. 1978), which awarded a wife \$55.00 per week alimony and limited the duration of that award to 18 months. Turner, defined rehabilitative alimony 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." 3 Western New England Law Review, supra at 132. Unusual circumstances should not be required when awarding rehabilitative alimony. Lepis v. Lepis, 83 N.J. 139, 155 n.9 (1980).

A judge who uses rehabilitative alimony must understand that its application is discretionary and not automatic. Like an award of permanent alimony, it should be subject to modification if the "substantial change" criteria of Lepis are satisfied. Of course, as held by Lepis, the burden of proving the need for a modification rests with the party seeking a change. 83 N.J. at 157. The pertinent standard of living should be that which existed when the original divorce complaint was filed. Id. at 150, 152-53.

The creation of illustrative guidelines by our highest court is as necessary in the area of rehabilitative alimony as it once was in the more difficult area of equitable distribution. Cf. Painter v. Painter, 65 N.J. 196, 211-12 (1974).

Recommendations

(V)(A)(1) The following criteria, many of which are used in other states, should be considered by trial judges in all cases where rehabilitative alimony is appropriate:

- a. the amount of the equitable distribution award to the spouse seeking support;
- b. the length of the marriage;
- c. the amount of the permanent alimony award, if any, to the spouse seeking support;
- d. the mental and physical health of both spouses;
- e. the ability of the supporting spouse to pay alimony;
- f. the age of both spouses;
- g. the job experience and training of the spouse who is seeking alimony;

- h. the time required for the spouse seeking support to acquire sufficient education or training to enable him or her to find suitable employment;
- i. the reasonable and fair cost of schooling or training that the spouse seeking support requires to obtain suitable employment;
- j. the cost to the spouse seeking support of household help to care for children of tender age; and
- k. other factors as the trial court deems appropriate.

The Committee stresses that trial courts should not award rehabilitative alimony without making specific factual findings in the areas described above. For purposes of appeal or post-judgment modification, a trial judge must make sufficient factual findings to support any order of alimony.

Alimony should not be a matter of right, nor should support be a penalty or a reward. Fairness to both litigants and the promotion of economic independence must be given greater consideration by our trial courts. The discretionary tool of rehabilitative

matrimonial assignment the most difficult and demanding in trial courts.

Recommendation

(V)(B)(1) The Chief Justice should continue to scrutinize every matrimonial assignment and monitor the increasing matrimonial case load in order to assign additional judges where necessary.

C. Family Court

The establishment of a single Family Court or a Family Division of Superior Court, with jurisdiction over any dispute involving members of the same family, is generally agreed to be a sound, desirable approach to family law. Many articles and commission reports have recommended its creation and various bar associations have adopted resolutions of support. In 1977, the National Council of Juvenile and Family Court Judges endorsed a resolution calling upon each state to establish a single, separate court with jurisdiction

over all family-related problems. Such a court with proper staffing and consulting services would eliminate substantial duplication of resources. The fact that so many family controversies are splintered among courts does not speak well for the ability or sensitivity of the judicial process.

The creation of a statewide Family Court would be not only effective reform, but a very positive major statement of judicial priorities. The Committee further recognizes that the mere alteration of court structure to consolidate the processing of any type of case is of limited utility without attention to adequate resources. When coupled with the judicious use of the cross-assignment power of the Chief Justice, consolidation of functions in a Family Court, with necessary support services, can improve the quality of family justice. The Interim Report stressed the importance of the application of appropriate criteria by the Chief Justice in evaluating judges for assignment. Among the traits cited by the Committee as essential for a matrimonial judge was "a sensitivity to emotional and sociological ramifications rendered in this court" (Interim Report, page 12). The importance of this trait for judges hearing juvenile as well as domestic relations matters, including child abuse and spousal abuse, is no less important. The Committee submits that one of the most significant societal roles played by the

judiciary is dispute resolution in those case categories which would logically be within the jurisdiction of a Family Court.

The Interim Report also stressed the importance of expertise in all of the complex aspects of a matrimonial case (Interim Report, page 13). Because of the extensive knowledge required by a matrimonial assignment, the Committee also urged that assignments to hear matrimonial causes be for at least two years.

In addition to the many benefits acknowledged by experts in family law over the past decade, the statewide implementation of the Family Court concept in New Jersey would enable judges assigned to this court to gradually develop expertise in juvenile, domestic and matrimonial matters. The rotation of assignment among judges assigned to hear matrimonial matters could be done more frequently since all would have developed expertise in each of the Family Court disciplines.

The ideal family court is appropriately staffed with consulting services to assist in counseling in conjunction with various aspects of the case load. Mindful of the fiscal constraints on all levels of government, the Committee is satisfied that the availability of resources

for counseling is not an absolute prerequisite for a Family Court. It is the one aspect of the Family Court concept that can await sufficient funding. Creation of Family Court and subsequent merger of functions will result in the existing counseling and intake services being made available to more litigants. We recognize the strain this will place on existing resources and emphasize that attention must be paid eventually to providing additional funding.

Recommendations

(V)(C)(1) The Supreme Court should continue its strong support for Family Court legislation, providing further funding for such a court at the State level.

(V)(C)(2) The Chief Justice and Supreme Court should consider exercising the rule-making authority to establish a Family Court, or a Family Division of the Superior Court, in each county throughout the State.

The jurisdiction of this court would include those matters currently under the jurisdiction of the Juvenile and Domestic Relations Court as well as the Matrimonial part of the Chancery Court. Additionally, adoptions and those cases commonly referred to as

"palimony" cases, alleging a relationship in the nature of marriage, and requesting resolution of issues similar to those raised in a divorce proceeding, should also be in this part. The court would have both civil and criminal jurisdiction.

CONCLUSION

It is doubtful that any of the Committee's proposed reforms will make matrimonial litigation popular. Rather, the Committee's overriding purpose has been to lessen the burdens imposed upon matrimonial litigants by the courts. Once the decision to obtain a divorce is made, the most satisfactory way to obtain it is as quickly and inexpensively as possible. Most, if not all, of the recommendations have been aimed at this target. Parties who are able to settle their differences by negotiation and without judicial intervention will more readily resume healthy, productive lives after the divorce and are more likely to live up to their agreements. The result will also be achieved at a lower public and private cost. All these benefits accrue to all the members of the separating family — children as well as parents.

Courts do not bear the sole responsibility for achieving these goals. Attorneys must educate their clients about the need to disclose financial information and to compromise. Clients will not be disposed to settle unless they realize how much they may lose by going to trial, and at what cost. They must be made aware of what they may reasonably expect to obtain by way of equitable distribution, alimony and child support. A corollary of the attorneys' responsibility

is that clients must recognize that the courts are not tools for spousal revenge. They must realize that adjustments in their style of living may be necessary as a result of the divorce. They must also control whatever bitterness and rage they feel. In addition, the courts will not tolerate matrimonial lawyers permitting their legal arguments and even their personal conduct to become extensions of their clients' emotional conflict. It requires greater courage, more patience and many times a higher level of professional skill to negotiate a fair settlement than it does to litigate family law issues.

Finally, matrimonial judges must realize their responsibilities go beyond the adversarial hearing. The matrimonial court should be concerned as much with negotiations as with litigation. Only then will the judge provide an effective alternative to destructive family conflict. The tools of enforcement must be firmly employed to guarantee that the litigants understand that the court will not be disobeyed and will not be used for selfish purposes.

The members of the expanded Supreme Court Committee on Matrimonial Litigation did not attend its first meeting one year ago with preconceived solutions to the complex problems raised in the Interim Report. The discussion was

necessarily freely and widely ranging, touching on many possible solutions. Many attorneys, judges and members of the public — many with different perceptions and conflicting interests — provided the Committee with valuable insight and suggestions. If any single truth has been found as a result of these dialogues, it is that the people of New Jersey demand reform in matrimonial justice. They deserve a court system that will be impartial, sympathetic, efficient and competent to deal with problems that are emotional and economic. The proposals contained in this report will go far in meeting those demands. Education, diligent advocacy and compassionate adjudication will complete the task.

6/26/80

COMMENTS OF THE SUPREME COURT ON THE
INTERIM REPORT OF THE COMMITTEE ON MATRIMONIAL LITIGATION

On August 1, 1979, the Supreme Court received the Interim Report of the Committee on Matrimonial Litigation.

After extensive review and discussion, the Court has endorsed the specific recommendation, or endorsed the concept of the recommendation and requested further study by Phase Two, or held the recommendation for further consideration by the Court.

The Court intends, in the near future, to implement by Rule, directive or otherwise as may be appropriate, the recommendations endorsed herewith. This intention should not be viewed as a limitation on the Committee's charge to review all aspects pertaining to matrimonial litigation.

RECOMMENDATIONS ENDORSED

Criteria for Assignment of Matrimonial Judges

That the Supreme Court reevaluate criteria for consideration by the Chief Justice in assigning judges to the matrimonial bench. The recommended criteria include a manifestation of emotional and sociological sensitivity, a reputation for managerial skills and a willingness to become involved at an early stage of every matrimonial case.

Training for Judges and Attorneys

That more extensive training courses be made available for matrimonial judges and attorneys, especially in the areas of property, tax and trust law and in the behavioral sciences.

Continuity of Matrimonial Assignments

That continuity of assignment of matrimonial judges is essential and that the Chief Justice establish two years as the normal minimum length of a matrimonial assignment.

Trial Attorney Certification

That a study be undertaken to determine the feasibility of an attorney trial certification program for matrimonial practitioners.

Time Guideline for Uncontested Cases

That the time from service of the complaint to judgment for uncontested cases be 60 days and that these uncontested divorce actions be heard by non-matrimonial judges if necessary in order to expedite disposition.

Bifurcation

That the present policy whereby bifurcation is permitted only with the approval of the Assignment Judge be continued.

RECOMMENDATIONS REFERRED TO PHASE TWO COMMITTEE

Representation of Litigants

That Phase Two Committee address the problem of representation for litigants who can neither afford an attorney nor qualify for representation by legal services.

Priority of Matrimonial Cases

That Phase Two Committee address methods of implementation of rules and policies as a means of emphasizing the priority of matrimonial cases.

Time Guidelines in Contested Matrimonial Cases

That Phase Two Committee identify and describe those special types of contested cases to which the general guideline of disposition should not apply; that, generally, a contested case should be disposed of within one year of the service of the complaint.

Use of Dismissal Process After Three Months of Inactivity in a Case

That Phase Two Committee determine the extent to which the present Rule concerning dismissal of cases where no proceeding has taken place for six months should be employed; and determine whether it is possible to develop indices for evaluating whether inactivity is productive, with a high probability of settlement, or unproductive.

Mandatory Judicial Settlement Conferences

That the Phase Two Committee recommend the time when a mandatory settlement conference [which the Court believes to be desirable] should take place in relation to the trial date.

Mandatory Pretrial Conferences

That the Phase Two Committee propose a Rule amendment which would define those types of complex contested matrimonial actions where a pretrial conference is mandatory, the Court believing such conference would facilitate disposition of such actions.

Motions

That Phase Two Committee recommend procedures to facilitate the processing of all types of motions.

Pendente Lite Financial Information

That the Phase Two Committee recommend specific types of information to be presented to the court in applications for pendente lite monetary relief.

Use of Court-Appointed Experts

That the Phase Two Committee develop specific procedures to be followed in the use of court-appointed experts as an alternative to each party retaining its own; that these procedures be developed with a view toward assuring the

cooperation of the bar; that those types of cases where use of a court-appointed expert may not be appropriate be identified.

Discovery

That the Phase Two Committee recommend whether forms of discovery, other than interrogatories, should be permitted without an order of the Court in matrimonial cases.

Time for Serving Interrogatories

That the Phase Two Committee evaluate all ramifications of shortening the time to serve and answer interrogatories.

Proposed Rule 4:79-11

That the Phase Two Committee perform an in-depth analysis of the proposal for purposes of determining whether the proposed Rule is the most efficient and effective way of providing the court with essential financial data in contested cases.

Formal Guidelines for the Award of Pendente Lite Support and Alimony

That Phase Two recommend whether such guidelines should be promulgated to address the problem of disparate financial awards.

RECOMMENDATION HELD

Use of Affidavits in Uncontested Divorce Actions

The Court will further consider whether the use of affidavits is desirable in divorce actions which are uncontested by reason of default or summary judgment, and whether such use should be instituted on an experimental basis.

C.J.

NEW RULE

4:79- .. Participation in Early Settlement Programs

In counties where early settlement programs have been instituted by the county bar association, a judge shall refer appropriate cases to the program based upon review of the pleadings and preliminary disclosure statements submitted by the parties. Parties to cases which have been so referred shall participate in the program as scheduled.

Name:
Address:
Telephone No.:

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION - COUNTY
DOCKET NO.

Plaintiff

Civil Action

vs.

ORDER FOR

CASE MANAGEMENT

Defendant

This matter being opened to the Court on
19 , during a judicial settlement conference the plaintiff
being represented by _____ and the defendant being
represented by _____, and the Court having considered
the pleadings filed, arguments of counsel, and having found
that discovery has not been completed;

It is on this day of 19 ,

ORDERED that the following be furnished by the plaintiff
to the defendant no later than the dates indicated:

- _____ Interrogatories, no later than _____.
- _____ Depositions, no later than _____.
- _____ Tax returns for the years _____, no later than _____.
- _____ W-2 forms for the years, _____, no later than _____.
- _____ Appraisals to be obtained, no later than _____.
- _____ Proof of bank account balances, no later than _____.

and it is further

ORDERED that the following be furnished by the defendant to the plaintiff no later than the dates indicated:

- _____ Interrogatories, no later than _____
- _____ Depositions, no later than _____
- _____ Tax Returns for the years _____, no later than _____
- _____ W-2 forms for the years _____, no later than _____
- _____ Appraisals to be obtained, no later than _____
- _____ Proof of bank account balances, no later than _____
- _____ Inspection of books and records, no later than _____.

and it is further

ORDERED that all discovery be completed no later than _____,

and it is further

ORDERED that a custody investigation be conducted by the _____ County Probation Department forthwith

and it is further

ORDERED that _____ be appointed as an expert to evaluate the following:

and it is further ordered that _____ and/or _____ produce an affidavit of services at trial to support a request for counsel fees.

and it is further

ORDERED that the trial in this matter shall be held on

_____, 19 ,

and it is further

ORDERED THAT

J.S.C.

NEW RULE

4:79- Preliminary Disclosure Statement **

(a) Contested Cases. Except as otherwise provided in R. 4:79-4, within 45 days after the filing of an answer or appearance, each party shall file and serve a preliminary disclosure statement in the form set forth in the Appendix to these rules. The statement shall be filed with the clerk in the county of venue.

(b) Default. Except as otherwise provided in R. 4:79-4, within 45 days after a default has been entered, the plaintiff shall file and serve a preliminary disclosure statement in the form set forth in the Appendix to these rules. The statement shall be filed with the clerk in the county of venue and served upon the defaulting party. If the parties have not entered into a written agreement for alimony, support and equitable distribution, a proposal for those matters on which there is no agreement shall be appended to the preliminary disclosure statement and filed with the clerk of the county of venue and served upon the defaulting party.

(c) Amendments. Parties are under a continuing duty to inform the court of any changes in the information supplied on the preliminary disclosure statement. All amendments to the statement must be filed with the court prior to 20 days before the final hearing.

** NOTE: Material in existing rules to be deleted is shown in brackets and new material to be added is underscored or, in the case of captions, double underscored.

4:79-4. Application Pendente Lite

(a) Support. Applications for support, counsel fees and costs pendente lite, whether made with the complaint or by notice of motion thereafter shall be accompanied by a [supporting affidavit or affidavits stating the applicant's needs, income and assets, and the answering affidavits shall state the defending party's needs, income and assets.] completed preliminary disclosure statements in the form set forth in the Appendix to these rules pursuant to R. 4:79-2. If this form has previously been submitted, amendments thereto must be filed with the court no later than eight days prior to the motion hearing date. A completed preliminary disclosure statement shall accompany the response to the application pendente lite. If previously submitted, amendments thereto must be filed with the court no later than eight days prior to the hearing date.

(b) ... no change

(Name, address and phone
number of counsel)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
COUNTY
DOCKET NO.

PRELIMINARY DISCLOSURE STATE-
MENT OF _____
(Litigant's Name)

Date of Statement _____ Is alimony in dispute? _____
Is child support in dispute? _____
Is equitable distribution in
dispute? _____
Does an agreement exist between
parties relating to support? _____

Date of Marriage _____ Number and Ages of Children: _____

Name and Address of Liti-
gant's Employer: _____ Do any health problems exist? _____

SUMMARY OF DISCLOSURE INFORMATION

1. Gross annual income (earned and unearned) of litigant. _____
2. Total taxes paid (federal, State, local, FICA) as reflected on last filed federal return. _____
3. Total net income (subtract line 2 from line 1). _____
4. Gross pay received per pay period; state whether weekly, bi-weekly, etc. _____
5. Total net pay (per pay stub) weekly, bi-weekly, etc. _____
6. Total alleged budget (from attached Form #1(g)). _____
7. Total combined net worth of parties (from attached Form #2). _____

INSTRUCTIONS [V] to indicate if attached.

___ 1. Complete Schedule A and attach thereto the following:

- ___ (a) A complete copy of last federal and state income tax returns filed, which should be listed as Attachment 1(a);
- ___ (b) For any prior year in which a federal or state income tax return has not as yet been filed, copies of all W-2 forms and 1099 forms, which should be listed as Attachment 1(b);
- ___ (c) A statement of year-to-date income from all sources (form attached) which should be listed as Attachment 1(c) and to which should be attached the last pay stub received prior to filing this Statement;
- ___ (d) A statement setting forth all perquisites of employment, including expense accounts, bonuses, deferred compensation or increments, and pension and profit-sharing plans, which should be listed as Attachment 1(d);
- ___ (e) A statement of all available medical and dental insurance benefits and/or insurance, which should be listed as Attachment 1(e);
- ___ (f) A statement of all unearned income, which should be listed as Attachment 1(f);
- ___ (g) Full and complete budget of expenses on a monthly basis (from form attached), which should be listed as Attachment 1(g);
- ___ (h) If Agreement exists between parties dealing with support, attach a copy, which should be listed as Attachment 1 (h).

___ 2. Attach a balance sheet setting forth all assets and liabilities; whether owned by husband, wife or jointly (indicate H,W or J) and, where possible, an estimate of the value of each, which balance sheet should be listed as Attachment 2.

LITIGANT'S YEAR-TO-DATE INCOMEGROSS EARNED INCOME \$ _____

TAX DEDUCTIONS:

Federal Income Taxes \$ _____

State Income Taxes \$ _____

Local Income Taxes \$ _____

F.I.C.A. \$ _____

Total \$ _____

Net of Taxes ----- \$ _____

OTHER DEDUCTIONS

Hospitalization/Medical Ins. \$ _____

Pension/Profit Sharing Plan \$ _____

Savings/Bond Plan \$ _____

Total \$ _____

Net of All Deductions ----- \$ _____

GROSS UNEARNED INCOME(Total of information appearing
on Attachment 1 (f).) \$ _____ATTACH LAST PAY STUB RECEIVED PRIOR TO DATE OF THIS PRELIMINARY
DISCLOSURE STATEMENT

BALANCE SHEET OF ALL FAMILY ASSETS AND LIABILITIES

STATEMENT OF ASSETS

TITLE TO
PROPERTY
(H,W,J)

If you contend asset is
fully or partially exempt
from equitable distribution,
state reason:

VALUE

Description:

1. Real Property

_____	_____	_____	\$ _____
_____	_____	_____	_____
_____	_____	_____	_____

2. Tangible Personal Property

_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

3. Securities

_____	_____	_____	_____
_____	_____	_____	_____

4. Pension Plan

_____	_____	_____	_____
_____	_____	_____	_____

5. Other

_____	_____	_____	_____
-------	-------	-------	-------

TOTAL GROSS ASSETS ----- \$ _____

STATEMENT OF LIABILITIES

Description:

1. Mortgages on real estate

_____	\$ _____
_____	\$ _____

2. Other

_____	_____
-------	-------

TOTAL GROSS LIABILITIES --- \$ _____

\$ _____

CERTIFY THAT THE FOREGOING STATEMENTS AND INFORMATION PROVIDED BY ME ARE TRUE. I AM AWARE THAT IF ANY OF THE FOREGOING STATEMENTS AND INFORMATION PROVIDED BY ME ARE WILFULLY FALSE, I AM SUBJECT TO PUNISHMENT.

DATE: _____

(Litigant's signature)

MONTHLY EXPENSES

SCHEDULE A: SHELTER

If Tenant:

Rent	\$ _____
Heat (if not furnished)	_____
Electric & Gas (if not furnished)	_____
Equipment and furnishings	_____
Monthly finance charges on equipment and furnishings	_____
Parking (at apartment)	_____
Other charges (specify):	_____
_____	_____
_____	_____

If Homeowner:

Mortgage	_____
Homeowners Insurance (unless included)	_____
Repairs and Maintenance	_____
Heat (unless electric or gas)	_____
Electric & Gas	_____
Water and Sewer	_____
Garbage Removal	_____
Home Improvement Second Mortgage	_____
Equipment and Furnishings	_____
Monthly finance charges on equipment and furnishings	_____
Snow Removal and Lawn Care	_____

Tenant or Homeowner:

Telephone	_____
Service contracts on equipment	_____

SCHEDULE A (continued)

Carpet, drape cleaning	\$	_____
Plumber		_____
Electrician		_____
Other (itemize) _____		_____

	TOTAL	\$ _____

SCHEDULE B: TRANSPORTATION

Amortization	\$	_____
Auto Insurance		_____
Registration, License, Maintenance		_____
Fuel and Oil		_____
Commuting Expenses		_____
	TOTAL	\$ _____

SCHEDULE C: PERSONAL

Food at home (groceries, meats, etc.)	_____
Dairy (if separate)	_____
Household Supplies (non-food)	_____
Drugs, Cosmetics, Toiletries	_____
School Lunches	_____
Restaurants	_____
Clothing	_____
Dry Cleaning, Commercial Laundry	_____
Hair Care	_____
Domestic Help	_____
Medical (exclusive of psychiatric)	_____
Psychiatric	_____
Dental (exclusive of orthodontic)	_____

SCHEDULE C (continued)

Orthodontic	\$	_____
Medical Insurance (hospitalization, etc.)		_____
Club Dues and Memberships		_____
Sports and Hobbies		_____
Camps and Vacations		_____
Tuition at private school (children)		_____
Other private school charges		_____
Tuition and other charges (parent)		_____
Lessons (dancing, music, sports, etc.)		_____
Babysitting		_____
Day Care Expenses		_____
Entertainment		_____
Alcohol and Tobacco		_____
Newspapers and Periodicals		_____
Gifts and Contributions		_____
Payments to Non-Child Dependents		_____
Prior existing support obligations		_____
specify _____		_____
Life Insurance		_____
Marine Insurance on Valuables		_____
Debt Service		_____
Other (specify) _____		_____

TOTAL \$ _____

SUMMARY: SCHEDULE A: _____
SCHEDULE B: _____
SCHEDULE C: _____
 \$ _____

APPENDIX E

4:79-5. Discovery

Interrogatories as to all issues in all matrimonial actions may be served by any party as of course pursuant to R. 4:17.

Depositions of parties may be taken pursuant to R. 4:11 et seq.

as to all matters except those relating to the elements that constitute grounds for divorce, separate maintenance or nullity.

All other discovery in matrimonial actions shall be permitted only by leave of court for good cause shown.

PENDENTE LITE GUIDELINES

The matrimonial bench, in appropriate cases, shall, in its discretion, use the following guidelines for pendente lite economic relief.

The purpose of these guidelines is to allow the development of greater uniformity and certainty of result in pendente lite applications. The use by counsel of guidelines in consultation with their clients should serve to minimize unnecessary pendente lite applications.

- A. In any pendente lite application for child support or alimony, the court shall allow for the maintenance of the standard of living achieved by the parties, when the necessary resources are determined to be available.
- B. The court will analyze the income and expense statements of the parties required to be submitted in the preliminary disclosure statement which sets forth the net available income of each party. The parties should offer proofs of the following expenses:
1. first mortgage
 2. second mortgage
 3. rent
 4. insurance (life, health, auto, homeowners)
 5. fuel
 6. telephone
 7. food
 8. medical, dental
 9. prescription pharmacy
 10. commutation
 11. clothing
 12. day care/babysitter
 13. auto maintenance/operation
 14. prior court-ordered obligation.

The court may consider such non-essential items as:

1. gifts
2. contributions
3. camp expenses
4. vacation
5. alcohol
6. tobacco
7. entertainment
8. periodicals
9. replacement of capital assets
10. cleaning/laundry
11. private education
12. lawn care/snow removal
13. club dues and membership
14. spouse's tuition
15. orthodontic
16. psychiatric
17. payment to non-child dependents

C. In appropriate cases, the court shall order that no beneficiary to any policy of insurance be changed.

D. The court shall consider counsel fees, expert fees, discovery costs and appropriate expenses for a pendente lite award.

E. Spouses have the mutual obligation to contribute reasonably to each other's support and maintenance.

F. A spouse has the obligation after separation to take all reasonable steps to become financially independent of the other spouse.

G. In determining whether to order pendente lite child support and/or alimony, a court shall consider all the circumstances of the spouses including, but not limited to, the following:

1. the financial needs of each spouse;
2. the financial means, earnings and earning capacity of each spouse;
3. the standard of living of the spouse;
4. any obligation of a spouse for the support and maintenance of a child or a person other than the other spouse;

5. where one spouse is financially dependent upon the other spouse, the measures available for the dependent spouse to become financially independent of the other spouse, and the length of time and cost involved in taking those measures;
6. any impairment of the income earning capacity and financial status of either spouse resulting from the marriage;
7. whether one spouse is financially dependent upon the other spouse, whether to what extent the dependent spouse is complying with the requirements of Paragraph(F);
8. the length of time that the marriage has subsisted;
9. any public assistance being paid;
10. the payor's income (and here the court may also consider the payor's prior earning capacity);
11. the payor's bona fide indebtedness;
12. the payee's actual needs (although his/her wants are not the only criteria);
13. the payee's age, condition of health and ability to earn income;
14. income tax obligations, and
15. existing support orders.

- H. No spouse shall be rewarded or penalized by a pendente lite order.
- I. Spouses have the mutual obligation to provide each other upon request with information and accountings respecting the financial affairs of the marriage, including the contents of the preliminary disclosure statement.
- J. Each parent has the obligation to provide reasonably for the child's support, maintenance and education, whether or not the child is in that parent's custody, until the child is emancipated.
- K. Neither party shall dispose of or otherwise liquidate, alienate, or encumber any marital asset without the written consent of the other or court order.

Name
Address
Telephone No. () -

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION COUNTY
DOCKET NO.

Plaintiff,

Civil Action

vs.

ORDER FOR

PENDENTE LITE RELIEF, ETC.

Defendant.

This matter being opened to the Court on (1)
198 , pursuant to (2) Motion(s) dated (3)
198 , the plaintiff being represented by (4)
and the defendant being represented by (5)
and the Court having considered the pleadings filed, argument
of counsel, and having found that the plaintiff has approximate
total net income of (6) per week, the defendant has
approximate total net income of (7) per week, the
plaintiff has approximate weekly needs of (8) and the
defendant has approximate weekly needs of (9) , and
good cause being shown therefore;

It is on this (10) day of , 198

ORDERED as follows:

CUSTODY &
VISITATION

1. The (11) shall have temporary custody of the child(ren) of the marriage, subject to reasonable visitations by the (12) as follows:

SUPPORT

2. The (13) shall pay, Pendente Lite, the weekly sum of \$ (14) , commencing on the (15) day of , 198 , allocated as follows:

- (a) Unallocated support for the movant and child(ren). \$ (16)
- (b) As support for (17) child(ren), allocated \$ (18) per child. \$ (19)
- (c) As support for (20) \$ (21)

There shall be no abatement of the support order for children by reason of any overnight visitation or vacation period.

PROBATION
PAYMENTS

3. Said payments shall be made through the (22) Probation Department, and that two (2) copies of this Order shall, within 24 hours be filed with the Probation Office of the County of (23) together with information concerning the addresses of both parties and their telephone numbers, if known, and the place of employment, if known, of the (24) .

DOF
EXPENSES

4. The (25) shall pay all expenses for the matrimonial domicile, including mortgage, taxes,

insurance and utilities not to exceed (26) . . . per month and all ordinary maintenance and repairs. Ordinary maintenance and repairs shall be considered any single incident of maintenance or repair not costing more than \$50. per incident. Extraordinary repairs shall only be undertaken after consultation and consent, except in cases of emergency.

MEDICAL

5. The (27) shall continue to maintain and carry Blue Cross, Blue Shield and Major Medical Insurance or its equivalent for the benefit of the (28) and in addition thereto, the (29) shall be responsible for all reasonable and necessary (30) . Neither party shall incur any expenses in excess of \$50. for a single treatment, incident or illness without the other party's prior consent, unless it is emergent.

OTHER PERSONS

6. No adult person of the opposite sex not related by blood or marriage shall reside in the marital domicile occupied by the child(ren) or be present during overnight visitation.

MARITAL ASSETS

7. Neither party shall dispose of, or otherwise liquidate or pledge any of the marital assets.

LIFE INSURANCE

8. The (31) shall continue to keep in full force and effect, life insurance, and not change the (32) as the beneficiary thereon on the condition that either the (33) or the child(ren) must be designated as beneficiaries if some other person is now

designated as beneficiary.

ATOMOBILE

9. The (34) shall supply to the
(35) an automobile and: (36)

- a. _____ make all loan payments
- b. _____ repair and maintain automobile
- c. _____ pay for automobile gasoline
- d. _____ pay insurance for automobile
- e. _____ pay registration and licensing
on the automobile.

10. The (37) shall pay to (38)
Esq., attorney for (39) , a counsel fee, Pendente
LITE, in the sum of \$ (40) within (41) days.

TORNEY'S
FEE

11. The defendant shall pay to (42) Esq.,
attorneys for (43) , the filing fee and sheriff's
fee, totaling (44) , on or before (45) .

J.S.C.

- (1) Insert date
- (2) Insert plaintiff's or defendant's
- (3) Insert date motion originally returnable
- (4) Insert firm name and name of attorney appearing for plaintiff
- (5) Insert firm name and name of attorney appearing for defendant
- (6) Insert plaintiff's weekly net income as found by Judge
- (7) Insert defendant's weekly net income as found by Judge
- (8) Insert plaintiff's weekly needs as found by Judge
- (9) Insert defendant's weekly needs as found by Judge
- (10) Judge to insert date
- (11) Insert plaintiff or defendant
- (12) Insert plaintiff or defendant
- (13) Insert plaintiff or defendant
- (14) Insert amount of weekly support ordered
- (15) Insert date payments shall commence
- (16) Insert amount of unallocated support ordered
- (17) Insert number of children
- (18) Insert total amount of support per child ordered
- (19) Insert total amount of child support ordered
- (20) Insert plaintiff or defendant
- (21) Insert amount allocated for plaintiff or defendant
- (22) Insert the county through which payments are to be made
- (23) Insert the county through which payments are to be made
- (24) Insert plaintiff or defendant

- (25) Insert plaintiff or defendant
- (26) Insert limit on total expenses as ordered
- (27) Insert plaintiff or defendant
- (28) Insert plaintiff or defendant
- (29) Insert plaintiff or defendant
- (30) Insert medical and/or dental and/or pharmaceutical and/or optical expenses for plaintiff or defendant and child(ren) as ordered by Judge.
- (31) Insert plaintiff or defendant, or both
- (32) Insert plaintiff or defendant
- (33) Insert plaintiff or defendant
- (34) Insert plaintiff or defendant
- (35) Insert plaintiff or defendant
- (36) Complete items (a) through (e) in paragraph 9 as ordered.
- (37) Insert plaintiff or defendant
- (38) Insert name of attorney
- (39) Insert plaintiff or defendant
- (40) Insert amount awarded
- (41) Insert number of days in which counsel fees must be paid
- (42) Insert name of attorney
- (43) Insert plaintiff or defendant
- (44) Insert amount (\$75.) plus sheriff fees
- (45) Insert date by which counsel fee is payable

4:79-8. Custody of Children

(a) Investigation Before Award. In matrimonial actions where the court finds that the [issue of] custody of children is [contested] a genuine and substantial issue the court [shall] may, before final judgment or order, require an investigation to be made by the county probation office of the character and fitness of the parties, the economic condition of the family and the financial ability of the party to pay alimony or support or both. In other matrimonial actions the court may, if the public interest so requires, order such an investigation. The court may continue any matrimonial action for the purpose of such investigation, but shall not withhold the granting of any temporary relief by way of alimony or support or both under R. 4:79-4 where the circumstances require. Such investigation of the parties shall be conducted by the probation office of the county of venue, notwithstanding that one of the parties may live in another county, and the probation office shall file its report with the court no later than 45 days after its receipt of the judgment or order requiring the investigation, unless the court otherwise provides.

(b) ... no change

(c) ... no change

(d) ... no change

(e) ... no change

(f) Trial of Custody Issue. Where the court finds that the custody of children is a genuine and substantial issue, the court shall set a hearing date no later than 3 months after issue has been joined. The court may, in order to protect

the best interests of the children, conduct the custody hearing in a matrimonial action prior to final hearing of the entire matrimonial action. Any judgment or order pursuant to this hearing shall be treated as a final judgment or order for custody.

TRIAL NOTICE TO LITIGANTS APPEARING ON THEIR
OWN BEHALF

Be advised that your matter has been scheduled for final hearing before me on _____ at ____ o'clock in the _____ noon. The trial will take place in Courtroom _____ at the _____ County Court House, _____, New Jersey.

Reviewing your file, the Court notes that a divorce complaint was filed by you, acting as your own attorney and assumes that at the time of final hearing you will appear on your own behalf.

Be advised that at the time of final hearing, you will be expected to establish your cause of action for divorce. You are further instructed to have with you a prepared Judgment of Divorce in a form suitable for this Court to sign, in the event that a judgment is allowed.

Very truly yours,

_____, J.S.C.

PROCEDURES FOR PRO SE LITIGANTS' MOTIONS

The following are the general guidelines to be followed by the courts in dealing with a motion in which a pro se litigant appears:

1. The court will inquire of the pro se litigant as to that individual's understanding of the procedure and require him or her to explain why he or she is in court.
2. If the motion judge doubts that the pro se litigant fully understands why he or she is in court, the judge will explain the reason.
3. Where appropriate, the motion judge will ask the pro se litigant if he or she desires to have the matter adjourned in order to obtain counsel. No more than one adjournment for this purpose may be allowed unless there is substantial prejudice to the other party. Where justice mandates, the court may impose conditions on an adjournment.
4. The judge shall confine oral argument to filed pleadings. If the pro se litigant has not filed a pleading, the judge will grant the litigant reasonable time in which to do so. If the pro se litigant does desire to have additional time in which to file a pleading, an appropriate adjournment with or without terms will be considered. An adjournment shall be allowed only when the interests of justice so require.
5. Both moving and responding parties shall be permitted to argue their positions.

6. Argument by both parties shall generally be limited in most motions to matters contained within the pleadings filed.
7. When the court renders its decision, it shall make specific findings as appropriate, and if necessary, explain to the pro se litigant the precise basis of its determination.

4:79-9. Alimony and Support Payments; Enforcement

(a) Payments Through Probation Office. In awarding alimony or support, or both, the judgment or order shall contain separately the amounts allowed for alimony and the amounts allowed for support, unless for good cause shown the court determines that the amounts should not be segregated. The judgment or order shall provide that payments be made through the probation office of the county in which the person against whom the award is made resides, and that payments shall be subject to a late interest charge at the rate prescribed by R. 4:42-11(a) unless the court, for good cause shown, otherwise orders. Upon the signing of an order of judgment allowing alimony or support or both through the Probation Office, the court shall send to the appropriate Probation Office two additional copies to which have been attached statements prepared by the attorney submitting the judgment or order showing the addresses of both parties and their telephone numbers, if known, and the place of employment, if known, of the party against whom the award was made.

(b) Failure to Pay; Enforcement by the Court or a Party.

If a person fails to make payments as directed by an order or judgment, the probation officer with whom the order or judgment is filed shall notify such person by mail that such failure may result in the institution of contempt proceedings. Upon [his continued] failure within any one year period to pay a total of three weeks support either consecutively or cumulatively, the probation office shall file a verified statement setting forth the facts establishing disobedience of the order

or judgment. The court in the county in which the person against whom the award is made resides unless another court is designated by order or unless paragraph (c) hereof otherwise provides, may then in its discretion institute contempt proceedings in accordance with R. 1:10-2, and an aggrieved party, or the probation officer on his behalf, may apply to the court for relief in accordance with R. 1:10-5. If the aggrieved party states under oath in his application that he is indigent and unable to pay the required filing fees, the court, if satisfied of the fact of indigency, may by endorsement thereon waive the payment of such fees. If the application for relief is made on behalf of a party by the probation office, filing fees shall be waived, and may, in the discretion of the court, subsequently be assessed against the adverse party if it is determined that he has not complied with the order or judgment sought to be enforced. The court shall, on its own motion or on motion by the party bringing the enforcement action, assess a late interest charge against the adverse party at the rate prescribed by R. 4:42-11(a).

(c) ... no change

2:9-1. Control by Appellate Court of Proceedings Pending
Appeal or Certification

(a) Control Prior to Appellate Division. The supervision and control of the proceedings on appeal or certification shall be in the appellate court from the time the appeal is taken or the notice of petition for certification filed except that enforcement proceedings pursuant to R. 4:79-9 shall continue to be heard by the trial court pending appeal unless a stay thereof shall have been ordered pursuant to R. 2:9-5 or unless otherwise provided by rule. The appellate court may at any time entertain a motion for directions to the court or courts or agencies below or to modify or vacate any order made by such courts or agencies or by any judge below.

(b) ... no change