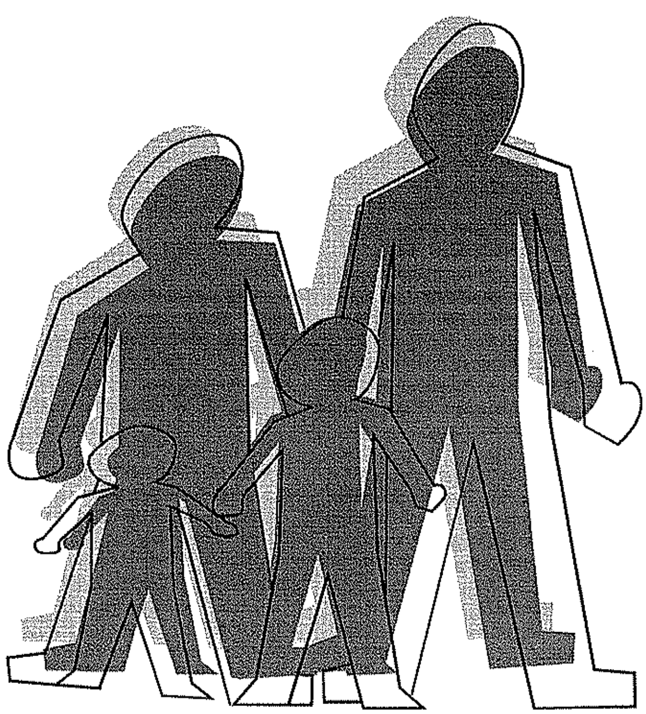
WHAT'S HOT in 2006

Family

Court determinations or individual ones?

By Mark H. Sobel

Family law, unlike many other areas of law, requires court intrusion into normally individual decisions regarding extremely private and personal matters. The court, of necessity, must deal with the cataloguing and valuation of assets for distribution, the impact of individual investment decisions by litigants, the appropriateness of non-financial determinations by the parties and even the reasons and ramifications of the causes for the divorce. In the past year our courts handled myriad cases in all these areas. Hopefully, the following provides some guidance to some of the most important decisions.



1. Why people divorce and impact on financial determinations

In *Mani v. Mani,* 183 N.J. 70 (2205) the New Jersey Supreme Court focused on the interplay between marital fault and payment of alimony. In essence, the issue was should one pay more or receive less if at fault for the marital breakup. *Mani* established the precedent that only two narrow instances would allow for the insertion of marital fault into a divorce action as a factor in the payment or receipt of alimony:

- Cases in which the fault has affected the parties' economic life;
- Cases in which the fault so violates societal norms that continuing the economic bonds between the parties would confound notions of simple justice.

After *Mani,* absent the most unusual of circumstances, marital fault will not be considered an element in the alimony computation.

2. Analysis of income for business valuation, alimony calculation

In *Steneken v. Steneken,* 183 N.J. 290 (2005), the court determined appropriate analysis of a litigant's income can allow for utilization of different methodologies for equitable distribution and calculation of alimony:

"... for purposes of computing the proper alimony award *actual income* of the paying spouse is the loadstar for determining the extent of that parties' alimony obligations."

However, with regard to analysis of the value of the business for purposes of equitable distribution, the court determined:

"... for the purpose of valuing a closely held corporation and determining the proper equitable distribution thereof proper valuation techniques, which may include the *normalization* of excess salary expenses, are to be applied."

Thus, the court established the evaluation of a business may utilize the "normalized earnings" (usually a lower amount than actual earnings to approximate the reasonable compensation based upon the hypothetical hiring of a substitute person to replace the owner) with the "excess" earnings of the owner thereafter capitalized to create additional value in that entity. At the same time, the actual higher real income received by owner then may be used for purpose of calculating alimony and child support.

While many have been critical of such economic analysis — suggesting it counts the same cash flow twice and does inconsistently — the Court's opinion in *Steneken* approves of this analysis stating:

"We find no inequity in the use of the individually fair results obtained due to the use of an asset valuation methodology normalizing salary in an ongoing close corporation for equitable distribution purposes, and the use of actual salary received in a calculus of alimony. The interplay of those two calculations does not constitute "double counting.'"

In *Steneken,* the high court also makes clear the trial court should, in an effort to obtain a fair and equitable result, analyze all statutory criteria concluding its opinion with the final cautionary instructions:

"Trial courts remain free to consider, in the exercise of their discretion and in accordance with the statutory guidelines, the fair and proper quantum of alimony and equitable distribution attendant to each case before them."

Thus, rather than altering the methodology for arriving at valuation for equitable distribution purposes and available income for alimony purposes, *Steneken* reflects a determination that courts carefully craft the appropriate percentage to be distributed and the amount to be provided for support so as to achieve an equitable and fair result.

3. Doing what you want with the money you get

In *Miller v. Miller,* 160 N.J. 408 (1999), the Supreme Court determined it was appropriate to impute income from the assets of the payor of support, rather than utilize the actual income derived from those assets for purposes of analyzing alimony obligations. In *Miller,* the ex-husband/payor invested a large portion of his portfolio in high-growth stocks which had little to no dividends or actual yearly income. As a result, the ex-husband sough a reduction in alimony payments, citing his actual income.

The Supreme Court determined it was appropriate to evaluate, for purposes of an alimony determination, the portfolio based upon a hypothetical return utilizing Moody's Composite Index on AAA rated corporate bonds over a five-year period. That hypothetical income would be imputed to the payor for the purposes of determining the appropriate alimony award, rather than the utilization of the actual income based on the actual investment portfolio.

This year, in *Overbay v. Overbay,* 376 N.J. Super. 99 (App. Div. 2005) imputation of income from the "other side of the fence" was sought: The alimony recipient had invested funds in certificates of deposit with extremely low yields, thereby necessitating greater need for support. In *Overbay,* the ex-wife had received a substantial inheritance, not subject to equitable distribution, and invested approximately 86 percent in cash or cash equivalents. Thus, the actual rate of return from that portfolio was approximately two percent. The ex-husband contended that under *Miller,* a hypothetical rate of return based upon Moody's was appropriate which would increase her income and lower his alimony obligation.

The Appellate Division's decision in *Overbay* did not require the ex-wife to invest as she previously hadn't, or impute income to her as if she had. Seemingly, the *Overbay* court focused on the fact Mr. Miller, was an experienced investor. Mrs. Overbay did not have such experience and had previously testified "it was always very important to her to maintain the principal and not let anything happen to it." Thus, the *Overbay* decision stands for the principle the hypothetical imputation of income may not be required under all factual parameters and a specific analysis of the issues in a particular case requires, on a case by case analysis, whether imputation of income achieves or prevents an equitable result.

4. How soon can we sell the house?

In *Randazzo v. Randazzo,* 184 N.J. 101 (2005) the Supreme Court finally specifically overturned the long-standing precedent in *Grange v. Grange* which prohibited, in other than the most extreme circumstances, the *pendente lite* sale of real estate owned by the parties without their mutual consent. In this case, the parties owned some valuable real estate in Florida but had limited cash for their various needs including, but not limited to, the payment of real estate taxes. The court held the trial court's exercise of its general equitable powers, under N.J.S.A. 2A:34-23 et. seq.:

"...had the discretion to order the sale of marital assets prior to a final judgment of divorce when the circumstances of the case so justify."

Furthermore, the court stated:

"Although ordinarily distribution of the proceeds from the sale of a marital asset should await the final judgment of divorce, a court has discretion to order an earlier distribution to serve the best interests of the parties."

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As a result, this recent case allows for a much wider utilization of *pendente lite* sales of property for a variety of reasons during a matrimonial litigation.

5. Do I have to file a joint tax return?

In *Bursztyn v. Bursztyn*, 379 N.J. Super 385 (App. Div. 2005) the Appellate Division held:

> "... trial courts in New Jersey have discretionary authority to compel parties in the divorce proceeding to file joint returns."

Previously, it had been thought a party could not be compelled to file a joint return although the failure to do so, if it had financial implications, could be visited on that party by the trial court. *Bursztyn* provides precedent to actually require the filing of a joint return. Nevertheless, the court is mindful such a compulsion has significant ramifications that should be avoided if possible:

> "In general, we believe trial courts should avoid compelling parties to execute joint tax returns because of the potential liability to which the parties would be exposed, and because there generally exists a means by which to compensate the parties for the adverse consequences of filing separately."

However, in this particular case, the court affirmed the trial court's requiring filing of a joint return for the significant tax savings. Separate returns would have "unnecessarily depleted the funds available to support the family." Furthermore, the court noted an absence of any evidence fraudulent returns had been filed in the past or that there was intent to file fraudulent returns. Finally, the court observed all the income was from the defendant-husband and the plaintiff-wife had no income during the marriage other than her alimony payments and provided no compelling reason for filing a separate return. While there are obvious limitations in this case, it does provide judicial precedent to compel the filing of a joint return.

6. Who decides the children's religion?

In *Feldman v. Feldman*, 378 N.J. Super. 83 (App. Div. 2005), the Appellate Division determined the children's primary caretaker has the right to determine religious training as well as the ability to bar other education in another religion. Although the case does not bar attending other religious services, the court held:

> "It is implicit in protecting the primary caretaker's right to raise and educate his children in his chosen religion to prevent others from simultaneously educating the same children in an alternate religion."

Interestingly, in this case, the parties' property settlement agreement was silent as to the religious upbringing of their children and only dealt with religion in the context of parenting time during holidays. Furthermore, it was only subsequent to the divorce that a request was made for the children to attend the non-primary caretaker's religious education classes. Nevertheless, this case gives the primary caretaker significant rights regarding continuing religious education — not their attendance at religious ceremonies or other exercises of their first amendment rights — and needs careful examination in tailoring agreements establishing a primary caretaker when divorcing parties practice different religions. ■

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