ISSUE NO. 1

PAYMENT OF PRE-MARITAL OBLIGATIONS SUCH AS ALIMONY, CHILD SUPPORT, STUDENT LOANS, WITH MARITAL FUNDS IS A FACTOR JUSTIFYING A LESSER DISTRIBUTABLE SHARE OF THE MARITAL ASSETS

One of the most common and overlooked arguments in our practice emanates from the responsibility remarried spouses have to their first family. These obligations generally include alimony, child support or equitable distribution which must be funded from income ("marital income") earned during the second marriage. The argument is equally applicable to payment of other pre-marital obligations, such as student loans. Despite the commonality of such facts and a clear comment from Justice Long, perhaps our most respected Judge addressing Family Part issues (then on the Appellate Division), I rarely see attorneys argue what is a significant and salient economic reality that impacts second marriages. Where the payor spouse, frequently the Husband, pays pre-existing obligations from marital funds, that impacts the new families' cash flow and adversely affects the financial security of the new marital partnership. Simply phrased, expenditures to satisfy pre-marital obligations means marital funds are utilized to eliminate a non marital debt. According to Justice Long, this is a factor that should be considered by a Court in how marital assets are distributed.

The issue was addressed in the infamous case of Dr. McGee. McGee v. McGee, 277 N.J. Super. 1 (App. Div. 1994). Justice Long, in language routinely ignored by the Bar, explained how these payments should be analyzed. While everything in McGee must be viewed with an extra dose of scrutiny because sometimes even with superb Judges, harsh facts effect the result (Dr. McGee was as reprehensible a character as we have in our jurisprudence), the legal principal is nonetheless soundly rooted in simple economics; therefore, in light of McGee, it should not be ignored. The real question, particularly in light of how other jurisdictions deal with the issue, is how should it be addressed.

Dr. and Mrs. McGee began their relationship in June, 1981 and married in 1989. Yet, they were only married for approximately two years. McGee at 4. Part of the reason the trial court was reversed was because, as Justice Long emphasized, this was a ten year relationship. Dr. McGee "paid over a quarter of a million dollars to support his previous wife and two children", which funds were part of the "general operating cost of himself and Mrs. McGee". McGee at 11. The decision is replete with instances of Dr. McGee taking advantage of Mrs. McGee, who at the time of trial, was 57, unskilled, unemployed and very likely according to the opinion of Justice,

unemployable. McGee at 11. In contrast, during the relationship, Doctor McGee's income doubled. McGee at 11. That such a significant amount was spent by the reprehensible doctor in the face of Mrs. McGee's financial circumstances at the time of divorce was clearly a factor in the result. Nonetheless, the principal is clearly set forth in the opinion - and ignored by lawyers.

While Justice Long acknowledged the trial judge may have been correct that Dr. McGee did not "dissipate assets" in the traditional sense, one of the reasons for the reversal was that the trial court appeared

> "To have given no consideration at all to the payment of a small fortune by Dr. McGee toward his pre-existing obligations to his former wife and children. Mrs. McGee was not required to contribute her assets towards that support. This is an equitable consideration applicable to distribution". McGee at 12 (emphasis added)

The legal principal McGee established was that utilizing marital funds to pay a pre-existing obligation, in this case Dr. McGee's alimony and child support, should be an "equitable consideration" in the fairness of the distribution. In other words, while there should not be a dollar for dollar credit or adjustment in Mrs. McGee's favor, in addressing the percentage allocation of distributable marital assets, the trial court should have considered these payments. The consideration would be that Dr. McGee would receive a lower percentage of the distributable assets because he spent $250,000.00 of marital funds on a non-marital obligation. Phrased another way, it is reversible error for a trial court not to consider the expenditure of marital funds for pre-existing obligations; the consideration should be in the percentage distribution.

The principal of McGee is clear. It does not flow from Dr. McGee's character, but rather from a judgment of the Appellate Division that payment of a pre-marital obligation by the marital partnership is not to be ignored and forgotten - seemingly rejecting the argument that one accepts their spouse with their positives and negatives. Although I suspect if that argument is advanced in opposition to the McGee equitable adjustment claim, some trial judges will nonetheless accept that position. They will distinguish McGee on the basis of its unique facts. Counsel would then argue the adjustments in McGee did not reflect a generalized legal principal applicable to all cases; rather, it was a response to the rather extraordinary actions by Dr. McGee.

That is not, however, how Courts in New York have examined the issue. In fact, they have gone significantly further than did Justice Long. Instead of there being an "equitable" adjustment, the New York Courts require a dollar for dollar credit against equitable distribution for pre-existing debts and

obligations such as alimony, child support, and even student loans. See Johnson v. Chapin, (2008 N.Y. Slip Op. 02203) 49 A.D. 3d 348 (March 13, 2008) (Appellate Division: First Department).

In Chapin, the Appellate Division approved the trial court's determination that the wife's distributive award should be increased by $641,069.00 because it felt there was "ample authority for the proposition that contribution to the separate assets and liabilities of a former spouse may be recouped in an award of equitable distribution". Chapin at 11.

As the Appellate Division noted in commenting upon their disagreement with the dissent:

> "The essence of what the dissent characterizes as a "remarriage penalty" is the lot of any individual who enters into a marriage with outstanding debt. That this Husband's debt stemmed from a former marriage, does not distinguish it from educational debt, credit card debt or any other separate financial obligation". Chapin at 12.

Chapin seems quite harsh as the dissent makes some good points:

> "In the first place, however, the husband's obligations can and should be distinguished from "educational debt, credit card debt [and] other separate financial obligation[s]." The husband's obligations were essential components of the very judgment of divorce that permitted the second marriage lawfully to take place. Obviously, when a prospective spouse incurs any of these other forms of debt, doing so does not enable him or her subsequently to enter into a legally valid marriage.
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> Moreover, the record establishes that the wife was aware, before marrying the husband, of the terms of his prior judgment of divorce. With the "good" of the husband's divorce judgment (i.e., the ability to marry the husband and the benefits, tangible and intangible, she realized over the course of their marriage), the wife took the "bad" (i.e., the husband's financial obligations to his former spouse and their children). Even putting aside that the risk the second marriage could end in a divorce was, as the majority puts it in a similar context, one "[t]he couple shared," the majority's determination to uphold the award is clearly wrong. To bestow upon the spouse an award of 50% of the amounts paid by the husband in accordance with his legal obligations to his first wife and their children wrongly assumes

that the wife received no compensating benefits as a result of the marriage she was able to enter into because of the prior judgment of divorce. **[FN4]** Clearly, the wife believed there were such benefits when she entered into the marriage with knowledge of the legal obligations imposed on the husband by that judgment of divorce." Chapin at 20. (emphasis added)