

REPORT
OF THE
COMMISSION
TO STUDY THE LAW OF DIVORCE



April 18, 1995

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TO STUDY THE LAW OF DIVORCE**

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FOREWARD

Joint Resolution No. 1 of 1993, approved April 5, 1993, established the Commission to Study the Law of Divorce "to determine [the law's] adequacy in protecting the rights and obligations of litigants as well as their children and to make recommendations for desirable and appropriate legislation."

What has made the task of this Commission more daunting than that of any of the myriad of study commissions created on other topics is that divorce law and its process intricately weave together familial and financial issues and set them in an emotionally charged, if not desperate, atmosphere.

Despite the fact that the Commission heard testimony from people with all kinds of perspectives, there was one common thread: the witnesses agreed that the system in its present form would benefit from reform.

There were 28,393 filings for dissolution of marriage between July 1992 and June 1993; 28,497 between July 1993 and June 1994.¹ In addition, there were over 25,000 filings in each of these fiscal years to petition on related matters after the dissolution had been granted.² Contrast these statistics with those for solemnized marriages: 35,321 in 1992.³

Also unequivocal is that the process of divorce can be costly and often lengthy. According to the Administrative Office of the Courts (AOC), a backlogged dissolution case is one that has been pending for over 12 months. Its statistics show that 18 percent of all dissolution cases have been pending for over 12 months; 8 percent for over 18 months and 4 percent for over 24

¹ Source: Administrative Office of the Courts.

² Id. These are so-called "reopened" or "post-judgment relief" cases.

³ Source: New Jersey Department of Health, Health Statistics. (Most recent available).

months. The cost can sometimes be prohibitive in light of the parties' financial circumstances.

We may sometimes find it too tragic to recognize the devastation caused to a significant number of the over one million children each year who experience the divorce of their parents.

. . . [A]lmost three of five children feel rejected by at least one divorcing parent. The children of divorce often experience feelings of prolonged sadness, anger, depression, loss of interest in school, or delinquent behavior, sometimes taking the form of drug use or theft.⁴

In light of the above considerations, we suggest that the introduction of legislation concerning the law of divorce cannot afford to proceed on a fragmented basis. Nor is this an implied or intended criticism of the many legislators who have, over the past 25 years or so, attempted to address problems in this area that have been brought to their attention. Indeed, some of this proposed legislation forms the basis of our recommendations. This approach served as a rationale for the conclusions of the Divorce Law Study Commission, created in 1967 "to study and review the statutes and court decisions relating to divorce and nullity of marriage." P.L. 1967, c. 57. That Commission recognized that it should be its function:

. . . to assimilate the hitherto uncoordinated inquiries authorized by the legislation into specific areas such as divorce, to which this study has been addressed, the desirability of a Family Court, to which another commission study is presently directed, a family conciliation

⁴ Wachtel, Divorce Counseling: For the Sake of the Child, Legal Times, May 24, 1993, p. 29.

service, thought imperative by this Commission, and such other matters as the economics of marriage and divorce, including modernization of the law pertaining to matrimonial property both during and after termination of a marriage, the possible enactment of the Uniform Child Custody Jurisdiction Act, and the experiences of those jurisdictions using the concept of "irretrievable breakdown" as the sole ground for terminating a marriage. These are but illustrative of the areas requiring coordinated study if our statutory laws relating to the family as an institution are to become or remain instruments serving the public interest.⁵

These observations are reflective of the necessity for revision of the divorce laws due to societal changes and interests as they existed in the late 1960's. Many of the suggestions set forth have been effected.⁶ The last 25 years have evinced further societal changes and interests in matters affecting the family, some of which are embodied in the statutes and in case law. A stronger domestic violence law, see N.J.S.A. 2C:25-17 et seq.; bolstered child support enforcement provisions, see N.J.S.A. 2A:34-23 et al.; and contemporary notions of coparenting time as it may affect financial support of children of the marriage; see Pascale v. Pascale, 274 N.J.

⁵ Final Report to the Governor and Legislature, Divorce Law Study Commission, p. 97.

⁶ The Family Court was created by P.L. 1982, c. 78, s. 2 (C. 2A:4A-1); family conciliation services have been created in several different forms under the auspices of the court; comprehensive amendments and supplements to the equitable distribution statutes were enacted by P.L. 1980, c. 153, s. 4 (C. 2A:34-23.1); the Uniform Child Custody Jurisdiction Act was enacted by P.L. 1979, c. 174.

Super. 429 (App. Div. 1994), are noteworthy examples of much needed introspection of our law in light of the changes in family structure.

In addition, it was painfully evident to the Commission that the resolution of issues in the divorce process over the years has led inevitably to a level of frustration for not only the litigants and others affected by the process, but for the courts themselves.

It has been the experience of the legislative members of the Commission that, while there is often distress in the manner in which laws affect the citizenry, clear and unambiguous laws, well publicized, are usually understood and accepted. In the main, the public tends to agree that rules and consequences for violations of rules are required. However there is an apparent lack of understanding as to how the process works. There is concern that the procedure is not understood by the persons who need to know it. The consequences of the divorce process are so critical that we must better commit the substance of the relevant law to writing and make it as widely available as possible.

This is not to say that discretion has no place in the adjudication of issues in the divorce process. Judicial discretion can be important in determining the best interests of families disrupted.

What is indicated here is the addition of new "tools" that may be applied in the context of the sundry issues to be resolved by the courts, a clear statutory delineation of standards to be applied and requirements that findings be made on these standards.

Concomitantly, for those disaffected by the process, it is vital that concerted efforts be made to inform, educate and forewarn litigants and others affected by the process of what they can expect. These preparatory programs should be mandatory and cover a broad range of subjects, including the impact of divorce on children and families and ways to mitigate that impact, legal costs, procedural aspects of the process, and means available for alternative dispute resolution.

Finally, the importance of the subject matter and the timeliness of our inquiry are underscored by the public comment portion of our work. The following list consists of random

selections of points raised with the Commission: pension distribution, high cost of divorce, child support guidelines being reflective of time spent with the children being supported, unaccountability of support payments, mediation system, perception that there is a disincentive for attorneys to settle cases, problems of children deprived of time with a parent, lack of consistency in practice among counties, harassment as a basis for a complaint of domestic violence, training for judges, more accountability on the part of attorneys, cap on divorce costs, education for persons commencing the divorce process, the perceived biases of persons working in the system, enforcement of visitation, false allegations of sexual abuse as a point of leverage, false allegations of domestic violence, the feminization of poverty, problems upon remarriage and the impact on second families, and, always, the effect of all this on children of the marriage.

A great number of the comments made pertain to matters beyond the scope of this commission. Matters concerning court procedure and administration, the comportment of individual judges and discipline and ethics of attorneys are not within our purview. The judicial branch had no public role in our endeavor, but was forthcoming with statistics and other information necessary to further our mission. Consequently, we make no recommendations in areas not constitutionally committed to us. We find, however, that remarks on such matters could pass on information beneficial to their disposition by the Judiciary:

The Commission has entertained testimony at times sensing that it was not germane to its mission, but, in the spirit of free and full discussion, functioned as a sounding board for individuals to air complaints on matters over which we would and could have no effect. The record has not been censored in any way, and, while it contains information and testimony of a highly personal and sometimes lurid nature, it should be stated that they were submitted to the Commission with the understanding that they could become public documents, and as with all evidence, its credibility must be determined and the proper weight must be accorded to it.

In the spirit of continuing legislative efforts in this area of utmost importance, we urge the adoption of the recommendations contained in this report, after proper debate and appropriate deliberation by the Legislature.

BACKGROUND

On April 5, 1993 Governor Florio approved Assembly Joint Resolution No. 26 (2R) of 1993 as Joint Resolution No. 1 of 1993. This joint resolution established the Commission to Study the Law of Divorce. It created an eleven member commission to be composed as follows: one member of the Senate to be appointed by the President thereof, one member of the General Assembly to be appointed by the Speaker thereof, and nine citizens to be appointed by the Governor. The citizens appointed by the Governor included a retired judge, a probation officer, a divorce mediator, the president of the County Prosecutor's Association, a representative from the New Jersey State Bar Association and four public members. The public members included one custodial parent, one non-custodial parent, one financial planner with expertise in family financial matters and one mental health professional with experience in the field of child care. The members of the commission as of this writing are as follows:

Assembly Walter J. Kavanaugh, Chair

Senator Robert Martin

Nancy Benz

Carol Bishop

Jeffrey S. Blitz, Esq.

Robert Broderick

Sara Flohr

Frank A. Louis, Esq.

Marianne Espinosa Murphy, Esq.

Douglas Schoenberg, Esq., Vice-Chair

Irene von Seydewitz*

* Ms. von Seydewitz submitted her resignation in December of 1994 to assume a new position with legislative staff.

Senator Robert Martin replaced Senator James Cafiero as of April 6, 1994. The representation of the non-legislative members is as follows: retired judge, Marianne Espinosa Murphy; probation officer, Carol Bishop; divorce mediator, Douglas Schoenberg, Esq.; the president of the County Prosecutor's Association, Jeffrey S. Blitz, Esq.; Atlantic County Prosecutor; a representative from the New Jersey State Bar Association, Frank A. Louis, Esq.; custodial parent, Irene von Seydewitz*; non-custodial parent, Robert Broderick; financial planner with expertise in family financial matters, Sara Flohr; and mental health professional with experience in the field of child care, Nancy Benz.

The findings and declaration portion of the joint resolution stated that present State law relating to divorce is based largely on common law and longstanding social practices, as modified in some aspects by statutory and case law; and present law may be considered inadequate to protect the rights of litigants as well as their children.

The Commission was charged with studying the present law of divorce in this State and in other states to determine its adequacy in protecting the rights and obligations of litigants as well as their children, and to make recommendations for desirable and appropriate legislation. The Commission was given 18 months from its organization to accomplish this study and to report its findings and recommendations to the Legislature with any legislative bills it desires to recommend for adoption by the Legislature. Appointments were made in the fall of 1993 and the Commission organized on October 18, 1993. The Office of Legislative Services provided professional and secretarial support staff for the Commission.

METHOD AND ORGANIZATION

The Commission to Study the Law of Divorce held a series of public hearings throughout the State as part of its information gathering effort.⁷ The dates and locations of these hearings are as follows:

December 7, 1993 in Trenton, N.J.

March 31, 1994 in Trenton, N.J.

July 28, 1994, in Toms River, N.J.

September 20, 1994, in Wayne, N.J.

November 2, 1994, in Trenton, N.J.

Many individuals took time out of their schedules to attend these public meetings, often at great personal inconvenience or sacrifice. In many instances it was obvious that the testimony revisited a painful experience for the person presenting it. Often persons who testified followed-up with the Commission and submitted additional information or materials. Many other individuals have provided their thoughts, suggestions and ideas in written communications to the Commission, in conversations with members of the Commission and in conversations with the staff.

The Commission wishes to take this opportunity to thank the many persons who gave so generously of their time and personal information. We would be remiss if we failed to thank also the many persons who provided assistance and cooperation when we conducted hearings outside of Trenton. A note of acknowledgement and appreciation is also in order for other

⁷ Transcripts of these hearings are available upon request from the Office of Legislative Services, Office of Public Information, Legislative Information and Bill Room, Level 1B, State House Annex. (609) 292-6395 or (800) 792-8630.

persons in the Office of Legislative Services, who, in addition to Commission staff, provided valuable assistance, including the Office of Public Information, in particular the Hearing Reporter Unit, and the Administrative Unit.

The Commission heard much information that was anecdotal. It did not conduct surveys or statistical studies. The Commission reviewed the current body of New Jersey statutory and case law that pertains to divorce and related issues. It examined selected portions of other states' laws and programs. A review of literature published in law journals was made and other articles of interest were examined. One of the most significant bases for information was the personal knowledge and experience of each member of the commission. There was no substitute for the personal experience and expertise that this membership represents. Executive sessions were held to review testimony and information and to meet with certain experts in the field.

The Commission also heard extensive testimony and received information from mediation experts from New Jersey and Florida.

The Commission was fortunate to have the opportunity to meet with the Presiding Judges of the Family Part of the Chancery Division of the Superior Court. A great deal of information on the procedure and process attendant to the Family Part was provided to the Commission and it was an opportunity that was appreciated. In addition, Commission members were offered the further opportunity to experience a "day in the life" of a Family Part judge.

The Commission was organized into three subcommittees which were announced at the March 1994 public hearing. The vast nature of the topic seemed to require some effort to organize the commission members by expertise and indicated interest.

The legislative members were ex officio members of each Subcommittee. The Subcommittees were comprised as follows:

SUBCOMMITTEE ON JURISDICTION AND CAUSES OF ACTION

Frank A. Louis, Chair

Jeffrey S. Blitz

Douglas K. Schoenberg

The Subcommittee on Jurisdiction and Causes of Action was charged with examining the issues concerning the statutes which establish the preliminary parameters of divorce cases. The work of this Subcommittee was circumscribed by definition since the focus was very pointed. In general the Subcommittee examined the current language of N.J.S.A. 2A:34-2 which sets the present causes for divorce and looked at a number of other states' statutory provisions in this regard. The Subcommittee considered issues related to the judiciary and court administration given the courts' jurisdiction in many of these matters.

SUBCOMMITTEE ON CUSTODY AND VISITATION

Robert P. Broderick, Chair

Nancy J. Benz

Douglas K. Schoenberg

Irene von Seydewitz*

The Subcommittee on Custody and Visitation was charged with the task of researching the issues surrounding custody and visitation in this State, highlighting the problems and developing recommendations by examining other states' policies and laws. The members understood that the present system, although at times frustrating is nevertheless a working system which needs to be enhanced. The recommendations recognize that the present system needs to be improved in order to address the concerns of the public.

The Commission's recommendations in this area take into consideration the public's concern that the system should be an effective one which would assist them in dealing with the

problems arising from a divorce and should be a system which would hold the interest of the family and children in the highest regard. Perhaps more importantly, it should be a system which they can understand.

SUBCOMMITTEE ON FINANCIAL ASPECTS OF DIVORCE

Sara Flohr, Chair

Nancy Benz

Carol Bishop

Frank A. Louis

Marianne Espinosa Murphy

The subject of the financial aspects of divorce is a broad and complex one, involving the intricacies of child support payments and the methods used to calculate these payments; the equitable distribution of the many types of marital assets, including assets which can only be properly evaluated by experts, such as retirement benefits and businesses; and the various forms of alimony which may be awarded by the court, for various purposes and for various time periods.

The Commission recognized that much of the law governing the financial aspects of divorce is unlikely to be affected by legislative enactments. Statutes can only provide general principles to govern the specific and unique circumstances of each case. Because of this, the Commission restrained its purview to selected topics which can be beneficially affected by statutory changes.

RECOMMENDATION 1

Legislation providing a new cause of action based on irreconcilable differences.

The Commission examined N.J.S.A. 2A:34-2 which reads as follows:

2A:34-2. Causes for divorce from bond of matrimony

Divorce from the bond of matrimony may be adjudged for the following causes heretofore or hereafter arising:

- a. Adultery;
- b. Willful and continued desertion for the term of 12 or more months, which may be established by satisfactory proof that the parties have ceased to cohabit as man and wife;
- c. Extreme cruelty, which is defined as including any physical or mental cruelty which endangers the safety or health of the plaintiff or makes it improper or unreasonable to expect the plaintiff to continue to cohabit with the defendant; provided that no complaint for divorce shall be filed until after 3 months from the date of the last act of cruelty complained of in the complaint, but this provision shall not be held to apply to any counterclaim;
- d. Separation, provided that the husband and wife have lived separate and apart in different habitations for a period of at least 18 or more consecutive months and there is no reasonable prospect of reconciliation; provided, further that after the 18-month period there shall be a presumption that there is no reasonable prospect of reconciliation;
- e. Voluntarily induced addiction or habituation to any narcotic

drug as defined in the New Jersey Controlled Dangerous Substances Act, P.L.1970, c. 226 or habitual drunkenness for a period of 12 or more consecutive months subsequent to marriage and next preceding the filing of the complaint;

f. Institutionalization for mental illness for a period of 24 or more consecutive months subsequent to marriage and next preceding the filing of the complaint;

g. Imprisonment of the defendant for 18 or more consecutive months after marriage, provided that where the action is not commenced until after the defendant's release, the parties have not resumed cohabitation following such imprisonment;

h. Deviant sexual conduct voluntarily performed by the defendant without the consent of the plaintiff.

(cf. P.L.1971, c. 217, s.11)

The Commission considered adding a ninth basis for divorce to the eight causes listed above. The Commission looked for other state statutes that used "irreconcilable differences" or a similar term. The Commission examined the statutory causes of action for divorce in the following states: California, Idaho, Montana, New Hampshire, North Dakota, Mississippi, Oregon and Tennessee.

The California statute, Cal. [Fam.] Code §2310 (West 1994), provides two grounds for dissolution or legal separation: irreconcilable differences and incurable insanity. Cal. [Fam.] Code §2311 defines "irreconcilable differences" as those grounds determined by the court to be substantial reasons for not continuing the marriage which make it appear that the marriage should be dissolved.

The same definition is found in Idaho Code §32-616 (1994). N.H. Rev. Stat. Ann. §458:7-a (1994) provides for divorce, regardless of fault, on the ground of "irreconcilable differences

which have caused the irremediable breakdown of the marriage." North Dakota's domestic relations law is similar to New Jersey's in that it lists seven causes for divorce, but it adds an eighth cause of "irreconcilable differences." See N.D. Cent. Code §14-05-03 (1994). The North Dakota definition for irreconcilable differences parallels California and Idaho. The Mississippi law permits irreconcilable differences as a sole ground or as an alternate ground for the causes set out in Miss. Code Ann. §93-5-1 (1994). Montana uses the term "irretrievable breakdown" and allows one party, if not in agreement, to force the court to make a determination as to whether the marriage is irretrievably broken. See Mont. Code Ann. §40-4-107 (1994). Oregon provides for irreconcilable differences in Or. Rev. Stat. §107.025 (1994).

The Commission held a public hearing in August of 1994 as to whether irreconcilable differences should be added to the present list of causes of action. The Commission recommends that N.J.S.A. 2A:34-2 should be amended to add subsection i. to read as follows:

"i. Irreconcilable differences which have caused the breakdown of the marriage for a period of three months, which is defined as substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved."

The Commission is of the opinion that the availability of this added ground may alleviate the need for allegations as may be used to substantiate the other causes. These allegations may be of a nature which sets a tone of bitterness and accusation. The availability of "irreconcilable differences" may permit two parties to begin to dissolve the marriage in a somewhat more amicable fashion.

RECOMMENDATION 2

Legislation requiring certain parties who file for divorce to attend a mandatory education program.

Educating parents, and in turn having parents educate their children, about divorce, the legal process, the psychology of divorce and the new family structures that arise out of a divorce was one of the main concerns of the Subcommittee on Custody and Visitation. The importance of educating the participants in a divorce was emphasized continually throughout the public hearings. A sense of frustration and miscommunication between the divorcing parties and their attorneys as well as the sense of frustration with the court system which the parties had to encounter during this difficult time were evident in the testimony. The Commission concluded that a mandatory education program should be one of the cornerstones of any attempt to revise the divorce laws. Such a program would bring about a better understanding of the legal process and financial responsibilities both parties would most likely face during the divorce process. The Commission determined that in order for any program to work certain guidelines needed to be established. For example, an effective program would educate parents on how to counsel their children during the divorce process. The program would stress the importance of keeping communication open between all the parties involved during the entire process.

In addition, the program would provide parents with the tools they could use in addressing their children's concerns. The program would also assist parents with dealing with the new family structure and the new set of rules which come with this new structure.

The Commission conducted a search of other state laws which established mandatory education programs for divorced parents. The research indicated that among the several states which required divorced parents to attend an education program the Utah and New Hampshire programs would be worthy of duplication in New Jersey. These programs emphasized the necessity of creating an understanding between the parents and children and stressed teaching

the parents strategies as well as providing them with tools to use during this time of adjustment. Another program proposal which emphasized some of the points of the Utah and New Hampshire programs and which also provided a great deal of information was the "Parent Education and Custody Education Program, or "P.E.A.C.E." program, which was developed by Professor Andrew Schepard of Hofstra University School of Law.

In addition to researching the innovative programs in other states, the Commission was made aware of the education program which is currently being administered on a limited basis in some counties in New Jersey. This court pilot program became an effective frame of reference for the Commission in developing a comprehensive legislative recommendation for a statewide program.

After extensive meetings on the impact of these programs in other states as well as discussing some of the problems arising from implementation of the court pilot program, the Commission concluded that an outline of some of the basic components of a model mandatory education program was necessary.

The Commission determined that in order for any education program to work it would be essential for the program to be mandatory. The legislation would require all parties filing an action for divorce, where the custody, visitation or support of a minor child is an issue, to attend the program. The participants would be required to pay a registration fee thereby placing a greater value on attending the program. In addition, the Commission surmised that sanctions for not attending the program would be essential in order to assure the success of the program. The legislation would provide that the court would be able to consider failure of any of the parties to attend the program, along with other factors, in making a custody and visitation determination. Due to the personal nature of the subject area as well as the often emotional state of the parties involved, the Commission also recommends that the legislation provide that all communications between the program moderators and the participants be confidential and inadmissible as evidence in any court proceedings. In addition, the legislative proposal would also create a temporary advisory committee, consisting of professionals in the area of divorce, who would

develop a specific curriculum, determine the program length, establish guidelines, establish qualifications for the program moderators as well as establish any other requirements for the program which may be necessary. This nine-member committee would be comprised of individuals who specialized in family law matters, including a former judge, an attorney, a mediator, a probation officer, two mental health professionals, an educator, a custodial parent and a non-custodial parent. The advisory committee would also be required to report its findings to the appropriate State agency which in turn would be required to use these recommendations in developing the mandatory education program.

Although the Commission's mission is restricted to divorce law the Commission recommends that this education program be made available in non-dissolution cases.

RECOMMENDATION 3

Legislation requiring a parenting plan to be filed in divorce actions.

The Commission was concerned with the recurring problems most parties filing for divorce encounter with regard to scheduling of visitation and the delineation of responsibilities between the parents. The Commission researched several innovative concepts used in states such as Arkansas, Nebraska, New Mexico and Washington which required parties in a divorce proceeding to file a parenting plan. After reviewing these state statutes as well as researching the effectiveness of such a requirement, the Commission concluded that requiring parties to file a parenting plan which meets the needs of the members of the family would assist these individuals in developing a restructured family unit. Thus, the State would be encouraging parties to fulfill their parenting responsibilities by working through an agreement rather than by relying on judicial intervention. The parenting plan would also encourage the parents to provide their children with frequent and continuing contact with both parents even after the parents have separated or divorced, absent any history or threat of violence or abuse. In addition, by fostering participation and cooperation between the parents with regard to the minor children's activities, the plan would decrease the minor children's exposure to parental conflict and provide the parties with equal access to the minor children.

The legislative proposal would require parents, in a parenting plan, to specify procedures for the day-to-day care of the minor child, procedures for transporting the child from one parent to the other parent at the start and conclusion of visitation and notification procedures between the parents concerning visitation.

Consideration would need to be given to the minor child's age and developmental needs. The plan would include a schedule which would specify the time the minor child is to spend with each parent on a weekly basis including, but not limited to, special occasions, religious and secular holidays, birthdays and vacations. The plan would specify how major decisions would

be made among the parents concerning the minor child's education, health care, and religious upbringing. Regardless of the allocation of the decision-making in the parenting plan, the parties would be required to authorize emergency medical procedures in situations affecting the immediate health of the child. More importantly, the plan would only address issues regarding parenting functions. Specifically excluded from the parenting plan would be property division, financial issues and child support matters. The plan would provide the parents with the freedom to construct a manageable and flexible parenting plan.

If there is disagreement between the parties, the parties would be referred to either a public or private mediator. The proposal would require each party to file the parenting plan within 90 days of filing a complaint for divorce, nullity or separate maintenance, where the custody, visitation or support of a minor child is at issue. After each party has filed an individual plan, the legislation would require the parties within 45 days to file a mutually agreed upon plan. The legislative proposal would also provide that if a mutually agreed upon plan was not achieved the matter would be referred to the court. In addition, the legislation would require the court to make available to each party a "parenting plan kit" which would include a sample parenting plan.

RECOMMENDATION 4

Legislation requiring all parties during the divorce process to maintain certain insurance coverages.

Another dilemma facing many individuals who are involved in the divorce process is the real possibility that any health or life insurance coverage which they had during the marriage could be summarily terminated by the party who maintained the coverage. The Commission was made aware of the fact that the court realizes the seriousness of this situation and often orders that all insurance coverages be maintained during the duration of the proceedings. In order to ensure that the parties in every divorce proceeding are given the same consideration, a law requiring the parties to maintain all insurance coverage during the course of the divorce process is necessary.

The Commission researched the question as to whether other states required parties who file for divorce to maintain insurance coverage until final judgment is entered. The research indicated that California and Washington were among the states which required the parties to maintain coverage.

The Commission recommends legislation which would require the parties in a divorce action to continue to maintain or continue to share in the cost of maintaining all existing insurance coverage, as of the date of the filing of the action, until the judgment is entered or the status quo is otherwise modified by court order or by agreement of the parties.

The legislative proposal would also authorize a party who has maintained the coverage to notify the other party when there is a change in that party's employment status which would make insurance coverage unavailable. Nothing in this recommendation diminishes the authority of the court to make appropriate changes concerning the coverage.

RECOMMENDATION 5

Legislation establishing a court-referred mediation program.

Mediation is a non-adversarial and informal process where the sole objective is to assist the disputing parties in obtaining a voluntary agreement which would be mutually accepted. It is a cooperative process by which parties are assisted in formulating an agreement by a mediator. The mediator is a qualified, neutral third person who attempts to facilitate the resolution of the dispute. Mediation is a process where the decision-making authority rests with the parties and not the Court.

The Commission held extensive discussions on the topic of mediation of divorce cases. Mediation experts from New Jersey and Florida provided information concerning court mediation programs. The Commission also received information from other states which have established mediation programs such as Alaska, California, Louisiana, Montana, Oregon and Utah.

After extensive meetings on the impact of mediation programs in other states as well as discussing some of the problems mediators are currently facing in New Jersey,⁸ the Commission concluded that New Jersey should adopt a mediation program.

The court-referred mediation program would be conducted according to the Rules of the Court. The court may refer the parties to a private or public mediator. The court may establish minimum standards and procedures for qualification and certification of mediators.

⁸ Rule 1:40 establishes guidelines and rules for a "Complementary Dispute Resolution Program" which authorizes a judge to refer any custody or visitation action to a mediator if the judge deems it necessary and after an initial evaluation of the parties has been conducted.

The Commission recognizes that all divorce matters do not necessarily lend themselves to mediation. Therefore, the proposal would provide that where the court determines that there is a history of domestic violence which would compromise the mediation process, the case would not be referred to mediation. The proposal would also provide that if a party, with regard to economic matters, objects to attending the mediation session the matter would not be referred to mediation. In addition, the Commission recognizes that the legislative proposal should include a mechanism which authorizes the mediator to terminate the session if the efforts are unsuccessful or the parties are unable to reach an agreement.

RECOMMENDATION 6

Legislation amending the statutes to more accurately reflect the rights and responsibilities of the parents by changing the term "visitation" to "parenting time" where appropriate.

The Commission determined that the term "visitation" is antiquated and, more importantly, does not necessarily reflect the new family structure and the obligations which come with that new structure.

After conducting a search of other state laws, the Commission found that Washington and Colorado, along with others, amended their statutes by changing the terms "custody" and "visitation" to more accurately reflect the relationship between the parent and the child who have gone through a divorce.

The Commission recommends that the statutes in New Jersey be revised to replace the term "visitation" with the term "parenting time."

The Commission anticipates that altering the system of referring to one parent as the custodial parent and the other parent as the "visiting" parent would more accurately encompass both parents' child rearing responsibilities.

In addition, the Commission is concerned about the inaccuracy of the term "custody" and recommends that the Legislature investigate the use of an alternative term if one can be determined.

RECOMMENDATION 7

Legislation guaranteeing each parent equal access to his or her children's records.

The Commission became aware of a trend in many divorce actions where parents, usually the non-custodial parent, may be denied access to their children's educational or medical records. Often these parents are denied access because of explicit directions given by the other parent. Other times access is automatically denied by an educational institution because the inquiring parent does not have legal custody of the child.

The Commission conducted a search of other state laws which provided for equal access to all medical and educational records. The Commission found that among the states which guaranteed equal access, Utah's and Washington's statutes could be used as models in developing a comprehensive proposal which may be implemented in New Jersey.

The legislative proposal would guarantee every parent equal access to his or her children's medical, dental, insurance, child care and educational records.

The legislation may provide that the place of residence or other identifying information about either parent shall not appear on any records distributed. The Commission is cognizant of a potential problem in this regard in domestic violence matters. The legislative proposal would also grant rule making powers to the Department of Education to establish guidelines and procedures for distributing records to the parents.

The Commission also recognizes that under certain circumstances access to the parent should be denied. The Commission recommends that the legislative proposal would authorize the court to deny access if it finds that it is not in the best interest of the child or if the access would only cause the other parent to suffer a detriment.

RECOMMENDATION 8

Legislation clarifying the sanctions available to a judge for a violation of a visitation order.

The Commission recommends legislation which would establish a series of specific statutory civil remedies for judges who hear violations of visitation order matters. A judge who sanctions a party for failure to comply with an order of visitation shall have these remedies available: counsel fees against the party who violated the terms of the order; community service; compensatory time for the time with the child of which the party was deprived; and other economic sanctions which may be decided on a case-by-case basis.

The court may require compensation when visitation has been denied for costs incurred by either party based on the circumstances. Some examples include reimbursement for the costs of travel arrangements made and forfeited, costs of child care incurred, costs of tickets to events which were purchased in advance and not used, loss of time at a place of employment due to delays resulting from a violation of the order and other economic losses.

The legislation may include a findings section to emphasize that the best interests of the children of dissolved marriages in maintaining close relationships with both parents, regardless of which parent has the physical custody of the child, is paramount. Further, proceeding criminally in cases where an order of visitation has been violated may be both difficult and, possibly, inappropriate. Increasing the statutory civil remedies available to a judge provides an indication of legislative intent to promote the enforcement of these matters. Judges' contempt powers as set forth in R. 1:10-1 et seq. are always available but this bill provides other specific remedies.

RECOMMENDATION 9

*Legislation establishing a definitive time when a child is emancipated.**

**The Commission is divided in its approach to the two issues set out in Recommendation 9 and Recommendation 10 which represent opposing stances. Therefore, we set out both Recommendation 9 and Recommendation 10, knowing that they are inconsistent with each other, but recognizing the importance of the policy issues they encompass and deferring the resolution of these matters to the Legislature.*

Subject to the reservations expressed above, the Commission recommends legislation which would establish a definitive time at which a child would be "emancipated" and relinquish the right to child support.

Currently, when a child reaches the age of 18 there is prima facie, but not conclusive, proof of emancipation. A long line of New Jersey cases has established the principle that whether a child will actually be considered emancipated at age 18 turns on the particular facts of each case.⁹ The courts have also held that parents who are "financially capable" generally will be ordered to contribute to their children's higher education, and that they may be ordered to contribute to postgraduate education as well.

The Commission believes that, for the sake of predictability in fixing the obligations of parents to their children, the law should provide for a time when the obligation to pay support on behalf of a child definitively ends. The Commission recognizes the moral obligation of a parent to his or her child and believes it will govern and guide parents to act in the best interests of their children.

⁹ See Newburgh v. Arrigo, 85 N.J. 529 (1982).

The proposed legislation would amend N.J.S.A. 2A:34-23, which concerns child support.

The proposed legislation would overturn the case law by providing that, except in a situation where a child is dependent on a parent because of a mental or physical incapacity, the obligation to pay support would terminate when a child is emancipated by law, including, but not limited to, emancipation through marriage or military service; when a child is emancipated by court order; or the later of the following: the child either graduates high school or reaches the age of 18. The proposed legislation would also set out a presumption that the obligation to pay support for a child who has not graduated high school terminates if the child has reached the age of 18 but is not attending high school.

The Commission's research into other states' statutes and case law indicated that 34 states set a definitive age of either 18 or 19 for termination of child support. The most frequent age is 18. Alternatively, many of these states allow support to continue if the child of the parties is still in high school, up to age 19 or, more rarely, to age 21.

Statutes of the states of Florida and Colorado were used as models for the Commission's recommended legislation.

RECOMMENDATION 10

*Legislation clarifying parental responsibilities for post-secondary education.**

**Subject to the provisions expressed in the first paragraph of Recommendation 9, the Commission recommends legislation which would clarify the circumstances under which divorced parents may be held financially responsible for their children's post-secondary education expenses.*

In Newburgh v. Arrigo, 88 N.J. 529 (1982), the New Jersey Supreme Court held that in divorce cases "[i]n general, financially capable parents should contribute to the higher education of children who are qualified students." The court held that this obligation is not limited to higher education but may, "[i]n appropriate circumstances" include postgraduate education, such as law school.

Newburgh delineated the standards for trial courts to use in determining whether non-custodial parents should be ordered to contribute to the higher education of their children. The Supreme Court ruled that, among other factors, a trial court should consider whether the parent, if still living with the child, would have contributed towards the costs of the requested higher education; the effect of the background, values and goals of the parent on the reasonableness of the child's expectation for higher education; the amount of the contribution for higher education sought by the child, and the ability of the parent to pay that cost; the financial resources of the child, including the availability of financial aid in the form of college grants and loans; the commitment to and aptitude of the child for the requested education; and the child's relationship to the paying parent, including mutual affection and shared goals as well as responsiveness to parental advice and guidance.

Current statutory law on this subject is minimal. N.J.S.A. 2A:34-23, the general statute concerning child support, provides that the court must consider nine different factors (plus "any other factors the court may deem relevant") in determining child support. These factors include

"needs of the child," "all sources of income and assets of each parent," and "earning ability" of each parent" in addition to "need and capacity of the child for education, including higher education."

The Commission's proposed legislation would codify and clarify the Newburgh standards. The legislation would set out a two-tier system for the court to use in determining parents' liability for the payment of higher education expenses. The legislation would also use the phrase "post-secondary education" rather than "higher education" in order to clarify that the standards are not limited to college education, but apply equally to trade schools, vocational schools and other types of post-secondary education.

Under the proposed legislation, the court would initially be required to determine whether post-secondary education expenses should be paid on behalf of the child. In reaching this determination, the court would consider the following:

- (a) Whether the parent, if still living with the child, would have contributed towards the cost of the post-secondary education;
- (b) The effect of both parents' educational background, values and goals on the reasonableness of the child's expectation for post-secondary education;
- (c) The commitment to, and aptitude of, the child for the requested education;
- (d) The child's relationship with the paying parents;
- (e) Whether post-secondary education was provided for other children of the parties;
- (f) Whether the parents or other family members attended post-secondary education; and
- (g) The reasonableness of the time between graduation from high school and the time the child desires to attend post-secondary education.

If the court makes the determination that these costs should be paid on behalf of the child, the next step is for the court to determine the amount that each parent must pay. This determination would be made by considering:

- (a) The amount of the contribution sought by the child for the cost of the post-secondary education;
- (b) The ability of each parent to pay the cost;

- (c) The income, assets, liabilities and financial resources of both parents;
- (d) The amount of child support to be paid for the child during the child's period of education;
- (e) The responsibility of each parent to pay for the support of other children during the period of education;
- (f) The income, assets, liabilities and financial resources of the child, including assets owned individually or held in custodianship or trust;
- (g) The ability of the child to earn income during the school year or on vacation;
- (h) The availability of financial aid in the form of college grants and loans;
- (i) The relationship of the requested education to any prior training and to the reasonable overall long-range goals of the child;
- (j) The reasonableness of the proposed school selection, given the child's needs and, if appropriate, unique skills, and the educational background of other family members;
- (k) The availability of comparable post-secondary education at a lesser cost, such as State universities and colleges; and
- (l) The need of either parent to maintain a residence for the child during attendance at post-secondary education.

The current statute does not clearly address this issue, and inequities have resulted. The Commission is aware of cases where child support payors have been ordered to pay post-secondary education expenses on behalf of their children pursuant to Newburgh, yet must continue to make child support payments at the previous amounts, regardless of whether the child's need for support has decreased because he is living away from home and regardless of the substantially increased financial burden.

The Commission recommends that this legislation also would impose an affirmative obligation on a custodial parent to notify a non-custodial parent who is paying expenses for the child's post-secondary education if the child is no longer enrolled in the course of study or is no longer attending the classes there. No statute currently addresses the issue.

RECOMMENDATION 11

Legislation requiring the court to review child support orders when a child attends post-secondary education.

The Commission recommends legislation providing that, upon application of a party, the court shall review the amount of child support to determine whether a contribution being made by a parent to post-secondary education for a child has resulted in a substantial change of circumstances warranting a change in the child support order. No statute currently addresses the issue.

RECOMMENDATION 12

Legislation concerning rehabilitative alimony.

The Commission recommends several changes in the statutes governing rehabilitative alimony:

Under the statute governing alimony awards, N.J.S.A. 2A:34-23, the court may award either permanent alimony or rehabilitative alimony. Rehabilitative alimony is not defined in the statute, but is defined by the courts as:

"alimony payable for a short, but specific and terminable period of time, which will cease when the recipient is, in the exercise of reasonable efforts, in a position of self-support." Turner v. Turner, 158 N.J. Super. 313, 314 (Ch. Div. 1978).

The Supreme Court originally sanctioned rehabilitative alimony in its landmark decision in Lepis v. Lepis, 83 N.J. 139, 155 (1980) when it expressed its disagreement with a statement made in a prior Appellate Division case "that only unusual cases will warrant the rehabilitative alimony approach." However, the Court cautioned that "careful and explicit fact finding" on the earning ability of the dependent spouse was of "paramount importance" in rehabilitative alimony cases. Lepis at 155.

The purpose of rehabilitative alimony is to allow the recipient to receive education or job training which will enhance or create an earning capacity, thus rehabilitating the recipient. Unlike permanent alimony, rehabilitative alimony is for a specific rehabilitative purpose and is intended to terminate when the specific education or training ends. As the Superior Court said in Mahoney v. Mahoney, 91 N.J. 488, 504 (1982), rehabilitative alimony is appropriate where a spouse who gave up or postponed her own education to support the household requires a lump

sum or a short term award to achieve economic self-sufficiency. Consequently, as part of the Commission's legislative proposal on the subject of alimony, the Commission recommends a statutory requirement that receipt of a rehabilitative alimony award be contingent on the recipient actually receiving the education or training that formed the basis for the rehabilitative award.

The proposed legislation would provide that rehabilitative alimony, like permanent alimony in current law, would end upon remarriage of the spouse receiving it.

RECOMMENDATION 13

Legislation authorizing the award of limited duration alimony.

The Commission recommends that the types of alimony which may be awarded by the court be expanded to include limited duration alimony.

The purpose of permanent alimony, in contrast to rehabilitative alimony, is to address any economic dependency created by the marriage and to permit the dependent spouse to share in the economic success created by the marital partnership and reflected by the supporting spouse's income level. See Gugliotta v. Gugliotta, 160 N.J. Super. 160, 164 (Ch. Div. 1987) aff'd 164 N.J. Super. 139 (App. Div. 1978).

The earning capacity of a full-time homemaker in a long-term marriage decreases proportionately with the length of the marriage as the homemaker's education, skills and job experience become outmoded. The longer the marriage, the more likely it is that the homemaker's earning capacity will become permanently diminished. Meanwhile, the homemaker's spouse has reaped the benefits of having a family and yet devoting all of his (or her) productive hours to an increase in earning capacity.¹⁰

After studying the topic, the Commission concluded that the statutes should recognize a third type of alimony, in addition to rehabilitative alimony (short duration; specific educational or training purpose) and permanent alimony (lifetime duration, unless the recipient remarries; general purpose of compensating the recipient's economic dependency). This third type, limited duration alimony, would address the factual circumstances that are presented in some of the

¹⁰ See Krauskopf, "Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony," 21 Family Law Quarterly 573 (Winter 1988).

cases that are heard in the Family Part. These cases generally involve a marriage of short duration where permanent or rehabilitative alimony would be inappropriate or inapplicable but where, nonetheless, economic assistance for a limited period of time would be just.

The Commission recognizes that, during the settlement process, when an objective such as limited duration alimony can only be obtained through settlement, the party desiring the objective is at a clear disadvantage in negotiations. A statute specifically authorizing limited duration alimony would fill a void that cannot otherwise be filled currently, except in the settlement process. It would offer a benefit to spouses deserving of alimony for a limited time but who would be unlikely to receive any alimony under our present statutory scheme.

With the added option of limited duration alimony, the courts will not have to use the fiction of requiring one spouse to pay "rehabilitative" alimony to a spouse who has a career and is in no need of "rehabilitation."

The recommended legislation in this regard would provide that, in any case where a party requests an award of permanent alimony, the court would first be required to consider and make specific findings on a number of factors, including the need and ability of the parties to pay, the duration of the marriage, the health of the parties, their standard of living and their earning capacities. After this threshold determination, if the court determines that an award of permanent alimony is not warranted in the case, it would then consider whether limited duration alimony is warranted.

The court would also be required to consider why, in lieu of such an award, equitable distribution of the marital property could not be used to compensate the potential alimony recipient for the recipient's financial or non-financial contributions to the marriage.

Specifically, the statutory factors that the court would use to determine whether limited duration alimony is warranted are as follows:

1. The duration of the marriage.
2. The payor's ability to pay.

3. The age, physical health and emotional health of the parties.
4. The standard of living enjoyed during the marriage.
5. The contribution of the spouse seeking support to the development and maintenance of the parties' marital standard of living.
6. The financial and non-financial contributions of the parties to the marriage.
7. The educational levels, vocational skills and earning capacities of the parties and how they were affected by the marriage.
8. The economic impact on the parties of the child-rearing responsibilities for children of the marriage.
9. The distribution of property acquired during the marriage and the ability of either spouse to have acquired such assets without the marriage.
10. The fairness of either spouse enjoying a standard of living comparable to that enjoyed during the marriage, given the parties' financial and non-financial contributions to the development, maintenance and acquisition of income or assets which supported the marital lifestyle.
11. Whether the parties were economically advantaged or disadvantaged by the marriage.
12. The income or property brought to the marriage by the parties.
13. The use and dissipation during the marriage of the parties' pre-marital assets.
14. The income generated by assets equitably distributed, except for income generated by a share of a retirement benefit treated as an asset and equitably distributed. [Current law, in N.J.S.A.2A:34-

23, specifically excludes income generated by retirement benefits from being included in determining alimony. The proposed legislation would not affect this provision.]

15. The sale of the marital assets and the availability of the proceeds for the parties' use.

16. The time in which the spouse seeking support can reasonably be expected to improve earning capacity to a level where alimony of limited duration is no longer appropriate.

17. Such other factors as the court deems appropriate.

Providing the power to award limited duration alimony, subject to safeguards and only after an analysis of carefully crafted statutory factors, will permit the courts to mold their decision making to the facts presented without the artificial constraints now presented by only having the options of awarding rehabilitative alimony, permanent alimony or no alimony at all.

In developing the statutory factors, the Commission's intent is to direct the court to focus upon the economic impact of the marriage on the parties by examining whether employment opportunities were lost or career opportunities delayed. In addition the court would inquire into any advantages obtained by either spouse by the equitable distribution award. All these must be inter-related with all relevant economic factors in determining whether any economic dependency that might exist between the parties was created by the marriage or was the product of the parties' disparate skills and educational opportunities, unrelated to anything that happened during the marriage. The court's inquiry would focus not on the fact that the parties were married but upon the impact of the marriage and child-rearing responsibilities on the parties.

The proposed legislation would also require the court to inquire whether either of the parties were economically disadvantaged by child-rearing responsibilities for children of the marriage.

The legislation would also require the court to consider, in determining the length of time that the limited duration award would last, the length of time it would reasonably take for the spouse seeking support to improve his or her earning capacity to a level where limited duration alimony is no longer appropriate.

The legislation would provide that the amount of an award of limited duration alimony might be modified by the court based on "changed circumstances" pursuant to the case law governing modification of permanent alimony awards, but that the length of the term during which the payments would be made could not be changed.

The legislation would provide that the obligation to pay limited duration alimony would terminate upon the death of either party or the remarriage of the recipient.

Under the legislation, if as a result of the marriage, the dependent spouse was economically disadvantaged to such a significant degree that economic assistance for a limited period of time would be inadequate, then limited duration alimony would not be considered.

Limited duration alimony is not intended to be a replacement for permanent alimony where the length of the marriage and the contributions made by the dependent spouse are significant. In particular, it is singularly inappropriate in long marriages. It is, therefore, the clear and unequivocal view of the Commission that such term alimony should be limited to shorter marriages and not be ordered in long-term marriages.

RECOMMENDATION 14

Legislation including family court motions in the "frivolous lawsuit" statute.

The Commission recommends legislation which would allow judges to impose sanctions against parties who file frivolous family court motions.

According to testimony at the Commission's public hearings, as well as discussions with several Family Part Presiding Judges, a substantial amount of court time and litigation costs are expended in matrimonial motions, many of which are without merit. The parties who defend themselves against such motions must incur the expense of hiring attorneys, and the courts' strained resources are wasted, yet there is little recourse against litigants who file such pleadings in bad faith, with no hope of winning but with the sole intent of harassing the other party.

Currently, the "frivolous lawsuit" statute, N.J.S.A.2A:15-59.1, allows a prevailing party in a civil action to recover attorney fees and costs from the nonprevailing party when the judge determines that a complaint, counterclaim, cross-claim or defense filed by the nonprevailing party was frivolous.

The New Jersey Supreme Court, in McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 562 (1993), and Lewis v. Lewis, 132 N.J. 541, 545 (1993), held that by the terms of N.J.S.A.2A:15-59.1, the statute does not apply to motions. In Lewis v. Lewis which involved post-judgment matrimonial motions, the family court awarded attorney fees to Joanne Lewis because it determined that a motion by her ex-husband to reduce his payment of alimony arrearages was frivolous under the standards set by N.J.S.A.2A:15-59.1. However, the attorney fee award was overturned by the New Jersey Supreme Court on the grounds that the statute only covers a frivolous "complaint, counterclaim, cross-claim or defense," and not a frivolous motion.

The Commission's proposed legislation would expand the statute to also allow recovery of attorney fees and court costs for a party who is forced to litigate against a frivolous motion or cross-motion in a matrimonial case.

RECOMMENDATION 15

Legislation providing for wage withholding for alimony payments.

The Commission recommends legislation which would require that payments for alimony or separate maintenance would automatically be made through the county probation department by way of income withholding at the time the court order is issued or modified.

The legislation would be modeled on the current child support withholding statutes, N.J.S.A. 2A:17-56.8 and N.J.S.A. 2A:17-56.9. As provided in those statutes, alimony payment withholding would not occur if the parties agree in writing to an alternative arrangement, unless the obligor accumulates arrearages equal to the amount payable for 14 days.

Currently, the child support withholding statutes set out detailed procedures for payment through the probation department. The proposed legislation would add similar language to the alimony statute.

RECOMMENDATION 16

Legislation providing an affirmative obligation on an ex-spouse to provide notice upon remarriage when the spouse is receiving alimony.

Under the provisions of N.J.S.A. 2A:34-25, any permanent alimony being paid to a former spouse must terminate if that spouse remarries. Probation department officials have expressed their concerns about situations they have seen where alimony obligors believe that their former spouses have remarried but cannot ascertain that information without filing a court motion. In order to alleviate this problem, the Commission recommends the equitable remedy of legislation which would amend N.J.S.A. 2A:34-25 to require a spouse who remarries while receiving permanent alimony to inform the payor spouse of the marriage.

Sanctions that the court could impose on a spouse who fails to comply would include attorney fees, costs reasonably incurred to support a motion and return of alimony, with interest, paid after the marriage.

RECOMMENDATION 17

Legislation clarifying the equitable distribution of retirement benefits.

The Commission recommends legislation which would clarify the equitable distribution of retirement benefits. Although the statutes governing equitable distribution, N.J.S.A. 2A:34-23 and N.J.S.A. 2A:34-23.1, do not specifically address the distribution of retirement benefits, the courts since 1977 have made it clear that these benefits are marital property that is subject to equitable distribution. (Kruger v. Kruger, 73 N.J. 464 (1977); Kikkert v. Kikkert, 177 N.J. Super. 471 (App. Div. 1981), aff'd 88 N.J. 4 (1981)).

However, establishing the actual value of a pension or other retirement benefit is a difficult process. Not only is the expertise of professionals often required, but in many instances there is strong disagreement among the various professionals concerning the methods used to establish a retirement benefit's value. In Moore v. Moore, 114 N.J. 147 (1989), for example, one consulting actuary provided the court with six different figures to represent possible values for the husband's pension in the New Jersey Police and Firemen's Retirement System. The amounts, which ranged from \$21,974 to \$84,951, varied based on several contingencies which the actuary speculated might occur, as well as several methods of calculation: the lowest sum was the actuary's value of the pension if the husband were to retire before completing 25 years of service, and without recognizing future salary or post-retirement cost-of-living increases, and the highest sum was his evaluation of the pension's value assuming the husband did retire after 25 years, and with recognizing future increases in salary and post-retirement costs-of-living.

The court finally decided that future, contingent pension benefits such as cost-of-living increases are subject to equitable distribution, and, in addition, recommended that the employee spouse generally pay the non-employee spouse the current cash value of the pension.

The preference established in the Moore decision for the immediate distribution of pension benefits has been strongly criticized by commentators, who have stated that the court

did not take into account the potential problems and inequities of the "immediate distribution" method.¹¹

The legislation recommended by the Commission would eliminate any preference for either the "immediate" or "deferred" methods of distribution. In addition, it would seek to standardize the factors employed to assess the value of pension benefits to eliminate the gross disparity in pension evaluations currently presented to the court and to specifically require that the "normal retirement age" be employed in the evaluation of pension benefits.

¹¹ See Dunn, Moore v. Moore: The New Jersey Supreme Court Compounds Problems Associated with Equitable Distribution of Pension Assets, 42 Rutgers Law Review 631 (1990).

RECOMMENDATION 18

Legislation permitting retroactive changes in child support awards in certain circumstances.

This bill would modify the stringent provisions of current law, set out in N.J.S.A.2A:17-56.23a, which bar the retroactive modification of child support orders except for the period during which there is a pending court application for modification.

In Ohlhoff v. Ohlhoff, 246 N.J. Super. 1 (App. Div. 1991), the Appellate Division strictly construed the statute to hold that a non-custodial father's obligation to pay child support on behalf of his son could not be retroactively modified to reflect the fact that the child was no longer living with the custodial parent (his mother). Although the child had moved out of his mother's house at the age of 13 and had been living with his father for the past year and a half, the court refused to modify the father's child support arrearages that had accumulated during that time, holding that the statute prohibited such modification.

The Commission believes that it was never the intent of the Legislature to prohibit retroactive modification of child support arrearages in cases like this one, where an obvious injustice would result. The Ohlhoff decision is also likely to lead to increased litigation, since non-custodial parents whose teen-age children decide to live with them are now forced to immediately file court motions in order to protect themselves from accumulating an irreducible amount of child support arrearages.

Consequently, this proposed legislation would amend N.J.S.A.2A:17-56.23a to allow the court to retroactively modify child support orders, with respect to a period during which there is no pending application for modification, if the court finds that the result of not doing so would be unjust.

The courts have always had the authority, pursuant to Court Rule, to modify or void a judgment or order for equitable reasons, and to interpret new statutory mandates in accordance

with pre-existing statutory principles. See R.4:50, allowing relief of a final judgment or order for reasons of "mistake, inadvertence, excusable neglect . . . the judgment or order is void . . . the judgment or order has been satisfied." And see the recent Appellate Division decision in Mallamo v. Mallamo, A-134-93T2, decided Feb. 27, 1995, holding that, despite the literal words of N.J.S.A.2A:17-56.23a, a child support order can be retroactively modified when the order is pendente lite (temporary), issued before the trial of the case. The proposed legislation would reiterate this judicial authority statutorily.

RECOMMENDATION 19

Legislation amending the equitable distribution statute to clarify that the court must consider parental responsibilities for children by both parents and consider this factor separately from its consideration of a parent's length of absence from the job market.

The Commission recommends legislation which would amend N.J.S.A.2A:34-23, the alimony statute, to clarify that the court consider the impact on both parties in awarding permanent or rehabilitative alimony.

Currently, the statute provides that, among other factors used in determining alimony, the court must consider:

The length of absence from the job market and custodial responsibilities for children of the party seeking maintenance.

[2A:34-23b.(6).]

It is generally acknowledged that this factor is directed to the alimony recipient's earning capacity and how that capacity has been affected by two factors — the length of the recipient's absence from the job market, and the recipient's custodial responsibilities for the children. However, in order to advance the principles of fairness and gender neutrality which are inherent in modern law, the Commission proposes that this factor be changed to reflect both parties' responsibilities for the children. As recommended, the current factor (6) would be split into two separate factors, to now read:

(6) The length of absence from the job market of the party seeking maintenance;

(7) The parental responsibilities for the children.

RECOMMENDATION 20

Legislation amending the equitable distribution statute to require the court to consider as an additional factor "the extent to which either party deferred career goals thereby allowing the other party's earning capacity to be enhanced."

In furtherance of the goals of gender neutrality and simple fairness expressed in the discussion of Recommendation 19, above, the Commission recommends legislation which would amend the equitable distribution statute, N.J.S.A.2A:34-23.1, to add an additional clarifying factor for the court to consider in allocating assets pursuant to equitable distribution.

Currently, the statute provides that the court must consider, in dividing marital assets, the following factors, among others:

The income and earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children, and the time and expense that is necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. [N.J.S.A.2A:34-23.1g.]

The Commission recommends that a new factor be added to the equitable distribution statute to require that the court consider:

The extent to which a party deferred achieving his or her career goals, thereby allowing the other party's earning capacity to be enhanced.

The Commission believes this to be an essential ingredient in determining the fairness of allocating marital assets acquired during the marriage. In a common factual scenario, the wife remains home for a number of years to care for the children and, as a consequence, her earning capacity is materially and adversely affected. By contrast, because of the wife's efforts in caring for the children, the husband has the ability to develop his own career and to have his own earning capacity enhanced. The Commission believes that this issue should be set forth in the statute as a factor that the court (and the parties themselves, when they settle cases) must consider in evaluating the fairness of an overall distribution of assets.

RECOMMENDATION 21

Legislation requiring alimony to be included as income in calculating child support.

The Commission recommends that the statute governing the calculation of child support, N.J.S.A.2A:34-23a., be amended to provide that alimony be included as income in determining the amount of the child support award.

Currently, the statute provides that, in determining the amount to be paid by a parent for support of the child, the court must consider a number of factors, including, among others:

- (1) Needs of the child;
- (2) Standard of living and economic circumstances of each parent;
- (3) All sources of income and assets of each parent [emphasis added];
- (4) Earning ability of each parent

As the present statute already provides that "all" sources of income for both parents must be included in calculating the amount of child support to be paid, adding the phrase "including alimony from the current relationship" would clarify the intent of the statute and the policy goals underlying our alimony law.

It would also be consistent with the court rules governing the "Child Support Guidelines," which currently provide that "alimony and separate maintenance payments from other relationships" are included as income in calculating child support amounts. Appendix IX-E.B.(1)(8).

Alimony is intended to compensate one party for the economic detriment that party suffered because of the marriage; it is intended to compensate for the lost income. Consistent with this policy of viewing alimony as compensatory income, it is the belief of the Commission that alimony should be treated as income for child support purposes.

SUMMARY OF LEGISLATIVE RECOMMENDATIONS OF THE COMMISSION TO STUDY THE LAW OF DIVORCE

RECOMMENDATION 1.

Legislation providing a new cause of action based on irreconcilable differences.

RECOMMENDATION 2.

Legislation requiring certain parties who file for divorce to attend a mandatory education program.

RECOMMENDATION 3.

Legislation requiring a parenting plan to be filed in divorce actions.

RECOMMENDATION 4.

Legislation requiring all parties during the divorce process to maintain certain insurance coverages.

RECOMMENDATION 5.

Legislation establishing a court referred mediation program.

RECOMMENDATION 6.

Legislation amending the statutes to more accurately reflect the rights and responsibilities of the parents by changing the term "visitation" to "parenting time" where appropriate.

RECOMMENDATION 7.

Legislation guaranteeing each parent equal access to his or her child's educational records.

RECOMMENDATION 8.

Legislation to enhance enforcement of visitation.

RECOMMENDATION 9.

Legislation establishing a definitive time when a child is emancipated for termination of child support purposes.*

RECOMMENDATION 10.

Legislation clarifying parental responsibilities for post-secondary education.*

RECOMMENDATION 11.

Legislation requiring the court to review child support orders when a child attends post-secondary education.

RECOMMENDATION 12.

Legislation concerning rehabilitative alimony.

RECOMMENDATION 13.

Legislation authorizing the award of limited duration alimony.

RECOMMENDATION 14.

Legislation including family court motions in the "frivolous lawsuit" statute.

* See text, pp. 26-28.

RECOMMENDATION 15.

Legislation providing wage withholding for alimony payments.

RECOMMENDATION 16.

Legislation providing an affirmative obligation on an ex-spouse who is receiving permanent alimony to provide notice upon remarriage.

RECOMMENDATION 17.

Legislation clarifying the equitable distribution of retirement benefits.

RECOMMENDATION 18.

Legislation permitting retroactive changes in child support awards in certain circumstances.

RECOMMENDATION 19.

Legislation amending the equitable distribution statute to clarify that the court must consider parental responsibilities for children by both parents and consider this factor separately from its consideration of a parent's length of absence from the job market.

RECOMMENDATION 20.

Legislation amending the equitable distribution statutes to require the court to consider as an additional factor "the extent to which either party deferred career goals thereby allowing the other party's earning capacity to be enhanced."

RECOMMENDATION 21.

Legislation requiring alimony to be included as income in calculating child support.

GENERAL RECOMMENDATIONS OF COMMISSION TO STUDY THE LAW OF DIVORCE

RECOMMENDATION 1.

The child support guidelines should be reexamined, clarified and studied to determine whether they should be modified. Appendix 1X-A of the Court Rules should be reviewed to determine whether it adequately sets forth all the assumptions, economic principles and expense categories used to develop the guidelines. The background reports used to develop the guidelines should be publicly available in each vicinage to assure public access to this information.

The Commission feels adjustments as a result of shared custody must be made in child support awards based upon factual scenarios presented by the recent Pascale decision. The Commission is aware of the extensive, but as of yet, unfinished, work of the Family Part Practice Committee and the fact that there has been coordination between the Commission and the Practice Committee which, notwithstanding the formal completion of the Commission's work, should continue. Since its report was not completed, the Commission could not assess the Practice Committee's work.

RECOMMENDATION 2.

The Administrative Office of the Courts has an opportunity to enhance its collection of statistical data in divorce matters. This information would be beneficial for researchers and policy makers. The Commission encourages these efforts.

RECOMMENDATION 3.

The Supreme Court should consider assigning Family Part judges on the basis of the judges' preferences, abilities and experience. Family Part judges who choose to remain in that assignment should be exempted from the rotation policy. This would make for a more experienced, able and dedicated family bench.

RECOMMENDATION 4.

The Supreme Court should consider significantly increasing training for judges with regard to matrimonial and domestic violence matters. New or recently assigned judges in the Family Part should participate in an intensive educational course prior to hearing any matters.

RECOMMENDATION 5.

The Administrative Office of the Courts should consider developing education programs for all divorce participants which would outline their rights, responsibilities, psychology of the divorce experience, the role of the judge, the role of the attorney and the structure of the attorney's fee. In addition, all litigants should be provided with a "pro se" kit in order that they may be able to file pleadings without the aid of legal counsel, if they so choose. Part of this kit should include a "users' guide" consisting of copies of the child support guidelines and court rules governing the guidelines, a glossary of terms, and pertinent information about the court's personnel, available programs and facilities.

RECOMMENDATION 6.

The Commission encourages the assignment of more judges to handle the heavy caseload in Family Part.

RECOMMENDATION 7.

The court should consider economic sanctions on parties whose actions are unreasonable but which do not rise to the level of "bad faith" set forth in the frivolous lawsuit statute. The court should have expanded power to assess counsel fees against litigants who take positions that are unreasonable without first being required to make findings of bad faith or that the position was "frivolous." Rather, the court should insist upon parties attempting to resolve cases on their own and that their settlement positions be memorialized for later review by a court. The courts' ability to assess counsel fees for unreasonable positions, or dilatory tactics, would have

the effect of inducing people to take more reasonable positions. Any requirement or practice that there be a finding of "bad faith" is too strict a standard and the Supreme Court is urged to develop more flexible ways to insist upon negotiation and attempts to resolve matters outside of court with counsel fees assessed where the court believes litigants have acted unreasonably.

RECOMMENDATION 8.

The Commission encourages the bench and bar to promote the discovery and exchange of early settlement plans.

RECOMMENDATION 9.

The Commission encourages the Supreme Court to provide that a completed copy of the child support worksheet shall be provided to each party and shall be filed with the court.

RECOMMENDATION 10.

The Commission encourages the bench and bar to develop innovative ways to reduce legal fees in divorce cases. There was much testimony concerning the costs of divorce. The Commissioners believe there are a number of creative ways to reduce legal fees which should be explored. Some are included in recommendations that have been made. Others may include but should not necessarily be limited to:

a. Increased use of the available technology which would limit court appearances by attorneys on routine scheduling and managerial matters. Instead of requiring counsel to appear in court to report on the status of cases, courts may use telephone conferencing which would have the salutary effect of reducing fees.

b. The Commission has also been advised of techniques utilized in some counties to minimize appearances on motions which would also reduce judges' time spent on relatively simple motions while minimizing legal fees. These devices include:

(1) telephone conferencing of motions;

(2) utilization of tentative decisions supplied to counsel before a motion is scheduled for argument; and

(3) incorporating an Early Settlement Program for motions.

c. The Commission has strongly urged the Legislature to significantly increase the use of mediation which it believes can be an effective alternative dispute resolution technique. For cases that remain in the courts, consideration should be given to ways to assist in the settlement of cases.

d. Trial time could be reduced by an aggressive insistence by the courts on requiring parties to stipulate facts and pre-mark exhibits. The use of the available technology to permit videotaping of witnesses instead of requiring a court appearance thus enabling judges to view that testimony at other times will also reduce the length of trials and reduce fees.

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