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A PUBLICATION OF DELAWARE BAR FOUNDATION

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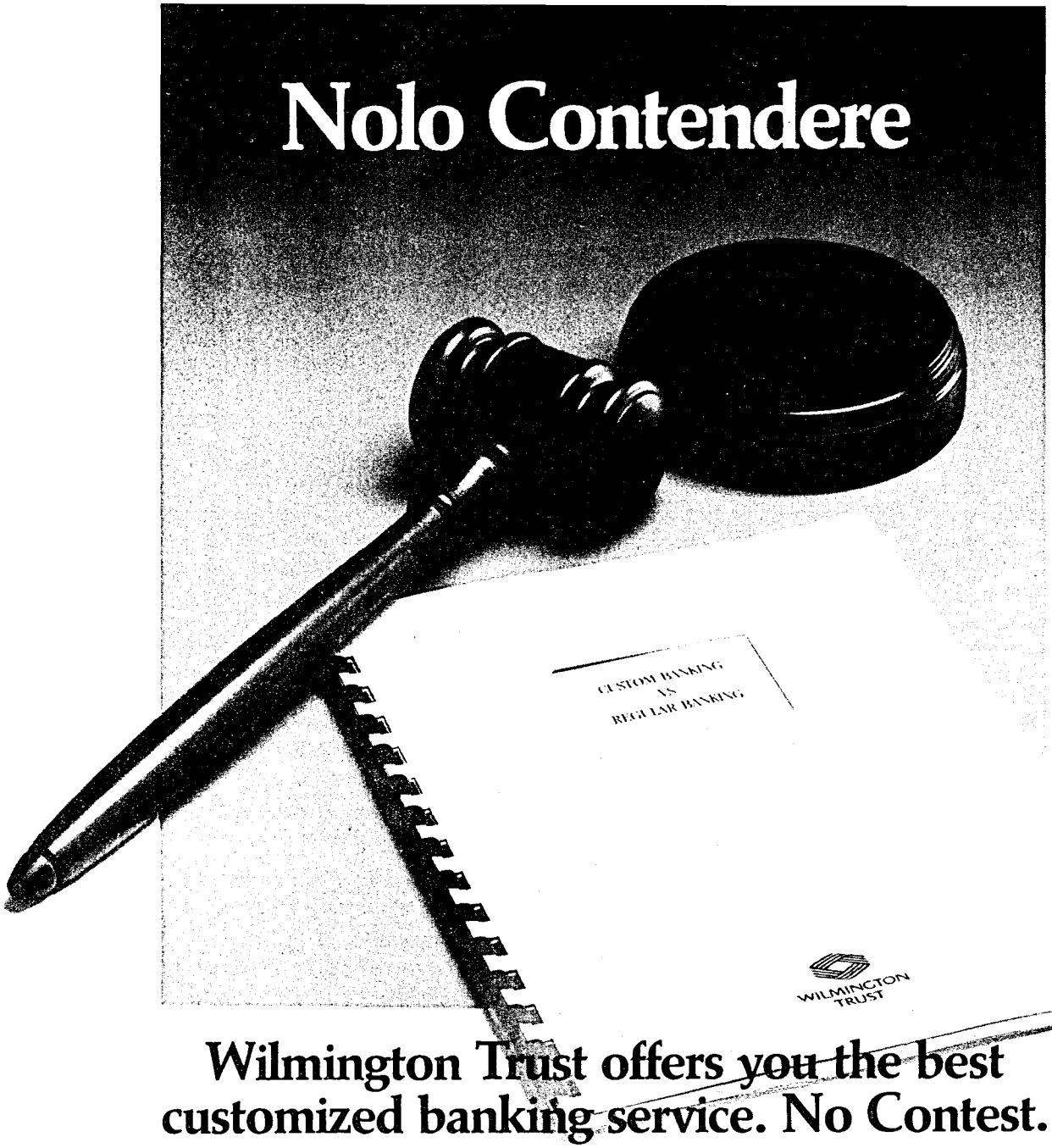

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Contents

Special thanks to Mary Johnston, Chairperson of the Delaware State Bar Association Section on Women and the Law. Mary was largely responsible for the design of this issue and the commissioning of the articles you are about to read.

Cover: This fanciful tribute to ante-nuptial agreements pits bride Lois Rasys against groom Carl Rasys as they negotiate their guarded endowment of each other with all their worldly goods, under the stunned gaze of flower girl Kate Crossan, ring bearer Patrick Forester, and a clerical member of our Board of Editors. To discover how it all turns out, see page 30.

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BAR FOUNDATION CORNER

Blood On Our Hands: Should A Civilized Society Tolerate Boxing?

Victor F. Battaglia

Sign of hope: In a press conference held in January, Wilmington boxer Henry Milligan announced his retirement from the ring. The well-educated Milligan is also sensible in electing not to transform himself into a walking vegetable for the delectation of beer-swollen sadists.

The Editors

The noise of the crowd echoes off the walls. The spectators have gathered to view the excitement. Accompanied by trainers, the contestants enter the ring located in the middle of the arena. In preparation for the match, the fighters have endured training exercises to develop and strengthen their muscles. The contest is regulated by a centralized management. A referee presides over the fight; his decisions are final. As the fight begins, the crowd cheers for their favorite fighter hoping the next strike will tell the end for his opponent. Suddenly there is a flurry of activity at the rear of the enclosure as State Police officers rush onto the scene. The combatants are taken into protective custody, the operators are arrested, and the barn is locked. This cockfight has been interdicted. A civilized society will not permit this cruelty. Parallels to modern day prize fighting are striking.

Most states have outlawed cockfighting. The brutalities of boxing are legal. The end for the gamecock may come quickly; but the young boxer, if he survives, is left to endure his struggle through a clumsy and confused middle age. Man claims a higher intelligence separates him from other animals. Yet boxing is allowed! Spectators gather to watch two men try to knock each other unconscious; successive blows to the head gradually reducing the boxer's intelligence to that of the gamecock. A cut to the area of the eyes is a similar goal that may shorten the "sporting event". Often a boxer will concentrate on a small cut in an attempt to make it more dangerous for his opponent to continue.

As in cockfighting and dueling, the primary goal is to inflict injury. Boxing is the only modern sport which not only fails to penalize but rewards efforts to hurt someone. The object of each boxer and the hope of each excited fan is a knockout blow, which is itself a concussion or more severe brain injury, or the infliction of a cut that makes it impossible for the opponent to continue. Even a technical knockout (TKO) in most instances indicates that the victim has suffered a cerebral concussion. Quite plainly, as previous opponents of boxing have put it, "the intent of boxing is wrong." In all other sports the intention to inflict harm on an opponent is illegal and severely penalized. In boxing if a fighter is dazed, the crowd screams for the kill.

The World and Canadian Medical Associations have urged that boxing be banned. The American Medical Association referred the matter to its Council on Scientific Affairs. The Council concluded that boxing is a dangerous sport that can result in long term brain damage or death. While some members of the Council on Scientific Affairs favored banning boxing, the majority viewed such action as unrealistic. In reaching this decision, the Council criticized current studies linking boxing to brain damage for the failure to account for the possible confounding effects of excessive alcohol or other drug use, sexually transmitted diseases, the aging process, the failure of these studies to use a suitable control group, and the failure to test a group of boxers who boxed subsequent to the institution of medical surveillance measures in 1950. Proponents of boxing argue that findings of brain damage merely are signs of minimal education or, if actual brain damage is found, it is simply an occasional occurrence in a poorly skilled boxer.

In response to these arguments, Dr. Casson of the Division of Neurology, Department of Medicine and the Department of Neurology, SUNY at Stony Brook and other experts conducted a study published by the American Medical Association in May, 1984. The study examined a test group of 13 ex-professional boxers, two active professional boxers, and three active Golden Glove amateur boxers. None of the subjects had known substance abuse, neurological, psychiatric, or medical illnesses. Their average age was 36 years. Their average educational level was grade 12. All of the subjects were employed full time in civil service, education, or private industry. Every subject in the study was active after the institution of modern medical controls. (Fifteen of the sixteen boxers fought after 1960.) The test group included champions as well as mediocre boxers. The study employed four different tests to detect the existence of brain damage: EEG, CT scan, neurological

(Continued on page 6)

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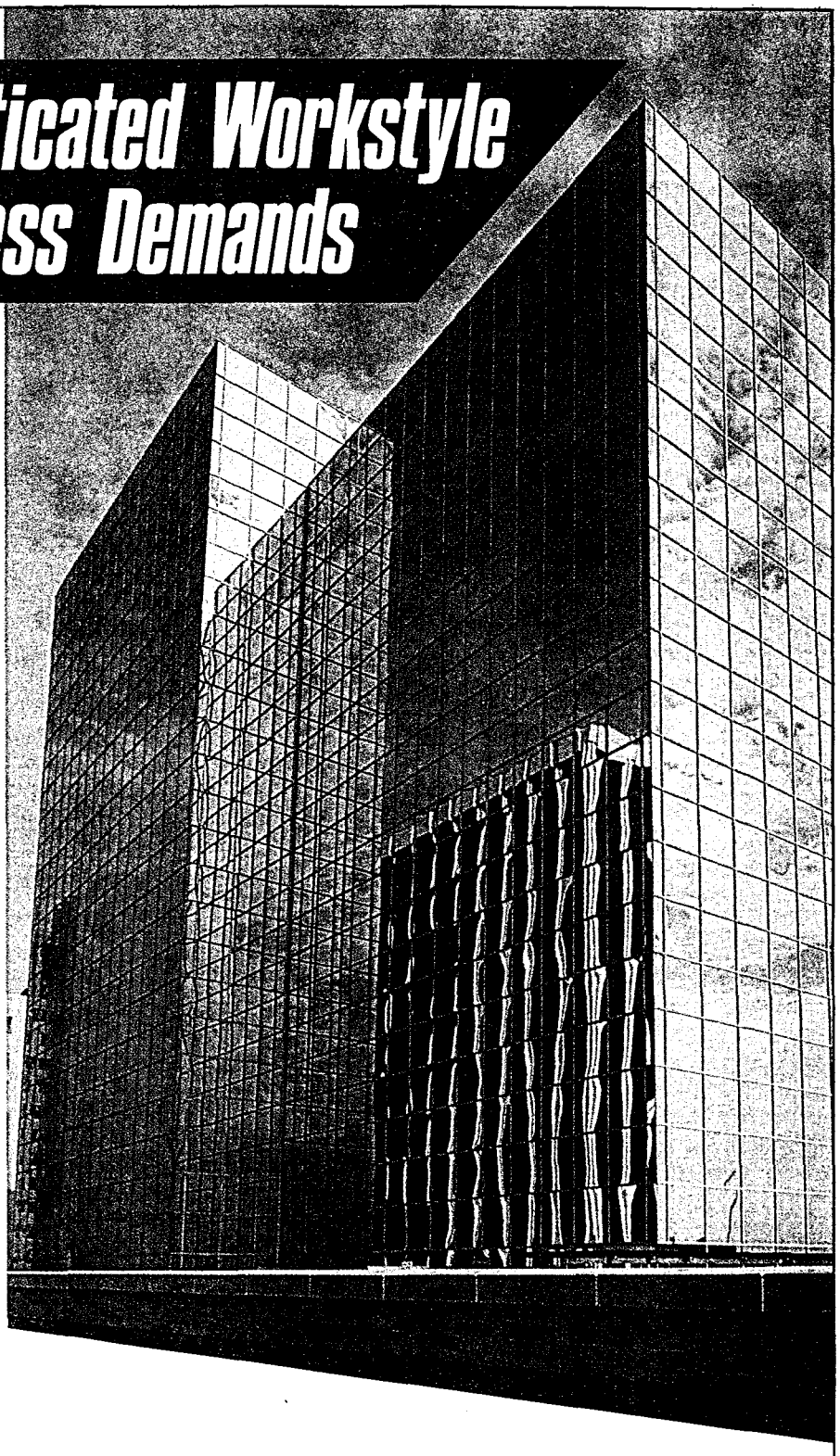

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(Continued)

exam, and neuropsychological test battery. A control group was not necessary because each fighter's score on each test was compared with the established norm for the general population. The results: 87 percent (13 of 15) of the professional boxers had an abnormal score on at least two of the four tests, unequivocal evidence of organic cerebral dysfunction. *Every fighter had abnormal results on at least one of the neuropsychological tests.* The study also showed a strong correlation between the number of fights and the likelihood of brain damage; the longer the boxing career, the greater the chance of injury. The results irrefutably establish the link between professional boxing and brain damage. Thus, brain damage is an expected result of a professional boxing career.

A punch to the boxer's head may result in brain damage leading to death. In other cases, each punch in conjunction with a career of other punches may slowly accumulate damage causing the brain to atrophy. A professional boxer is capable of throwing a punch with a force exceeding 100 gravity. Slow motion camera scenes depict the sharp punch as it strikes the head contorting the face, snapping the neck back and propelling droplets of sweat from the boxer's face. Networks repeat the drama to the delight of the T.V. fan. As the punch slams against the boxer's head, the soft brain glides and twists within the skull ripping blood vessels and nerve fibers and smashing the brain with a whiplash effect against the rigid skull. This effect has been compared to water in a bucket which is sharply kicked or the yolk of a raw egg suddenly shaken. The greater the acceleration of the head, the more violently the brain twists and spins within the skull and hence the greater the brain damage. If the acceleration of the skull is particularly severe, the twisting of the brain may rip the connecting veins of the brain and skull. The hemorrhaging veins create a massive build-up of blood between the brain and skull, a hematoma. As it expands, the hematoma squeezes the brain to death. An example of this form of deadly brain damage occurred to Duk Koo Kim in November, 1983. Duk Koo Kim died of a subdural hemorrhage suffered in a fight with Boom Boom Mancini. It is neither this type of deadly blow nor the knockout blows which pose the statistically greatest danger. Studies have shown that the cumulative effect of repetitive subconcussive blows to the head pose the greatest long run danger, chronic encephalopathy.

What the layman refers to as "punch-drunk", is actually chronic encephalopathy; repeated blows to the head cause slowed motor performance, clumsiness, rigidity, spasticity, memory loss, slowness of thought and personality change. The severity of brain damage is strongly correlated to the number of bouts in which the boxer participates and not the number of knockouts or technical knockouts of which he is a victim.

Chronic encephalopathy is characterized by atrophy of the brain. Repeated blows to the head cause the brain to shrink in size. Enlarged ventricles, *cavum septum pellucidum,* and deep pockets extending down from the brain surface characterize the atrophy. The enlarged ventricles and the appearance of the *cavum septum pellucidum* signify the inner atrophy of the brain, while the deep pockets on the brain's surface indicate the outer atrophy of the brain. In essence, the brain shrinks from all sides. Further, chronic encephalopathy is a progressive condition; once established, it is not reversible. The condition steadily advances even though the boxer stops fighting. Since brain tissue does not regenerate, the atrophied cells are lost forever. Experts agree that headgear would be ineffective to prevent chronic encephalopathy. *Sports Illustrated* reported in April, 1983 that a CT scan performed on Ali in July, 1981 clearly depicted a *cavum septum pellucidum,* an enlarged third ventricle as well as other signs of brain damage or atrophy. In October, 1984 *Time* magazine reported that Ali, age 42, was experiencing slurred speech, loss of coordination, reduced muscle strength and a persistent feeling of fatigue. Not even the once proud Ali who "floated like a butterfly and stung like a bee" seems immune from the effects of a career in boxing.

Modern studies confirm the "punch-drunk" syndrome. One who pursues a career in boxing can expect to experience chronic encephalopathy. The question becomes should society permit boxers to sell their well-being to boxing fans who pay to watch men deliberately harm each other. Proponents of boxing argue that

society should not stand in the way of the boxer's voluntary decision. But, the decision to box is often made at a young age and without benefit and understanding of the grave consequences. Next, boxing proponents claim that boxing is the only way for some to make it out of the ghetto. However, of the multitudes of young men who venture a career in boxing few make it to the top. The rest are left to become battered sparring partners never to realize the goal for which they sacrificed their minds. Even those who make it to the top suffer the consequences that inevitably follow repeated physical abuse.

Boxing is a humiliating, degrading abuse. It should be outlawed, and those who engage in it or who aid and abet those who participate or who conspire to permit it, should be prosecuted just as they would be if they conspired to assault, maim, or kill outside the ring.

There are other ways to sell beer and to fill gambling casinos. We should turn away from boxing—a morally reprehensible activity. The consent of the participants is no more a validating factor than is the consent of the prostitute to the actions of the pimp or the addict to the actions of the drug dealer.

Delaware should take the lead. It should find boxing to be a danger to the participants and illegal. We've done as much for the chickens! ■

Victor Battaglia is Chairman of the Board of Directors of Delaware Bar Foundation, which publishes this magazine. He is also a past president of Delaware State Bar Association.

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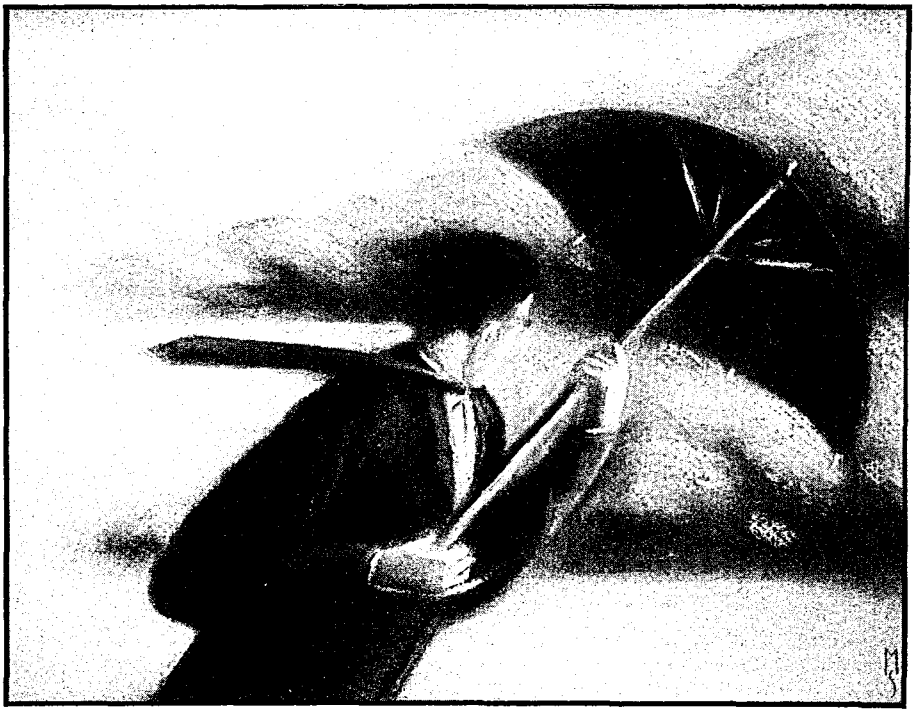

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Alimony

Will the First State Please Join The Rest of the Nation?

Aida Waserstein and Christine K. Demsey

I. Delaware Law Now

The present Delaware statute, Section 1512 of Title 13 of the Delaware Code Annotated, provides that the Family Court may grant alimony to a dependent spouse regardless of gender. A dependent spouse is one who does not have sufficient property or income to provide for his or her reasonable needs. Although it has been traditionally assumed that only women are the ones who benefit from this law, men have been awarded alimony when their income levels are lower than those of their wives.

It can be expected that more men will be eligible for alimony in the near future. Today, 53 percent of the work force is female, and among two thirds of young married couples aged 25 to 34 both husbands and wives work. This figure was only 47 percent in 1973. According to a Census Bureau study based on 1984 income levels released in June of 1986, the traditional one earner family accounts for only 25 percent of families, while 42 percent have two wage earners. Increasingly, women are moving into work that has been traditionally male. More and more women are becoming lawyers, doctors, and executives. A significant number are also self-employed. In the last decade, women have been going into business at a rate at least four times greater than that of men. In Delaware, for example, 31.9 percent of non-farm sole proprietorships were owned by women and they generated 44.3 percent of the business receipts for such enterprises in 1980.[1]

It can also be expected that some women will continue to receive alimony. In contrast to European women who have been gaining on men much more rapidly than their U.S. counterparts, according to Census Bureau figures as of August, 1985 American women earn $.64 for each dollar earned by males, up only one cent since 1939. Swedish women, on the other hand, average 81 percent of male annual earnings, up from 71 percent in 1970. French women average 78 percent of men's average earnings and Italian women average 86 percent. As American women close the earnings gap, there will be greater equality between the sexes in alimony awards.

Unlike child support, which is based primarily on the children's needs and is not taxable, alimony is based on the spouse's needs and is keyed to the court's decision regarding property division. When alimony is a consideration, the court will try to strike a balance between how much of the marital estate is awarded to each and the amount of alimony. For example, the court may grant alimony and a 60/40 split of the marital property in favor of the dependent spouse. There have been cases, however, where, despite a disparity of incomes of as much as $30,000 per year, no alimony has been granted. There is, in short, no way to predict the amount of alimony or the proportion of the marital estate that a dependent party can expect to receive. The court considers each case on its merits and makes its decision accordingly.

Alimony ends upon remarriage, cohabitation of the payee, or the death of either party. The length of the award in Delaware is set by statute. In marriages of over twenty years, the alimony award may be indefinite. However, for marriages of less than twenty years, where the marriage is not irretrievably broken because of the respondent's mental illness, the court may award alimony for only two years after the date of divorce.

Many believe that the twenty year rule is arbitrary and unfair. It treats a nineteen year marriage the same as a one year marriage despite the fact that the parties have invested a much greater portion of their lives in their marriage. In addition, a spouse who has been dependent for a longer period of time is less able to increase his or her income. It is obvious, therefore, that marriages of different lengths should be treated differently. The present statute already recognizes this to the extent that it instructs the court to consider both the duration of the marriage and the time necessary to acquire sufficient education or training to enable the dependent spouse to find suitable employment. However, by arbitrarily distinguishing between marriages of less than twenty years and those that are longer, the statute artificially ties the hands of Family Court judges and limits their ability to evaluate each case on its merits.

II. What Other States Provide

Except for the State of Texas, Delaware has the most restrictive alimony statute. As the accompanying table shows, except for Delaware and Indiana, the duration of an alimony award is within the discretion of the Court. Of course, each statute requires that the party to whom alimony is awarded be dependent on the other spouse. And, even though the duration of alimony may be indefinite, an award can be modified or terminated on substantial change of the parties' financial circumstances, as well as on the death of either spouse, the remarriage of the payee, and in many cases, the payee's cohabitation with a new partner. The Delaware statute, like many throughout the country, has a list of criteria for the judge's review. This aids not only the judge but the attorneys

The proposed statute also extends new protections to the payee. It requires the court to consider any financial or other contribution made by either party to the education, training, vocational skills, career or earning capacity of the other.

Alimony
The First State
(Continued)

and the parties in evaluating whether or not alimony should be considered. The guidelines set forth very similar criteria. In the majority of statutes, the judge can consider the length of the parties' marriage. Delaware is the only state, though, that directly ties in the length of the marriage to an award of alimony.

As you will note in the table, a few states confine an award of alimony to the wife.[2] In an attempt to avoid paying alimony, a gentleman in Alabama challenged the Alabama statutory scheme, which did not require wives to pay alimony. The Supreme Court, in *Orr v. Orr* 440 US 268, 99 S.Ct. 1102, 59 L.Ed. 2nd 306 (1979), held that, to withstand scrutiny under equal protection, classification by gender must serve an important governmental objective and relate to the achievement of that objective. No longer can a woman be considered destined only for the home and child rearing and the male for the market place and the outside world. The Supreme Court ruled that the use of gender instead of financial ability and need was discriminatory. Any states that have not yet made their statutes gender neutral will probably do so in the near future or suffer the repercussions from statutes overturned on constitutional grounds.

III. What The Proposed Alimony Law Provides

During this session, the Delaware Legislature will consider a bill that seeks to amend the present alimony law. The bill eliminates the arbitrary two year rule for marriages that are less than twenty years. Instead, it provides that a dependent person is eligible for alimony up to the length of the marriage for marriages less than twenty years. This is an improvement, because the length of the payments is in direct proportion to the length of the marriage, which is more consistent with the existing legislative mandate that the court consider the duration of marriage when awarding alimony.

The proposed law protects the payor in several ways. First, it codifies the existing case law, which requires that the payee become self-supporting. It

Article and Chart
(Continued on page 47)

State Alimony Statutes Compared

STATE	ALIMONY	PERIOD OF TIME	STATUTORY GUIDELINES	LIMITATIONS
Alabama	yes	indefinite	no	none
Alaska*	—	—	—	—
Arizona	yes	indefinite	yes	none
Arkansas	yes	indefinite	no	none
California	yes	indefinite	yes	none
Colorado	yes	indefinite	yes	none
Connecticut	yes	indefinite	yes	none
Delaware	yes	2 years for marriages less than 20 years, then indefinite	yes	none
Dist. of Columbia	yes	indefinite	no	none
Florida	yes	indefinite	yes	Can consider adultery of spouse seeking
Georgia	yes	indefinite	yes	Must prove adultry or desertion
Hawaii	yes	indefinite	yes	none
Idaho	yes	indefinite	ues	Decree must be for an offense, innocent is allowed
Illinois	yes	indefinite	yes	none
Indiana	yes	indefinite	no	**
Iowa	yes	indefinite	yes	none
Kansas	yes	121 months, periods can be extended	no	none
Kentucky	yes	indefinite	yes	none
Louisiana	yes	indefinite	no	none
Maine	yes	indefinite	no	none
Maryland	yes	indefinite	yes	none
Massachusetts	yes	indefinite	yes	none
Michigan	yes	indefinite	no	none
Minnesota	yes	indefinite	no	none
Mississippi	yes	indefinite	no	none
Missouri	yes	indefinite	no	Wife if decree in her favor
Montana	yes	indefinite	yes	none
Nebraska	yes	indefinite	yes	none
Nevada	yes	indefinite	no	Modifiable if entered after 7/1/75
New Hampshire	yes	3 year period extendable	no	To wife
New Jersey	yes	indefinite	no	none
New Mexico	yes	indefinite	no	none
New York	yes	indefinite	yes	none
North Carolina	yes	indefinite	no	Can consider misconduct
North Dakota	yes	indefinite	no	none
Ohio	yes	indefinite	yes	none
Oklahoma	yes	indefinite	no	none
Oregon	yes	indefinite	yes	none
Pennsylvania	yes	indefinite	yes	Can consider misconduct
Rhode Island	yes	indefinite	yes	Can consider misconduct
South Carolina	yes	indefinite	no	No to adulterous spouse
South Dakota	yes	indefinite	no	none

Alimony Reform: Facing Up To Reality

Ellen S. Meyer

Family Law practitioners know it as the 2/20 Rule: a dependent party cannot receive more than two years of alimony after the dissolution of a marriage unless the marriage has lasted for more than twenty years. The only exception to that harsh rule is where mental illness has been alleged in the divorce petition and found to be the reason that the marriage has been irretrievably broken. The mentally ill dependent party can then receive alimony for more than two years, regardless of the length of the marriage (13 *Del.C.* §1512 (a) (2)).

The complete text of the current alimony law is as follows:

(a) The Court may grant alimony for a dependent party as follows:

(1) Temporary alimony for either party during the pendency of an action for divorce or annulment;

(2) Alimony for a respondent commencing after the entry of a decree dissolving an irretrievably broken marriage characterized by mental illness; or

(3) Alimony for a petitioner, or for a respondent who does not qualify for alimony under paragraph (2) of this subsection, commencing after the entry of a decree of divorce or annulment but not to continue for more than 2 years after marriage dissolution unless the parties were married for more than 20 years.

(b) A party is dependent if the party or someone on behalf of the party shall aver in an affidavit of dependency filed in the action and shall prove by a preponderance of the evidence that such party:

(1) Is dependent upon the other party for support and the other party is not contractually or otherwise obligated to provide that support after the entry of a decree of divorce or annulment;

(2) Lacks sufficient property including any award of marital property, to provide for the party's reasonable needs; and

(3) Is unable to support himself or herself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(c) The alimony order shall be in such amounts and for such time, except as limited in time under subsection (a) of this section, as the Court shall deem just without regard to marital misconduct and after considering all relevant factors justified by the evidence, including:

(1) Financial resources of the party seeking alimony including marital property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with such party includes a sum for that party as custodian;

(2) Time necessary to acquire sufficient education or training to enable the party seeking alimony to find appropriate employment;

(3) Standard of living established during the marriage;

(4) Duration of the marriage;

(5) Age, and the physical and emotional condition of the party seeking alimony;

(6) Ability of the other party to meet his or her needs while meeting those of the party seeking alimony; and

(7) Tax consequences.

(d) A party who has contractually waived or released his or her right to alimony shall have no remedy under this section.

In *Michael J.F. v. Carmella L.F.*, Del. Supr., 437 A.2d 579, 580 (1981), a recent case that construes the Delaware alimony statute, the Delaware Supreme Court held unequivocally that in a less-than-twenty-year marriage, "a grant of alimony may not continue for more than two years after the entry of the divorce decree."

In *Michael J.F. v. Carmella L.F.* the dependent spouse sought alimony for a two-year period beginning at the time of the hearing on the ancillary matters, rather than at the time the divorce was granted. Had the dependent spouse prevailed, alimony would have continued for ten months beyond the two-year anniversary of the divorce. The request for the additional alimony was denied.

The 2/20 Rule was signed into law on July 13, 1979 and is rumored to be the direct result of action taken by the legislature on behalf of a man who was married 19 years.

The "official" explanation given for the 2/20 Rule was that at the time it was passed, a spouse could obtain Social Security benefits in the right of the other spouse, if the marriage had lasted twenty years or more. Today there is no twenty-year requirement for spousal Social Security benefits.

The statute that passed in Dover in 1979 was actually an amendment to a Family Law Committee bill intended to cure an unintended result under the old statute (i.e., alimony could not be received by the petitioner if the grounds for the divorce were misconduct or voluntary separation).

As far back as 1980, the Family Law Committee, with the approval of the Delaware State Bar Association, began to work on alleviating the harsh 2/20 Rule. So far, the Committee* has been unable to obtain passage of corrective alimony legislation.

Before 1979 unlimited alimony was available to the respondent in any petition seeking divorce for incompatibility, regardless of the length of the marriage.

On January 10, 1985, at the beginning of the session of the General Assembly in Dover, the Family Law Commission introduced House Bill No. 2, which would have made changes throughout Title 13 (the domestic relations section of the Delaware Code). The proposed alimony statute read as follows:

* *Now the "Section on Family Law".*

(a) The Court may award interim alimony to a dependent party during the pendency of an action for divorce or annulment.
(b) The Court may award alimony to a dependent party, but only as long as he or she remains dependent, in an action for divorce or annulment after the entry of a final decree of divorce or annulment.
(c) A party may be awarded alimony only if he or she is a dependent party in that he or she:

(1) Is dependent upon the other party for support and the other party is not contractually or otherwise obligated to provide that support after the entry of a decree of divorce or annulment;

(2) Lacks sufficient property, including any award of marital property made by the Court, to provide for his or her reasonable needs; and

(3) Is unable to support himself or herself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that he or she not be required to seek employment.

(d) The alimony order shall be in such amount and for such time as the Court deems just, without regard to marital misconduct, after consideration of all relevant factors, including, but not limited to:

(1) The financial resources of the party seeking alimony, including the marital or separate property apportioned to him or her, and his or her ability to meet all or part of his or her reasonable needs independently;

(2) The time necessary and expense required to acquire sufficient education or training to enable the party seeking alimony to find appropriate employment;

(3) The standard of living established during the marriage;

(4) The duration of the marriage;

(5) The age, physical and emotional condition of both parties;

(6) Any financial or other contribution made by either party to the education, training, vocational skills, career or earning capacity of the other party;

(7) The ability of the other party to meet his or her needs while paying alimony;

(8) Tax consequences; and

(9) Any other factor which the Court expressly finds it just and appropriate to consider.

(e) Any person awarded alimony has a continuing affirmative obligation to make good faith efforts to seek appropriate vocational training, if necessary, and employment unless the Court specifically finds, after a hearing, that it would be inequitable to require a person awarded alimony to do so (i) at any time, due to (A) a severe and incapacitating mental or physical illness or disability or (B) his or her age, or (ii) immediately, after consideration of the needs of a minor child or children living with him or her.

(f) A party who has waived or released his or her right to alimony in writing before, during or after their marriage shall have no remedy under this section.

(g) Unless the parties agree otherwise in writing, the obligation to pay future alimony is terminated upon the death of either party or the remarriage of the party receiving alimony and shall be suspended during any period of time during which the party receiving alimony cohabits with another person not related to him or her by blood or marriage, but may be reinstated by the Court upon the cessation of such cohabitation. As used in this section, 'cohabitation' means residing with an adult of the

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same or opposite sex, if the parties hold themselves out as a family unit or couple, whether they have sexual relations with each other or not and whether the relationship confers a financial benefit on the party receiving alimony or not. A party receiving alimony shall promptly notify the other party of his or her remarriage or cohabitation.

(h) If the Court does not equitably distribute the marital portion of a pension or other employee benefit of one or both of the parties' as property pursuant to §1513, it may order one party to pay all or part of the marital portion of his or her pension or other employee benefits to the other party if, as and when received by him or her as alimony without regard to the requirements of subsections (b), (c), (e) or (g) above, except that the obligation to make such payments shall terminate upon the death of either party unless the parties agree otherwise in writing.

The bill languished in the General Assembly and did not pass.

On May 8, 1985, the proposed changes in alimony were deleted from House Bill No. 2 and reintroduced as House Bill No. 207. By December the bill had passed the House with three amendments, two of which were "housekeeping" and one which removed the definition of cohabitation. House Bill No. 207 then was sent to the Senate. It never came up for a vote.

The Family Law Commission had been established in 1984 as a result of a recommendation by the Blue Ribbon Task Force created by Governor DuPont on February 2, 1983, in response to a request by Mary Moore Williams of New Castle County that the family law of the State of Delaware be studied and revised, with a sensitivity to the current needs of the citizens of Delaware.

At the time that House Bill No. 2 was introduced in 1985, the Federal tax law had changed the definition of alimony for tax purposes.

Code Section 215 of the Internal Revenue Code allows the deduction of alimony payments from gross income by the payor and taxability of payments received by the payee.

The Deficit Reduction Act of 1984 (DEFRA) made major changes to what

was considered alimony for tax purposes. Because so many marital property settlements were treating marital assets transferred to the dependent spouse as alimony, in order for the higher income earner to reap tax benefits, DEFRA put strict limitations on what could be characterized as alimony.

Under DEFRA, in order for payments to qualify as alimony for tax purposes, they had to meet the following requirements (as defined under Section 71(a)):

1. The payment had to be in cash (as opposed to stocks, etc.)
2. The payment could not be characterized as anything other than alimony (e.g., child support).
3. The parties could not be members of the same household.
4. The payments had to cease upon the death of the recipient; if the payments were pursuant to a separation instrument, the instrument had to so state.
5. Payments in excess of $10,000.00 per year had to be made in each of the six post-divorce calendar years to qualify as alimony. If annual payments decreased by more than $10,000.00 during the six-calendar-year period, there would be a recapture of excess alimony.
6. Payments of $10,000.00 or less could be paid over a period of less than six years and still qualify as alimony. The

The Family Law Commission, recognizing that the Delaware limitation of two years of alimony for a less-than-twenty-year marriage was inconsistent with the IRS requirement of six calendar year payments of yearly amounts in excess of $10,000.00 in order to be deemed alimony, sought passage of House Bill No.2/House Bill No. 207. Their efforts came to naught.

Because the Delaware legislators could not accept discretion in alimony awards, even with the guidelines provided in the two versions of the bill, they would not pass the proposed changes. As of January 1, 1987, when the Tax Reform Act of 1986 (no acronym as yet) took effect, the taxation of alimony underwent yet another change. Because of the inherent problems in continuing alimony payments for six calendar years, that requirement was deleted. Recapture of excess alimony could only be avoided for annual payments in excess of $15,000.00 if the payments were made over three post-separation calendar years.

"Calendar years" allows a shortening of the payment period to less than six—or three—years. For example, an initial payment can be made in 1987. The final payment can be made in 1989. The actual passage of time can be exactly two years, but for purposes of the Tax Reform Act of 1986, the three-calendar-year requirement has been met.

Mercifully, the Tax Reform Act of 1986 puts Delaware alimony law in compliance with the new federal income tax requirement for alimony recapture avoidance because our statute mandates a payment of no more than two years from the date the decree is final for a less-than-twenty-year marriage. In the example in the previous paragraph, both the IRS three-calendar-year requirement and the Delaware two-year requirement are met as long as the two years of payments end in a third calendar year.

The Tax Reform Act of 1986 eliminates the written specification that payments terminate at the death of the payee as long as the law of the jurisdiction requires alimony to cease at the payee's death; if that is "good news", then the "bad news" is that the requirement is deleted only for divorce or separation instruments executed after December 31, 1984.

Recapture is a devious resort to subsequent behavior to increase taxes already paid. The IRS will "recapture" taxes unpaid on amounts that should have been taxed previously, but were not. For example, using the Tax Reform Act of 1986's three-calendar-year threshold, rather than the outdated six-calendar-year threshold, and using the $15,000.00 floor, rather than the $10,000.00 floor, a hypothetical recapture would be as follows:

1. $50,000.00 alimony payment—first year
2. $20,000.00 alimony payment—second year
3. Nothing

The recapture amount will be $5,000.00 from the second year (the excess over $15,000.00) plus $27,500.00 for the first

The gifted Ellen Meyer is rapidly becoming a regular contributor to this magazine. Her article on the history of the American Civil Liberties Union in Delaware appeared in the Fall 1986 issue. It is with great pleasure that we welcome her back to these pages. Ms. Meyer conducts an extensive practice in domestic relations law.

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year (the excess of $50,000.00 over the sum of $15,000.00 minus $7,500.00). (The $7,500.00 is the average difference for years two and three after reducing the payments by the $5,000.00 recaptured from year two, making the amount to be averaged $15,000.00.)

Confused? Try a simpler illustration:

1. $50,000.00—first year alimony payment
2. zero—second year alimony payment
3. zero—third alimony payment

$35,000.00 will be recaptured; tax will have to be paid by the alimony payor on that amount.

Recapture was introduced to prevent "front loading" of payments, which could be characterized as alimony and thereby allowable as an alimony deduction to the payor.

The exceptions to recapture are the death, remarriage or cohabitation of the recipient, all of which would end the requirement that alimony be paid.

With the repeal of the six-year recapture rule and the replacement by the three-year recapture rule, divorce or separation instruments executed prior to January 1, 1987, may be modified in order to meet the less stringent three-year recapture rule requirement, if the modification expressly provides that three-year, not six-year, recapture rules apply.

Under the Tax Reform Act of 1986, if a divorce or separation instrument executed before 1987 is not modified to make the three-year recapture rule apply, then the six-year recapture rule will apply, but only with respect to the first three post-separation years. Welcome to "tax simplification"!

What effect will the Tax Reform Act of 1986 have on alimony payments? That is hard to determine at this point. Because with a lower tax rate, the payor will presumably have more disposable income, alimony payments could be more generous under the Tax Reform Act of 1986. So, too, since tax rates are lower, the payee would pay less tax on alimony received so would realize more net income from alimony payments. However, both of those facts are affected by the loss of tax shelters, which may mean less disposable income for the payor and with lower rates taking less of the payee's alimony, the alimony payments could be reduced accordingly.

One fact is certain, however: There is no longer a requirement that large amounts of alimony be paid for a minimum number of years to be deemed alimony by the IRS. A post-separate-residence, three-calendar-year benchmark, however, is advised for payments in excess of $15,000.00 per year to avoid recapture.

Because of the change to the three-calendar-year alimony rule by the Tax Reform Act of 1986, there is no longer a pressing income tax need for a change in the Delaware alimony law for those who pay substantial amounts of alimony after a less-than-twenty year marriage. However, economic hardship remains in the two-year limitation for the dependent spouse in a long-term marriage of less than twenty years.

The Sections on Family Law and on Women and the Law of The Delaware State Bar Association are in the process of drafting an alimony statute to present to the legislature this term. The statute as proposed by the two sections differs from that proposed in House Bills Nos. 2

and 207 in that discretion in the alimony award is limited by the length of the marriage, until the parties have been married twenty years.

The statute reads as follows:

A. AWARD OF ALIMONY

1. The Court may award interim alimony to a dependent party during the pendency of an action for divorce or annulment.

2. A party may be awarded alimony only if he or she is a dependent party after consideration of all relevant factors contained in §1512 (A) (3) (a)-(j), in that he or she:

(a) Is dependent upon the other party for support and the other party is not contractually or otherwise obligated to provide that support after the entry of a decree of divorce or annulment;

(b) Lacks sufficient property, including any award of marital property made by the Court, to provide for his or her reasonable needs; and

(c) Is unable to support himself or herself through appropriate employment or is the custodian of a child who condition or circumstances make it appropriate that he or she not be required to seek employment.

3. The alimony order shall be in such amount and for such time as the Court deems just, without regard to marital misconduct, after consideration of all relevant factors, including, but not limited to:

(a) The financial resources of the party seeking alimony, including the marital or separate property apportioned to him or her, and his or her ability to meet all or part of his or her reasonable needs independently;

(b) The time necessary and expense required to acquire sufficient education or training to enable the party seeking alimony to find appropriate employment;

(c) The standard of living established during the marriage;

(d) The duration of the marriage;

(e) The age, physical and emotional condition of both parties;

(f) Any financial or other contribution made by either party to the education, training, vocational skills, career or earning capacity of the other party;

(g) The ability of the other party to meet his or her needs while paying alimony;

(h) Tax consequences;

(i) Whether either party has foregone or postponed economic, educational or other employment opportunities during the course of the marriage; and

(j) Any other factor which the Court expressly finds is just and appropriate to consider.

B. LIMITATIONS

1. **Duration of alimony award.** A person shall be eligible for alimony for up to a period of the length of the marriage with the limited following exception:

If a party is married for 20 years or longer, there shall be no time limit as to his or her eligibility; however, the factors contained in subsection 1512(A)(3) shall apply and shall be considered by the Court.

2. **Duty to become self-supporting.** Any person awarded alimony has a continuing affirmative obligation to make good faith efforts to seek appropriate vocational training, if necessary, and employment unless the Court specifically finds, after a hearing, that it would be inequitable to require a person awarded alimony to do so (i) at any time, due to (A) a severe and incapacitating mental or physical illness or disability or (B) his or her age, or (ii) immediately, after consideration of the needs of a minor child or children living with him or her.

3. **Waiver.** A party who has waived or released his or her right to alimony in writing before, during or after their marriage shall have no remedy under this section.

4. **Termination.** Unless the parties agree otherwise in writing, the obligation to pay future alimony is terminated upon the death of either party or the remarriage or cohabitation of the party receiving alimony. As used in this section, cohabitation means "regularly residing with an adult of the same or opposite sex, if the parties hold themselves out as a couple, and regardless of whether the relationship confers a financial benefit on the party receiving alimony." Proof of sexual relations is admissible but not required to prove cohabitation. A party receiving alimony shall promptly notify the other party of his or her remarriage or cohabitation.

Section 2. The provisions of this Act shall be effective on date of enactment, and shall apply to all actions filed since the effective date.

The statute, as proposed by the Bar Association Sections reincorporates most of the definition of "cohabitation" removed from the Family Law Commission's bill and carries over from that bill an affirmative duty on the part of the recipient to become self-supporting, language not in the current alimony law. So, too, the proposed legislation adds as factors to be considered in the decision to award alimony and the amount of the alimony to be awarded a recognition of the contribution of each party to the "education, training, vocational skills, career or earning capacity" of the other and any foregone "economic, educational or other employment opportunities". The biggest difference, however, between existing alimony law and the most recently proposed statute is the sliding scale of allowable alimony, pegged to the length of the marriage, for marriages of less than twenty years.

It is to be hoped that alimony law in Delaware, last changed in 1979, will soon undergo another sweeping alteration. Although many years overdue, any modification in alimony as proposed thus far will mean that Delaware law will at last reflect the way people's lives are being lived in the late 1980s. ■

Divorce and Economic Well-being: The Effects on Men, Women, and Children

Saul D. Hoffman

In 1985, nearly five million families were headed by single women who were divorced or separated from their husbands. Another three million families were headed by women who had never been married to the fathers of their children. In all, just under a quarter of all families with children were maintained by single women, more than double the percentage in 1970. Over a third of the women and children in female-headed families in 1985 were classified by the government as living in poverty.

Recent research by Sandra Hofferth[1] suggests what lies ahead, viewed from the perspective of children. Her projections show that 70 percent of white children and 94 percent of black children born in 1980 can expect to spend some time in a family with only one parent before they reach age 18. The average white child will spend about one-third of his or her childhood and the average black child almost three-fifths in a single parent family.

Whatever we may think of these tremendous changes in family structure, it is clear that they will greatly affect the lives of an enormous number of women, men, and especially children. The need to understand the economic impact of these living arrangements is great.

Most of the findings I discuss below are based on research that I have done jointly with Greg J. Duncan of the Institute for Social Research at the University of Michigan.[2] Our work provides a rare "before and after" glimpse of the economic status of all the participants in a divorce and thus provides direct information on how divorce alters economic well-being. The information is drawn from a representative national sample of families (The Panel Study of Income Dynamics[3]) and, therefore, provides an accurate picture of the experience of men, women, and children in families undergoing divorce or separation during the past 10-15 years.[4]

Statistics from a genuinely representative sample are especially important in assessing the economic consequences of divorce and in trying to develop legislative and judicial policy. The break-up of a marriage is an intensely personal event, and the participants quite understandably tend to view it from a relatively narrow perspective, grounded in their own experiences. It is thus easy to lose sight of the general nature of the problem. Statistical summaries may lack the flesh and blood of real divorce cases, but they enable us to see clearly which outcomes are truly typical and which are not.

Women receiving court-ordered payments actually fared worse than women with voluntary written agreements, in terms of the average annual amount due ($2290 vs. $2960) and especially in the amount actually paid ($1330 vs. $2590). That difference is puzzling: does it reflect differences between the incomes of those who end up in court and of those who reach voluntary settlements, or does it reflect the operation of the legal process.?

Changes in Economic Well-Being

To measure the economic impact of divorce, we compared the standard of living of a family in the year before a divorce with that prevailing in the years following divorce. Standard of living means total family income (including alimony or child support payments when received or subtracting them when paid) relative to the needs of the family. The needs are the official government poverty standard for a family of that size.[5] Where income is less than needs, the family is classified as officially poor. Because divorce leads (at least initially) to the creation of two new smaller families with a corresponding fall in their needs, a family's standard of living falls by less than its income. Thus, for assessing the economic impact of divorce, the change in living standards is both more appropriate and more conservative than the change in income alone.

Consider, then, the economic well-being of men, women, and children in the year preceding the break-up of marriage. On average, family income substantially exceeds needs—by about a factor of three for white families and a factor of two for black families. That means they are consuming at an average level three and two times the poverty level, respectively. There are, of course, some families and some children who are already in distress—about one-ninth (12 percent) of all children live in families with incomes low enough for them to be officially classified as poor. And nearly a quarter of the black children live in such families.

For women and children the break-up of the marriage worsens the picture—substantially. In the first year following divorce, the average standard of living is about 30 percent lower than in the year before. Although the proportionate drop is similar for both whites and blacks, the fall in living standards means that the average black child in a post-divorce household now has a standard of living only 30 percent above the poverty level. The average white child in a post-divorce

household has a standard of living about twice the poverty level.

That 30 percent decline in living standards occurs despite some quite substantial efforts by many divorced women to provide increased income for their families. For example, there is a substantial increase in their labor market activity. In the year before divorce, roughly half of the women were working 1000 hours or more a year. In the year after divorce, almost three-quarters are. Because of this increase, their average earned income rises by over 50 percent. It is obvious that in the absence of such actions, the economic impact of divorce for women and children would be significantly larger.

For men the economic impact of divorce is quite different. On average, their total family incomes do fall somewhat, both because of the loss of their wives' earned income and payment of alimony, child support, or both. But their *needs* fall even more and thus their standard of living in the year after divorce actually rises slightly—by about 10-15 percent.[6] This is true even though a substantial number of men remarry and often acquire new family responsibilities. Our results take account of those changes when they occur.

Of course, these figures are averages, and there is a great deal of variation in the economic consequences. Many do considerably worse. Nearly a quarter of all women and children and about a third of black children find that their standard of living is *less than half* of what it had been in the year before divorce. For men, the comparable figure is nine percent, a figure which is itself far from insignificant. Poverty rates more than double. Where about one child in eight was officially poor even when his or her parents were married, now one child out of four is in that predicament. For black children, the percentage is nearly 40 percent.

On the other hand, since a divorce sometimes coincides with a job promotion or a substantial salary increase for the mother, and sometimes alimony and child support payments are adequate or better, the new family's standard of living actually improves in the years after divorce. We found that about one-fourth of women and children experience such an increase and that this improvement tends to be more common for black women and for low income white women. Presumably this is so, because their husbands earned less and the loss of that income is more easily compensated for by favorable labor market events.

The statistics that I have been discussing actually refer to the first year after a divorce occurs. In our study, we followed the men, women, and children for five years from the date of divorce, to see whether things might improve with the passage of time as the women found better jobs, became full-time workers, and so forth. In fact, we found little evidence of that. The major adjustments in labor market activity, for example, occur almost immediately. Changes thereafter are minor and sometimes offsetting—a woman's earned income does continue to increase, but child support payments fall as non-compliance rises. Indeed, the only thing that made a dramatic impact on the post-divorce economic well-being of the women and children was remarriage.

Divorce and Welfare

Divorce is one of the main routes by which women and children enter the welfare system. Important work by Mary Jo Bane and David Ellwood[7] has shown that divorce is the single most important cause of an episode of welfare receipt, accounting for 45 percent of all beginnings of stays on welfare. Another 30 percent are due to the birth of a child to an unmarried woman. Accordingly, the relative importance of these family composition changes should be clear.[8] In our work, we found that in the years following divorce, one-quarter of the women and one-third of the children lived in a household receiving at least $250 a year in welfare income. For black children and white children from families with below median family income, the percentage is nearly 50 percent.

Child Support and Alimony

The data we used do not provide any information on agreements or court awards of alimony or child support nor do they even distinguish between the two in all of the years that we examined. They do, however, indicate the extent to which payments of either kind are being received. We found that about 40 percent of all divorced women (about 50 percent of all children) received at least $250 a year in either alimony or child

Doctor Hoffman received his Ph.D. degree in Economics from the University of Michigan in 1977 and joined the Economics Department of the University of Delaware that year. He is currently an Associate Professor, teaching courses in economic theory and labor economics.

In June 1986 he presented invited testimony on the economic consequences of divorce for the Select Committee on Children, Youth, and Families of the United States House of Representatives. Dr. Hoffman's research includes, in addition to the economic consequences of divorce, the economic analysis of family structure decisions and the use and effects of welfare programs. He is the author of more than twenty articles and a textbook on labor economics.

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support. Not surprisingly, these payments are more likely to be received, the higher the pre-divorce family income. There is also a very substantial difference by race in the receipt of alimony or child support; white women were nearly 2½ times as likely to receive alimony or child support as black women.

Fortunately, more detailed information on child support and alimony, including the amounts due and actually received, is available in a recent Census Bureau study.[9] In 1983 (the last year for which full data are available) just under half of all women heading families with dependent children were supposed to receive child support payments from absent fathers. (Of those not due support, over 60 percent are either separated from or were never married to the absent fathers. Women who have been divorced are much more likely to be due child support). Of those due support in 1983, only about half (or 25 percent of all families with absent fathers) actually received the full amount, while another 25 percent received partial payment. The remaining 25 percent due child support received nothing at all. Roughly 30 percent of all child support payments due in 1983 were never paid. In 1983, 65 percent of the women raising children alone did so without any child support at all.

There are some other disturbing findings. The average amount of child support actually received in 1983 was $2340 or a bit less than $200 per month. But after adjusting for the effects of inflation, that figure is about 15 percent *lower* than the average amount received in 1978. And as a proportion of the average income of all men, child support payments averaged about 13 percent.[10]

Women receiving court-ordered payments actually fared worse than women with voluntary written agreements, in terms of the average annual amount due ($2290 vs. $2960) and especially in the amount actually paid ($1330 vs. $2590). That difference is puzzling: does it reflect differences between the incomes of those who end up in court and of those who reach voluntary settlements, or does it reflect the operation of the legal process?

Finally, relatively few women received either alimony payments or some portion of marital property. As of the spring of 1984, only 14 percent of ever-divorced or currently separated women were due alimony and, of those, only about three-quarters received at least some portion of it. The time trend in alimony is clearly downward: women divorced before 1970 were far more likely to be receiving alimony payments than women divorced since that time. Marital property was received by only 37 percent of women who had ever been divorced and, of the other 63 percent who received no marital property, only about one in seven (14%) received any income from either alimony or child support.

It is difficult to examine the figures on the economic consequences of divorce without concluding that there are usually clearly-identified winners and losers. That the losers virtually always include children makes the situation that much more serious.

It is difficult to examine the figures on the economic consequences of divorce without concluding that there are usually clearly-identified winners and losers. That the losers virtually always include children makes the situation that much more serious.

The findings about the relative changes in economic status for men and women, even net of all alimony and child support payments, certainly say

something about the adequacy of those payments and the financial burden they typically impose on absent fathers. The Census figures on compliance, which indicate that only half of all child support awards were received in full, are especially troubling.

Even if child support awards were more generous, and complete compliance could be obtained, many women and children would still suffer a decline in their living standards after divorce, simply because women continue to fare more poorly in the labor market than men. Some of this is due to their often less continuous labor market activity. But we know from a great deal of economic research that this is more attributable to differences in opportunity and gender-based treatment.[11] In a sense, women gain financially from marriage by partial access to the income of better-paid men, and they lose financially when their marriages are dissolved. That result is compounded when a woman's own labor market prospects are reduced as a consequence of her marriage, as in the case of women who stay home and raise a family.

Finally, in many respects, the worst economic situation is not that of women who are divorced, but of those who have never been married to the fathers of their children. It is in those families that child support payments are rarely even due to be received and where family income is lowest and poverty among children highest.

[1]Sandra L. Hofferth, "Updating Children's Life Course," *Journal of Marriage and the Family*, February, 1985.

[2]Our research was originally published as "Economic Consequences of Marital Instability" in *Horizontal Equity, Uncertainty, and Economic Well-Being*, edited by Martin David and Timothy Smeeding and published by the University of Chicago Press in 1985. A shorter version, entitled "A Reconsideration of the Economic Consequences of Marital Dissolution," appeared in the Nov., 1985 issue of *Demography*.

[3]The Panel Study of Income Dynamics (PSID) was begun in 1967 as a survey of about 5000 families. Those families, including new families created by divorce, have been re-interviewed annually since then, thus providing a detailed record of the changing economic and demographic circumstances of American families over a period of almost 20 years. The PSID is widely used in research by economists, sociologists, and demographers.

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[4]It is not possible to know for certain on the basis of the information we analyze whether the situation in Delaware is similar to that of the country as a whole. In the absence of information to the contrary, it is probably prudent to assume that it is.

[5]The official poverty standard is based on the minimum cost of obtaining a nutritionally adequate diet (the Department of Agriculture's "Economy Food Plan") for a family of given size and composition. That dollar amount is then multiplied by three for families of three or more and by a slightly larger figure for smaller families to account for the typical share of food expenditures in a family's budget. Except for adjustments for inflation, the poverty standard has been held constant since its inception in 1964. In 1985, the poverty standard for a family of four was approximately $10,600.

[6]Our results for changes in economic status are not as dramatic as the widely-cited findings of Lenore Weitzman, presented in her book, *The Divorce Revolution.* Using a similar approach to ours, applied to a sample of divorces which occurred in 1977 in Los Angeles County, Weitzman reports that the standard of living for women falls by 73 percent while that of men increases by 42 percent. It appears likely that Weitzman's numbers are, at best, unrepresentative of the rest of the country and, at worst, the result of a computational error.

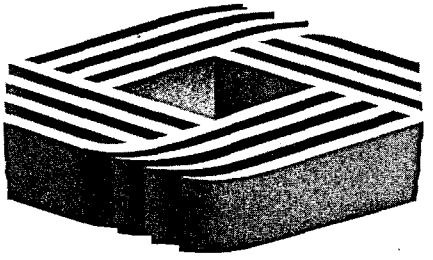
[7]Mary Jo Bane and David Ellwood, "The Dynamics of Dependence," Final Report to the U.S. Department of Health and Human Services, 1983.

[8]In a sense, this finding is not very surprising, since married couples are eligible for AFDC in very few states and, even then, a number of restrictions apply. The significant point, though, is that entry into welfare is typically precipitated directly by a change in family structure, rather than following some years later.

[9]"Child Support And Alimony: 1983," U.S. Bureau of the Census, Current Population reports, Series P-23, No. 141, July, 1985. The figures reported include both voluntary agreements and court awards, unless otherwise indicated.

[10]This figure is based on overall averages and not on a direct comparison of actual child support paid by an absent father and his own income. It thus needs to be interpreted cautiously, but it is suggestive.

[11]The best estimate is that roughly 40 percent of the difference in average earnings between men and women can be attributed to differences in their labor market activity, and the other 60 percent unrelated to differences in apparent skills and commitment. ■



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The Divorce Bind: Temporarily Indigent Women

Shirley C. Horowitz

The Other America, a powerful book by Michael Harrington, described the poor in our country twenty years ago. If you compare what is happening now, two decades later, you will notice that it is a changing neighborhood. The men are moving out and women and children are moving in. Now the buzz words are "The Feminization of Poverty." Whether as widows, divorcees, or battered and abused spouses, the number of women with children living in poverty has increased dramatically. Once poor, the family maintained by a woman is at least ten times more likely to remain poor than the disadvantaged two-parent family. In fact, it is often stated that many married women are just a husband away from poverty. Upon the breakup of a marriage, the income of the woman and her children falls on the average 73 percent while the father's increases 42 percent.

The members of the Delaware State Bar Association who accept *pro bono* referrals from Delaware Volunteer Legal Service (DVLS) to represent poor women have made a tremendous effort to stabilize their situation. But the case load is shaped by an overwhelming call for representation in Family Court. The clients accepted by DVLS must meet a standard of 125 percent of the poverty level. A continuing problem both DVLS and Community Legal Aid Society, Inc. (CLASI) face is protecting the rights of women who do not meet that financial eligibility standard, and yet have no resources immediately at hand to retain private attorneys. For all intents and purposes, these women are penniless although their prospects for awards of support and property upon divorce render them ineligible under stringent Federal guidelines for poverty law representation. Many times their husbands have good to excellent jobs and the marital property may have moderate or even substantial value, but the women have been put out of their homes or have removed themselves because of abuse or violence. With no funds or recourse to marital property, they are not able to retain counsel. They are unable either to gain representation on their own or to qualify for representation through the resources of DVLS or CLASI. Sadly enough, only after a divorce do many women then become eligible for our representation.

Shirley Horowitz is Director, Pro Bono Services of Delaware Volunteer Legal Services, Inc., the poverty law arm of the Delaware State Bar Association. Shirley's extensive background in public interest work includes service as Director of Community Relations and Fund Raising Associate of the Jewish Federation of Delaware, as Director and Lobbyist for Common Cause/Delaware, and as Director of Public Relations and Development for Delaware League for Planned Parenthood. She was a member of the Delaware Advisory Committee to the U.S. Civil Rights Commission from 1977 to 1985. She is now engaged principally in lawyer recruitment, DVLS public relations, and in arranging the delivery of private lawyer services to DVLS clientele who might not otherwise enjoy the protection of competent counsel.

There is an altogether reasonable reluctance on the part of many attorneys in private practice to accept cases of this type, where there is no assurance that they will receive court awards sufficient to justify their time and to pay their continuing expenses of practice. As a practical result, these women and their children are both ineligible for poverty law assistance and incapable of securing the representation of domestic relations practitioners. They are left without counsel in matters where they are quite likely to encounter permanent financial injury, which they would not have suffered had they enjoyed the benefit of effective representation.

This problem, which presents itself with alarming frequency, demonstrates a need to command the attention of the legal community and the courts. The practice of not awarding interim court fees only compounds this problem. The Delaware State Bar Association's Section on Family Law has expressed the concern of the family law practioner about an unwritten policy of the Family Court to postpone awards of attorney fees until the conclusion of cases rather than awarding them prospectively or from time-to-time, *as provided by statute.*

An awarding of attorney fees may be one of the few means by which negotiation may go forward for alimony, custody of children, or division of property. Without competent counsel, especially

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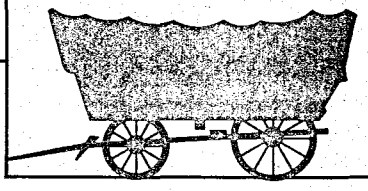

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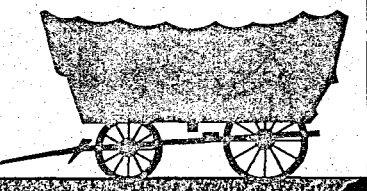

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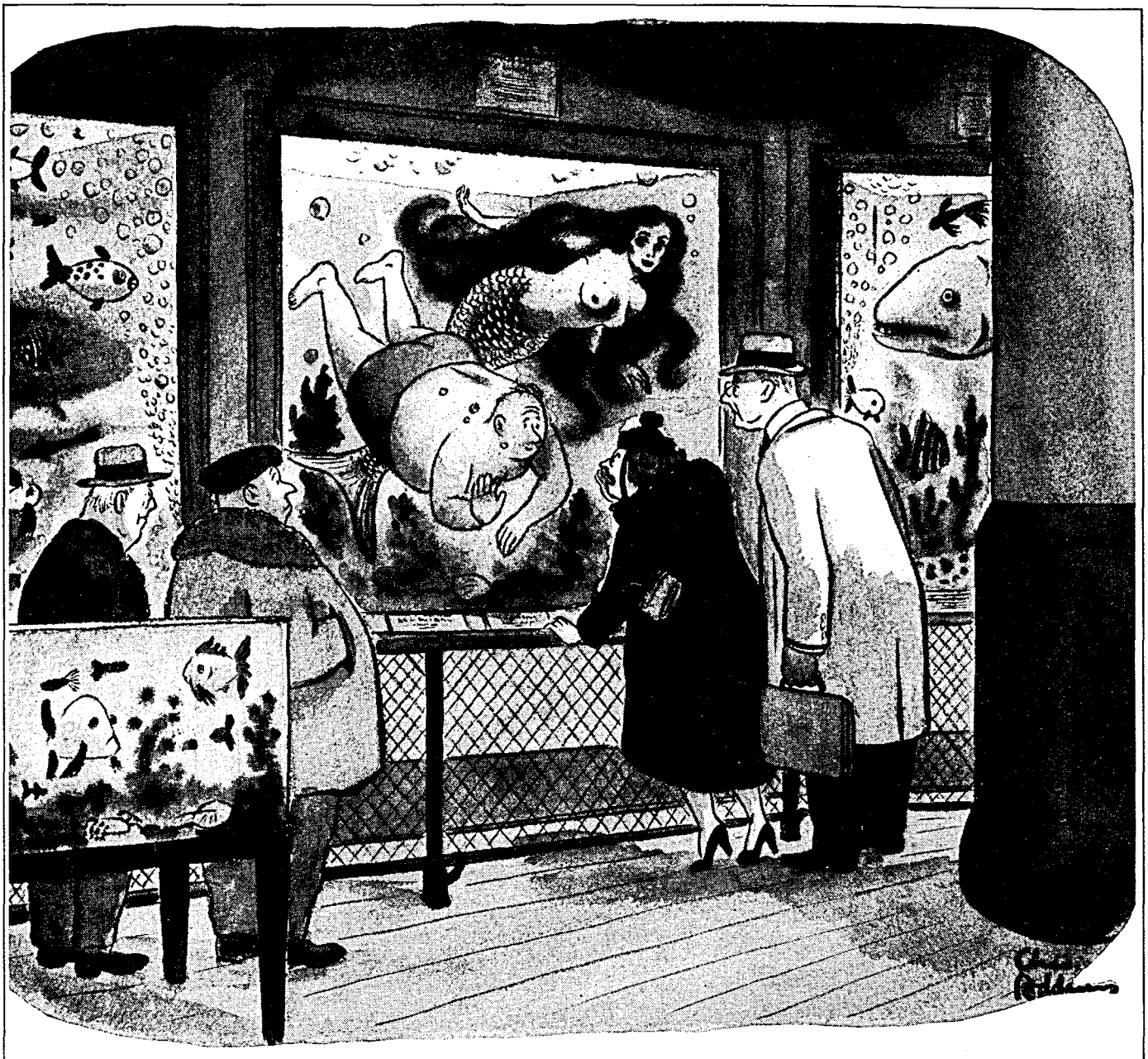


Drawing by Chas. Addams; © 1938, 1966
The New Yorker Magazine, Inc.

"Richard! I said I want you to meet my lawyer."

when the adverse party is well represented, further danger awaits an already injured spouse.

Both DVLS and CLASI have expressed their concerns about this practical problem to the Bar Association through the Lawyer Referral Service and the Section on Family Law. Their genuine concern is gratifying, but that is cold comfort for the women whom we cannot represent and who are unable to secure such services elsewhere.

While many women are poor for the same reasons men are poor (*e.g.*, lack of job opportunity because of lack of skills or education), much of women's poverty is due to two causes that are uniquely female. Women often must provide all or most of the support for their children, and they are often disadvantaged in the job market.

Women often bear the economic as well as emotional burden of rearing children. When a couple with children break up, the woman becomes a single parent, while the man becomes single—period.

Legal advocates for women with children must be aware of the need for adequate spousal and child support as well as the need for the caregiver, usually the mother, to remain in the marital home. Women often earn less than their male counterparts even for the same work. The advocate must also proceed from certain fundamental principles, one of them being gender discrimination as a key element behind the feminization of poverty.

It is uncertain which remedies and mechanisms are the best ways to achieve the changes needed to protect women at risk. When the representation they need is not at hand, it is clear that the courts and legal community must develop some highly creative and innovative programs. If we are committed to a humane society with justice for all, the legal needs of women and their children should be high on our list of unsolved and neglected problems. ■

The History of Alimony in Delaware

Marsha Kramarck

Alimony: disinterest, compounded annually.
Walter McDonald

Until 1978 the principles of alimony in Delaware had continued, unchanged, from the inception of the colonies. The form of alimony, which was limited to the period of litigation until 1978, traveled with the Pilgrims from England, where it enjoyed a rich and colorful history. Because of the intimate intertwining of divorce and alimony, a brief review of English history is required.

Absolute divorce from the bonds of matrimony did not exist in England before 1670.[1] Before the 12th century, the King's Court decided matrimonial cases. Thereafter, matters of the separation of legally married parties were treated as a religious matter within the exclusive jurisdiction of the ecclestiastical courts. By the mid-12th century, cannon law became settled doctrine, and the exercise of *in personam* jurisdiction by lawyers trained in ecclesiastical law evolved from a process of judgment by local clerical dignitaries.[2]

In pre-Reformation Western tradition, a marriage once validly contracted was indissoluble and the Church took notice only of divorce *a mensa et thora,* or from bed and board. This was tantamount to a legal separation, and alimony was that sum required for the continued support of a needy separated spouse. Remarriage was a legal impossibility. Even as late as 1604, cannon law expressly disallowed divorce *a vinculo,* absolute divorce.[3]

By the mid-16th century, Henry VIII freed himself from the authority of Rome, and by the Ecclesiastical Licenses Act of 1536, began the trend toward the development of absolute divorce. Even the Church began to review its prohibition against divorce in circumstances of adultery or when the malicious desertion by a spouse coupled with the legal investiture of the financial resources of the wife in her husband made public wards of entire families, inasmuch as remarriage was impossible.[4]

In 1670, John Manners, Lord Roos, future Earl and later Duke of Rutland, petitioned for an Act of Parliament to dissolve his marriage. Two years later, his private bill passed the assembly, and the first divorce was granted.[5] The first commoner to obtain an absolute divorce was a London grocer, whose private bill in Parliament prompted a debate over his wife's finances.[6] Such bills governed matters both of real property and money, in addition to dissolving marriage bonds. The need for permanent maintenance of the spouse was recognized, and a rule of thumb that the husband should pay one-fifth of his income to the former wife was established.[7] Thus, only the wealthy and privileged could seek divorce, considering the high cost of financing private bills, and the resulting economic maintenance of two households, particularly if remarriage should follow. Divorce continued to be an exclusively male province until 1801, when the first absolute divorce was granted a woman.[8]

The complexity of the system was enhanced by a cumbersome two-pronged procedure whereby a spouse was required to prove a civil charge of criminal conversation or trespass as a prerequisite to the passage of a private bill.[9] It became customary to use house servants to attest to the misconduct of the offending spouse with his or her lover.[10]

While all of England was "scandalized by the divorce epidemic raging in 1770" where 31 divorces were granted in one three year period, a simplified system was desired.[11] The Matrimonial Causes Bill of 1857 was enacted to reform the procedure and to equalize the positions of those seeking divorce. Ecclestiastical Courts were separated from the Courts of Common Law, and a Court for Divorce and Matrimonial Causes was born.[12] In the meantime, of course, the thirteen colonies had been established, and the Revolutionary War resulted in a new Union. In the fledgling judicial system of Delaware, as in other states, there was no statute expressly governing divorce or alimony. The Delaware legislature took up the English procedure of privately enacted bills. In the legislative session of 1789, the first Delaware divorce *a vinculo* was granted. Between 1789 and 1897, some 500 private divorces were granted.[13] During this period, Delaware's civil courts contemporaneously exercised jurisdiction over broader matters of divorce and alimony for nearly three quarters of a century.[14] The overlapping jurisdiction resulted from the theory that the legislature could determine the "status" of its citizens, but had no authority to grant alimony, which was held to be in the nature of a judicial fiat. Finally, Delaware's Constitution of 1897 expressly prohibited the procedure of private legislative bills for divorce.[15]

In 1832, the first "Divorce Act" vested in the Superior Court "sole cognizance of granting divorces." Divorce and alimony were held to have been derived from the Act of Assembly exclusively, and expressly not from the common law.[16] This fact is worthy of note particularly in light of the concurrent judgments of courts of equity in petitions for separate maintenance, often called alimony. Those judgments cited the "rules and practices of the High Court of Chancery of Great Britain."[17] Moreover, although no Ecclesiastical courts ever existed in Delaware, the tenets and principles of cannon law were regarded as sound guidelines for the civil courts in administering the first Divorce Act.[18] Alimony continued to be limited to the period of litigation.

During the pre-Revolutionary period, it is generally believed that no equity jurisdiction in matters of separate maintenance existed. However, Delaware archives provide fragmentary records,

which document hearings on separate maintenance as early as 1743.

Temporary alimony has been held to be distinguishable from separate maintenance.[19] Alimony is said to be based on the wife's economic need and the husband's ability to pay, while maintenance is based on principles of equity, including clean hands.[20]

Thus, even before the existence of an alimony statute, maintenance actions formed part of Delaware's judicial history. Equitable jurisdiction in matters of separate maintenance continued until 1973, when all domestic relations jurisdiction was transferred exclusively to Family Court.[21]

Eleonor Fisher v. William Fisher is the docket entry for a petition for separate maintenance, alleging that William had left his wife for another woman. The archives further document such petitions in 1755 (Haverloe), 1759 (Humphrys) and 1770 (Boyd). The most complete record of these early equity actions derives from a 1783 action in Kent County by one Elizabeth Robinson. Depositions of witnesses for the parties either support or contest the wife's allegation of her "sober, faithful, virtuous and industrious nature." The resultant judgment directed the husband "to make biannual payments of ten pounds each" pending his treatment of his wife "with becoming tenderness and humanity."[22]

The first pleading denominated as a "petition for Alimony" appeared in 1785 in Sussex County. Therein Sarah Smith alleged physical abuse by her husband and prayed for financial support. Similarly, in New Castle County, a 1791 action by Martha Dick sought relief from the repeated beatings and forcible ejectment by her husband. The husband admitted bull whipping his wife "as by law he conceives he well might" owing to her mental derangement.[23] Apparently, the character and flavor of these actions have changed little in 200 years!

In regard to alimony, the 1832 Divorce Act made specific mention of an allotment that could be awarded by the Court to a wife "for her sustenance during the pendency of a petition..."[24] This language was interpreted to permit an award of alimony regardless of which party was petitioner. In 1852, the Act was changed to permit such an award "pending *her* petition..." (emphasis added).[25] Thus, a petitioning husband was barred from an alimony award *pendente lite*. There continued to be authority for alimony beyond the litigation period.

A further legislative change in 1859 added language to include suit money and other expenses, such as counsel fees, but only to a petitioning wife. The spirit and language of the statute then continued to be:

"The Court may grant alimony to the wife for her sustenance pending her petition for divorce and may order and direct the husband to pay such sums as may be deemed necessary to defray the expenses in conducting her case." [26]

The next amendment, in 1874, added the language "whether the application be on the part of either the wife or husband" so as to permit expenses to be awarded to a wife regardless of her status as petitioner or respondent.[27]

In 1915, the Court was authorized to employ compulsory process in the execution of its powers.[28] The first codification of Delaware law in multiple volumes in 1953, like the code revision of 1935, contained no substantive change in alimony. Further expansion of the grounds for divorce in 1967 for the first time included "reciprocal conflict of personalities...", but reflected no expansion of alimony.[29] In 1959, and again in 1971, Delaware Courts upheld the rule that there is no authority for an award of even temporary alimony beyond a decree *nisi* or effective date of a final order. In *Beres*, it was argued that since the Constitutional Amendment of 1897 barred the granting of divorces or alimony ex-

Marsha Kramarck's long commitment to public service has included a term as Counselor and later an Administrator with the Family Court, following its expansion to statewide status. While an Administrator with the Administrative Office of the Courts, she completed a study of case delays in the Supreme Court. She served as an Assistant Public Defender for nearly four years before entering private civil practice in 1980. One of the authors of the original Women and the Law Handbook, *she was commissioned by the Center for Women's Policy Studies in Washington, D.C. as co-author of the Delaware publication on the Legal Status of Dependent Women.*

History of Alimony in Delaware
(Continued)

cept "in the judgment of a court...", such language must necessarily confer jurisdiction for permanent alimony. The Court rejected this novel argument.[30] In 1971, it was argued that an enforceable agreement requiring alimony was tantamount to an award of permanent alimony. The Court also rejected this argument, again affirming the absence of any statutory authority to grant permanent alimony.[31] In 1974, the Delaware Divorce and Annulment Act became effective, amending the wording of the statute providing for alimony, but making no provision for an award that would extend beyond the date of a final decree.

Finally, in 1978, the first substantive change in the alimony statute appeared:

"(g) In order to assist a party to achieve independent financial status, the Court may award temporary alimony... or continue an award of interim alimony for a period of time following the divorce, but not to exceed 2 consecutive years if the marriage existed less than 20 years..."[32]

It is widely believed that the twenty year marriage requirement for permanent alimony arose from a personal need of a then sitting legislator embroiled in a domestic controversy and to whose benefit such a restriction would redound. In fact, however, it appears that the amendments were actually born of a fear among Delaware lawyers specializing in domestic relations practice of unbridled discretion in Family Court. It was only in 1973 that Family Court acquired Statewide status. Eventually jurisdiction over plenary matters of support, divorce, alimony, and separate maintenance were transferred from the Superior Court and the Court of Chancery. The judgments and decisions resulting from this broadened subject matter jurisdiction were perceived to be somewhat erratic and unpredictable, depending on the identity of the trier of fact. Then, in 1976, legislation was introduced in the General Assembly that would invest Family Court with absolute discretion to determine the duration of an alimony award, based only upon the equities, and without statutory limitation. While this bill did not pass the legislature, its consideration motivated the then members of the then Family Law Committee (now "Section") of the State Bar Association to draft more restrictive legislation. In their discussions, the members were apparently sympathetic to the need for alimony that would extend beyond the period of litigation. However, a statutory scheme that imposed some guidelines for the length of an award was considered preferable to the open-ended design of the bill that was expected to be reintroduced at the next legislative session. It was acknowledged that the length of a marriage should be tied to the length of an alimony award. The then existing format of the Social Security regulations required a minimum twenty year marriage for permanent benefits to attach. It was this method of assessing eligibility that was incorporated into the draft legislation, which ultimately became law. Since that time, even the Social Security Administration has revised its regulations, reducing its "vesting" requirement to ten years.

The original amendments creating a right to temporary or permanent alimony were expressly designed to avoid an alimony award to one who was the petitioner in a divorce action. By creating the so-called "respondents' exception", the legislature sought to permit an award of alimony only to a party who was as nearly blameless as possible. Thus, the stated purpose of the amendment was:

"(5)...to award alimony only to respondents divorced on account of incompatibility or mental illness..." 13 Del. C. §1502

One year later, this exception was removed, in apparent recognition that a guilty wife could be as hungry or needy as a blameless one. Again, it is popularly believed that the self-interest of a sitting legislator prompted the change. In fact, there was a House member whose personal crisis was affected by the amendment. However, the now deceased sponsor of the amendment was apparently moved by members of his constituency to recognize the inequitable effect of the exception, and thereupon pressed an attorney residing in his district into service to draft the change. The new relevant subsection on purpose read, in 13 Del. C. §1502:

"(5) To award alimony under this chapter to a dependent party but only during the continuance of such dependency."

The limitation on alimony awards to 2 years for marriages of fewer than twenty years duration has been attacked both on appeal and by proposed legislative amendment. The Delaware Supreme Court was compelled to conclude that the limitation was plain on its face.[33] Attempts at legislative modification have been unsuccessful, despite the finding of a Blue Ribbon Commission that Delaware's statute is unique, and should be changed.

Since the inception of alimony, those parties who entered into separation agreements or contracts waiving alimony are held to be barred from an otherwise enforceable right to alimony. Separation agreements in appropriate cases have always been enforceable in Delaware, first in the Court of Chancery, and now in the Family Court.[34]

Ultimately, the significance of the amendments to the alimony statute lies in the shift in the view of alimony entitlement as directly related to blame and fault to a more benevolent and widely prevailing view that innocence is no prerequisite. As observed by the Court in *Brown* in 1942:

"Divorce is no longer an Ecclesiastical judgment for a spiritual offense or sin, but a necessity for the correction of social maladjustment".[35]

[1]*Allen Horstman, Victorian Divorce* (London: Croom Helm, Ltd., 1985) p. 4.

[2]B.H. Lee, *Divorce Law Reform in England,* (London: Peter Owen, Ltd., 1974) p. 3.

[3]*Ibid.,* p.4.

[4]*Ibid.*

[5]Horstman, *supra,* p. 1.

[6]*Ibid.,* p. 12.

[7]*Ibid.,* p. 4.

[8]*Ibid.*

[9]*Ibid.,* p. 15.

[10]*Ibid.,* p. 5.

[11]Lee, *supra,* p. 15.

[12]*Ibid.,* p. 12.

[13]*Brown v. Brown,* Del. super., 29 A. 2d 149 (1942) at 151.

[14]20 Del. Laws, ch. 542.

[15]8 Del. Laws, ch. 144; Del. Const. 1897, §18.

[16]8 Del. Laws, ch. 144; Brown, *supra,* p. 152.

[17] p.25

[18]*Jeans v. Jeans,* Del. supr., 2 Harr. 38, 2 Del. 38 (1935) Accord, *DuPont v. DuPont,* Del. supr., 87 A. 2d 394 (1952).

[19]1 Nelson, Divorce and Annulment, (2nd Ed.) §12.38.

[20]*Husband v. Wife,* Del. supr., 252 A. 2d 106 (1969).

[21]56 Del. Laws, ch. 296; 57 Del. Laws, ch. 540; 58 Del. Laws, ch. 116.

[22] p. 25-27

[23]*Ibid.,* p. 28.

[24]8 Del. Laws, ch. 144.

[25]14 Del. Laws, ch. 548.

[26]11 Del. Laws, ch. 638.

[27]14 Del. Laws, ch. 548.

[28]24 Del. Laws, ch. 221.

[29]56 Del. Laws, ch. 296.

[30]*Beres v. Beres,* Del. supr., 184 A. 2d 384 (1959).

[31]*Spruance v. Dir. of Revenue,* Del. supr., 277 A. 2d 695 (1971).

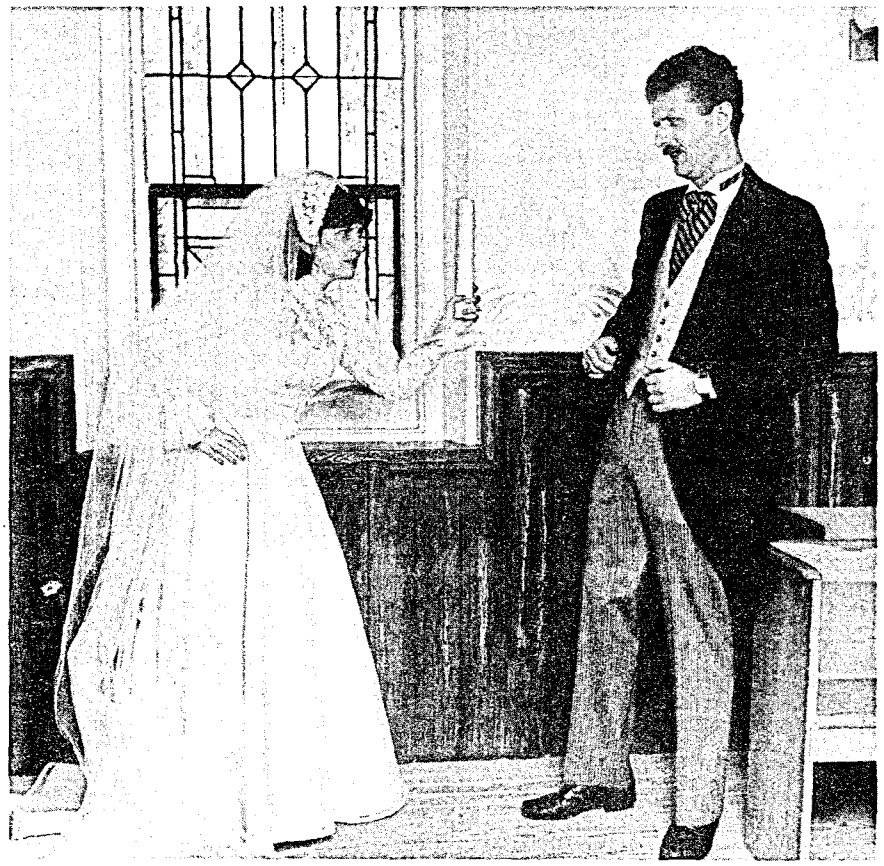
[32]61 Del. Laws, ch. 204.

[33]*Wife B v. Husband B,* Del. supr., 395 A. 2d 358 (1978).

[34]13 Del. C. §1512 (d).

[35]*Brown, supra* at 153.

A Divorce Kit in Every Trousseau!



Eric Crossan Studio

That old gang of mine is breaking up wedding bells...

"In most every pre-nuptial agreement I've seen, the marriage ends in divorce."
- Marvin Mitchelson

Caveat Ante-Matrimonia

Francine S. Gritz and Jean A. Crompton

An Ante-Nuptial Agreement or Pre-Nuptial Agreement (hereinafter Agreement or Ante-Nuptial Agreement) defines a future marital estate before a marriage takes place. It contracts property rights, both in property owned before marriage, as well as property, including earnings, acquired subsequently.

Although maintenance and support provisions in Ante-Nuptial Agreements have frequently been held void as against public policy, for fear that a spouse would become a charge on the state, it is still advisable to include such a clause within the Agreement. One way of addressing the support issue could be a lump sum alimony payment, determined by the length of the marriage or by the future financial needs and circumstances of the party seeking support. An alternate method of providing support might be monthly installment payments, or a reasonable monthly payment toward household and living expenses.

The support aspect of an Ante-Nuptial Agreement becomes highly relevant where a spouse is already receiving support or alimony, as a result of a prior marriage settlement or court order. Upon remarriage, that support usually will terminate. See 13 *Del. C.* §1519(b). A clause within the Ante-Nuptial Agreement could provide for support of the spouse in the same amount as that to which the recipient had been accustomed. Thus, the result of the Ante-Nuptial Agreement could be to restore the spouse to a *status quo ante,* in the event of a subsequent divorce.

In a proceeding for divorce or annulment, marital property encompasses all property acquired by either party subsequent to marriage. However, under 13 *Del. C.* §1513(b)(2), property excluded by valid agreement of the parties will not be subject to distribution after divorce.

Earlier Ante-Nuptial Agreements rarely spoke of a disposition of property upon divorce, but usually addressed distribution upon death. In fact, 13 *Del. C.* §301 does not even speak of divorce, only of death. The statute states as follows:

A man and a woman in contemplation of matrimony, by a marriage contract executed in the presence of 2 witnesses at least 10 days before the solemnization of the marriage, may determine what rights each shall have in the other's estate during marriage and ***after its dissolution by death*** *and may bar each other of all rights in their respective estates not so secured to them, and any such contract duly acknowledged before any officer authorized to take acknowledgements may be recorded in the deed records in the office of the recorder in any and all counties of the State.* (Emphasis added)

Historically, Ante-Nuptial Agreements that mentioned divorce were deemed to be void as against public policy, the thought being that such agreements promoted divorce as opposed to preserving marriage. The two earliest Delaware cases that consider Ante-Nuptial Agreements are *Cochran v. McBeath, et al.,* 1 Del. Ch 187 (1822) and *Farrow v. Farrow,* 1 Del. Ch. 457 (1822).

In *Cochran v. McBeath, et al., supra,* at 201, the Court stated that:

Such contracts are prudent, and if they were oftener made the happiness and safety of wives and of their children would reward them for their foresight and caution.

In *Farrow v. Farrow, supra,* at 463, the Court found that:

Like all other contracts, if she is fully apprised of all the circumstances, if she acts with her eyes open, and has an equal knowledge with the husband of all the facts, so that she may judge of them and of the probable result of the contract, she certainly ought to be bound. But if there is any concealment, or the suppression of any fact or thing which ought to be communicated, it amounts to fraud, and will vitiate the contract. This doctrine is applicable to all contracts.

The modern trend is to uphold Ante-Nuptial Agreements, whether the occasion is divorce, separation, or death, if certain conditions have been met. In examining an Ante-Nuptial Agreement, the court will first determine whether it appears fair on its face. Most jurisdictions hold that parties contemplating marriage stand in a confidential relationship to each other. The burden of proving fairness in the inception is placed upon the party seeking to uphold the Agreement. There must be fairness, not only in the content of the Agreement, but in the circumstances surrounding the execution of the Agreement.

In the State of Delaware, fairness is determined as of the time of the execution of the Agreement. However, if there are significantly changed circumstances, which cause the Agreement to no longer comport with the reasonable expectations and the original intent of the parties, the court may consider the Agreement as of the date of execution and any subsequent date as well. The rule as to Ante-Nuptial contracts involves all of the familiar equitable considerations of undue influence, fraud, mistake, duress, unfair bargaining power and arms-length considerations.

In order for the court to find fairness in the inception of an Agreement, there should be mutuality, meaning that *both* parties have agreed that they desire such a contract. Moreover, both parties should have independent legal counsel. In the event that one party does not have independent legal counsel, it is advisable that there be a recital within the Agreement itself that the party without counsel was aware that he or she had such a right and knowingly and intelligently waived it. We recommend that one further step be taken where one party has elected not to have counsel: the other party should offer to pay for legal counsel to review, advise, and recommend. This should also be recited within the Agreement itself.

Eric Crossan Studio

Such contracts are prudent, and if they were oftener made the happiness and safety of wives and of their children would reward them for their foresight and caution.

Even the most carefully drafted Ante-Nuptial Agreement can be defeated by events subsequent to marriage. These pitfalls arise primarily from the commingling of assets sought to be excluded by the Agreement with assets that are clearly marital, *i.e.*, those assets earned through marital effort or received throughout the course of the marriage. 13 *Del. C.* §1513(b) reads as follows:

For purposes of this chapter only, 'marital property' means all property acquired by either party subsequent to the marriage except:
(1) Property acquired in exchange for property acquired prior to the marriage;
(2) Property excluded by valid agreement of the parties; and
(3) The increase in value of property acquired prior to the marriage.

Although 13 *Del. C.* §1513(b)(2) permits the parties to exclude by valid agreement certain property, this intent can be defeated, knowingly or unknowingly, by the parties' actions subsequent to marriage.

Example 1. Helen and Lloyd were happily married for 25 years, when Helen suddenly died, leaving Lloyd, their three married children, and five grandchildren as her surviving heirs. During their 25 year marriage, Helen had inherited Black Acre, which had belonged to her father's family for over 150 years. Helen left all her assets to Lloyd, who had promised Helen that Black Acre would go to the children. Two years later, Lloyd met Joan, a wealthy widow. Six months later they were married, and Joan moved into Black Acre, inherited by Lloyd through Helen. Before their marriage, Lloyd and Joan executed an Ante-Nuptial Agreement, which stated that each party was to always retain property titled in (his)(her)

Eric Crossan Studio

The Ante-Nuptial Agreement in the process of being executed on the cover of this issue looks shaky. There is plain disregard of the ten-day waiting period. Besides, the groom seems nervous: one suspects bridal duress. *The Editors*

Caveat Ante-Matrimonia
(Continued)

individual name. The Agreement specifically listed Black Acre as Lloyd's separately titled property. Subsequently, because of economic circumstances beyond his control, Lloyd became increasingly fearful that creditors might be able to execute on property held solely in his name. Upon the advice of his then attorney, Lloyd placed Black Acre in joint names as a tenancy by the entirety. Two years later, Lloyd suffered a heart attack and died, leaving Joan the new owner of Black Acre. Thus, the intent of the Agreement was defeated.

Example 2. When Anita and William married, Anita owned 12,000 shares of Reliance stock, which was listed in the Pre-Nuptial Agreement as her separate property. Subsequently, after marriage, Exxon Corporation bought out Reliance, paying Anita a substantial profit, even after deducting for the capital gains tax. Anita placed the money in the money market account, she held jointly with William without considering the ramifications of her act and without knowing that it constituted a commingling of marital and pre-marital assets. $10,000 was used to add a new bathroom for the marital home and another $12,000 was used to buy a new family car, a car that they had planned to buy that year anyway. The car was titled in joint names, as was the marital home. Subsequently, Anita took the remaining $50,000 and invested it in mutual funds, titled in her name alone. Six years later the parties divorced, and William claimed that all of the proceeds from the sale of the Reliance stock became marital property, because of the commingling of this property in a joint account. Thus, under Delaware law, the burden fell upon Anita to prove that the proceeds from the sale of the Reliance stock were never intended to be marital property.

Example 3. Before their marriage thirty years ago, Carol and Robert executed a well-drafted Ante-Nuptial Agreement. Although it was a first marriage for each party, they were both considered rich by ordinary standards and were the recipients of considerable wealth from their respective families. Both expected that during their marriage they would inherit additional substantial assets. During the 1970s, their only child, Steven, became heavily involved with drugs, joined a cult, and disappeared. Because of their concern over the great amount of estate taxes they would have to pay upon the death of either of them, Carol and Robert put all of their assets into joint names. The very next year, Robert divorced Carol and married his secretary, Ann, who was already pregnant with his child. Carol consulted her domestic attorney, who informed her that the subsequent act of commingling all their property defeated the intent of their Ante-Nuptial Agreement.

As previously stated, when an Ante-Nuptial Agreement is presented to a court for consideration, the first step the court must take is to examine the entire Agreement for fairness. In weighing the fairness and reasonableness of an Ante-Nuptial Agreement, the court will consider numerous factors, including, but not limited to the following:

(a) The emotional and financial situation of each party at the time the Agreement was written;

(b) Ages and health of the parties;

(c) All of the circumstances leading up to the execution of the Agreement;

(d) Whether each party was represented by an attorney or, at the very minimum, whether each party had the opportunity to be so represented;

(e) Whether there was a listing of the value of all the assets and liabilities owned by each party at the time of the writing of the Agreement; and

(f) Whether each party had advised the other of all of his or her property, property rights, income and expectancies, including any pension benefits.

Although in the majority of jurisdictions the burden of proof is on the party who seeks to uphold an Ante-Nuptial Agreement, once that person has established that the Agreement is fair on its face, the burden of proof shifts to the party who seeks to rescind the Agreement. Many agreements have failed simply for lack of complete disclosure of assets owned at the time of the writing of the Agreement. Ante-Nuptial Agreements are not appropriate for everyone contemplating marriage. However, for certain groups of people, they are highly recommended. For example, elderly people who are contemplating marriage or remarriage and who have grown children by prior marriages, or close relatives to whom they would like their estates to go, would be wise to carefully draft Ante-Nuptial Agreements that will insure the fulfillment of their intentions. Those contemplating subsequent marriages and who have amassed assets throughout previous marriages should also consider executing Ante-Nuptial Agreements

(Continued on page 41)

An Emerging Consistency

In which an accomplished domestic law practitioner charts the increasing (and reassuring) consistency of rulings on division of marital property...

Michael K. Newell

This is an expanded version of an article originally printed in Volume 7 of Fair$hare Magazine *in February, 1987. It is reprinted with the permission of Prentice Hall Law and Business.*

Amidst the daily complaints of insufficient support, lack of alimony and property division guidelines, and lack of consistency in decisions, there emerges a clear approach by the Family Court in dividing inherited property and gifts acquired during a marriage. Although the statutory guideline (13 *Del. C.* Section 1513(a)(9)) directing the Court to consider the manner of acquisition of property has existed since 1973, it was not until the last two years that the Family Court actually started to treat inherited and gifted property differently from other marital property in an equitable distribution proceeding. During 1986, the case law in the State of Delaware further refined the treatment of gifted and inherited marital property subject to equitable distribution. The case discussion that follows suggests that, although gifts and inheritances may be marital property for purposes of equitable distribution, there is a definite trend toward awarding all or the larger portion thereof to the recipient spouse. If this property is not awarded exclusively to the recipient spouse, the Court in the vast majority of cases is awarding significant percentages to the recipient.

Approximately twenty-two states exclude gifts and inheritances from consideration as marital property.[1] In those states that exclude this type of property from equitable distribution proceedings, the gift or inheritance may be considered by the Court with respect to the financial circumstances of each party.[2] Of the fifty-three jurisdictions responding to the American Bar Association's Family Law in the Fifty States Survey, only fifteen states revealed that they include gift and inherited property as marital property. Delaware is one of those states.[3]

Statutory Guidelines

Delaware is an equitable distribution state and the Family Court of the State of Delaware is guided by 13 *Del. C.* Section 1513 when distributing marital property. Marital property is defined by 13 *Del. C.* Section 1513 as:

"All property acquired by either party subsequent to the marriage except: (1) property acquired in exchange for property acquired prior to the marriage; (2) property excluded by valid agreement of the parties; and (3) the increase in value of property acquired prior to the marriage."

13 *Del. C.* Section 1513(c) sets forth a rebuttable presumption that all property acquired by either party subsequent to the marriage is presumed to be marital property whether title is held individually or by the parties in some form of co-ownership such as joint tenancy, tenancy in common, or tenancy by the entireties. The presumption of marital property can be overcome by demonstrating that the property was acquired under one of the three subsections set forth above.

13 *Del. C.* Section 1513 also sets forth eleven relevant factors for the Court to consider in dividing the marital estate. Subsection 9 of Section 1513 requires the Court to inquire whether the property was acquired by gift, bequest, devise, or descent. Therefore, if either party receives a gift or inheritance during the term of the marriage, the statute requires that the Family Court consider it marital property. It is significant that in a predecessor statute to 13 *Del. C.* Section 1513 gifts and inheritances were specifically excluded from the category of marital property. The present statute including this type of property as marital property became law in 1973.

Case Law Development

In *Husband R.T.G. v. Wife G.K.G.*, Del. Supr., 410 A.2d 155 (1979), the Delaware Supreme Court characterized 13 Del. C. Section 1513(a)(9) as one of the most troublesome provisions in the Divorce Act. The Court stated:

We are unaware of any legislative history or other source which would provide guidance for construction or application of the gift provisions of Section 1513(a). In addition, we note that Section 307 of the Uniform Marriage and Divorce Act, from which Section 1513 is largely copied, does not include this provision. In fact, property acquired by gift, bequest, devise, or descent is excluded from the definition of 'marital property' under the Uniform Act.

The Court then concluded that, in the absence of any indication to the contrary, if either spouse receives a gift or inheritance during the marriage it is to be treated as marital property.

In *Ferrell v. Ferrell*, Del. Fam., C.A. No. 227-81, Wakefield, J. (Jan. 26, 1982), one of the first cases to address the equitable distribution of inherited property, the husband's mother died during post-trial briefing but before a decision was ren-

An Emerging Consistency
(Continued)

dered. The mother's estate was valued at approximately $200,000.00. The wife moved to reopen and her request was granted. However, the Court stated in its final decision:

While I have considered the fact of the husband's substantial inheritance from his mother after the divorce, I have given it very little weight on the issue of division of property since, even if it were marital property, this Court generally allows an inheritance to remain largely with the recipient unless the property is so co-mingled with marital property thereafter to be indistinguishable.

It was not until the case of *Gordon v. Gordon,* Del. Fam., C. A. No. 1990-82, Keil, J., (Apr. 12, 1984), 10 Fam. L. Rep. (BNA) 1473, that the Family Court actually laid down a four part test to address the distribution of donated and inherited property. The Court held in *Gordon,* that the themes of a "natural line of succession, donor intent or continuity of ownership" should be given great significance when dividing such assets. The four factors the Court examined in *Gordon* were:

1. The testator's intent;
2. The time during the marriage when the spouse received the inheritance or gift;
3. The non-inheriting spouse's participation in the operation, care, or maintenance of said property;
4. Whether the property was income producing.

When the Court in *Gordon* applied the four factors to the inheritance in that case, it determined that the recipient or inheriting spouse should receive 85 percent of the property. *Gordon v. Gordon* was the seminal case in Delaware regarding inheritances and has since led to other decisions where the Court has either awarded gifts or inherited property exclusively to the recipient spouse or significantly larger percentages of the inherited property to the recipient spouse.

Since *Gordon v. Gordon,* the Family Court has rendered several significant decisions on inherited property. In *Hale v. Hale,* Del. Fam., C. A. No. 1039-84, Horgan, J., (June 21, 1985), the wife had inherited during the course of the marriage an account worth $560,000.00. There was some co-mingling of a portion of this account. The Court applied the test in *Gordon* and declined to distribute any portion of the inherited property with the exception of those monies which had already been invested in the marriage by the recipient spouse. Therefore, the Court awarded the wife 100 percent of this property, which was inherited during the 11th year of an 18 year marriage.

Similarly, in the case of *Pikus v. Pikus,* Del. Fam., C.A. No. 39682, Lee, J., (January 9, 1986), the husband received, during the course of the marriage, a gift of a 49 percent ownership in a family business. In light of the gift, the Court awarded 70 percent of the value of the business to the husband and 30 percent to the wife. However, 60 percent of the remaining non-business marital assets were awarded to wife. As will be seen in the following cases, an award of 70 percent of inherited property is a low award comparatively speaking.

One of the remaining factors under 13 *Del. C.* Section 1513 that must be considered by the Family Court is the relative financial circumstances of the

parties at the time of the distribution. Therefore, while the Court is awarding an extraordinary percentage of inherited property to the recipient spouse, it sometimes compensates for such an award by awarding an additional percentage of the remaining marital property to the non-recipient spouse.

...although gifts and inheritances may be marital property for purposes of equitable distribution, there is a definite trend toward awarding all or the larger portion thereof to the recipient spouse.

Such was the case in *Lynam v. Gallagher,* Del. Fam., C. A. No. 626-84, Ableman, J., (Mar. 14, 1986). Shortly before marriage, the husband had received the corpus of a trust, which contained shares of stock. The market value of the shares was approximately $20,000.00. Shortly after the marriage, husband transferred 100 shares of this stock into a joint tenancy with right of survivorship. During the course of the marriage, there were three 100 percent stock dividends and as a result, the shares increased to approximately 6,100 shares with a value of $189,000.00. The Court ruled that the stock dividends received during the marriage constituted marital property.

If, for the purpose of illustration, inherited property is regarded in isolation, it can be seen that the factors for division of property enunciated by 13 Del. C. *Section 1513 are not readily applicable. This is because the statutory factors are designed for analysis of property that is being created by or benefited from the contributions of both former marriage partners. Inherited property normally does not arise from joint contributions. With respect to such property it is apparent that the legislative and judicial policy is to allocate such property entirely or at least substantially to the inheriting spouse.*

It is obvious...that the key to success in these cases is documentation and tracing of assets.

However, it also indicated that it must consider the origin of the property to determine an equitable distribution thereof. The Court concluded that a disproportionate share of the stock should be awarded to the husband and the Court, therefore, awarded 4,522 shares to husband and the remaining shares to wife. The Court stated that because of the husband's receipt of the greater portion of this significant asset, it could apportion 70 percent of the remaining marital estate in favor of wife.

Two recent decisions demonstrate the culmination of this evolution of the Family Court treatment of inheritance and gifted property. In *W.M.H. v. A.B.H.,* Del. Fam., 310-85, Gallagher, J., (Nov. 3, 1986), the husband had inherited from his father approximately $1.2 million during the course of the marriage. Similarly, at the time of the property division, wife had a vested remainder interest, which was valued at $350,468.00. The Court studied the decisional law of the cases contained in this article and concluded that the spouses should retain 85 percent of the inheritance property received by them during the course of the marriage and that each spouse should share in the former spouse's inheritance to the extent of 15 percent. Judge Gallagher commented on 13 *Del. C.* Section 1513 as follows:

In *J.A.G. v. P.J.G.,* Del. Fam., C.A. No. 1201-85, Conner, J. (October 31, 1986), the Court was faced with dividing a marital estate in excess of $2.3 million. The parties had been separated for approximately two years before the entry of the decree of divorce and three years before the actual property division. Approximately six months before the parties separated, the wife received a substantial inheritance from her mother. The Court awarded 100 percent of the property received at the time of separation or thereafter to the wife. In addition, wife was successful in proving that substantial gifts of stock were made to her by her father during the course of the marriage. As a result of the sale of this stock, the parties enjoyed a very comfortable standard of living and were able to acquire other property, such as beach houses, other stock, and other real estate. The Court awarded the wife 90 percent of the stock acquired by gift, 75 percent of a beach property, which was purchased through the assistance of gifts from her parents and 98 percent of art work, antiques, and silver which were given to her before her father's death.

It is obvious, as was demonstrated in *J.A.G. v. P.J.G.* above, that the key to success in these cases is documentation and tracing of assets. In *J.A.G.,* wife possessed gift tax returns, estate and inheritance documents from the beginning of her marriage. This easily identified the origins of assets and the dates that they came into the marriage. In addition, the analysis by a C.P.A. and a stockbroker assisted in showing how the stock splits occurred during the marriage. Since these assets were income producing, wife also was able to trace the sale of certain assets and the acquisition of other assets, which led to a significant award of those "later acquired" assets to her. ■

Mike Newell, an indisputable expert in domestic relations law, is a native Delawarean who graduated from the University of Delaware in 1975. He received a Master of Arts degree from Northeastern University in 1976. From 1978 to 1981 Mike served as Executive Assistant to Family Court Chief Judge Robert D. Thompson, Jr. During this time he was also studying at Delaware Law School, from which he received his J.D. degree in 1981. During 1982 he served as a Master of the Family Court. He subsequently became associated with the firm of Bayard, Handelman and Murdoch and, armed with his extensive court experience, has practiced domestic relations law since the beginning of that association. We are very pleased to welcome him as a first time contributor.

[1] *19 Fam. L. Q. No. 4, Winter, (1986) Family Law in the Fifty States.*

[2] 2 Am. Jur. 2d, *Divorce and Separation,* Section 883.

[3] 19 Fam. L. Q. No. 4, Winter, (1986) *Family Law in the Fifty States.*

CASENOTE

In the Matter of Derek W. [Burns], A Minor Child, Del. Supr., C.A. No. 322, 1985 (December 19, 1986)*

Carolyn R. Schlecker and Merril L. Zebe

The story unfolds like a TV miniseries portraying the consequences of teenage pregnancy or the plot of a modern day Dickensian novel exposing the realities of enduring childhood as a ward of the State. It is instead, *In the Matter of Derek W. [Burns],* a termination of parental rights case, in which the Delaware Supreme Court found a gross lack of due process at every important juncture in the case and in which the Court delineated for the first time the obligations of the Division of Child Protective Services (hereinafter "State" or "DCPS") to promote family stability and preservation of the family unit, whenever feasible, under the federal Adoption Assistance and Child Welfare Act of 1980 (hereinafter "Child Welfare Act" or "Act"), P.L. 96-272, 42 U.S.C. §§608, 620-28 and 670-76 (1982), and concomitant Delaware law, 29 *Del. C.* §§9001, 9003 (3) (a-b), (4).

Judy Burns' story is an all too common one. Barely a month after her birth on April 9, 1966, she and her brothers and sisters were taken from their parents and placed in foster homes. From that time until she was approximately seventeen years old, Judy was moved at least twelve times to foster homes or with various relatives. At age sixteen Judy became pregnant with her son, Derek. Although DCPS was still her legal custodian, Judy was living with her natural mother in Chicago. Shortly after Derek's birth, Judy's relationship with her mother deteriorated. Neither Judy's mother nor Derek's father provided financial or emotional support or assistance with Derek's care. Judy, a high school drop out, was unable to support herself and Derek.

Judy returned to Delaware in October of 1983 and stayed temporarily with various friends and relatives. By January of 1984 Judy had nowhere to stay and turned in desperation to DCPS. The DCPS told Judy they could not help her unless she signed a document transferring custody of Derek to DCPS. This document became the wedge that separated Judy from her son for more than two and a half years. During this period, neither DCPS nor its sub-contractor, The Childrens Bureau, Inc., made reasonable efforts to prevent Judy's separation from her son or reunite her with Derek.

At age seventeen Judy signed the consent forms transferring custody of Derek to DCPS without the benefit of an independent legal representative to advise her of the consequences of her actions and under the mistaken impression that the forms were simply a technicality required in order for her and her son to be placed in the same foster home. After Judy signed the Consent to Custody form, Judy and Derek were placed together in a foster home until Judy turned eighteen years of age and circumstances forced her to leave the home. Judy believed she could simply revoke her consent to the transfer of custody and leave the foster home with her child. However, when Judy tried to leave with Derek, the police were called and Judy and Derek were forcibly separated.

In an *ex parte* proceeding on April 2, 1984 in Family Court, a Master signed an Order granting custody of Derek to DCPS solely in reliance on the Consent form signed by Judy and without issuing a summons to Judy or providing notice informing her of the date, time and place of the hearing. During the months that followed her separation from Derek, Judy made good faith efforts on her own to achieve self sufficiency. However, her age, lack of training, and the absence of any assistance from DCPS or the Childrens Bureau impeded her success.

In reversing the Family Court decision terminating Judy's parental rights, the Supreme Court held that the failure of DCPS and Family Court to recognize and comply with both the minimal requirements of due process and the Child Welfare Act at several steps along the path to termination of parental rights vitiated the entire set of proceedings and mandated reversal. In doing so, the Court invalidated a long-standing practice used by the state in obtaining initial custody orders through the use of voluntary consent forms signed by natural parents and declared that such a practice violated due process standards and Family Court rules.

In discussing the procedural due process infirmities found in the *Burns* case, the Court observed that its decision did not necessarily derive from the United States Constitution. Instead, the Court stated that its decision was based on applicable Delaware principles of due process, which are concomitant with, but not dependent upon, like principles of federal constitutional law. The Court emphasized that the standards of due process required by the *Burns* decision stand on independent judicial and statutory bases clearly enunciated by the Court and the General Assembly as mandated by the due process standards of the Delaware Constitution.

In recent years, the Delaware Supreme Court has forcefully and unequivocally held that the physical, mental, and emotional health and well being of the children of this state will be protected without abrogating the constitutionally guaranteed rights of parents to the privacy and integrity of their families. Nor will the Court place children in peril while ignoring parental responsibilities. In *Daber v. Division of Child Protective Services,* Del. Supr., 470 A.2d 723 (1983), the Court held that there is no presumption or compelling rule that a parent's rights to his or her children override

* *A pseudonym was adopted by the Supreme Court to protect the identities of the parties.*

parental responsibilities. However, in acknowledging a parent's fundamental right to the care and companionship of his or her children, Justice Moore stated:

Fewer rights are more sacred than those which derive from the parent-child relationship. A society which arrogates to itself the power to intervene and disrupt that relationship can do so only for the most compelling reasons necessary to correct or protect a child from circumstances which directly threaten or affect the minor's physical or emotional health. The State and its agencies are not in the business of determining or otherwise interfering with the parent-child relationship on any less substantial grounds.

Burns and *Daber,* and the principles they espouse, are distinguishable from cases such as *In the Matter of Karen A.B.,* Del. Supr., No. 325, 1985 (July 28, 1986), in which the Court held that a putative father does not have a due process right to notice of a termination of parental rights hearing when the mother of the child wishes to relinquish all parental rights to the child and refuses to divulge the identity of the child's father with whom she is not married or with whom she is not living as husband and wife, and when not terminating the putative father's rights would be contrary to the best interest of the child. In *Karen A.B.,* it was not the State that was attempting to intervene and disrupt the family relationship; rather, it was the mother who sought to place her child for adoption. In *Karen A.B.,* the Court was not faced with balancing its responsibility to safeguard the physical, mental, and emotional health of the child against a parent's contitutional right to family integrity but, instead, was compelled to resolve the seemingly conflicting rights of each parent. In weighing the mother's right to privacy against the rights of a putative father, who had a fleeting relationship with the mother of the child, the Court held that, unlike the parents in *Burns* and *Daber,* the putative father did not have a right to due process under those circumstances.

However, in cases where the State seeks to intervene to either temporarily or permanently separate parents from their children, the Court's message is potently articulated by Justice Moore in *Burns:*

The parental right is a sacred one. It does not depend on societal standards or mores of lifestyle, age, economic achievement or sex. Santosky v. Kramer, *455 U.S. 745, 753, 102 S. Ct. 1388, 1394-95 (1982). Certainly, it does not hinge on spoken or unspoken amorphous concepts of a "model" or "ideal" parental environment contrived by the mind of a social worker or judge. Were that the norm, few would qualify for a role and relationship that usually reflects success, not by the exhaltation of great achievements, but by an effort to minimize one's failures. In that spectrum there are many hues, and none remain constant.*

Of equal importance in the *Burns* decision is the guidance that the Supreme Court provides in interpreting and applying the federal Child Welfare Act and 29 *Del. C.* §9001 *et. seq.,* which specify the State's obligations in preserving the intregrity of the family unit whenever possible. In finding that the State did not fulfill its obligations, the Court stated:

Even adherence to rules of due process could not cure the equally serious failures of the State to meet its obligations under the federal Child Welfare Act. Those requirements are matters of first impression before us, and this record forces us to address them irrespective of due process considerations.

In *Burns,* Justice Moore painstakingly sets forth the State's specific obligations under the Child Welfare Act and state law and instructs the Family Court that in all future cases where termination of parental rights is sought on the ground that the parent has failed, or was unable, to plan for his or her child as set forth in 13 *Del. C.* §1103 (5), the Court must insure compliance by the State, or its agent, with the requirements under the Child Welfare Act and concomitant State law and make appropriate findings of fact and conclusions of law as to the State's *bona fide* efforts to meet its obligations under federal and state law in order for the vague criterion of "failure to plan" to survive constitutional muster and appellate scrutiny.

As the Court observed, the Child Welfare Act, enacted by Congress on June 17, 1980, was intended to stimulate nation-wide reform of the foster care system. Numerous studies conducted by individual States and nationwide in

This is Carolyn Schlecker's first contribution to the pages of DELAWARE LAWYER. A 1978 graduate of Delaware Law School and a member of our Bar since that date, Carolyn has devoted her entire career to Community Legal Aid Society, Inc., where she practices family and housing law with distinction. Her interests in the concerns of parents led her to be a member of the Bar Association's special Committee on the Needs of Children from its outset to the present. Carolyn is thus an FFV of children's rights in Delaware. (In her protection of the interest of parents she is, of necessity an advocate of the rights of children.)

Like her collaborator, Merril Zebe has worked with Community Legal Aid Society, Inc. ever since she became a lawyer. Merril was admitted to the Pennsylvania Bar in 1980, and the Delaware Bar the following year. Her work with CLASI has been principally in family law. Aside from her qualifications as a practicing lawyer, she brought to CLASI a legal training well suited to the needs of that organization's clientele: her concentrated studies in public interest litigation before graduating in 1980 from the University of Santa Clara Law School. We welcome her to the pages of this journal.

Casenote
(Continued)

the early 1970s revealed that thousands of children were languishing in foster homes for most of their childhood and that there was little effort to providing families with services that would obviate placement of their children in foster homes or make it possible to reunify them with their natural families. This national tragedy of systemic disintegration of families had grown to such proportions that Congress felt compelled to enact the Child Welfare Act and redirect fiscal incentives by imposing, as a condition of continued federal funding for State child welfare services, several specific reforms. For example, in order to qualify for federal funds the State must demonstrate that for each child for whom foster care expenditures have been made, (1) a judicial determination has been made that all reasonable efforts were extended to prevent the necessity of removing a child from his or her parents and/or to reunify the parents and child, or in the case of a voluntary placement, that a judicial determination has been made that such placement was in the best interest of the child; and (2) that for each child there is a case plan for the reunification of the family and a semi-annual review of the plan. Similarly, under Delaware law, DCPS is required to provide preventive and reunification services, written case plans and semi-annual reviews. 29 *Del. C.* §§9003 (3) and (4).

Burns requires in all termination cases, and presumably all cases where the Act and 29 *Del. C.* §9003 apply, the State to prove compliance with its duties under the Act and concomitant State law. The Supreme Court has made it clear that the Court will no longer uphold termination decisions based solely on evidence establishing the vague criterion set forth in 13 *Del. C.* §1103 (5) absent sufficient evident that the State has made *bona fide* efforts to meet its own obligations under federal and state laws at all relevant stages of the proceedings.

The *Burns* decision may well extend beyond Delaware to other states with similarly vague termination statues and lend guidance as well to those States in the interpretation and application of the Child Welfare Act. For example, the Department of Health and Human Services (HHS), the federal agency responsible for administering the funds under the Act, will disseminate the *Burns* decision to all regional offices of HHS to be used in training States on the correct interpretation of what is meant by "reasonable efforts" under the Act. Perhaps the most significant impact of *Burns* will be that families will receive the services they so desperately need, such as housing, in order to avoid the tragedy of separation and eventual dissolution. The significance of *Burns* to Judy and Derek, however, is that after more than two and a half years of unnecessary separation they were finally reunited on Christmas Eve, 1986. ■

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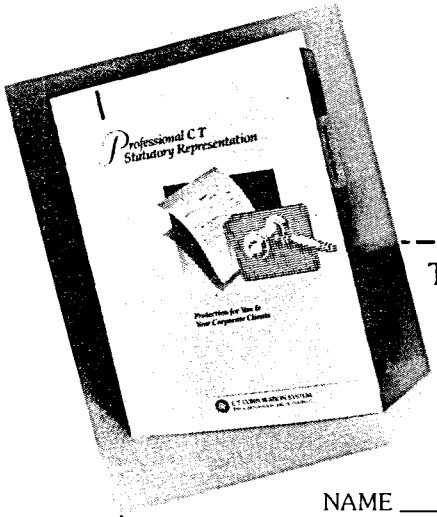

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The Juror Gods

Toni Cooper

Toni Cooper, born in New York City, has resided for the past sixteen years in Wilmington, Delaware, and is employed at Hercules Incorporated. She is a creative writer, working on her first novel, and is a CEND student at the University of Delaware.

Imagine. Twelve John and Jane Does line up and enter the Jury Box in single file. Twelve law-abiding citizens from all walks of life with one basic thing in common: their sworn duty to weigh to the best of their ability the evidence presented, without prejudice or bias. But is every John and Jane Doe capable of fulfilling this commitment? What are some of the circumstances that sway their judgment, their actions?

Cora Lee Rodgers and I were two of those twelve sworn in on that brisk October morning. What set us apart from the other ten was that we were in opposition from the time we grappled for the same chair until the tilted end of the trial. We were to find out later that we also differed in our judgment of the man on trial. On first sight Cora thought the defendant guilty, that the State presented a "damned" good case against the defendant, and that the defendant "looked like a criminal type" (believe it or not she referred to a Perry Mason movie).

On the other hand, I felt the defendant was not guilty, that the State presented a flimsy, badly-prepared case, that entirely too much was left up to the jurors' imaginations, and that the defendant looked like any other American citizen.

When the chairman of the jury, seated at the head of the long table, started at the first person to his right, and moved up our row to see what the initial feelings of the jurors were, Cora Lee's eyes and mine meshed. It was our votes that brought the tally to six guilty, six not guilty.

The case was a serious one. The defendant was accused of mugging and pistol-whipping the plaintiff in a hotel room, of discharging a revolver during the commission of the crime, and of taking money at gunpoint from the plaintiff's wife.

The State produced a .22 caliber pistol taken from the defendant's home at the time of his arrest—eight months after the commission of the crime. The introduction of this weapon as evidence seemed to me to automatically call for a slug and a spent cartridge. Neither was produced.

A very blurred Polaroid photo taken at long-range was passed among the jurors. The photo showed a small speck, alleged to be a bullet hole in the hotel ceiling. Another photo, also badly out of focus, depicted traces of plaster scattered on and around a suitcase on top of a bed. (Purportedly, the plaster came from police probing the speck in the ceiling for the bullet.) Were these photos sufficient to implicate the .22 pistol found in the defendant's home?

Cora Lee glowered. "Well, the POLICE said the photos were taken in the hotel room." I did not challenge that assertion, but I did ask if police photographers could have taken such poor quality photos. I wondered how they were ever admitted as evidence.

"Then the police are liars," Cora said, smiling, looking slowly around the room into the faces of the other jurors.

And how did the State come to arrest this defendant? There had been legal jargon about "inadmissible testimony". We would never know how this defendant came into the hands of the law eight months after the crime for which he was being tried.

To account for the absence of the spent cartridge and slug the Attorney General said the bullet *probably* ricocheted. Where? Through a closed window? And, if the weapon was discharged in the room, didn't it stand to reason that the cartridge and slug had to be somewhere in that room?

And still more important than the blurred photos and the missing cartridge and slug was that, in a crime of that magnitude, where a man's head is bleeding, his wife is crouched screaming in terror, a weapon discharged, and over $1000 in cash has been stolen, the room had not been dusted for fingerprints.

The heaviest evidence against the defendant was the victim's "positive identification". He testified that the hotel room was dimly lit, that the defendant, wearing a skully that partially concealed his eyes, rushed in, spun him around, grabbed him from behind, and knocked him nearly unconscious.

The defense wondered, and so did I, how the witness could have been so positive. An entire year had passed during which he had not been brought into proximity with the defendant. In fact, the plaintiff had never seen the man facing him before the day of the trial. The victim had been shown a composite drawing of the suspect 24-hours after the crime was committed, and during the course of the year, detectives had transported books of mug shots up to Maine to the victim's home. Furthermore, the victim selected not one but a number of shots that he said *resembled* the defendant. Yet, after seeing all of these faces he was able to positively identify the defendant one year later?

Furthermore, and importantly, on the night of the crime, eight members of the defendant's family, most persuasive of whom was the defendant's sobbing mother, attested to his presence at a family wedding. According to Cora Lee, it was not unusual for entire families to lie. I accused her of suffering from movieitis.

At 3 p.m., after long deliberation, when we were all weary and uncomfortable, the vote was still six guilty, six not guilty. By 4 p.m. one lady began to fidget, it was nearing dinner time. She voted guilty. By 5 p.m., three more

people voted guilty. One had a part-time job and said she'd be fired. Other excuses came into play. Others voted guilty, leaving us deadlocked, ten guilty, two not guilty.

I learned a little about the process that day, about the different types of Americans who are representative of a jury, their complexities, their dispositions, their prejudices, "what makes them tick." I was able to understand more fully, why, in certain cases, lawyers go to such great lengths in the selection of a jury. And as I walked home that evening, I could not help but feel a pang of pity for the defendant, for the choice of jurors afforded him. In a sense jurors are of a sort gods, and in no uncertain terms, he had been at their mercy. ■

Caveat Ante-Matrimonia

(Continued)

to preserve their pre-marital and individual property. Even a young professional couple with flourishing careers may want to determine what rights each may have in the other's individually acquired assets during marriage and after it is dissolved by death or divorce.

Lastly, Ante-Nuptial Agreements can bring a certain peace of mind to those who are ambivalent about marriage and who would like to define any disposition of property upon divorce in order to minimize any later risk.

It is important to be aware that an Ante-Nuptial Agreement does not receive the same treatment awarded other contracts. Instead, such an Agreement will be carefully scrutinized and interpreted against the party seeking enforcement and will probably not be upheld, if there is even a scintilla of unfairness. In other words, the doctrine of *caveat emptor* has no place in the law of Ante-Nuptial Agreements. ■

Jean Ashe Crompton and Francine Gritz, conduct the practice of law in Wilmington in the firm that bears their names. They are experienced in the intricacies of family law: Jean once served as a Magistrate and Francine was a Master in Family Court. Francine's picture appears here, but mystery woman Crompton has neglected to supply us with her likeness.

BOOK REVIEW

Days Like This: A Tale of Divorce

By Phyllis Gillis
Published by McGraw-Hill Book Company, 1986.

The story is all too familiar. He is a type-A personality and a successful businessman. She gave up a promising and well-paid career in New York City to move to the country, act as hostess for his business associates, and raise their child. Sure, there was friction in the marriage, but they would work it out.

One cool autumn night, without warning, he entered the house, switched off the television and stated, "Phyllis, I'm leaving you. I've taken an apartment and I will be moving in the morning...Jackie is coming with me." The next day, he and Jackie, Phyllis's friend and next-door neighbor, moved into a previously furnished and decorated apartment.

Within eight months, he and Jackie were vacationing in the Caribbean while he discontinued voluntary support payments, cancelled Phyllis's oil supply and electricity during a snowstorm, and discontinued her car insurance. She took the only job she could get—a $42-a-night short order cook at a singles hangout. Meanwhile, their son was seeing a psychologist and having problems in school.

Through the use of extensive notes taken upon the advice of her attorney during the course of the divorce, Phyllis Gillis sets out a detailed account of two years of strategies, counter-strategies, emotional upheaval, court hearings, custody battles, telephone battles, and survival. From Ms. Gillis's perspective, women facing divorce are at a pronounced disadvantage. Having given up a career, a middle-aged woman cannot easily reenter the job market. Her inability to obtain employment comparable to her former status is looked upon as evidence of malingering. Past training and experience prevent her from obtaining more than marginal alimony and child support. The irony is that although she changed her life style for him and at his request, suppressed ambition and dissatisfaction with her dependent status probably contributed to his philandering.

After the divorce and property settlement were final, the hidden assets began to emerge. He remarried and bought a $260,000 house and a new Saab. Statistically, the disposable income of a woman after divorce falls, on the average, 70 percent while the man's income increases 40 percent. Equitable distribution laws fail to take into account the gross disparity between the husband's and wife's future earning potential.

Phyllis Gillis's account of her struggle to cope as a single woman in a "couples" society reinforces her opinion that most women see divorce from an emotional perspective and men treat settlement negotiations as a business deal. Ms. Gillis emphasizes the need for women to assume greater financial awareness and responsibility during marriage. In her opinion, no-fault, equitable distribution divorce laws heavily favor the ex-husband. Ms. Gillis advocates treating divorce as a complex, but serious game, marshalling resources to negotiate a fair settlement.

Phyllis Gillis's skill as a professional writer (previous works include *Entrepreneurial Mothers* and *The New Pregnancy*) provide the reader with a personal story that reads like a novel. The book is impossible to put down as the reader becomes involved in the intrigue of the good guys—bad guys scenario. Ms. Gillis is the beseiged and spurned woman desperately struggling for custody of her child and financial security. Of course, there are two sides to every story, but Ms. Gillis's version makes fascinating and sometimes chilling reading. *Days Like This* should be required reading for anyone, male or female, contemplating divorce or in the midst of it.

Mary M. Johnston

The War On The Thistles

William Prickett

Recently, from my desk in the living room, I glanced idly up from my boring legal work to the corner of the pasture. I saw a tall thistle growing along the fence line. Its coarse, prickly leaves were surmounted by the flower, firm and slightly green but soon to become purple, then slowly turning white and dissolving into the seedy down that is carried away by the wind. As I glanced at the thistle, I could not help but think back on my father's war on thistles. I guess that his war on the thistles started in much the same way as my idle glance away from my work carried me to the thistle, except that he never made an idle glance in his life. He probably saw a single thistle and right then went and pulled it up. Perhaps he brushed against it or stepped on it and realized how disagreeable these weeds are. In any case, one hot June day before the war, when I was thirteen or so, I saw him working in the hot sun, pulling up some thistles. I asked him what he was doing and he said that he proposed to get rid of the thistles on the place. By this time, he had already determined that it would not do to cut a thistle off because it grew up again from the roots. He had also determined that one could not take the thistle by the stem even with gloves on because the stem of a thistle was simply too weak and broke off in one's hand leaving the stump to grow again. The only way to get the thistle out was to get some sort of a tool under the root, lever it up and then pull it up, root and all. It sounds fairly simple but it was actually quite a hard job because, unless one really got under the roots of the thistle, the thistle came apart and some of it was left in the ground and, as previously pointed out, it flourishes again, seemingly with renewed vigor. A shovel could be used to get under the thistle but actually, my father, who was pretty thorough with any sort of a problem, came to the conclusion that there was one instrument that was particularly effective in dealing with these thorny pests. It turned out to be a heavy iron bar used many years ago for switching trolley tracks. It was about three feet long. One end of the bar had been pounded into a v-shaped point. The old trolleys used to carry them up front: the conductor would pull out the bar, jump down, switch the track over and then swing aboard the rear of the trolley as the motorman drove by. Just how my father had originally gotten one of these instruments I do not know since even then the trolleys had just about been replaced by trolley busses, but he found that these bars were most effective in dealing with the thistle. One took the bar and plunged it down next to the thistle and then pried up under the thistle, grabbing the thistle. It was a hot and disagreeable job. The thistle can only be located effectively in late June or early July when the tell-tale purple flower comes into view making it stand out apart from the other lush early summer vegetation. On the other hand, thistling could not be done too late, since once the purple flower had burst open, literally millions of thistle seeds were liberated, each one of which would in turn produce another thistle. Therefore, the thistling season had to be in late June and early July.

Soon after my father resolved on his war on the thistles, he enlisted my twelve year old brother and me in the war, somewhat in the manner that Tom Sawyer got Aunt Polly's fence white washed. My older sister was occasionally con-

The invaluable William Prickett adds another chapter in the extra-legal career of his distinguished father.

Thistles
(Continued)

scripted. When my father found how effective his original trolley bar was, but could not find any more at the old trolley barn, he found a puzzled blacksmith to duplicate it so that each of us would have one. Thus armed with thistlers on hot Saturdays and Sundays, we would fan out over the property and dig up thistles. Originally, we took entire thistles, put them in a pile, and burned the pile. However, the sheer number of the thistles made this ineffective. In addition, we found that when the thistles were burned, the flower would sometimes open and, rising with the smoke, would be a host of seeds providing next year's crop.

We then decided that we would uproot the thistle itself, cut off the purple head, and put the heads in burlap bags. The question then arose as to what to do with these collected thistle heads. They could, of course, be buried but they

might germinate and sprout where they were buried and one would then have an entire forest of thistles—a thought too horrible to contemplate. It was decided in council that the bags of thistle heads would be loaded into my father's Chevrolet car and he would drop them at the city dump on his way to and from work. Of course, my father was busy with his law practice and it was sometimes several days before he would find an opportunity to get to the city dump. In the meantime, he would ride around in a car stacked up to the ceiling with bags of thistle heads. At times, some of the thistles would go to seed. I am afraid that he may have trailed thistle seeds out of the windows and even today there are probably thistles around the countryside (and even in town) that owe their beginning to my father's inadvertent role as a Johnny Thistleseed. On one memorable occasion, my father had to

(Continued on page 46)

Thistles
(Continued)

go to a wedding at the Country Club. Since he had not had an opportunity to dump his collection of thistles, the men of the parking service were greatly surprised when they had to park a small Chevrolet car loaded to the gunwales with thistles among the Cadillacs and foreign cars.

Actually, thistling was a hot and disagreeable job. No matter how careful one was, it was inevitable that one would get stuck with thistles as one went carefully through the steps of uprooting and decapitating them. However, the job had its own compensations. There was a sense of real accomplishment when, at the end of a long afternoon, one felt that a particular area of the property was completely free of the offending thistles and a sense of real triumph when after four or five disagreeable afternoons, it could be said that the entire property was free of thistles. After the first year's operations were completed, my father was justifiably pleased that he had rid the property once and for all of the disagreeable pests. He then would unconsciously cast around for some other project like disposing of woodbine or eradicating all the poison ivy on the acreage. However, when next spring rolled around, the telltale purple flowers again appeared. We, of course, banded together and thought that we would be able, at this point, to dispose of the few remaining thistles in short order: after all, it seemed to us that it was probably a task of diminishing magnitude and that, after a year or so of more work, there would be no thistles at all. We therefore, set to work and went through another four or five afternoons of thistling. These hot afternoons ended with a swim in the old icepond and several well-earned beers. However, when the third year rolled around and thistles appeared in undiminished numbers, we all came to the slow realization that our war against the thistles was probably a hopeless or endless task. A moment's reflection told us all why: while we were busy uprooting the thistles on our property, the gentle westerly winds were bringing the downy seeds from fields lying to the west of us, which our neighbors were not bothering to thistle. Indeed, in later years, as I rode over the fields and pastures lying to the

(Continued on page 48)

Aida Waserstein

Christine K. Demsey and Aida Waserstein are partners in the firm of Waserstein & Demsey. They are both members of the Sections on Family Law and Women in the Law. Ms. Waserstein is a member and former co-chair of the Committee on the Needs of Children. Together, they bring eighteen years of experience as practicing attorneys to bear on the issues discussed in their article.

The Durable 2,500 Year Marriage

In an issue not conspicuous for accounts of domestic felicity, it is nice to report that the Delaware House of Representatives recently adopted a Resolution "extending congratulations and best wishes to Mr. and Mrs.____on their 50th Golden Wedding Anniversary". They must be a remarkable couple!

The Editors

Alimony
The First State
(Continued)

provides that any person awarded alimony has a continued and affirmative obligation to make good faith efforts to seek appropriate vocational training, if necessary, and employment, unless the court finds that it would be inequitable to require it in light of certain standards spelled out in the legislation.

Second, it confirms case law by specifying that the alimony recipient's cohabitation with a new partner terminates alimony. It defines cohabitation as the regular residence of members of the same or opposite sex if they hold themselves out as a couple, even if the relationship confers no financial benefit on the party receiving alimony. It further imposes on the payee an obligation to notify the payor of remarriage or cohabitation. Third, unlike the present law, the proposed law does not allow unlimited alimony when the dissolution of marriage was due to the Respondent's mental illness.

The proposed statute also extends new protections to the payee. It requires the court to consider any financial or other contribution made by either party to the education, training, vocational skills, career or earning capacity of the other. The court must also consider whether a party has forgone or postponed economic, educational, or employment opportunities during the course of the marriage. It also limits the payee's duty to become self-supporting in those cases where the dependent spouse has a severe and incapacitating mental or physical illness or disability. In evaluating the payee's duty to become self-supporting, consideration is also given to the payee's age and the needs of a minor child or children living with the payee.

Although it will not put Delaware in the forefront of national reform, passage of the proposed statute will provide greater benefits to both payors and payees, regardless of their sex. The Family Court will also benefit in its continuing effort to decide alimony disputes fairly.

[1]Study by State Department of Public Instruction and the University of Delaware based on 1980 figures.

[2]It must be kept in mind that states modify and change their statutes regularly and the law libraries in Delaware may not be completely up to date. ■

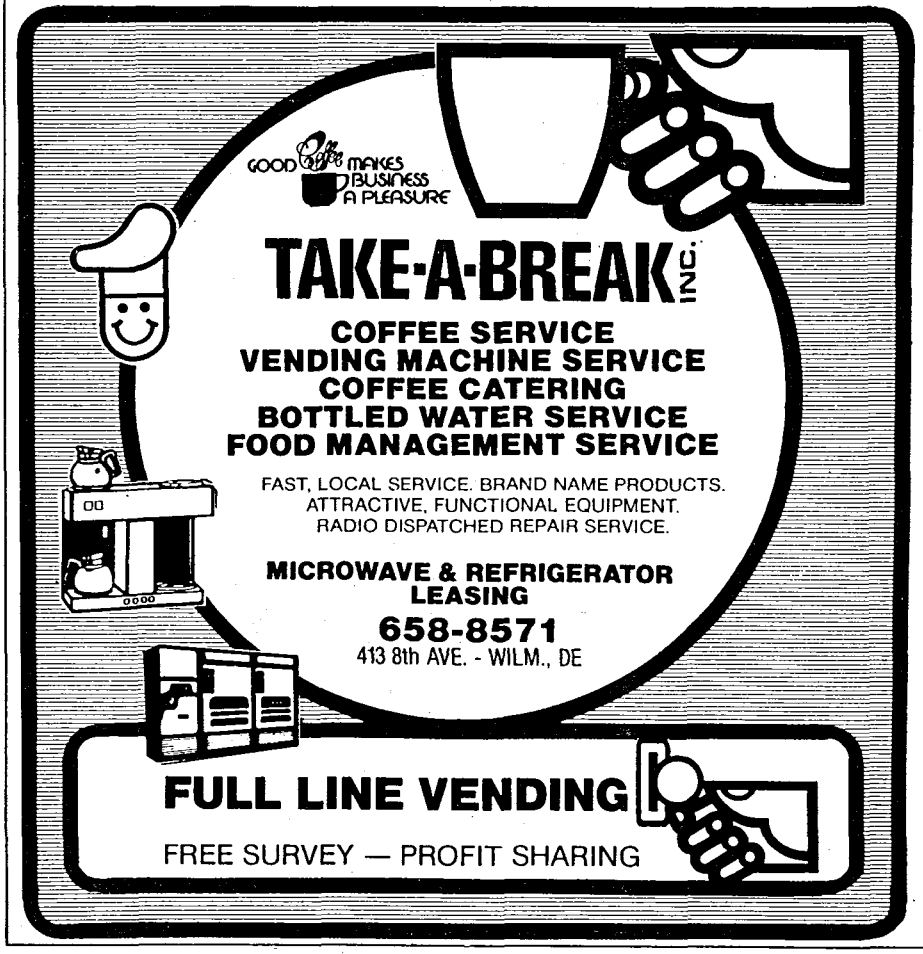
State Alimony Statutes Compared

Tennessee	yes	indefinite	yes	Misconduct can decrease amount
Texas	no	none	—	—
Utah	yes	indefinite	no	none
Vermont	yes	indefinite	no	Wife, but not if adultery committed
Virginia	yes	indefinite	yes	Misconduct limits award
Washington	yes	indefinite	yes	none
West Virginia	yes	indefinite	yes	none
Wisconsin	yes	indefinite	yes	none
Wyoming	yes	indefinite	no	none

* *Statute unavailable.*

** *Only when spouse found physically or mentally incapacitated to extent it materially affects ability to work; or, dependent and has a child which requires that spouse to stay home; or, rehabilitative maintenance for up to two years from decree.*

Research based on a local law library most recent materials. Neither attorneys nor lay persons should rely on the above in giving advice.



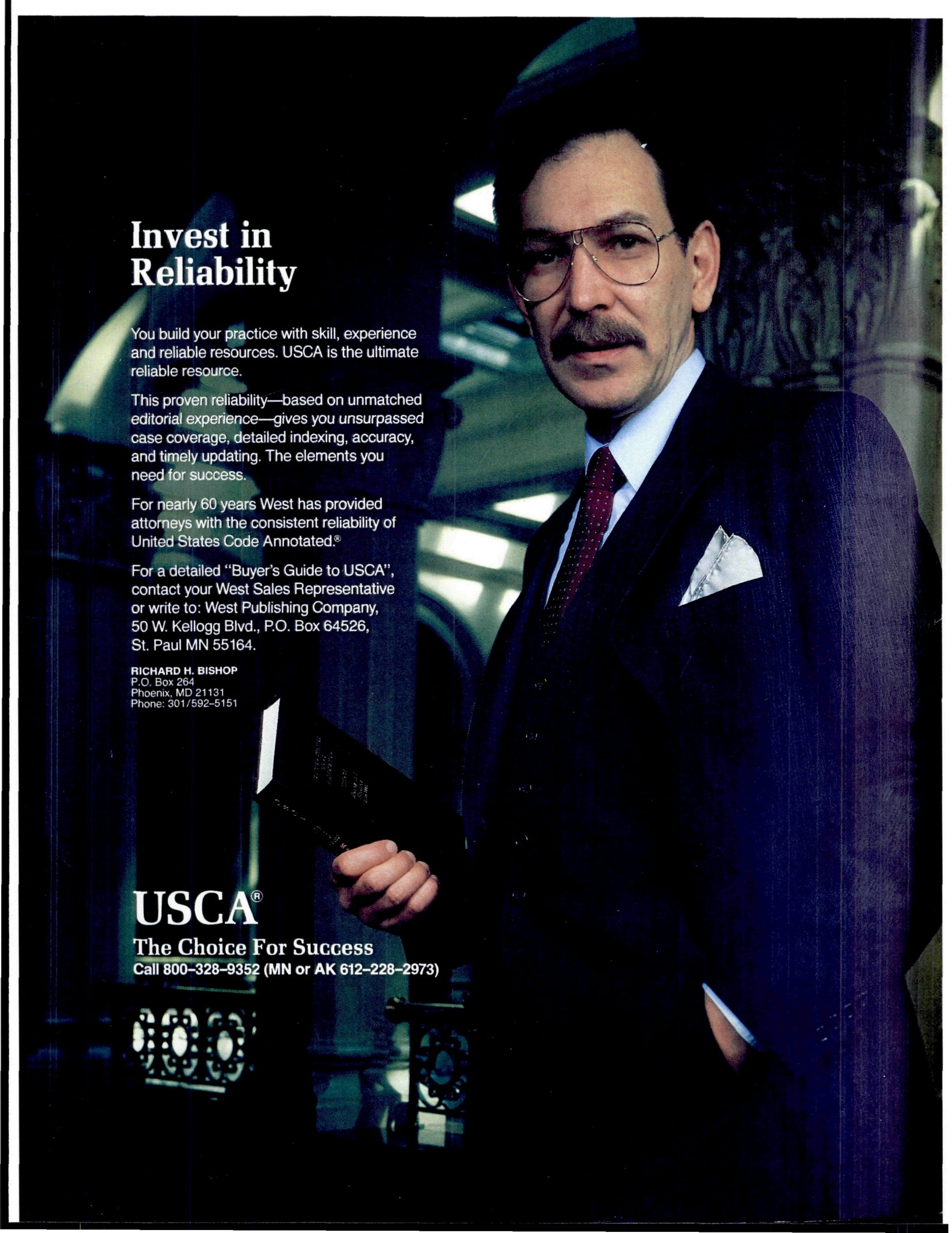
Thistles

(Continued)

north and west of us, I saw entire fields that had been unabashedly surrendered and had become under the sole dominion of the thistle enemy. However, our war against the thistles continued and dutifully each June, we would sally forth armed with our thistlers. Of course, Mother, whose origin and temperament were Gallic, simply shrugged her shoulders at the war on the thistles: she never could fathom the strong Puritan forces that motivated or drove her American husband and his sons. She never could see why he never asked or (even thought of asking) the man who was hired to cut the grass to do or even share in this particularly disagreeable job.

When World War II came along, my brother and I were scattered to more serious wars and my father became too busy to thistle the place entirely. Still, from time to time, he would spend a solitary hot afternoon warring on the thistles. However, by the end of the war, Nature had quietly solved the problem of the thistles on the place: the fields had been kept cut and the thistles never got a chance to get started. In the second growth, the young tulip poplars and woods maples grew up and shut off the sunlight necessary for a healthy thistle. Still, here and there, throughout the property, a solitary thistle raised its purple head. To the end of his active life, my father always found the time to go to the tool house and get his trolley bar thistler, carefully uproot the offender, and cut off the head.

As I sit here and look at that arrogant thistle growing along the fence line, I have decided to declare war on the thistles on this place. (There is at least one rustly "thistler" lying in a corner in my own tool shed and I know a blacksmith who could probably be persuaded to pound out some new ones.) I realize that if I uproot the present crop of thistles the prevailing winds will undoubtedly bring future generations of thistles from the uncut pastures lying to the west. My reasons for doing so is far better than merely to rid this place yearly of the purple pest. While my son Will, who is taking his afternoon nap, is still too small to wield a thistler, the time will come when he can, and I want to try to instill in him, if possible, some of his grandfather's fierce joy in a hard task, the doing of which carries its own reward. ■



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