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Perspective

EXTREME MEASURES

By Peter J. **Galasso**

MONEY IS POWER. Not unexpectedly, its redistribution shifts the balance of that power. Historically, government's primary tools for reallocating wealth had been confined to changes in the tax laws and affirmative action initiatives. However, those who govern have been left little room for bridging the gap between the haves and have-nots.

Evidently sensing that the time had come for action, over the past year, Chief Justice Judith Kaye and her fellow members of the Court of Appeals began speaking with one voice on family law issues. Their apparent design was to level the playing field between men and women by enhancing the financial benefits allocated to women. Indeed, the Court's reconfiguration of a long-existing status quo will have dramatic effects on how divorce cases will be resolved in the future.

Recently trumpeting the High Court's empowerment of women, Carolyn Levy, president of the Women's Bar Association of the State of New York, acknowledged that the “Court of Appeals [has given] the women of this state Cassano, Tropea and McSparron,” as she pushed for further reforms that would permit women to enjoy the fruit of these decisions. While the cases mentioned by Ms. Levy are among the most significant, one must add to her list the Court's two other unanimous decisions, namely the Powers and Hartog cases, to appreciate how proactive the Court has been over the past year in liberating women from the financial straitjacket their roles as homemakers, housewives and mothers have traditionally imposed upon them.

Ironically, on Valentine's Day 1995, the Court started its journey in the case of Hartog v. Hartog,[FN1] as it radically changed how the issues of spousal support and the appreciation of separate property would be viewed. In unanimously repudiating the Appellate Division's thoughtful analysis on the latter issue, the Court held that to the extent that the appreciated value of separate property is at all “aided or facilitated” by the non-titled spouse's direct or indirect efforts, that part of the appreciation is marital property subject to equitable distribution.

Hartog came down to an analysis of the significance to be accorded the effort of the titled spouse in bringing about the appreciation of separate property. While the Court of Appeals conceded that some connection between that effort and the appreciation must be discernible from the evidence, it rejected the requirement that the wife prove that her husband's efforts somehow caused the growth in value. Hence, although the husband was only minimally involved in the operation and direction of his family's closely held business, the Court of Appeals awarded the wife an additional equitable distribution of over $6 million from the husband's share of the appreci-

ation of that business.

Not satisfied with that pronouncement alone, the Hartog opinion went on to denounce the bar and lower courts' previously held belief that the length of maintenance should be tied to a point in time when the needy spouse could become self-supporting. Instead, the Court replaced the yardstick for maintenance from a "self-supporting" standard to one based upon the parties' pre-divorce lifestyle. That change cannot help but benefit divorcing wives over husbands.

To appreciate just how far the lower courts may go in adopting this new test, on Oct. 8, 1996, in the case of Walker v. Walker,[FN2] the trial court awarded maintenance of $720,000 per year to the wife for life. In so holding, the court leapfrogged over the "comfortable" lifestyle standard for spousal support favored by the husband, by relying on Hartog to justify an award which would permit the wife to continue her lavish pre-divorce lifestyle.

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ON MAY 9, 1995, in Cassano v. Cassano,[FN3] the Court attacked the issue of child support, as it challenged a needs-based interpretation of the Child Support Standards Act (CSSA), universally (but for perceived crackpots) endorsed by the lower courts and matrimonial practitioners alike. Ignoring the pragmatism of requiring a nexus between the non-custodial parent's child-support obligation and the child's actual needs, the Court of Appeals took a drastic turn away from the nearly unanimous interpretation given the CSSA by endorsing an approach that would lead to an award of child support in excess of the child's actual and proven historical needs.

The confusion caused by the Court's opinion in Cassano surfaced exactly one year later, in Jones v. Reese,[FN4] where the CSSA percentages were applied to the non-custodial parent's income of nearly $300,000, resulting in an award of child support that was approximately twice the amount determined at the Family Court level to be necessary to meet that child's ongoing needs. As observed in Justice Anthony Cardona's dissent in that case, "[c]hild support should not be perceived a disguised source of income for the custodial parent." Hence, because the custodial parent need not account for how the child support paid to her is expended, child support paid in excess of a child's actual needs does not necessarily enhance a child's resources or standard of living, but instead may paradoxically enhance the custodial parent's lifestyle.

Of course, increasing the amount of support would be rendered meaningless if a woman's ability to enforce that right were not in some way enhanced. On that point, in 1995, the Court spoke quite clearly in deciding Powers v. Powers,[FN5] wherein a unanimous Court reversed the Appellate Division once again and found the husband in contempt, thus exposing him to incarceration. The Court's lengthy recitation of selected facts in Powers certainly seemed to justify the Court's impatience with this "deadbeat" dad. What was extraordinary about Powers, however, is how critical the Court was of its brethren on the appellate level, who were implicitly labeled ineffectual at appreciating the facts presented. If anything, the decision also revealed the Court's willingness to draw the line a little closer to the non-monied spouse on the gamesmanship that too often prevents needy wives from enforcing their support awards.

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ON DEC. 7, 1995, in McSparron v. McSparron,[FN6] the Court disappointed its long-time critics by reaffirming its position that a professional license (e.g., a medical license) acquired during a marriage was marital property subject to equitable distribution. The McSparron holding then went further than prior opinions by the Court in

repudiating a doctrine developed at the appellate levels which had limited the distribution of such licenses to situations where the license had not merged into the holder's professional practice or career. By declining to follow the Appellate Division's effort to limit the exposure of the licensed spouse, the Court of Appeals prevented non-licensed spouses from getting shortchanged in the future.

Finally, in Tropea v. Tropea and Brownard v. Kenward,[FN7] the Court held that the rights of a non-custodial parent (generally the father) to nurture his relationship with his child should not be given any special weight in determining whether or not the custodial parent may relocate with that child. Indeed, the importance of “regular and meaningful” contact with one's child gave way to the custodial parent's right to a fresh start.

Not unexpectedly, given the enhancement of the powers of the custodial parent to relocate, the non-custodial but committed parent may now feel that he is the one being treated like a second-class citizen, his relationship with his child subjugated to an ex-wife's freedom to relocate. Couple the erosion of the non-custodial parent's right to visitation with the increase in his support obligations, whether that obligation be defined by a distribution of a license, maintenance or child support, and it becomes rather clear that fathers and husbands are rapidly losing the power they held in a time of less generous support awards.

If there is any doubt that this shift in power will continue, the newly energized movement to eradicate no-fault divorce laws should dispel it. The pretext behind requiring terribly unhappy people to establish a specifically defined reason to get a divorce is ostensibly premised on keeping families together by making divorce more difficult to obtain. Indeed, in New York, in the context of a contested case, you cannot obtain a divorce unless the other spouse abandoned, sufficiently abused or cheated on you. Not surprisingly, the National Organization of Women has been instrumental in preventing the passage of a no-fault divorce law here in New York. Evidently, women have fared better financially when there are impediments to obtaining a quick divorce.

No one doubts that the tide has changed. In its wake, men sit along the matrimonial coastline wondering whether the Court will continue to endorse such **extreme measures** to balance the power between the sexes. Judging by the Court's efforts to date, divorcing men had best proceed with caution.

FN1. 85 NY2d 36, 623 NYS2d 537 (1965).

FN2. NYLJ, Oct. 8, 1996, p. 1.

FN3. 85 NY2d 649, 628 NYS2d 10 (1995).

FN4. 642 NYS2d 378, 1996 N.Y. App. Div. LEXIS 5028 (3d Dept. 1996).

FN5. 85 NY2d 36, 623 NYS2d 537 (1995).

FN6. 87 NY2d 275, 639 NYS2d 265 (1995).

FN7. 87 NY2d 727, 642 NYS2d 575 (1996).

Peter J. **Galasso** is a partner at **Galasso**, Langione & Goidell LLP in Garden City.
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