

The Gap Between What the Client Wants and What the Court Can Do

Each prospective client enters our office for the first time with many questions to be answered. What will happen to my children and me? When will I see my children if I separate from my spouse? Will the home have to be sold? Will the children and I have to move from our home into an apartment? Will we get enough support to live as we've been living? Will I have enough money to live on after I pay support? How will I/we survive?

Each prospective client also comes in ridden with anxiety due to a lack of knowledge of what will happen to him or her now and in the future as a result of a possible or pending divorce. The value of our initial consultation and divorce assessment to the prospective client is to answer these and other questions and relieves or at least lower the prospective client's level of anxiety.

New clients present with both financial and emotional needs to be met in the course of their divorce. Sometimes a new client presents with a need for revenge or vengeance for what the other spouse "did" to him or her by being unfaithful, by lying, squandering money, being secretive, being insensitive, etc. Or, a new client comes in feeling victimized by his or her spouse and wants a judge (a father figure in the eyes of many clients) to mete out justice by punishing the other spouse or validating that, in fact, he or she **has** been victimized and needs to be vindicated. These needs are real to the client. They are so real that they are almost palpable to the attorney in the initial conference.

Unfortunately for the client with such needs, the legal system of the 20th and now the 21st century has moved away from punishing errant, unfaithful, abusive, or uncaring spouses with the advent of no-fault divorce. In New Jersey, division of property (called "equitable distribution") as a matter of law **cannot be** affected by fault of a spouse, that is, a judge cannot award you more or less property or money for the value of property because you perceive your spouse as the cause of the breakup. The same has become true with regard to alimony for the last few years. While the New Jersey alimony statute includes fault as a factor in determining alimony, our state Supreme Court in 2005 all but

eliminated the role of fault in determining alimony or the amount of alimony to be paid or received. In the case of *Mani v. Mani*, the New Jersey Supreme Court ruled that fault or misconduct may be taken into consideration in the determination of amount and duration of alimony ONLY to the extent that the misconduct has affected the economic status quo of the marriage or where that fault was egregious. By way of example, if a spouse gambles away savings and retirement funds (or has used income to maintain a drug or other addiction which took money away from the family unit), and the remaining assets are inadequate to allow the other spouse to recoup her share of what was squandered (in addition to what he or she otherwise would receive), an appropriate savings and retirement component can be included in (added to) the base alimony award. Where marital fault (such as infidelity or emotional cruelty) has no residual economic consequences, fault cannot be considered by the judge when he or she fixes the amount of alimony to be paid. The only exception to that rule is in the very narrow band of cases involving “egregious fault.” The Supreme Court did not define what “egregious fault” means other than to say it is something more than ordinary fault, defining it loosely as a term of art that requires not simply more, or even more public acts of marital indiscretion, but acts that by their very nature, are different in kind than ordinary fault that breaks up a marriage. In the extremely narrow class of such cases where a spouse’s conduct rises to the level of egregious fault, fault can be considered by the judge at trial, not in calculating an alimony award, but in the initial determination of whether alimony should be allowed at all.

Thus, the law has intentionally stepped away from that which many people getting divorced often seek, namely, to have fault in the breakup of the marriage be the central theme of the case so that the party (more) at fault is “punished” somehow by the judge in the judge’s ruling following trial. Spouses considering divorce must understand that the system cannot and will not do that. The legal system is ill equipped to meet the emotional needs of a divorcing spouse who sees him- or herself as the innocent victim in the breakup of the marriage. One answer to this dilemma is individual counseling. Divorce has been shown to be one of the most emotionally traumatic and stressful of life events, akin to the death of a loved one or loss of one’s job which threatens one’s

existence as one knows it.

It is the hope of this writer that those who read this article and who are considering divorce or are in the midst of getting divorced will take it to heed and consider entering into counseling. It is essential that all divorce litigants, however, understand the limitations of the judicial system in meeting his or her emotional needs.

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