

Family Law: Curtailing Judicial Discretion

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Family law practitioners accustomed to the morass of judicial discretion governing maintenance and property division have been given a ray of hope by Mr. Justice Dooley in *Klein I* (*Klein v. Klein*, 150 Vt. 466 (1988)). (Lawyer earning \$80,000 must as a matter of law, pay maintenance to unemployed wife of 18 years). His bold statement reversing the trial court for abuse of discretion in not awarding maintenance should be heeded by the bar:

"While we have recognized the trial court has discretion in this area, we must be ever mindful of the observation of Justice Frankfurter that '[d]iscretion without a criterion for its exercise is authorization of arbitrariness.' *Brown v. Allen*, 344 U.S. 443, 496 (1953). Further, we expect that different judges dealing with the same case should reach essentially the same result. The purpose of discretion is not to foster inconsistency." (Emphasis added)¹

This statement is a welcome relief from the usual response by the Court to divorce issues:

"The trial court has wide discretion in distributing property (awarding maintenance) upon divorce . . . Its award will not be disturbed on appeal unless the Court's discretion was abused, withheld, or exercised on untenable grounds or to a clearly unreasonable extent." *Ellis v. Ellis*, 150 Vt. 650 (1988).

For too long, the *Ellis* approach has allowed judges to hide behind pious intonations of justice and equity while escaping hard intellectual analysis of the values structuring an outcome.

I regard *Klein I* as the family law analogue to *State v. Jewett*, 148 Vt. 325 (1988) in which the Court invited bench and bar to define the meaning of the Vermont Constitution's Bill of Rights in criminal cases. The Court is plainly inviting the Bar to brief and argue reasons for decisions, and demanding that in Family

Law cases, judges articulate "what was decided and why."

If the decision in *Klein I* does not make this clear, the Court reversal of other divorce decisions does. See *Nauman v. Krug*, _____ Vt. _____ 87-169, August 1989 (drug dependent wife entitled to maintenance) and *Downs v. Downs*, _____ Vt. _____ #88-283 (April 6, 1990) (medical degree justifies future maintenance award). In both cases, the Court established guidelines for awarding maintenance and reversed the trial court with directions to justify its result.

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However, the most interesting reversal occurred in *Klein II*. *Klein v. Klein*, _____ Vt. _____ #89-131 (February 2, 1990). *Klein I* demanded a well reasoned, carefully crafted property and maintenance award. But that's not what was served up to the Court for inspection on the newly narrowed field of judicial discretion. In the remand proceedings, the trial court, without hearing new evidence, without providing any rationale for its result and using the financial data obtained in *Klein I*, awarded maintenance of \$250 per week, until death of either party or until June 1, 2000, whether or not the wife remarried.

At oral argument, on *Klein II* able counsel argued both sides of such difficult questions as why \$250 was reasonable or unreasonable; when the wife should go back to work, why it made sense (or didn't) to terminate on June 1, 2000, and why remarriage should or shouldn't be a bar. Further, at oral argument, it appeared each of the justices had a different view of what maintenance amounts should be set, and how long it should be paid. One justice hinted at the view that life time maintenance was appropriate. Others appeared to take an intermediate position. The Court clearly expressed differing views on the appro-

appropriate outcome. The litigants awaited a decision answering these perplexing questions.

But the Supreme Court refused to give its version of what a just result would be, and reversed again stating emphatically it would approve no award without trial court findings to show "what was decided and why or the method employed and weight accorded various factors".

So where do we look for guidance? Vermont's statutory laundry list of factors, without any weighting, doesn't help. 15 V.S.A. §751, and 752. No overall goal is specified, and no theoretical basis for reaching that goal is enacted.

Justice Dooley in *Klein* and Justice Peck in *Nauman* recognized this. Each suggested curing this omission by looking to Professor Joan Krauskopf's writings to fill the statutory void.² The Court borrowed a nonstatutory goal for maintenance from her, writing in *Klein I* and reiterating in *Nauman* that the purpose of maintenance is (1) to reduce the financial impact of divorce and (2) to recompense the homemaker for contributions to family's well being with reference to the standard of living achieved during the marriage. These purposes are, perhaps, only a slight rearranging of the vagueness of the statutory factors. But the uniqueness of *Klein I* is its attempt to look for a purpose or goal to be achieved, providing a method of analysis and requiring the trial court to clearly articulate its decisional basis.

Krauskopf herself, in my opinion, has later stated a better purpose than referenced in *Klein I*. Writing after that decision in *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 Family Law Quarterly 253 (1989), she writes:



"The purpose of economic settlement is to assure that, at the conclusion of the marriage, one party does not suffer unduly while the other gains because of the marriage experience. In order to encourage marriage as the normative mode for loving personal relationships and for nurturing children, social policy seeks to assure a fair allocation of the gains and losses when the marriage relationship ends."

The article details a comprehensive way of doing so in dollars. The concept of allocating gains and losses appeals to me not only because it is the essence of the divorce process, but also because it provides both an economic and a personal-emotional context for analysis.

For example, it provides some framework for at least considering the father's (typically) loss of daily contact with his children in the (typical) equation of financial support for the wife³; and it is possible to consider personal harm done by one spouse to another (apart from the end of the marriage itself which, in this theory, is not a compensable loss to either party⁴).

Other writers use the "gains and losses" approach to repudiate the sometimes used, but inapposite analytic tools that marriage is a "contract" or a "partnership." The legal remedies in those fields has nothing to do with marital dissolution. Using the terms only befuddles thinking about what really is going on. See for example, Ellman, *The Theory of Alimony*, 77 California Law Review 1-82 (1989), an excellent article.

Ellman approaches the problem of quantity and duration of maintenance in rigid economic terms. He has a decidedly business school flavor. Marriage, for a woman, he argues is giving up all her capital early in the relationship: her child-bearing ability, her opportunity to learn a compensable skill, her marriageability. The husband, on the other hand, gives up very little. He has a home and pursues a career. His real contribution, Ellman argues, is at the end of the relationship. He writes:

"The traditional marriage thus involves considerable upfront investment by the wife which, like the idiosyncratic improvements in the building or the pur-

chase of equipment needed for the production of a unique part, has little general market value even though it has value to the one person for whom it was made. Like the owner or part supplier, she risks great loss if her husband stops buying."

I quote this here only to give a flavor of Ellman's analytical approach rather than argue for its adoption.

Ellman's article concludes with a rather precise set of rules for quantification of economic settlements. They may or may not be workable. Krauskopf suggests others. Clearly, Justice Dooley called for some hard thinking on these problems. Bench and bar alike will be required to review the legal literature to come up with better theoretical and practical solutions to these issues.

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In my view, *Klein* obligates us to look beyond the statutory factors of 15 V.S.A. §751, and to develop new ones within their elastic borders. Practitioners should submit to judges requests for findings of fact, articulating a purpose to be achieved in a decision where it will be possible to tell whether similarly situated people are treated similarly.⁵ Trial judges would then have the background to make decisions articulating the "what and why," and to compare the results to other decided cases.

I predict after a few years in the post *Klein* world when bench and bar have tried to expose the rationale for outcomes, it will be apparent a study commission will be necessary to recommend legislative change. Similarly situated people will demand to be treated similarly, and I submit will not tolerate a wide, unarticulated disparity of outcomes. Appeals will test the legitimacy of trial judges' idiosyncracies. Whether a formulaic approach to property settlement and maintenance such as has developed in child support is either possible or desirable, is the next frontier in family law.⁶ The

woodenness of the Federal sentencing guidelines gives one pause. On the other hand, rampant discrimination between couples will yield explosive discontent.

The Court has hinted at a long, overdue revolution. We should applaud the trumpet call and get to work to see if we can meet the challenge thrown down by Mr. Justice Dooley.

Footnotes

¹This appears to be a rich area for publication of unappealed trial court contested decisions, and rich new area for contesting results on appeal.

²Krauskopf, *Maintenance: A Decade of Development*, 50 Mo.L. Rev. 259 (1985), Krauskopf, *Rehabilitative Alimony: Uses and Abuses*, 21 Family L. 2573 (1988).

³Clearly, in tort law loss of consortium with a child is compensable. *Hay v. Medical Center Hospital of Vermont*, 145 Vt. 533 (1985) (child may recover for loss of consortium of parent). *Savard v. Cooley*, 126 Vt. 405 (1967), Harper, James and Gray, *The Law of Torts* §8.8 (1986). If tort law recognizes a loss as compensable, shouldn't a divorce court take it into account?

⁴In *Sheltra v. Smith*, 136 Vt. 472 (1978) the Court defined the tort of outrage. That behavior seems to me an appropriate basis for allocating gains and losses in a marriage. Taking someone's property on the basis of a vague phrase contained in 15 V.S.A. §751(12) "the respective merits of the parties" does not. It seems somehow unconstitutional to me as being standardless and to fly in the face of the limited discretion called for in *Klein I*. Further, since maintenance and property division are a function of each other, "fault" necessarily spills over into each category. Courts have no business, it seems to me, trying to determine who caused the marriage to fail, as the parallel organizations of Alcoholics Anonymous and Al Anon attest. It is allocating gains and losses in an economic sense that "encourages marriage as a normative" mode, not trying to fix blame for the destruction of the relationship, which I think is an extraordinarily difficult thing to do. See Scarf, *Intimate Partners* Random House (1987).

⁵Skepticism is warranted. Krauskopf reports an exercise where 27 Ohio judges were given the same facts and reached widely (shockingly) different results, in *Theories of Property Division*, supra at 275.

⁶See Justice Dooley in *Ainsworth v. Ainsworth* _____ Vt. _____ 87-552 (Mar. 16, 1990), a child support case, where he states using judicial discretion to depart from support guidelines should not be used to create disparity. And see Norton, *The Future of Alimony: A Proposal for Guidelines in Alimony: New Strategies for Pursuit and Defense* (1988). Apparently Maricopa County, Arizona which inspired some of the work of the Family Proceedings Advisory Committee has published guidelines; See Ellman, Kurtz and Stanton, *Family Law* 277 (1986).

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