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DIVORCE, FAMILY & MATRIMONIAL LAW

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TESTIMONY OF GAETANO FERRO

In Favor of Raised Committee Bill 1155

Forty years ago, the Connecticut legislature significantly reformed our state's divorce laws.[1] Perhaps the most significant innovation was the addition of "irretrievable breakdown" as a ground for obtaining a dissolution of marriage.[2] While not abolishing traditional fault grounds and while not eliminating consideration of fault in dissolutions where irretrievable breakdown is alleged, the then-new law was responsive to a national trend toward eliminating the need to plead and prove fault in order to become divorced.[3]

Much has happened in the last forty years. Dissolutions of marriage are more numerous and much more complicated. Our courthouses are understaffed. Budgetary constraints limit the appointment of judges and staff. Those circumstances cry out for ways to improve the efficiency of the dissolution of marriage process.

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[1] Public Act No. 73-373, An Act Concerning the Dissolution of Marriage.

[2] Another change was the end of the term "divorce" and its replacement with the term "dissolution of marriage."

[3] *See, generally*, McAnerney and Schoonmaker, *Connecticut's New Approach to Marriage Dissolution*, 47 Conn.B.J. 375 (1973).

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Four family law practitioners, including the undersigned, have spent significant time and effort addressing those aspects of dissolution of marriage law and process most in need of reform. Those practitioners, collectively, are:

A former Justice of the Connecticut Supreme Court, Judge of the Appellate Court, and Judge of the Superior Court;

A former President of the Connecticut Bar Association;

Four former Chairs of the Family Law Section of the Connecticut Bar Association;

Two Past Presidents of the American Academy of Matrimonial Lawyers (national)[4];

Three Past Presidents of the Connecticut Chapter of the American Academy of Matrimonial Lawyers

Three Senior Topical Editors (Family Law) (two past; one current) of the Connecticut Bar Journal; and

A Past Editor-in-Chief of the Journal of the American Academy of Matrimonial Lawyers.

The result of much of their efforts is Raised Bill No. 1155.

Section 1 of the bill provides Section 46b-36 should be revised. This statute deals with "Wife and Husband property rights not affected by marriage." It is a vestige of days gone by. The recommendation is that the terms "husband and wife" be deleted and substituted with the

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[4] The views expressed are those of the author, not those of the American Academy of Matrimonial Lawyers or of its Connecticut Chapter.

word "spouse" to comport with the Supreme Court's decision in *Kerrigan v. Commissioner of Public Health,* 289 Conn. 135 (2008), and other changes in the law.

Section 2 recommends that Section 46b-65 be revised to make clear that only the parties signing and filing of a written declaration that the parties have resumed cohabitation should vacate the decree of legal separation. Although the statute so states, by necessary implication, at least one judge has recently ruled to the contrary. *Sultzbach v. Sultzbach*, 2013 WL 951337. Section 2 also seeks to bring clarity to the court's role in the event of a conversion of a decree of legal separation to a decree of dissolution of marriage. Its role should not be to relitigate all of the financial issues previously resolved. The Appellate Court has, however, construed *Mitchell v. Mitchell*, 194 Conn. 312 (1984), to require a new inquiry into the financial circumstances of the parties at the time a decree of legal separation is converted to a decree of dissolution of marriage. *Mignosa v. Mignosa*, 25 Conn.App 210 (1991). Other courts instead have limited *Mignosa* and held that at the time of conversion of a legal separation to a dissolution where there has been no resumption of marital relations, the court is precluded from changing the prior financial orders. *See, e.g., Gilbert v. Gilbert,* 2008 WL 2313381 (Swienton, J., May 13, 2008).

In 2005, the legislature approved of arbitration in family law matters. 2005 Conn. Legis. Serv. P.A. No. 05-258 (S.S.B. No. 1194). Section 3 recommends that Section 66 be amended to broaden the issues subject to arbitration in family law cases. That child support and child-related financial issues cannot be arbitrated under current law has made arbitration of family cases almost irrelevant. Making them subject to arbitration should help ease the burden on our courts, while preserving the rule that custody and visitation may not be arbitrated.

Section 4 of the bill recommends that Section 46b-81, "Assignment of Property and Transfer of Title," be revised to grant the court continuing authority to adjudicate property rights of parties to a marriage after a dissolution where it could not previously divide property because it lacked personal jurisdiction over a party, if it reserves the right to do so and later acquires personal jurisdiction. Many states have so-called "divisible divorce," where the marriage can be dissolved and the financial orders determined at a later date. Connecticut does not, except in limited circumstances. *See Ross v. Ross*, 172 Conn. 269 (1997). Section 46b-46 provides for the exercise of personal jurisdiction over nonresidents upon notice in order to make alimony and child support orders. There is no similar provision to enter equitable distribution orders. The proposed change, while not authorizing divisible divorce where the court has jurisdiction over both parties, would let a Connecticut court reserve jurisdiction to make such orders at a later time if it later has personal jurisdiction.

The proposed revision would also require that the court consider the tax consequences of its orders and tax attributes of the parties' assets. While under current law the trial court may consider the tax consequences of its orders, *Powers, v. Powers*, 186 Conn. 8, 10 (1982), it is not required to do so. *See, e.g.*, *Maturo v. Maturo*, 296 Conn. 122 (2010); *Hawkins v. Hawkins*, 11 Conn.App. 195 (1987). The importance of considering tax consequences and the tax attributes of assets cannot be overstated. *See, e.g.*, Frumkes, DIVORCE TAXATION, 9th Ed. (James Publishing, 2012). Section 5 of the bill addresses Section 46b-82, "Alimony." It includes the most substantial proposed revisions in the bill. Proposed subsection (b) seeks to give judges and practitioners guidance about the amount of alimony to be awarded. Review of Connecticut cases and discussions with family law practitioners compel the conclusion that awards of alimony are

unpredictable. Predictability will enhance the likelihood of out-of-court settlements. It will reduce the number of contested cases. It will make dissolution less financially devastating by reducing the amount of legal fees to both parties. There is a growing movement for alimony guidelines in other jurisdictions. They exist for determinations of temporary alimony in Pennsylvania, 23 PA CONS. Sec. 4322 (2002), Arkansas, In re: Administrative Order Number 10: Arkansas Child Support Guidelines, Supreme Court of Arkansas (2002), and New Mexico. They exist for determinations of permanent alimony in Massachusetts, Maine, and Texas. Many counties, including Santa Clara, California, Washtenaw County, Michigan, Maricopa County, Arizona, and Johnson County, Kansas use alimony guidelines. *See, generally*, L. W. Morgan, Current Trends in Alimony Law: Where Are We Now?, GP Solo Report, American Bar Association. The proposed legislation does not, however, propose alimony guidelines. Instead, the first suggestion is the addition at subparagraph (c) of a **suggested** calculation for the determination of alimony. The calculation is discretionary; the court does not need to make it. If it makes it, the result is neither mandatory nor presumptive. The bill also provides that if a court awards lifetime alimony, it specify the basis for such an award. Doing so will make the law neutral as under existing law the court should not award time-limited alimony unless there is a basis in the record for such an award. *See, e.g., Markarian v. Markarian*, 2 Conn. App. 14 (1984); *Ippolito v. Ippolito*, 28 Conn.App. 745 (1992), and its progeny. The same rule should obtain where the court awards lifetime alimony. The bill also proposes in subsection (a) that earning capacity and education be added to make the statute consistent with case law. Courts often base orders upon earning capacity. *See, e.g., Langley v. Langley*, 137 Conn.App. 588 (2012); *Boyne v. Boyne*, 112 Conn.App. 279 (2009). They also consider the parties' educations. *See, e.g., Langley*

v. Langley, 137 Conn.App. 588 (2012). Another proposed change to (a) adds the tax consequences of the court's orders as a factor to be considered.

Section 6 of the bill addresses Section 46b-86, "Modification of Alimony" and suggests that the law provide that child support cannot be made non-modifiable in any circumstances. A number of cases have resulted in significant uncertainty about whether child support can be made non-modifiable. *See, e.g., Guille v. Guille*, 196 Conn. 260 (1985); *Amodio v. Amodio*, 56 Conn.App. 359 (2000); *Tomlinson v. Tomlinson*, 305 Conn. 539 (2012); *Malpeso v. Malpeso*, 140 Conn.App. 783 (2013). Eliminating that uncertainty will ease the administration of justice. Section 6 also confirms that under existing case law in order to modify, the court should first determine whether a substantial change in circumstances has occurred and, if so, make a determination as to the appropriate amount of alimony. The proposal also clarifies that the parties may by agreement set forth the provisions for modification of alimony awards based upon the living arrangements of the recipient. Case has created uncertainty. *See DeMaria v. DeMaria*, 247 Conn. 715 (1999). Allowing the parties to negotiate a clear standard should reduce litigation.

Please give Raised Bill No. 1155 your serious consideration.