Egregious Fault or Economic Foul: Knowing It When You See It; Revisiting *Reid*, *Mani* and *Clark*

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As a practitioner, one of the most frequent questions clients pose in the initial stages of representation is, "Am I going to have to pay alimony?" That question is usually quickly followed with a commentary and summary from the client outlining all of the ways in which the dependent spouse contributed to or caused the breakdown of the marriage. The practitioner is then invited to hear about the adultery and substance abuse issues in the marriage and the client's frustration that spousal support should not be awarded to the 'at fault' spouse. This article seeks to address certain potential areas where a *bona fide* good-faith argument can be established for challenging the calculation and the duration of alimony, based on the payor spouse establishing that the dependent supported spouse engaged in fraudulent conduct effecting the parties' finances.

The general response to that initial question by most practitioners is that a spouse's fault in causing the breakdown of the marriage is generally not a basis for challenging a *pendente lite* spousal support or alimony award. This response is based upon the principles set forth in *Mani v. Mani*,[1] and the New Jersey Supreme Court, holding that fault is not a basis to deny an award of alimony except for when it is 'egregious fault.' In fact, many practitioners throw the phrase 'egregious fault' around as if it were the only scenario available. *Mani*, however, instructs that there are two instances of egregious fault: 1. where fault has affected the parties' "economic life," and 2. in cases where fault "violates societal norms that continue in the economic bonds between the parties with confound notions of simple justice."

While these two exceptions are commonly referred to as egregious fault collectively, in order to utilize these tools correctly it is important for the practitioner to understand that there are subtle distinctions between egregious fault, economic fault, a total denial of alimony, and the use of economic fault in the 'calculation of alimony,' from leveraged positions attacking the alimony calculus.

In *Clark v. Clark*,[2] the Appellate Division provided instruction on the subtle distinction between the exceptions. Economic impact caused by the supported spouse's conduct, amorphous and vague as it may be, should not be overlooked given the frequency in which financial divorce planning occurs in matrimonial matters.

The *Mani* decision has had a profound and long-lasting impact in the area of matrimonial law for more than a decade since it was decided. Often, when cases as significant as the *Mani* decision are rendered, practitioners can be inclined over time to over generalize the main proposition of the case at the expense of nuanced distinctions and exceptions that can be pivotal in the right cases. It is not enough to simply say fault is not a basis for determining alimony without inquiring further as to whether the fault involves an economic impact on the marriage. The refrain, 'fault is not a basis to deny alimony,' has crept into the lexicon and been generically woven into the fabric of common matrimonial parlance, causing many among the bench and bar to overlook fault as it applies to alimony, or to consider *Mani* in the context of other cases and statutes. In large part, the *Mani* decision's use of the term 'egregious fault' has contributed to the notion that the concept of fault's effect on alimony is extremely limited. Practitioners and judges alike overlook that *Mani* also focused on economic fault. As practitioners, it is important to continue to be mindful that surreptitious financial hypothecation, dissipation, transmutation and concealment from a divorce planning standpoint may be a fertile ground to raise a challenge to a potential alimony obligation or the calculation of alimony.

The common fact scenario is that the moneyed spouse is the party engaging in financial divorce planning prior to the litigation. But what about instances where it is discovered that the dependent spouse has engaged in systemic and significant financial divorce planning or financial subterfuge and has either converted marital monies, hypothecated or dissipated marital monies or assets, or concealed through straw-man

tactics or other subterfuge bank accounts, spending and purchases, including but not limited to, acquisition of property and debts? What effect if any, should this have on alimony? The answer is that, this conduct, if discovered and established, may place the payor in a favorable position to challenge the calculation of alimony through negotiations and at the time of trial.

Alimony and equitable distribution are distinct but related types of relief. However, the discretionary application of the equitable maxim of unclean hands applies to matrimonial cases. It is well settled that a party "in equity must come into court with clean hands and...must keep them clean...throughout the proceedings."[3] It is axiomatic throughout every practice area in the body of law that, 'a court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit.' Family court is particularly sensitive to the concept of unclean hands and the principle that 'one who seeks equity must do equity.' Consequently, equity demands that the trial court consider dishonest, illegitimate conduct, and its impact on the past and future economic security. Secretive transmutation, hypothecation, dissipation, conversion, or transfer of marital monies and property may trigger a *bone fide,* good faith position for challenging an alimony obligation, depending on the quantum, frequency, or materiality of such conduct.

So, what fault is egregious? A bright-line answer does not exist. Instead, subjectively the attack or challenge to alimony based on egregious fault, an amorphous concept, must be answered on a case-by-case basis by a trial judge. In 1964, Justice Potter Stewart, in *Jocobellis v. Ohio,*[4] famously stated in reference to obscenity and the difficulty in clearly defining it, "*But …I know it when I see it.*" Similarly, 'egregious fault' is a vague concept that requires the practitioner to see it, pursue it, and put forth the best argument to assist the trial court to see it, too. The general consensus is to intermingle 'egregious conduct' with 'economic conduct,' but to do so may be an error. The analysis is illuminated by looking at several cases that define the boundaries of egregious marital fault, as well as civil and criminal statutory violations triggered by this type of conduct in the context of several common hypothetical fact scenarios typically experienced by practitioners.

N.J.S.A. 2A:34–23(b) provides that in all divorce actions the court may award alimony, upon consideration of the following non-exclusive list of enumerated factors:

1) The actual need and ability of the parties to pay;
2) The duration of the marriage;
3) The age, physical and emotional health of the parties;
4) The standard of living established in the marriage and the likelihood that each party can maintain a reasonably comparable standard of living;
5) The earning capacities, educational levels, vocational skills, and employability of the parties;
6) The length of absence from the job market of the party seeking maintenance;
7) The parental responsibilities for the children;
8) The time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, the availability of the training and employment, and the opportunity for future acquisitions of capital assets and income;
9) The history of the financial or non-financial contributions to the marriage by each party including contributions to the care and education of the children and interruption of personal careers or educational opportunities;
10) The equitable distribution of property ordered and any payouts on equitable distribution, directly or indirectly, out of current income, to the extent this consideration is reasonable, just and fair;
11) The income available to either party through investment of any assets held by that party;
12) The tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a non-taxable payment;
13) The nature, amount, and length of *pendente lite* support paid, if any; and
14) Any other factors the court may deem relevant.

The word 'fault' does not appear in the statute. However, N.J.S.A. 2A:34-23(i) provides:

> No person convicted of murder…manslaughter…criminal homicide… aggravated assault…or a substantially similar offense under the laws of another jurisdiction, may receive alimony if: (1) the crime results in death or serious bodily injury to a family member of a divorcing party; and (2) the crime was committed after the marriage or civil union. A person convicted of an attempt or conspiracy to commit murder may not receive alimony from the person who was the intended victim of the attempt or conspiracy.

Critically, N.J.S.A. 2A:34-23(i) additionally provides: "Nothing in this subsection shall be construed to limit the authority of the court to deny alimony for other bad acts." While, a trial court judge cannot take into account fault or misconduct in making an equitable distribution determination, a judge may consider misconduct when determining the amount of or right to alimony in two instances: 1) when marital conduct negatively affects the economic *status quo* of the parties, and 2) where the conduct is so outrageous that the court cannot turn a blind eye to the behavior.[5] Egregious marital fault may and should be considered where an award of alimony would be unjust.

The range of financial subterfuges that many practitioners see varies, factually and in degrees of seriousness; however, there are simple and common types that always should be considered in determining the amount and length of alimony. By way of example, where the supported spouse has been divorce planning, secretly removing money from joint account(s) and placing it in straw accounts set up in the names of family members solely to shield the accounts from discovery and subpoena and conceal the monies from distribution. Another example is when a spouse obtains fraudulent loans or debts from confidants to drive up marital debts that will later be forgiven following the divorce.

Three cases set the stage for an argument that the misappropriation of marital monies, or fraud, conversion or dissipation should be utilized in analyzing the alimony calculation.[6] Additionally several civil causes of action, such as breach of fiduciary duty, constructive or actual fraud, constructive deceit, fraudulent conveyance, conversion, and criminal statutes prohibiting money laundering and impersonation provide further guidance in analyzing the spouse's conduct.

For example, in *Reid v. Reid*,[7] the trial court determined that the wife, who embezzled significant sums of money from her husband's business and dissipated marital assets, which significantly (and detrimentally) impacted her husband, was not entitled to alimony. The Appellate Division affirmed the trial court's denial of an alimony award. Prior to the divorce action, the parties, who were equal shareholders in Reid Enterprises, were adversaries in a federal bankruptcy proceeding, where the husband claimed counts of embezzlement, fraud and mismanagement against the wife. The bankruptcy court agreed with the husband's claims following trial, and entered an order for damages, including punitive damages against the wife. Judge Robert Coogan presided over the matrimonial matter, and in denying alimony chronicled the parties' lifestyle, and all of the various improper real estate dealings by the wife, and cited to the bankruptcy court judge's findings that the wife misappropriated monies and assets from the parties' jointly owned business by diverting or funneling monies and not recording "substantial cash transactions."

In upholding the findings of the trial court the Appellate Division stated instructively:

> Judge Coogan could not ignore the embezzlement by defendant and her misappropriation of marital assets which 'significantly impacted on her husband.' The judge also observed that after the misappropriation and embezzlement, defendant attempted to 'cover [her defalcations] up. We agree entirely with the Chancery judge's conclusion that this conduct should not be rewarded in a court of equity by an order entitling her to alimony.

In *Reid*, the Appellate Division, along with the trial court, clearly looked to findings of embezzlement, misappropriation and dissipation to define outrageous or egregious conduct sufficient to deny an award of alimony.[8]

In *Mani*, seven years following *Reid*, the parties were business partners working together on many ventures, similar to the wife and husband in *Reid*, except that at some point the wife received a stock from her father in a separate family-owned business, which rose significantly in value and split several times. The wife sold the stock and the parties slowly retired and lead an extravagant lifestyle. The couple spent seven years together in retirement before the wife discovered her husband was having an affair and filed a complaint for divorce alleging adultery and extreme cruelty. The wife argued the husband was not entitled to alimony as his dependency was based on his own "indolence." The court disagreed, and found alimony was appropriate.

The *Mani* Court, curiously ignoring the *Reid* decision, however, similarly found that "[t]he thirteen alimony factors listed in N.J.S.A. 2A:34–23(b) clearly center on the economic status of the parties. That is the primary alimony focus. However, the Legislature adopted...that 'fault, where so asserted as a ground for relief will be a *proper consideration* for the judiciary in dealing with alimony and support.'" Therefore, the Court held that:

> [I]n cases in which marital fault has negatively affected the economic status of the parties it may be considered in the calculation of alimony. By way of example, if a spouse gambles away all savings and retirement funds, and the assets are inadequate to allow the other spouse to recoup her share, an appropriate savings and retirement component may be included in the alimony award.
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> ...Given the economic basis of alimony, there can be no quarrel over the notion that fault that has altered the financial status of the parties is relevant in an alimony case. The same relevance notion does not apply to the ordinary fault grounds for divorce that lurk in the margins of nearly every case and therefore those grounds should not be interjected into an alimony analysis. To do so would distort the application of the principles the Legislature has adopted to secure economic justice in matrimonial cases. Moreover, without concomitant benefit, considering non-economic fault can only result in ramping up the emotional content of matrimonial litigation and encouraging the parties to continually replay the details of their failed relationship.
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> Thus we hold that to the extent that marital misconduct affects the economic *status quo* of the parties, it may be taken into consideration in the calculation of alimony. Where marital fault has no residual economic consequences, it may not be considered in an alimony award.

More recently, and perhaps more importantly in *Clark*, using *Mani* and *Reid* as guidance, the appellate court shed light on instances where economic misconduct can rise to the level of egregious conduct, and in doing so indicated a subtle distinction between a total denial of alimony and the consideration of fault-based economic transgressions in the alimony calculation. In *Clark*, the husband appealed an alimony award to the wife because at trial he proved that his wife secreted approximately $350,000 from their business during the marriage. As in *Reid*, the parties were equal shareholders in a business. The trial judge required the wife to pay back half of the amount, as the plaintiff's equitable distribution. On appeal, the husband argued that such conduct in secreting and concealing significant monies demonstrated "egregious fault," obviating any alimony award. The Appellate Division in *Clark* agreed, vacated the alimony and remanded the matter back to the trial court. In doing so, the *Clark* court, in *dictum*, held that even if economic fault does not rise to egregious fault, it still may be considered in the alimony determination. Moreover, the court held that where economically based misconduct is systematic, willful, and purposefully designed to deprive the other spouse of the economic benefits of the marital partnership, the acts transcend simply effecting the economic status quo.

Citing to *Mani*, the Court acknowledged the two "narrow" exceptions where fault can warrant reconsideration regarding alimony. The Court further noted that marital misconduct that affects the economic *status quo* of the parties alone, *may be taken into consideration* in the calculation of alimony, whereas egregious conduct allows a court to, as an initial ruling, determine *whether alimony should be allowed at all.* The court in *Clark* made specific note of the wife's conduct of moving monies between accounts, diversion of cash, and use of safe deposit boxes to secret marital monies, in determining that, "Defendant's conduct fell within *Mani*'s delineated 'narrow band of cases' that 'affected the parties' economic life.'" The court pointed out that there was no evidence of physical harm caused by the "thievery" but the conduct transcended "mere economic impact," and that the wife "kicked [the parties'] economic security in the teeth." The court was also mindful to note that the wife was engaged in a "scheme," which was "long-term" and was not only criminal but demonstrated a "willful and serious violation of societal norms."

Significantly, the court noted: "[f]inally, if the Court concludes [on remand] an award of alimony remains warranted, the trial judge must nevertheless assess the impact of defendant's conduct prior to affixing an amount of alimony…the...determination could include an off-set against the alimony award by the amount stolen." In other words, if the trial court follows the Appellate Division's instruction to make findings as to whether or not the conduct rose to the level of egregious fault, and determines that it does not, the trial court *must* still consider the conduct when fixing an amount of alimony. This last sentence is a clear indication that in every case where there is evidence of systematic scheming to conceal and to deprive a spouse of an economic benefit of the marital partnership through the movement of cash between accounts, dissipation of funds, hypothecation of monies, and a willful and purposeful act, courts must consider that conduct in the alimony calculus.

The most important portion of the *Clark* court's decision is the notion that the court must take into account these economic misconducts even if they do not rise to the level of egregious conduct and if established can and should offset alimony by the amounts dissipated, hypothecated or converted. Therefore, a claim that marital monies were taken, or dissipated or converted, no matter how small, should not be overlooked. In other words, any economic misconduct when discovered should be used as a mechanism to challenge alimony and to obtain an offset.

It also is imperative that such evidence be presented to the court for consideration in the overall alimony determination. A court has substantial discretion in determining whether to grant alimony and in setting the amount. A practitioner should, therefore, consider the common occurrence of intentional dissipation of assets as a means for challenging alimony. In many cases, the monies or property that have been misappropriated are now outside the reach of the other spouse or unrecoverable. The likelihood is that part of the scheme in the first place was to place the asset outside of the reach of the other spouse to shield the asset from distribution in the divorce. Dissipation is the natural argument following the misappropriation and fraudulent concealment of marital monies. In a matrimonial matter, "dissipated funds are subject to equitable distribution, as if the funds were not dissipated at all."[9]

The ultimate question regarding an intentional dissipation of assets is whether the assets were expended by one spouse with the intent of diminishing the other spouse's share of the marital estate.[10] Where one spouse has "dissipated the marital assets, or otherwise disposed of them in fraud of the other," a court properly imposes a debt on the dissipating "spouse in favor of the other."[11] In *Clark*, the court indicated that this 'debt' should preclude an award of alimony or at the very least be considered in the calculation. One might question: Does this include the common situation where a spouse removes marital monies in a joint account to pay back the 'loan' they received from a friend to pay for expenses during the divorce? In all likelihood, following *Clark*, it does, and an argument should be made to offset it against the alimony.

To support these positions, it is important to note that in each of these cases there were references to criminal behavior, systematic concealment, and deprivation of marital property purposefully and willfully designed to deprive the other spouse of an economic benefit. In analyzing whether or not 'egregious' economic conduct has occurred, or whether or not conduct rises to the level of challenging alimony, other sources should be considered by the practitioner, such as the New Jersey Criminal Code, Title 25 of the New Jersey Statutes relating to frauds and fraudulent conveyances, and common law causes of action for fraud, breach of fiduciary duty and misappropriation. In *Reid*, *Mani* and *Clark*, the courts focused heavily on the very same elements in the money laundering and fraudulent conveyance laws and common law breach of fiduciary duty and fraud. Accordingly, if one is in violation of criminal statutes, the behavior must be considered by the court and must be taken into consideration if it affects the *status quo* of the martial lifestyle.

N.J.S.A. 2C:21-25 and 2C:21-17, outlines the criteria for one to be found guilty of money laundering:

> e. A person is guilty of a crime if, with the purpose to evade a transaction reporting requirement of this State or of 31 U.S.C. s.5311 et seq. or 31 C.F.R. s.103 et seq., or any rules or regulations adopted under those chapters and sections, he:
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> (1) *causes or attempts to cause a financial institution*, including a foreign or domestic money transmitter or an authorized delegate thereof, casino, check casher, person engaged in a trade or business *or any other individual or entity required by State or federal law to file a report regarding currency transactions or suspicious transactions to fail to file a report*; or
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> (2) *causes or attempts to cause a financial institution*, including a foreign or domestic money transmitter or an authorized delegate thereof, casino, check casher, person engaged in a trade or business or any other individual or entity required by State or federal law *to file a report regarding currency transactions or suspicious transactions to file a report that contains a material omission or misstatement of fact*; or
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> (3) *structures or assists in structuring, or attempts to structure or assist in structuring any transaction with one or more financial institutions*, including foreign or domestic money transmitters or an authorized delegate thereof, casinos, check cashers,

persons engaged in a trade or business or any other individuals or entities required by State or federal law to file a report regarding currency transactions or suspicious transactions. "Structure" or "structuring" means that a person, acting alone, or in conjunction with, or on behalf of, other persons, conducts or attempts to conduct one or more transactions in currency, in any amount, at one or more financial institutions, on one or more days, in any manner, for the purpose of evading currency transaction reporting requirements provided by State or federal law.

Moreover, a companion statute is frequently charged for impersonation; theft of identity, specifically, N.J.S.A. 2C:21-17. That statute states as follows:

a. A person is guilty of an offense if the person:
   (1) Impersonates another or assumes a false identity and does an act in such assumed character or false identity for the purpose of obtaining a benefit for himself or another or to injure or defraud another;
   (2) Pretends to be a representative of some person or organization and does an act in such pretended capacity for the purpose of obtaining a benefit for himself or another or to injure or defraud another;
   (3) *Impersonates another, assumes a false identity or makes a false or misleading statement regarding the identity of any person, in an oral or written application for services, for the purpose of obtaining services*;

Where a spouse is found to have utilized a straw account in the name of a family member for continued financial transactions, including withdrawals, transfers, cash deposits and general banking, as if they were that family member, the spouse arguably has violated the anti-money laundering statute as well as the criminal prohibition against impersonation. Both are generally prosecuted together. One's criminal behavior must be scrutinized by the court when it is determining if an award of alimony is warranted. If the elements in the above statutes are present, egregious behavior is evident, and it serves as a basis to use the existence of such actions in the litigation and trial. A practitioner need not prove all of these elements, but can utilize statutory elements to demonstrate that egregious behavior is occurring. Being in violation of criminal statutes is the exact behavior that qualifies as 'I'll know it when I see it' behavior to be considered egregious.

In addition to reviewing the criminal statutes, the elements of common law fraud and fiduciary duty should be considered when analyzing the behavior, and an amended pleading should be considered upon the discovery of such marital economic misconduct. In order to plead common law fraud, a litigant must show: 1) a material misrepresentation of a presently existing or past fact; 2) knowledge or belief by the defendant of its falsity; 3) an intention that the other person rely on it; 4) reasonable reliance thereon by the other person; and 5) resulting damages.[12] The defendant must act "knowingly and with an intent to deceive the plaintiffs in the course of making representations." Of course, this is exactly the type of conduct that was admonished in *Reid, Mani* and *Clark*.

A "fiduciary is liable for harm resulting from a breach of the duties imposed by the existence of such a relationship."[13] "The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care." The essence of a fiduciary relationship is that one party places trust and confidence in another, who is in a dominant or superior position. A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship.

The discovery of purposeful economic and financial misconduct, however sizeable in value, should be scrutinized closely where alimony is demanded by the faulting party. While marital fault related to alimony has been given a short shrift over the last decade as only being a factor in 'rare' cases, reserved for only the most substantial and egregious misconduct, it may be more legally significant than once thought following *Clark*. Despite that economic misconduct may fall short of egregious conduct, it should still be utilized by the court to assess the amount of alimony, and is a powerful tool for the practitioner. Analyzing the conduct in the context of criminal and civil statutes and common law focusing on

fraud and fraudulent activity will also assist in helping both the practitioner and court know it when they see it. ■

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Endnotes

1. 183 N.J. 70, 92 (2005).
2. 429 N.J. Super. 61 (App. Div. 2012).
3. *Chrisomalis v. Chrisomalis*, 152 N.J. 226, 238 (1998).
4. 173 Ohio St. 22, 179 N.E.2d 777.
5. *Chalmers v. Chalmers*, 65 N.J. 186, 194 (1974).
6. *Reid v. Reid,* 310 N.J. Super. 12 (App. Div. 1998); *Mani v. Mani*, 183 N.J. 70 (2005); *Clark v. Clark*, 429 N.J. Super. 61 (App. Div. 2012).
7. 310 N.J. Super. 12 (App. Div. 1998).
8. This article seeks to focus economic fault as it relates to economic marital transgressions. It should be noted, however, that the Court in *Mani*, *supra*, also cautioned against alimony where to do so would violate societal norms. For reference, *D'Arc v. D'Arc*, 1164 N.J. Super. 226 (1978) denied an alimony claim based on a spouse's attempted murder of the other. This constituted egregious fault or something that violates societal norms such that an award of alimony would be unjust.
9. *Wasserman v. Schwartz,* 152 N.J. 226, 238 (1998).
10. *Kothari,* 255 N.J. Super. 500 507-509 (App. Div. 1992)(affirming the decision to compensate the wife for her interest in marital assets dissipated by her husband while he was "thinking about and planning for a divorce" where the expenditures were not made to benefit the marriage); *see also Siegel v. Siegel,* 241 N.J. Super. 12, 13 (Ch. Div. 1990) (finding that the defendant's gambling losses which occurred "pre-complaint, but when the marriage was irreparably fractured," were dissipation of funds).
11. *Kothari v. Kothari*, 255 N.J. Super. at 510.
12. *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 172-73 (2005) (*quoting Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 610 (1997)). The defendant must act "knowingly and with an intent to deceive the plaintiffs in the course of making representations." *Gennari, supra*, 148 N.J. at 611. Of course this is exactly the type of conduct that was admonished in *Reid v. Reid,* 310 N.J. Super. 12 (App. Div. 1998); *Mani v. Mani*, 183 N.J. 70 (2005); *Clark v. Clark*, 429 N.J. Super. 61 (App. Div. 2012).
13. *McKelvey v. Pierce*, 173 N.J. 26, 57 (2002) (*quoting F.G. v. MacDonell*, 150 N.J. 550, 563-64 (1997)) (*citing* Restatement (Second) of Torts) 874 (1979)).