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Incoming Chair's Column
The Year Ahead

by Brian Schwartz

It is with great pride that I assume the chairmanship of the Family Law Section. I have been involved with the section since 1998; initially, as the first co-chair (with Debra Weisberg) of the Young Lawyers' Subcommittee and then, since 2002, as a member of the Family Law Executive Committee. Over the years, I have served under a number of wonderful, talented chairs; I can only hope to be as successful as those who have come before me. With my fellow officers, I promise to continue working hard to serve family lawyers throughout New Jersey.

I say "continue" because our section has been quite active on the legislative front. As many of you may know, a number of pieces of legislation have been introduced that may substantially change our practice. Over the course of my year as chair, in this column, I will address legislation, case law, and other matters that affect our section's members—such as the proposed revisions to the child support guidelines, proposed legislation to overhaul our alimony statute, and so forth. It is my goal to use this column to inform our members (and, yes, if you will so indulge me, to occasionally pontificate) about potential/actual changes to our law and the efforts of our section to influence those proposing the changes.

In this issue, I will address one of the more prominent bills currently pending, which seeks to markedly change the standard for enforcement of a pre-marital agreement. In fact, by the time this article is published, notwithstanding more than one year of vigorous lobbying by my fellow officers and me, the pre-marital legislation (S-2151) may have become law. As of this writing, the bill had passed both the Assembly and the Senate, and has been forwarded to the governor.

Under the proposed bill, there will be two critical changes: First, the definition of unconscionability found in N.J.S.A. 37:2-32(c) has been deleted. Currently, the definition states:

> c. "Unconscionable premarital or pre-civil union agreement" means an agreement, either due to a lack of property or unemployability:

(1) Which would render a spouse or partner in a civil union couple without a means of reasonable support;
(2) Which would make a spouse or partner in a civil union couple a public charge; or
(3) Which would provide a standard of living far below that which was enjoyed before the marriage or civil union.

This definition would be replaced with the following, found in the newly proposed N.J.S.A. 37:2-38 c and d:

c. The agreement was unconscionable when it was executed because that party, before execution of the agreement:
   (1) Was not provided full and fair disclosure of the earnings, property and financial obligations of the other party;
   (2) Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided;
   (3) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party; or
   (4) Did not consult with independent legal counsel and did not voluntarily and expressly waive, in writing, the opportunity to consult with independent legal counsel.
d. The issue of unconscionability of a premarital or pre-civil union agreement shall be determined by the court as a matter of law. An agreement shall not be deemed unconscionable unless the circumstances set out in subsection c. of this section are applicable.

This new definition of unconscionability ignores what may have occurred since the execution of the agreement and, therefore, ignores the effect of the marriage on the parties.

Similarly, the second significant change is related to the time at which the issue of unconscionability is reviewed. Currently, the question is whether the agreement is unconscionable at the time of *enforcement;*[1] that is, a court can consider the parties' circumstances at the time of the divorce action in determining whether the agreement is unconscionable. Under the proposed bill, the question is whether the agreement was unconscionable at the time of *execution*; that is, the court can only consider the parties' circumstances as they existed prior to the marriage. In other words, under the proposed bill, the court will not be able to consider the impact of the marriage upon the parties; that is, how the marriage has impacted the parties financially from the date of execution to the date of enforcement. Again, issues include: one party leaving the workforce to care for children, or the impact of having children generally; the accumulation of assets in one person's name despite the efforts of both parties; and, the sacrifices made by one party for the benefit of the other. The proposed bill will render the impact of the marriage upon the parties and the decision-making during the marriage irrelevant.

Presently, many practitioners, in drafting and reviewing pre-marital agreements, include 'sunset' provisions; that is, often the agreement will provide consideration to the non-titled spouse based upon a number of factors, such as the length of the marriage, the birth of children, relocation by the non-moneyed spouse for the benefit of the moneyed spouse, and so on. These sunset provisions are generally inserted to overcome an argument by the non-moneyed spouse that the agreement is unconscionable at the time of enforcement. However, if the focus of the review is changed to the time of execution of the agreement, I question whether an attorney for the moneyed spouse would include such sunset provisions because, under the proposed bill, the moneyed spouses no longer has a legal incentive to be fair to his or her intended spouse. More importantly, considering the disparity of bargaining positions that often exists between parties to a pre-marital agreement—and the level of emotion that exists leading up to the marriage—the current proposed bill leaves the non-moneyed spouse particularly vulnerable.

Where New Jersey had always been a positive trendsetter in issues related to family law, this proposed bill is a step in the wrong direction. It negates decades of law and legal precedent for no apparent reason, and sets New Jersey apart from most of the country in that New Jersey will now be inconsistent with the Uniform Premarital Agreement Act.

Notwithstanding my opinion on this issue, as practitioners we must all review and understand the proposed law before drafting or reviewing pre-marital agreements, to avoid the pitfalls that will surely arise.

In closing, I am looking forward to a year of fighting the good fight for our section's members and for all of our clients. I would be remiss in not thanking my fellow officers—Patrick Judge, Jeralyn Lawrence, Amanda Trigg and Tim McGoughran (and our incoming officer, Stephanie Hagan)—not only for their hard work over the past year, but for the tremendous efforts we will be putting forth in the coming year. I know that they are all up to the task.

Endnote

1. N.J.S.A. 37:2-38b.

Inside this issue

The opinions of the various authors contained within this issue should not be viewed as those of the New Jersey Family Lawyer or the New Jersey State Bar Association.

Executive Editor's Column

Protecting Your Client From a *Pro Se* Litigant Who Seeks to Waive Counsel in Domestic Violence Matters: A Duty Incumbent Upon All Practitioners

by Ronald G. Lieberman

A scenario involving a represented party adverse to a self-represented (*pro se*) party probably most often occurs in domestic violence proceedings. A vulnerability particular to this dynamic appears when a *pro se* litigant fails to prevail. He or she may raise on appeal that he or she did not make an informed waiver of counsel. Practitioners should protect the integrity of the proceedings by establishing the self-represented party's informed and voluntary decision to proceed unaided by counsel.[1]

There is ample precedent that can be tapped into to develop a script of sorts on which to rely in the event a practitioner has a client adverse to a *pro se* litigant in a domestic violence proceeding. Similarly, trial-level domestic violence judges also *voir dire pro se* litigants regarding the implications of proceeding without counsel.[2] What this column suggests is that we as practitioners create our own series of questions to pose to *pro se* litigants, as a supplement to any questions presented by the trial judge. The goal is to establish a clear and unequivocal record that the waiver of counsel was informed and voluntary. As uncertainty often breeds litigation, this attempt at clarity could potentially safeguard a practitioner's client from due process challenges on appeal.[3]

In trying to develop these foundational questions, the following background is illustrative. Presently, the closest a domestic violence matter has to 'guidelines' for questioning a litigant who seeks to proceed *pro se* is a terse reference in *Franklin v. Sloskey*,[4] admonishing the trial court for not explaining to the litigant both the serious consequences of the final restraining order (FRO) and the right to request an adjournment to obtain counsel.

Even then, the Appellate Division did not go so far as to characterize the statements as guidelines for questioning a *pro se* litigant. The trial judge did not inform both *pro se* litigants of the serious consequences that came with the entry of a final restraining order; the trial judge did not indicate that either party could obtain a postponement to retain an attorney; and the trial judge did not suggest that either party consult with an attorney. On appeal, the final restraining order entered against the plaintiff was vacated and all restraints were dissolved.

It has long been accepted that domestic violence is "a serious crime against society."[5] It then logically flows that a *pro se* litigant appearing to address this "serious crime against society," should be supplied with information about the ramifications of the entry of a FRO.

Even in the absence of formalized guidelines in domestic violence matters or any meaningful reference by case authority, a practitioner need not look any further for reference than how criminal proceedings unfold with a *pro se* defendant who seeks to waive counsel.

In criminal matters, a waiver of counsel must be made "knowingly and intelligently."[6] A trial court fulfills its duty to inquire of a defendant's decision to waive counsel by informing a defendant of the charges to be tried, the statutory defenses to the charges, and the potential sentencing exposure.[7] The trial court should also inform a defendant of the risks he or she faces of proceeding *pro se*, and the problems he or she may encounter at trial in proceeding self-represented.[8] The trial court should explain to a defendant that he or she will be held to the same rules of procedure and evidence as a member of the bar.[9] The court should stress the difficulties the defendant would face in not having an attorney, and "specifically advise the defendants that it would be unwise not to accept the assistance of counsel."[10]

During the inquiry of the defendant's responses to those questions, the trial court should "'indulge [in] every reasonable presumption against waiver.'"[11] Without

a probing examination by the trial court of a defendant who appeared *pro se*, a judge cannot be certain the defendant "fully appreciated the risks of proceeding without counsel, and…decided to proceed *pro se* with [his or her] eyes open."[12] The Appellate Division has held that a defendant's right of self-representation is not absolute, and the state has an equal interest in ensuring the integrity of judicial proceedings and trial verdicts.[13]

In place of the current piecemeal approach to gauge the waiver of counsel by *pro se* litigants in domestic violence matters, there should be certain questions posed by counsel to such litigants. To that end, it is proposed that, before a domestic violence proceeding commences, counsel *voir dire* the *pro se* litigant on the following ramifications of entrance of a FRO and appearing unrepresented, each of which come right out the Prevention of Domestic Violence Act.[14]

1. In the case of a *pro se* defendant, a *voir dire* explaining the serious consequences that come with the entry of a final restraining order including but not limited to: (a) fingerprinting; (b) registration in a central registry by the Administrative Office of the Courts of all persons who have domestic violence restraining order entered against them; (c) violation of a final restraining order constitutes contempt and a second contempt offense requires a minimum of 30 days imprisonment; (d) loss of the right to carry firearms or to have the right to receive a license for the possession of a firearms; (e) surrender of any firearms to law enforcement; (f) assessment of a victims of crime compensation board penalty; (g) anger management classes or risk assessment before any parenting time occurs; (h) loss of the right to possess a residence or household in favor of the victim; (i) fundamental alteration of the familial relationship with custody in favor of the victim, no contact with the victim, and the possibility for supervised parenting time if any; (k) the issuing court can require emergency financial support by the defendant to the victim and any children including payment of rent if the victim cannot possess the residence or household; (l) payment by the defendant to the victim for compensatory losses including lost wages and reasonable attorney's fees; (m) temporary possession by the victim of specified personal property; (n) a defendant's supervised removal of any personal property from the residence or household; and (o) psychiatric evaluation.
2. In the case of a *pro se* plaintiff, a *voir dire* explaining that all temporary protections in place will be dissolved if the court believes that the litigant failed to establish by a preponderance of the evidence that both an act of domestic violence occurred and that the litigant is in fear either for his/her safety or of a future act of domestic violence.
3. For either a *pro se* plaintiff or defendant, an explanation that, a. The right to have the trial postponed to consult with counsel if he or she has not yet done so. b. The right to have the trial postponed to obtain an attorney to represent him or her at the final hearing. c. The right to have the trial postponed to subpoena witnesses or otherwise prepare for the final hearing. d. The risks of proceeding *pro se* including being held to the same rules of procedure and evidence as a member of the bar. (Stress the difficulties in not having an attorney including seeking to enter documents into evidence, objecting to proposed testimonial and/or documentary evidence, preparing a defense or case-in-chief, preparing a rebuttal to a defense, and cross-examining witnesses appropriately.)

Until standardized guidelines are created that ensure a *pro se* litigant makes an intelligent and knowing waiver of counsel, a cautious family law attorney can work in partnership with the bench to ensure due process rights are protected, thereby mitigating the potential of this issue being raised on appeal.

Endnotes

1. This is the recent case of *DN v. KM*, 2013 NJS LEXIS 6 (App. Div. 2013). This decision examines the trial court's obligation to protect the due process rights of self-represented individuals through a *voir dire* on the implications of proceeding *pro se*. In that decision, the Appellate Division rejected the imposition of a strict adherence to standardized questions addressing those implications. This column is not the forum to reargue that issue. Rather, this column proposes what we as practitioners can do to try to safeguard our clients from due process challenges on appeal.
2. In part, N.J.S.A. 2C: 25-29 is pivotal to that *voir dire* as it identifies the consequences defendants in domestic violence proceedings face if a FRO is entered.
3. As a matter of suggested procedure, these questions could be posed at the beginning of the case, after the trial judge has completed his or her directions and questioning. An attorney can simply advise the court that he or she has a few initial questions for the *pro se* party, without waiving rights to additional direct or cross-examination as the situation warrants.
4. *Franklin*, 385 N.J. Super. 534, 540-41 (App. Div. 2006).
5. *Bresocnik v. Gallegos,* 367 N.J. Super. 178, 181 (App. Div. 2004 (*quoting* N.J.S.A. 2C: 25-18).
6. *State v. Crisafi*, 128 N.J. 499, 509 (1992).
7. *Id.* at 511.
8. *Id.* at 511-512.
9. *Id.* at 512.
10. *Id.*
11. *State v. Gallagher*, 274 N.J. Super. 285, 295 (App. Div. 1994).
12. *Crisafi*, 128 N.J. at 513.
13. *State v. McNeil*, 405 N.J. Super. 39, 51 (App. Div. 2009).
14. N.J.S.A. 2C: 25-29.

Meet the Officers

Brian M. Schwartz (Chair) is the managing partner at Brian Schwartz, Attorney at Law, LLC, in Summit. Schwartz has been a member of the Family Law Executive Committee of the New Jersey State Bar Association (NJSBA) since 2002. He is also the former executive editor of the *New Jersey Family Lawyer*. He had been selected six times by the Institute for Continuing Legal Education (ICLE) to lead the Skills and Methods Course in family law for first-year attorneys. He was a speaker at the Family Law Symposium in 2007, 2008 and 2009. Schwartz has authored various articles for ICLE, the *New Jersey Family Lawyer*, ATLA and *Sidebar*. He is a frequent lecturer for ICLE, ATLA (now known as NJAJ), the NJSBA, the New Jersey Society of Certified Public Accountants, and local bar associations. He also serves as a barrister and group leader for the Barry I. Croland Inn of Court.

In 2011, Schwartz was named to the Best Lawyers in America and the law firm has been named a Best Law Firm–Tier One. Schwartz has been a Super Lawyer from 2007 to 2013, and was named a Rising Star by Super Lawyers in 2006. In 2006, he was also named one of the Top Ten Leaders Under 45 in Matrimonial Law in Northern New Jersey, and in 2005, he was named one of the Top Ten Matrimonial Attorneys Under 40.

In 2011, he was a faculty member in the inaugural AICPA Expert Witness Skills Workshop in Washington, D.C. He was also a faculty member in 2012 in Chicago, and will again participate in 2013 in Seattle. Schwartz received his B.A. from the George Washington University and his J.D. for the University of Pittsburgh School of Law.

Jeralyn L. Lawrence (Chair Elect) is a partner in the firm of Norris, McLaughlin & Marcus, P.A. She devotes her practice to matrimonial, divorce, and family law, and is a trained collaborative lawyer and divorce mediator. Lawrence is a fellow of the American Academy of Matrimonial Lawyers and has been certified by the Supreme Court of New Jersey as a matrimonial law attorney. She serves on the Matrimonial Certification Committee that oversees the statewide matrimonial attorney certification process. She is a senior editor of the *New Jersey Family Lawyer* and second vice president of the Somerset County Bar Association. She has been selected as a New Jersey Super Lawyer in family law for several years and named in the top 100 lawyers and top 50 women categories. She was also recognized by the *New Jersey Law Journal* as one of the 40 accomplished and promising attorneys in the state of New Jersey under the age of 40. She is an attorney volunteer at the Somerset County Resource Center for Women and Their Families; and with the NJSBA's Military Legal Assistance Program, where she provides *pro bono* legal assistance to New Jersey residents who have served overseas or on active duty in the armed forces after Sept. 11, 2001. Lawrence was recently honored by NJBiz as one of New Jersey's best 50 Women in Business. She received the Kean University Distinguished Alumnae Award, was honored as an outstanding woman by the Somerset County Commission on the Status of Women, and has received the NJSBA's Young Lawyer Division's Professional Achievement Award and the Annual Legislative Recognition Award. She is a graduate of the National Institute of Trial Advocacy and a member of the Central New Jersey Inns of Court, and serves on the District XIII Attorney Ethics Committee.

Lawrence earned her bachelor's degree from Kean College and her law degree from Seton Hall University, where she graduated second in her class. She served as a judicial law clerk to the Honorable Herbert S. Glickman, J.S.C.

Amanda S. Trigg (First Vice Chair) is a partner with the law firm of Lesnevich & Marzano-Lesnevich, LLC, in Hackensack, where she practices family law exclusively. Trigg is certified by the Supreme Court of New Jersey as a matrimonial law attorney and is a fellow of the American Academy of Matrimonial Lawyers. Prior to becoming an officer of the Family Law Section Executive Committee, she chaired the Legislation Sub-Committee for three years and received the New Jersey State Bar Association's annual advocacy award. She is an associate managing editor of the *New Jersey Family Lawyer.* Trigg served on the Supreme Court of New Jersey's Statewide Bench-Bar Liaison Committee on Family Division Standardization. She frequently moderates and lectures for ICLE and the NJSBA, and contributes toward continuing legal education presentation for the American Academy of Matrimonial Lawyers. In 2013, *New Jersey Monthly Magazine* honored Trigg as one of the Top 50 Women Lawyers in New Jersey.

Trigg earned her B.A. from Brandeis University and her J.D. from Emory University School of Law.

Timothy F. Mcgoughran (Second Vice Chair) is the founding partner of the Law Office of Timothy F. McGoughran, LLC. He is a member of the Family Law Committees of the New Jersey and Monmouth County Bar Associations. He is a past co-chair of the Monmouth Bar Association Family Law Committee (2009-2011) and president of the Monmouth Bar Association (2007-2008). He is a past chair of the Legislative Subcommittee of the New Jersey State Bar Association Family Law Executive Committee. In addition to continuing to serve as a member of the New Jersey State Bar Association Family Law Executive Committee, he is also a member of the NJSBA Military and Veteran's Affairs Section Executive Committee and Legal Education Committee. He will serve as the trustee for Monmouth County on the New Jersey State Bar Association's Board of Trustees for the term of 2013-2015. He received the NJSBA's Distinguished Legislative Service Award in 2010, as well as the Family Lawyer of the Year Award in 2012 from the Monmouth Bar Association Family Law Committee.

McGoughran is a regular speaker and presenter at numerous symposiums regarding various facets of law and ethics. He graduated from the University of Pittsburgh with a B.A. in political science in 1982. He graduated from the Seton Hall University School of Law with a J.D. in 1986.

Stephanie Frangos Hagan (Secretary) is a named founding partner in the law firm of Donahue, Hagan, Klein & Weisberg, LLC, located in Morristown, and has limited her practice exclusively to family law for more than 25 years. She is a graduate of Seton Hall University Law School and received an undergraduate degree from Rutgers University. She is a frequent lecturer and panelist, speaking regularly for ICLE and county bar associations on a variety of family law topics, including alimony, child support, custody, paternity, domestic partnership, and other important family law issues. She serves as a panelist for the Essex, Union, and Morris County Family Law Early Matrimonial Settlement Programs and is a Court-approved family law mediator and Academy of Matrimonial Law arbitrator, frequently being appointed as a mediator by the courts throughout the state. She has been a member of the Executive Committee of the Family Law Section of the NJSBA for more than 15 years and co-chair of the Legislative Committee for the past three years, was a former chair of the District Fee Arbitration Committee for Morris County, and is the co-chair of the Morris County Family Law Section, as well as a trustee of the Morris County Bar Association. Hagan also is a member of the Meetings and Arrangement Planning Committee and Long Range Planning Committee for the NJSBA.

Patrick Judge Jr. (Immediate Past Chair) is a shareholder in the firm of Louis and Judge. Judge is a senior editor of the *New Jersey Family Lawyer.* He is a former member of the New Jersey Supreme Court Committee on the Unauthorized Practice of Law and the District IV Ethics Committee for Camden and Gloucester counties. Judge serves as an early settlement panelist in Burlington, Camden, and Gloucester counties and lectures on family law issues. He also serves regularly as a blue ribbon panelist and is the author of several articles that have been published in the *New Jersey Family Lawyer.*

Judge earned his B.A. from Allentown College of St. Francis de Sales, where he graduated *cum laude*, and his J.D. from Widener University School of Law, where he graduated *cum laude.* He served as judicial law clerk for the Honorable Donald P. Gaydos, in Burlington County, Family Part.

Does Lack of a Relationship With Your Child Relieve You of the Obligation to Contribute to College Expenses?

by Jane R. Altman and Brian G. Paul

The issue of requiring a parent to contribute to the college expense of an estranged child is a hot button issue for family lawyers and litigants, which arises with increased frequency in post-divorce situations. A common scenario is as follows:

The parents have a hostile divorce, inevitably negatively impacting the child with their hostility toward one another. A barrier develops between the child and the noncustodial parent. The parties ultimately settle their case, providing for joint legal custody. The child resides primarily with his mother. Dad exercises parenting time with increasing infrequency. By the time the child is ready to commence the college application process, he reluctantly sees Dad only three or four times a year, ignoring Dad's phone calls and texts. Eventually, Dad drops out of the picture, leaving the child and Mom to remove Dad from the college selection process.

Dad comes to you, frustrated and angry. He asks whether, under these facts, he is required to contribute to the child's college costs. You look at the marital settlement agreement, which contains some variation of the following provision:

> Each party shall contribute to the child's college tuition, room and board, and related college expenses not covered by custodial accounts established on behalf of the child based on the parties' respective incomes at the time, and ability to pay. The parties and the child shall consult with regard to the choice of college.

In *Newburgh v. Arrigo*,[1] the New Jersey Supreme Court addressed the college contribution issue, and determined the following factors must be considered when establishing a parent's obligation to contribute toward the cost of their children's college education:

1. Whether the parent, if still living with the child, would have contributed toward the costs of the requested higher education;
2. The effect of the background, values and goals of the parent on the reasonableness of the expectation of the child for the higher education;
3. The amount of the contribution sought by the child for the cost of higher education;
4. The ability of the parent to pay that cost;
5. The relationship of the requested contribution to the kind of school or course of study sought by the child;
6. The financial resources of both parents;
7. The commitment to and aptitude of the child for the requested education;
8. The financial resources of the child, including assets owned individually or held in custodianship or trust;
9. The ability of the child to earn income during the school year or on vacation;
10. The availability of financial aid in the form of college grants and loans;
11. The child's relationship to the paying parent, including mutual affection and shared goals, as well as responsiveness to parental advice and guidance; and
12. The relationship of the education requested to any prior training and to the overall long-range goals of the child.

Applying the client's fact pattern, *Newburgh* factor 11 may present a basis for the client's argument that he should be relieved of his obligation to contribute to college. Nevertheless, while it seems noncustodial parents are more and more frequently attempting to utilize factor 11 and the lack of a relationship with their child as a sword in an effort to avoid their contractual obligation to contribute to a child's college-related expenses, a review of the case law demonstrates that such relief has only been granted in the most egregious of circumstances, and generally requires evidence that the custodial parent and

child completely obstructed the noncustodial parent from meaningfully participating in the college process. Additionally, a review of New Jersey case law further reveals that a parent's lack of a relationship with his or her child alone has not yet been considered a valid ground to relieve the parent of the contractual obligation to contribute to a child's college-related expenses. In fact, the New Jersey Supreme Court has specifically stated that, "[A] relationship between a non-custodial parent and a child is not required for the custodial parent or the child to ask the non-custodial parent for financial assistance to defray college expenses."[2]

There are only two New Jersey Appellate Division cases, one reported and one unpublished, where a court has absolved a parent of an obligation to contribute to college-related expense on the basis of estrangement. The reported decision is *Moss v. Nedas*.[3] In *Moss*, while the court ultimately ruled the father should be absolved of his obligation to contribute toward his daughter's college expenses, the court's decision was based on much more than a mere "lack of relationship" or "estrangement" between father and child. Rather, the underpinning of the court's ruling was that it was no longer equitable for the father to be obligated to contribute to college-related expenses, inasmuch as the mother and daughter had willfully and flagrantly refused to include the father in the college selection process in violation of multiple court orders. Thus, the court's decision relieving the father of his obligation to contribute to college expenses in *Moss* could be viewed as a sanction to punish the mother and daughter, given their egregious and repeated failure to comply with court orders.

Similarly, the unpublished opinion of *Agos v. Camuso*[4] also involved extraordinary egregious conduct on the part of the custodial parent and child, which would have rendered a college contribution by the father inequitable. In *Agos*, after a mother and child had continuously rebuffed a father's one-sided efforts to build a relationship with his son and deprived him of his right to be involved in the college selection process, the trial court relieved a noncustodial parent of his obligation to contribute to college-related expenses, and ordered that his obligation to contribute to future college-related expenses was contingent upon the mother and child keeping the father informed of college-related matters in advance of the event so the father had an opportunity to participate in a meaningful manner. The mother appealed, and the Appellate Division affirmed.

The Appellate Division opined:

> Here, the judge properly considered *Newburgh*'s factors in determining that enforcement of the marital settlement agreement as it applied to the payment of college expenses would not be fair and just in the circumstances presented. In doing so, the judge recognized that the abuse of the continued estrangement between defendant and his son was a factor to be considered in assessing defendant's obligation to pay a portion of the son's tuition. *Gac, supra*, 186 N.J. at 544. Further, he recognized that the non-existence of a familial relationship between defendant and his son did not necessarily eliminate defendant's obligation. *Id.* at 546. Instead, the judge's primary focus was on the question of whether communication among plaintiff, the son and defendant existed that would have satisfied defendant's often-expressed desire to know of and participate in the son's educational decisions. We find the judge's determination that the lack of any communication rendered the requirement that defendant contribute to the son's educational costs inequitable to have been consistent with the Supreme Court's decision in *Gac id.* at 546-*47 and our decision in *Moss, supra*, 289 N.J. Super. at 359. Accordingly, we affirm the judge's order.[5]

Accordingly, just as in *Moss*, the decision in *Agos* to absolve the noncustodial parent of the obligation to contribute to college-related expenses was based upon the lack of communication and failure to permit the noncustodial parent to participate in the college process in a meaningful manner, rather than a lack of parent-child relationship.

The other college contribution cases in New Jersey in which the courts considered a parent's claim that he or she should be relieved of their obligation to contribute to college expenses on the basis of estrangement all rejected that argument. For instance, in *Gac* the Appellate Division rejected the father's claim that the estrangement between him and his daughter should absolve him of his obligation to contribute to her college-related expenses. The Appellate Division, noting the father's own misconduct contributed to the estrangement, reasoned:

> We do not read *Moss* as holding that a child's rejection of a parent's attempt to establish a mutually affectionate relationship invariably eradicates the parent's obligation to contribute to the child's college education. In this case for example, a judge could reasonably find from the evidence that defendant's abusive conduct during the marriage so traumatized the children as to render nugatory any real possibility of a rapprochement. In that event, it would not be reasonable to penalize Alyssa for the defendant's misconduct. Nor would it be reasonable to reward defendant by removing his financial obligation to contribute to his daughter's college costs. There are indeed circumstances where a child's conduct may make the enforcement of the right to contribution inequitable, but here it is claimed that it was the defendant himself who was the architect of his own misfortune.[6]

The New Jersey Supreme Court affirmed, agreeing with the Appellate Division that the estrangement between father and daughter was not adequate grounds to relieve the father of his obligation to contribute to college-related expenses.[7] Significantly, the New Jersey Supreme Court noted that, "[A] relationship between a non-custodial parent and a child is not required for the custodial parent or the child to ask the non-custodial parent for financial assistance to defray college expenses."[8] Ultimately, the New Jersey Supreme Court relieved the father of his obligation to contribute to college-related expenses, albeit not on the basis of the estrangement, but rather because the mother had waited years after the fact to seek a college contribution.[9]

The unpublished decision of *Winans v. Winans*[10] also provides guidance. In *Winans*, the father appealed from a trial court's ruling requiring him to contribute to his estranged son's college education. The crux of the father's argument on appeal was essentially that his relationship with his son was so acrimonious and hostile that he should not be compelled to pay for his college. The Appellate Division conceded there was a wide gulf between father and son, and that they could not live together or communicate in a way consistent with a healthy father/son relationship, but nevertheless further added as follows:

> …but factor eleven (11) requiring the Court to consider "the child's relationship to the paying parent, including mutual affection and shared goals as responsiveness to parental advice and guidance" is not solely determinative. While it is a factor, there must be a fair balancing of all *Newburgh* factors to determine whether a parent should contribute and, if so, the extent of that obligation.

The *Winans* court went on to reiterate the New Jersey Supreme Court's prior holding in *Gac*, that a relationship between a noncustodial parent and a child is not a prerequisite to the parent being responsible to assist in the cost of the child's college-related expenses.[11]

Another unpublished Appellate Division decision in 2007, *Jones v. Jones*,[12] also rejected an estrangement claim as the basis for avoiding the obligation to contribute to college. At the time of the divorce, the parties agreed the father would pay 55 percent of the child's college-related expenses. In an effort to avoid having to meet his contractual obligation to contribute 55 percent of college-related expenses, the father in *Jones* raised the failure of his ex-wife and child to consult with him about the choice of college, despite an affirmative obligation that they do so under the terms of a property settlement agreement. The Appellate Division affirmed the father's obligation to share in 55 percent of the child's college-related expense, rejecting the father's contention that he was relieved of his obligation to contribute to his child's college expenses because he had no input into the choice of college. The *Jones* court agreed with the findings of the trial court that:

> the [PSA] did not provide…relief should… consultation and communication not take place." In other words, nothing in the PSA made plaintiff's 55% contribution to college expense contingent on securing his approval of or consent to the child's choice of college. Rather, the only condition was that the children apply for financial aid.[13]

The *Jones* court also rejected the father's ancillary argument that he was relieved of his obligation to contribute to college on the basis of a lack of relationship with his child. In so doing, the Appellate Division emphasized:

> The lack of a relationship between a child and the paying parent does 'not necessarily eradicate the parental obligation to make appropriate contribution for college education.' *Gac v. Gac*, 351 N.J. Super. 54, 64 (App. Div. 2002), *rev's on other grounds*, 186 N.J. 535 (2006). 'A relationship between a non[-]custodial parent and a child is not required for the custodial parent or the child to ask the non-custodial parent for financial assistance to defray college expenses.' *Gac v. Gac*, 196 N.J. 535, 545 (2006). Indeed, the child's relationship to the paying parent is only one of twelve factors in evaluating a claim for contribution to the costs of higher education. *Newburgh v. Arrigo, supra*, 88 N.J. at 545. We are satisfied, as was evidently the trial judge, that nothing in *Newburgh* absolves plaintiff of the responsibility he knowingly and voluntarily assumed for his proportionate share of the children's college expenses.

Based upon the above cases, it is reasonable to conclude that if there is a contractual obligation to contribute to college, it is very likely the litigant will be required to contribute unless the estrangement prevented the parent from meaningfully participating in the college process. The litigant's own misconduct as a contributing factor to the estrangement will be considered but is *not* necessarily dispositive. Relieving a parent of the contractual obligation directly contradicts New Jersey's public policy and strong interest in promoting settlement and enforcing family law agreements.[14]

It is very unusual to include a provision in a property settlement agreement or marital settlement agreement that spells out sanctions if there is no consultation with the noncustodial parent when a college is chosen. It is equally unusual to require the actual consent of the noncustodial parent, rather than mere consultation. Most litigants would refuse to include specific sanctions or consent if asked to do so. So how do attorneys protect their clients in these situations?

Attorneys representing custodial parents should impress upon them the importance of keeping an email or paper trial of advising the other parent of colleges being considered and asking for input. Attorneys representing noncustodial parents should emphasize the importance of keeping a paper trail of attempts to be involved in the process that are rebuffed. If it is clear prior to the execution of a property settlement agreement that there is parental alienation or an estrangement issue that already exists, practitioners should insist on including a provision that, absent consultation, there will be no obligation for the client to contribute to college, or there will be a rebuttable presumption against contribution. ■

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Endnotes

1. *Newburgh v. Arrigo*, 88 N.J. 529 (1982).
2. *Gac v. Gac*, 186 N.J. 535 (2006).
3. *Moss v. Nedas*, 289 N.J. Super. 352 (App. Div. 1996).
4. *Agos v. Camuso*, 2012 WL 3078929 (App. Div. 2012).
5. *Id.*
6. *Gac, 351* N.J. Super. at 54.
7. *Gac v. Gac*, 186 N.J. 535 (2006).
8. *Id.*
9. *Gac,* 186 N.J. at 547.
10. *Winans v. Winans*, 2007 WL 4270351(App. Div. 2007).
11. *Id.*
12. *Jones v. Jones*, 2007 WL 506048 (App. Div. 2007).
13. *Id.*
14. *See, Davidson v. Davidson*, 194 N.J. Super. 547 Ch. Div. 1984) (settlements should be encouraged especially in family law actions); *Massar v. Massar*, 279 N.J. Super. 89, 93 (App. Div. 1995) ("This State has a strong public policy favoring enforcement of agreements."); and *Peskin v. Peskin*, 271 N.J. Super. 261, 274 (App. Div. 1994) ("It is fundamental that the settlement of litigation ranks high in the public policy of this state.").

The Current Status of Palimony in New Jersey Post Amendment to Statute of Frauds and *Botis*

by Megan Murray, Bea Kandell and Christopher McGann

For over 30 years, New Jersey courts recognized the right of an unmarried cohabitant to enforce a promise by the other cohabitant to provide support and other consideration. Specifically, in 1979, in the case of *Kozlowski v. Kozlowski,*[1] the Supreme Court established an enforceable right to palimony between unmarried cohabitants. In *Kozlowski*, the Supreme Court held that "an agreement between adult parties living together is enforceable to the extent it is not based on a relationship proscribed by law, or on a promise to marry."[2] The Court further held that such an agreement is enforceable as a valid contract, regardless of whether the agreement was express or implied by the conduct of the parties, noting the "[p]arties entering this type of relationship usually do not record their understanding in specific legalese."[3]

Palimony law as established by the courts of this state was forever changed on Jan. 18, 2010, when the New Jersey Legislature passed N.J.S.A. 25:1-5(h) as an amendment to the statute of frauds. The statute of frauds requires that certain contracts be memorialized in writing to be enforceable. With the passage of N.J.S.A. 25:1-5(h), the statute of frauds was expanded to include contracts for palimony, which are defined by the statute as follows: "A promise by one party to a non-marital personal relationship to provide support or other consideration for the other party, either during the course of such relationship or after its termination. For the purposes of this subsection, no such written promise is binding unless it was made with the independent advice of counsel for both parties."

The new statute, in simple terms, means that valid claims for palimony must be supported by a writing. After the passage of the new law, practitioners first had to address how it would affect the cases already pending in the courts. In other words, would the statute apply retroactively to palimony complaints filed prior to the passage of the statute or only prospectively to cases filed after the passages of the statute.

In *Botis v. Estate of Kudrick*, the appellate court held that N.J.S.A. 25:1-5(h) (the statute) applies prospectively only, and that it would not affect those palimony complaints filed prior to the passage of the statute.[4] In *Botis*, the plaintiff filed a palimony complaint approximately one year before the statute was amended in Jan. 2010, and shortly after the decedent passed away. The plaintiff alleged that over the course of their relationship the decedent promised her he would "always take care of her and that in the event of his death, she would be cared for consistent with the lifestyle that they shared together."[5] The decedent's estate moved to dismiss the complaint based upon the enactment of the statute.

The trial judge determined the statute applied prospectively, and denied the estate's request to dismiss the plaintiff's palimony complaint. The estate appealed, claiming the trial judge erred by, among other things: 1) failing to consider the legislative and curative intent of the statute, and 2) finding that retroactive application would be unconstitutional and would result in a manifest injustice to the plaintiff.

The appellate court first gleaned the Legislature's intent in drafting the statute by looking at the plain wording of the statute. The court noted the statute provides that it "shall take effect immediately," but that it provides "no clear indication" of whether the Legislature intended the statute "to apply to claims that were pending on the date of its enactment."[6] The court held that in the absence of language in the statute requiring retroactive activity, the preference is for prospective application. The court held that "our courts 'have long followed a general rule of statutory construction that favors prospective application of statutes.'"[7]

The court held that a statute would be afforded retroactive effect only: 1) where the Legislature declared such an intent, 2) when an amendment is curative, or 3) "when the expectations of the parties so warrant."[8] As there was no clear legislative intention favoring retroactive application of the statute, the court addressed the expectations

of the parties. The court held that the critical inquiry is "whether the parties could have expected and, therefore, complied with the conditions [of the statute]."[9] The court held that the parties' reasonable expectations in *Botis* could not have warranted retroactive application. The court reasoned that with respect to palimony agreements, the parties' "relevant expectations are generally those they had at the time of the agreement."[10] Under the circumstances, where the decedent died almost one-and-a-half years before the effective date of the statute and the plaintiff filed her complaint approximately one year before the statute was amended, they could not have expected they would need to memorialize the decedent's promise to support the plaintiff. Moreover, the decedent could not comply with the statute, as he passed away prior to its passage. Under the circumstances, the court held that the pre-statute case law, supporting enforcement of an oral agreement, should be applied.

Finally, with respect to curative effect, the court noted that "[a]ffording a statutory amendment retroactive effect based upon its curative intent is appropriate where the 'cure' is addressed to prior legislation, not to the decisions of our courts."[11] The court reasoned that in this case, the legislative intent was to "overturn...[the] palimony decisions [in *Devaney*, *Roccamonte* and *Kozlowski*] by requiring that any such contract must be in writing and signed by the person making the promise."[12] In other words, the statute was enacted not to cure prior legislation, but rather to cure decisions of the court.

Based on its analysis, the court determined that retroactive application of the statute was inappropriate. However, the court did not address cases where the complaint for palimony was filed after the statute took effect but where the promise for support took place prior to passage of the statute. Shortly after *Botis* was decided, in *Pierson v. Estate of Daul*, the Appellate Division reversed a trial court decision, which retroactively applied the statute to the plaintiff's complaint where it was filed on Jan. 13, 2010, (five days prior to the effective date of the statute).[13] There, the plaintiff claimed the decedent (who died in July 2008) orally promised in March 2007 to support her for life.

On May 17, 2010, the trial court retroactively applied the statute and dismissed the plaintiff's complaint for palimony. In so doing, that court did not have the benefit of the ruling by the court in *Botis*. In reversing the trial court's decision, the appellate court relied on *Botis* and agreed that the language of the statute did not "purport to address pending actions."

In *Harrison v. Estate of Massaro,*[14] the decedent died on Feb. 15, 2007, and the plaintiff filed her claim for palimony thereafter. The plaintiff based her claim on the fact that the decedent orally informed her he would provide for her for life. She also relied upon the assertion that the decedent had executed a will her in favor, which she found in the decedent's jacket after his death. On March 3, 2010, the trial court ordered the estate of the decedent to pay palimony to the plaintiff based on the decedent's oral promise to the plaintiff to support her for life. In so ruling, the trial court acknowledged the legislation (which ultimately led to enactment of the statute) had just been passed by one house of the New Jersey Legislature but not the other. The estate appealed, arguing that the trial court should have applied the statute retroactively to bar the plaintiff's palimony claim.

The Appellate Division affirmed the trial court's decision not to retroactively apply the statute to the plaintiff's claim, relying exclusively on *Botis* and reinforcing the points made therein that the decedent died prior to the effective date of the statute and the plaintiff filed her complaint prior to the enactment of the statute, thereby making it impossible for the decedent to comply with the statute's requirements and making retroactive applicability contrary to the parties' mutual expectations.

In the first reported Chancery Division decision addressing a claim for palimony made after enactment of the statute, the trial court dismissed the plaintiff's palimony claim, which alleged a breach made approximately 18 months after the statute's effective date.[15] In *Cavalli*, over the course of the parties' relationship the defendant promised to continue to support the plaintiff financially. The plaintiff filed her complaint on July 1, 2011. In dismissing the plaintiff's complaint, the trial court found the claim was barred by the plain language of the statute, which provides that "no action shall be brought...." The court further found the legislative intent, set forth in the Senate Judiciary Committee statement to S-2091 (Feb. 9, 2009), was expressly meant to overturn case law that held enforceable oral promises of lifetime support. As the alleged breach of the defendant's promise to support the plaintiff took place approximately 18 months after the statute's effective date, the court noted there was "ample opportunity [for the parties] to cure and comply with the statute."

Most recently, on Feb. 4, 2013, in the case of *Maeker v. Ross*,[16] the Appellate Division embraced the reasoning of the *Cavelli* court in holding that palimony claims

are invalid if: 1) the complaint for relief was filed after the passage of the statute, and 2) no writing exists that memorializes the agreement of one party to pay support on behalf of the other. The court further held the plaintiff had no valid claim for relief based on equitable remedies, including *quasi*-contract, *quantum meruit*, joint venture and partial performance.

The *Maeker* court held the language of the statute is "clear and unambiguous in directing that enforcement of palimony agreements may only occur in those instances where the agreement has been reduced to a writing and the parties have each had the benefit of counsel."[17] As the plaintiff's claim for palimony was not supported by a writing, the court held it could not be sustained under the clear terms of the statute, notwithstanding the plaintiff's claim the defendant had made oral promises to support her for life.[18]

The court rejected the plaintiff's argument (espoused by the trial court) that her complaint was not barred by the statute because her claim for palimony arose prior to the passage of the statute at the time the defendant promised to support her for life. The Appellate Division held the plaintiff's palimony claim did not arise at the time the defendant originally promised to support the plaintiff for life. Rather, as palimony is based on contract law, the court held the plaintiff's palimony claim arose at the time of the defendant's breach of the contract.[19] As the defendant abandoned the plaintiff and breached his promise of support after the passage of the statute, the court held her claim for palimony could not be sustained. It also noted the parties had ample time to enter into a written agreement between the passage of the statute and the defendant's breach of the alleged promise, but they chose not to do so.

The court specifically rejected the plaintiff's argument that she was entitled to relief based on partial performance, which would take her case outside of the statute of frauds and eliminate the requirement of a formal writing memorializing the promise for support. The court found such an argument to be questionable in light of the fact that the Legislature's reasoning in its passage of the statute was to overturn palimony decisional law. In support of its decision, the Appellate Division explained the standard to obtain relief under such circumstances required the performance of the party from whom the relief is sought must be of such peculiar nature that it could not be measured by "ordinary pecuniary standards."[20] The facts of *Maeker*, it noted, had no such unusual circumstances.

Significantly, the court also rejected each of the plaintiff's alternatively pled claims for relief based on equitable remedies: unjust enrichment, *quantum meruit*, *quasi*-contract and equitable estoppel. It was acknowledged that while such relief is "widely recognized in other contexts, New Jersey courts have refrained from awarding future support based on equitable theories."[21] The court suggested claims for relief based on joint venture and unjust enrichment could be sustained when a party residing with another party in a marriage-like relationship makes substantial and uncompensated contributions toward an asset in the other party's name.[22] However, the court rejected the plaintiff's claim for unjust enrichment when it was "based entirely upon the provision of homemaking services and companionship to the defendant."[23]

The *Maeker* case is a landmark decision, as it settles the question of whether palimony claims based on oral promises made prior to the passage of the statute will be enforceable. As a result of *Maeker*, individuals in long-term marriage-like relationships for 10, 20, or even 30 years will be precluded from seeking palimony—notwithstanding the validity of multiple promises made for support—unless they have a writing to memorialize these promises. Moreover, the multiple equitable remedies that practitioners believed could provide a viable alternative to a traditional palimony claim appear to be unavailable unless the party seeking relief has made financial contributions toward an asset in the other party's name. This is troublesome, as most individuals seeking palimony relief have been dependent on the other party and any contributions they have made to the relationship are not financial or pecuniary.

At this time, *Maeker* is binding law with regard to palimony cases in this state. Under the circumstances, practitioners must be creative in drafting complaints for palimony where the plaintiff does not have a writing to memorialize the promise of support. In those cases, practitioners should still consider the possibility of equitable remedies to the extent the plaintiff has made contributions to the relationship "that are independent of homemaking services."[24] As set forth in *Maeker*, equitable remedies based on the theory of unjust enrichment are available under those circumstances "even in the absence of a viable claim for palimony."[25]

Notwithstanding the limitations on equitable remedies now available to plaintiffs seeking relief in palimony cases, the following are several equitable remedies and alternative remedies that should at least be considered for

inclusion in palimony complaints filed after the passage of N.J.S.A. 25:1-5(h), based on the specific facts of the case.

1. **Constructive Trust:** A constructive trust should "be impressed in any case where to fail to do so will result in an unjust enrichment."[26] A constructive trust is an equitable remedy to be utilized in a case where "property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest."[27] In that case, equity converts the legal titleholder of the property into a trustee for the benefit of the equitable holder of the property.[28] A constructive trust may also be appropriate where the retention of the property would constitute "an unconscionable advantage by the holder of legal title, even though its acquisition was not wrongful." [29]
   The courts utilize a two-prong test when determining whether a constructive trust is warranted in a given case. First, the court must find that a party has committed a wrongful act. Second, the wrongful act must result in a transfer or diversion of property that unjustly enriches the recipient.[30]
2. ***Quasi*-contract:** A *quasi-contract* is a contract implied in law. Unlike an express contract, a *quasi-contract* is "imposed by the law for the purpose of bringing about justice without reference to the intention of the parties."[31] The plaintiff seeking to assert a claim under the principle of *quasi*-contract must prove: 1) what services were rendered; 2) what the value of those services were; and 3) that the plaintiff entered the relationship with the expectation there would be remuneration for services.[32]
3. ***Quantum Meruit*:** *Quantum meruit* is a form of *quasi*-contractual recovery that "rests on the equitable principal that a person shall not be allowed to enrich himself unjustly at the expense of another."[33] The theory of recovery is that where there is no agreement regarding payment for services, the law implies a promise to pay that which is just and reasonable. The elements necessary for recovery under this theory are:
   1. the performance of services in good faith;
   2. the acceptance of the services by the person to whom they are rendered;
   3. an expectation of compensation therefore; and
   4. the reasonable value of the services.[34]
4. **Resulting Trust:** A resulting trust may be imposed by the court where one party purchases property with consideration furnished in whole or in part by the other party with the intention by the title holder to hold the title in trust for the party providing the consideration.[35]
   While this equitable remedy is available in those 'palimony' cases where consideration for property was furnished by the dependent party, the more likely remedy in palimony cases is constructive trust, which is not based on actual intent of the parties but rather imposed by the court to prevent unjust enrichment. The reason for this is that in many palimony cases, the party seeking palimony or some other form of relief was dependent on the other party for support and did not contribute consideration for the property at issue.
5. **Joint Venture/Partition:** "Persons who have engaged in a joint venture to purchase property in which they reside, are entitled to seek a partition" when "their joint enterprise comes to an end ... irrespective of how title is formally held."[36] One of the remedies available in connection with a partition is a forced sale of the property.[37] However, "where an agreement exists between an unmarried couple giving one party 'a continued right to occupy... the jointly-owned home,' 'a partition by way of sale to third parties is not an appropriate remedy.'"[38] In those cases, the agreement reached by the cohabitants with regard to the disposition and use of the property is material in actions concerning its division, and "may be specifically enforced when that remedy is appropriate."[39]

While the above remedies may be available in limited circumstances, as a result of the *Maeker* decision, creative lawyering may be insufficient to craft bases for relief in cases where traditional palimony is no longer available. Palimony complaints should include relief under alternative remedies when the cause of action arose after the passage of the statute and no writing exists to memorialize the promise. However, the likelihood of success is diminished, despite the need of the plaintiff or the perceived inequity of the result. Conversely, practitioners who represent defendants in such cases should immediately file a motion to dismiss the underlying complaint. Given the significant consequences to parties involved in

these cases as a result of the *Maeker* decision, it is imperative that attorneys involved in these cases have a clear understanding of the current status of the law as cases move through the system, and take action where necessary to protect their clients.

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Endnotes

1. *Kozlowski v. Kozlowski*, 80 N.J. 378 (1979).
2. *Kozlowski* at 387.
3. *Id.* at 384.
4. *Botis v. Estate of Kudrick*, 421 N.J. Super. 107 (App. Div. 2011).
5. The entirety of the decedent's estate was willed to his daughter and grandchildren.
6. *Id. citing Bunk v. Port Auth.*, 144 N.J. 176, 194 (1996).
7. *Id. quoting Cruz v. Central Jersey Landscaping*, 195 N.J. 33, 45 (2008).
8. *Ibid. citing Gibbons v. Gibbons*, 86 N.J. 515, 522-23 (1981).
9. *Id.*
10. *Id. citing* 73 Am. Jur. 2d Statute of Frauds §429 (2010).
11. *Id. citing In re D.C.*, 146 N.J. 31 (1996).
12. *Id. quoting* Senate Judiciary Committee, Statement to S. 2091 (Feb. 9, 2009); *See Also Serrano v. Gibson*, 304 N.J. Super. 314, 319 (App. Div. 1997) (noting that the Legislature's intent to "reverse" a decision of the Supreme Court was neither "ameliorative or curative").
13. *Pierson v. Estate of Daul*, 2011 WL 5026072 (App. Div. 2011).
14. *Harrison v. Estate of Massaro*, 2012 WL 2285042 (N.J. Super. App. Div. 2012).
15. *Cavalli v. Arena*, 425 N.J. Super. 595 (Ch. Div. 2012).
16. *Maeker v. Ross*, 2013 WL 398761 (N.J. Super. A.D.).
17. *Maeker v. Ross*, 2013 WL 398761 (N.J. Super. A.D.), at 6.
18. *Id.*
19. *Id.*
20. *Id.* at 20.
21. *Id.* at 21.
22. *Id.* at 9.
23. *Id.*
24. *Id.* at 9.
25. *Id.*
26. *D'Ippolito, et. Al v. Castoro, et. al.*, 51 N.J. 584, 588 (1968).
27. *Beatty v. Guggenheim Exploration, Co.*, 225 N.Y. 380 (Ct. App. 1914).
28. *Id.*
29. *Stretch v. Watson*, 5 N.J. 268, 279 (1959).
30. *Flanigan v. Munson*, 175 N.J. 597 (2003).
31. *Saint Barnabas Medical Center v. County of Essex*, 11 N.J. 67, 79 (1998) (*quoting Saint Paul Fire & Marine, Ins. Co. v. Indemnity Ins. Co.*, 32 N.J. 17, 22 (1960).
32. *Stark v. Reingold*, 18 N.J. 251, 268 (1955).
33. *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 437 (1992) (*quoting Callano v. Oakwood Park Homes Corp.,* 91 N.J. Super. 105, 108 (App. Div. 1996).
34. *Weichert*, 128 N.J. 427 (1992).
35. *Coney v. Coney*, 207 N.J. Super. 63, 74 (Ch. Div. 1985) (*referring to D'Ippolito v. Castoro*, 51 N.J. 584, 588-89 (1968).
36. *Mitchell v. Oksienik*, 380 N.J. Super. 119, 127 (App. Div. 2005).
37. *Id.*
38. *Botis v. Estate of Kudrick*, 421 N.J. Super. 107, 120 (2011) (*quoting Olson v. Stevens*, 322 N.J. Super. 119, 123 (App. Div. 1999).
39. *120 Houseman v. Dare*, 405 N.J. Super. 538, 545–46 (App. Div. 2009) (*citing Olson, supra,* 322 N.J. Super. at 123).

The Evolving Definition of 'Victim' Under the Domestic Violence Act

by Frank E. Tournour and Peter Hekl

The laws governing domestic violence have endured an historical evolution. That evolution includes an expanding definition of who is a 'victim' of domestic violence. This article examines that evolution with an overview of some of the milestone turning points in the law regarding domestic violence.

Domestic violence has long been a part of human culture. Physical abuse within the domicile was commonplace well before the U.S. was established. Laws governing the relationships between husband and wife can be traced back to 753 B.C., when Romulus, the founder of Rome, required married women to "conform themselves entirely to the temper of their husbands and the husbands to rule their wives as necessary and inseparable possessions."[1]

This tolerance of abuse of women in the home endured for thousands of years. In fact, through the 19th century, most legal systems implicitly accepted physical abuse within the home and wife beating was often viewed as a husband's right.[2]

Court opinions reflect the majority sentiment that husbands were permitted to chastise their wives in certain situations, albeit not without restriction. In *Bradley v. The State*, an 1824 Supreme Court of Mississippi case, the Court recognized that a husband may chastise his wife within reason:

> To screen from public reproach those who may be thus unhappily situated, let the husband be permitted to exercise the right of moderate chastisement, in cases of great emergency, and use salutary restraints in every case of misbehavior, without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned.[3]

Similarly, the Supreme Court of North Carolina found that a husband's use of force toward his wife was permissible four decades later in the 1864 case *State v. Black*:

> A husband is responsible for the acts of his wife, and he is required to govern his household, and for that purpose the law permits him to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself; and unless some permanent injury be inflicted, or there be an excess of violence, or such a degree of cruelty as shows that it is inflicted to gratify his own bad passions, the law will not invade the domestic forum or go behind the curtain. It prefers to leave the parties to themselves, as the best mode of inducing them to make the matter up and live together as man and wife should.[4]

The Court set forth two important points in the opinion: 1) a husband may use reasonable force against his wife, and 2) such force should be administered within the boundaries of the home. This ruling set the precedent that the state should not and would not inject itself into private, marital affairs concerning violence between spouses.

Despite these rulings, public opinion regarding violence between husband and wife began to change during the 1800s, due to the rise of feminism.[5] This sentiment is evident in the 1871 Supreme Court of Alabama case, *Fulgham v. State*, where the Court found that the law no longer allowed husbands to inflict physical force upon their wives. In doing so, the Court said, "the wife is entitled to the same protection of the law that the husband can invoke for himself. She is a citizen of the state, and is entitled, in person and in property, to the fullest protection of its laws."[6]

By the end of the 19th century, most courts denied husbands the right to chastise their wives.[7] Nevertheless, few, if any, formal protections for the victims of domestic violence were established, legally or otherwise. During the early- to mid-20th century, it became common for police to intervene in cases of domestic violence, but

arrests were rare, despite the fact that almost all jurisdictions had enacted statutes forbidding physical violence between spouses.[8]

The Women's Movement of the 1970s was the catalyst for domestic violence reform in the United States.[9] Feminists and women's organizations pressured police to treat domestic violence as they would treat any other assault.[10] Battered women's shelters began opening to provide a safe haven for victims and their children.[11] It was around this time that the term 'domestic violence' was coined. The United Kingdom was one of the first nations to pass legislation using the term in 1976, with the passing of the Domestic Violence and Matrimonial Proceedings Act.[12] Although domestic violence was previously thought of as violence between a husband and wife, the act extended protections to either party in a marriage and to a man or woman living with each other in the same household as husband and wife. Further, protections were extended to the children of the protected parties. This commenced the expansion of the concept of what was considered domestic violence. Domestic violence awareness and an expansion of the definition of who is a victim of domestic violence, both in the eyes of society and in the law, continues to the present.

New Jersey's Response to Domestic Violence

In the late 1970s and early 1980s, protection for victims of domestic violence gained momentum. New Jersey legislators took notice, and in 1982 the Prevention of Domestic Violence Act was passed. The act provided protections for spouses and cohabitants who fell victim to domestic abuse. The Legislature stated its reasons for passing the act as follows:

> The Legislature finds and declares that domestic violence is a serious crime against society; that there are thousands of persons in this State who are regularly beaten, tortured and in some cases even killed by their spouses or cohabitants; that a significant number of women who are assaulted are pregnant; that victims of domestic violence come from all societal and economic backgrounds and ethnic groups; that there is a positive correlation between spouse abuse and child abuse; and that children, even when they are not themselves physically assaulted, suffer deep and lasting emotional effects from exposure to domestic violence. It is therefore, the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide.[13]

In 1991, the original act was repealed, extensively revised and replaced by the Prevention of Domestic Violence Act of 1991.[14] In part, the 1991 version of the act amended the prior definition of victim by replacing the word "cohabitant" with "household member."[15] The original version of the 1991 act defined a domestic violence victim as:

> . . . a person protected under this act and shall include any person who is 18 years of age or older or who is an emancipated minor and who has been subjected to domestic violence by a spouse, former spouse, or any other person who is a present or former household member, or a person with whom the victim has a child in common.[16]

Soon after the new act was passed in 1991, the Legislature sought to widen the scope of who may be considered a domestic violence victim. In 1994, the Legislature made numerous amendments to achieve that end. In the act's preamble, the Legislature added the following supplemental language:

> The Legislature further finds and declares that the health and welfare of some of its most vulnerable citizens, the elderly and disabled, are at risk because of incidents of reported and unreported domestic violence, abuse and neglect which are known to include acts which victimize the elderly and disabled emotionally, psychologically, physically and financially; because of age, disabilities or infirmities, this group of citizens frequently must rely on the aid and support of others; while the institutionalized elderly are protected under P.L. 1977, c. 239(C. 52:27G-1 et seq.), elderly and disabled adults in noninstitutionalized or community settings may find themselves victimized by family members or others upon whom they feel compelled to depend.
>
> The Legislature further finds and declares

> that violence against the elderly and disabled, including criminal neglect of the elderly and disabled under section 1 of P.L. 1989, c. 23(C. 2C:24-8), must be recognized and addressed on an equal basis as violence against spouses and children in order to fulfill our responsibility as a society to protect those who are less able to protect themselves.[17]

Furthermore, the act was amended to include victims who are in dating relationships and those anticipating a child in common.[18] The act currently defines a victim of domestic violence as:

> . . . a person protected under this act and shall include any person who is 18 years of age or older or who is an emancipated minor and who has been subjected to domestic violence by a spouse, former spouse, or any other person who is a present or former household member. "Victim of domestic violence" also includes any person, regardless of age, who has been subjected to domestic violence by a person with whom the victim has a child in common, or with whom the victim anticipates having a child in common, if one of the parties is pregnant. "Victim of domestic violence" also includes any person who has been subjected to domestic violence by a person with whom the victim has had a dating relationship.[19]

The Legislature's movement to expand the reach of the Prevention of Domestic Violence Act has continued through recent years. As Judge Lawrence R. Jones noted in the 2010 case of *J.L. v. G.D.*:

> [p]rior to 1994, a plaintiff had to be at least eighteen years of age to file a domestic violence complaint. However, in 1994 the Act was amended to permit a person of any age, even a minor, to seek a protective order from ongoing abuse by an adult dating partner. Specifically, the Legislature expanded the definition of "victim of domestic violence" to include "any person, regardless of age, who has been subjected to domestic violence by a person...with whom the victim has had a dating relationship."[20]

The statement of the amendment's sponsors reveals a clear legislative intent that the act have a far-reaching effect well beyond traditional spousal relationships:

> The bill would broaden the definition of persons protected by the act to include persons 18 years of age and under who are involved in teen date abuse situations, in order to extend the provisions for the imposition of court sanctions and professional interventions in this population....[21]

As Judge Jones points out, the efforts to ensure the act was broadly construed by courts and law enforcement was widespread, especially regarding minors:

> Following the 1994 amendments to the act, the New Jersey Supreme Court and the Attorney General's office jointly issued the Domestic Violence Procedures Manual to provide specific procedural and substantive guidelines and instructions for trial courts presiding over domestic violence proceedings. The DVPM has been regularly amended and updated, most recently in October 2008.
>
> Section 1.20 of the DVPM expressly recognizes the expanded definition of a "victim of domestic violence" under the Act to include minors in dating relationships with adult partners. Section 2.1.3(A) further provides: "A victim may be below the age of 18, may sign the Complaint...and does not need the consent of a parent or guardian to file or withdraw a complaint or to request a modification of an existing order."
>
> Accordingly, the DVPM permits minors to institute legal proceedings against violent dating partners without having to inform or involve their parents. Presumably, the intent of this provision is to protect victims' rights of privacy and to encourage abused teens to seek help—even those who otherwise would not come forward if forced to disclose their situation to their parents or anyone else in their personal lives. While minors can choose to tell their parents if they so desire and can invite them to attend the court proceedings and provide moral support, they are not required to do so.[22]

Judge Jones went on to note that the DVPM did not specifically address the issue of a minor's right to adult representation in a contested case, and held that he could appoint a guardian *ad litem* or counsel to represent a minor plaintiff's interests in the courtroom in a domestic violence setting.

Judicial Interpretation and Expansion of the Prevention of Domestic Violence Act: Household Members and Dating Relationships

Despite the statute's seemingly clear language, several issues have arisen regarding the scope and limitations of who may be protected by the act. In almost all of the following cases, courts have followed the lead of the Legislature in broadly interpreting the Prevention of Domestic Violence Act. It is important to point out, however, that courts have, on occasion, established some limits to the act.

In the 1995 case *Jutchenko v. Jutchenko*, the plaintiff and defendant were brothers who had not lived together for approximately 20 years prior to the plaintiff's initial application being filed in Morris County.[23] The trial judge in Morris County dismissed the initial complaint because the plaintiff did not continue to "occupy the status of a former household member twenty years after he occupied the same household as defendant."[24] Over one year later, the plaintiff filed another complaint against the defendant, this time in Passaic County. The Passaic County trial court found that:

> ...defendant was a "former household member" of plaintiff, and consequently that plaintiff's complaint against defendant was within the court's jurisdiction under the Act. The court expressed the view "the passage of time does not diminish the relationship which [is] established" when two persons live in the same household.[25]

Accordingly, the trial court granted the plaintiff a final restraining order and the defendant appealed.

On appeal, the Appellate Division found that the plaintiff was not protected by the Prevention of Domestic Violence Act, as the act is directed at "violence that occurs in a family or family-like setting."[26] Even though the act covers individuals who have previously resided together, the court concluded:

> we do not believe that the Legislature could have intended the protections of the Act to extend to conduct related to a dispute between two persons who have not resided together in the same household for twenty years, at least in the absence of any showing that the alleged perpetrator's past domestic relationship with the alleged victim provides a special opportunity for "abusive and controlling behavior." An alleged act of harassment arising out of a dispute between two middle-aged brothers who have not resided together since reaching adulthood cannot reasonably be viewed as "domestic violence."[27]

Jutchenko supports the proposition that, while the law is "particularly solicitous of victims of domestic violence,"[28] the act has its limits.

But what exactly are those limits? And what exactly constitutes a domestic relationship? More specifically, what constitutes "present or former household members"? What about college suitemates? Judge Louis F. Locascio, J.S.C., addressed that latter issue in *Hamilton v. Ali*,[29] a published trial court decision. In that case, the parties shared a suite with seven other freshman students at Monmouth University. The suite consisted of a large common area, a common bathroom and four bedrooms, three of which housed two students each and one of which housed three students. The parties in *Hamilton* were not roommates, but did live in the same suite. A physical altercation between the parties ensued about a month into the school semester and as a result, a final restraining order was issued. The defendant appealed, however, contending the plaintiff did not fall under the act's definition of victim.

In reaching its decision that the plaintiff did, indeed, qualify as a household member, the court in *Hamilton* cites to case law that has been interpreted to expand the court's jurisdiction. In the cited cases, the term "household member" was construed to be more expansive than the traditional meaning and includes people temporarily living together,[30] people living in the same apartment complex but a different apartment,[31] and unmarried couples who never shared the same legal residence.[32] The court also cited to the 1991 amendment of the act, which evidenced the legislative intent to extend protection to "any person who has a close relationship with his or her batterer."[33] In addition, the court opined that the Legisla-

ture's expansion of the act to include unrelated, same-sex persons living together and elderly persons in the care of unrelated persons indicated a clear intent that the act be far reaching in scope.

The definition of household members has continued to expand. In the 2012 case of *N.G. v. G.P.*,[34] the Appellate Division had to decide whether adult siblings who have not resided together since 1960, when they were both children, may be considered victims under the act. The 66-year-old defendant had suffered from severe obsessive compulsive disorder since his childhood. During his teenage years, the defendant's parents secured his involuntary commitment to a psychiatric hospital. The defendant harbored a deep resentment of the plaintiff, his sister, and had harassed her on numerous occasions over the years.

In its opinion, the Appellate Division introduced the proposition that,

> [i]n determining whether a defendant is a "former house-hold member" under the Act, the inquiry should be whether the "perpetrator's past domestic relationship with the alleged victim provides a special opportunity for abusive and controlling behavior."[35] The Act is directed at "violence that occurs in a family or family-like setting."[36]

The court then cited to the six-factor test set forth in *Coleman v. Romano*,[37] a trial-level decision involving an adult daughter and her mother who had not lived together for over 18 years, to determine whether jurisdiction exists based on the parties' status as "former household members." The *Coleman* test focuses on "whether the parties have been so entangled, emotionally or physically — or they will be in the future — that the court should invoke the Act to protect the alleged victim and prevent further violence."[38]

The six factors identified in *Coleman* are:

1) the nature and duration of the prior relationship;
2) whether the past domestic relationship provides a special opportunity for abuse and controlling behavior;
3) the passage of time since the end of the relationship;
4) the extent and nature of any intervening contacts;
5) the nature of the precipitating incident; and
6) the likelihood of ongoing contact or relationship.[39]

The *N.G.* court applied the test and ultimately found the plaintiff was protected under the act as a former house member. In doing so, court specifically noted:

> This case and *Jutchenko* are factually dissimilar. In *Jutchenko*, one adult brother accused the other brother of abusing the latter's own children, and the accused brother responded by threatening his brother's life. Unlike this case, the misconduct of the defendant in *Jutchenko* while an adult did not pertain to any incident or issue that occurred or evolved from the period when the two brothers lived in the same household.[40]
>
> Moreover, in the nearly two decades since *Jutchenko* was decided, its rationale has been eroded. The focus has shifted from an analysis of the amount of time that has elapsed since the parties last resided together to an evaluation of whether the current conflict arose from the prior domestic relationship. Courts subsequent to *Jutchenko* have recognized that "the court's predicate for exercising jurisdiction is that the 'former household' relationship essentially places the plaintiff in a more susceptible position for abusive and controlling behavior in the hands of the defendant."[41]

While not outright overturning *Jutchenko*, the Appellate Division has made clear in *N.G. v. J.P.* that the simplistic analysis of the length of time in which the parties have lived separate and apart is no longer the trial court's primary inquiry. A more layered and nuanced analysis is required.

The disparity in the court's holdings of *Jutchenko* and *N.G.* can further be attributed to the Legislature's efforts to expand the breadth of the act. The *N.G.* court had the benefit of almost 20 more years of legislative activity and judicial precedent to rely on than the *Jutchenko* court. The decision begs the question: Had *Jutchenko* been decided in 2012 as *N.G.* was, would the outcome of *N.G.* been different?

Most recently, the definition of "household member" was addressed by the Appellate Division in the case of *S.P. v. Newark Police Department, et. al.*[42] In this case, decided on Sept. 27, 2012, the issue was whether cohabitants in a boarding house could be considered household members for the purposes of the act. About two weeks

prior to the incident in question, the victim moved into a boarding house in which the assaulter was already living. Upon the victim moving in, the parties were the only two habitants on the third floor of the house. The parties slept in separate locked bedrooms but shared a communal bathroom and kitchen. The trial court found that this close living arrangement was sufficient to consider the parties household members, despite the fact that they had not interacted prior to the incident in question. On appeal, the Appellate Division upheld the trial court's determination. In doing so, it made clear that although not all boarders in a rooming house are automatically to be considered household members, the expanded definition applied to the facts at hand even though the parties did not have a personal relationship prior to the act of domestic violence. Most significantly, the court cited to the fact that the parties' living quarters were closely situated and they shared a bathroom. Thus, regular interaction between the parties would be inevitable. The court's ruling came as no surprise considering the ongoing judicial efforts to broaden the definition of household member, and remains consistent with recent case law.

Courts have continued to broaden the scope of the act's protections by expanding the definition of terms other than "household member" contained in the act. Similarly, the definition of "dating relationship" has been subject to judicial interpretation. In the 2009 case *J.S. v. J.F.*,[43] the Appellate Division was faced with the question of whether the parties had a dating relationship where the defendant frequented gentleman's clubs where the plaintiff worked as a dancer and paid for the plaintiff's services as an escort. In their analysis, the court said:

> Our decisional law defining the scope of a dating relationship is essentially limited to a single opinion authored by a trial judge. In *Andrews v. Rutherford*...Judge Michael Hogan suggested various factors to be evaluated in defining what constitutes a dating relationship for purposes of the Act:
>
> 1. Was there a minimal social interpersonal bonding of the parties over and above a mere casual fraternization?
> 2. How long did the alleged dating activities continue prior to the acts of domestic violence alleged?
> 3. What were the nature and frequency of the parties' interactions?
> 4. What were the parties' ongoing expectations with respect to the relationship, either individually or jointly?
> 5. Did the parties demonstrate an affirmation of their relationship before others by statement or conduct?
> 6. Are there any other reasons unique to the case that support or detract from a finding that a "dating relationship" exists?
>
> Recognizing the difficulties in attempting to describe all the characteristics of a dating relationship, Judge Hogan concluded that "[w]hile none of these factors may be individually dispositive on the issue, one or more of the factors may be more or less relevant in any given case depending on the evidence presented."[44]

The *J.S. v. J.F.* court neither approved nor disapproved of the *Andrews* test and did not specifically determine whether all the factors listed in *Andrews* have relevance in defining a dating relationship. The court did agree with *Andrews*, however, with its holding that the facts should be liberally construed in favor of finding a dating relationship, "because the Act itself is to be liberally construed in favor of the legislative intent to eradicate domestic violence. Stated another way, the Act embodies a strong public policy against domestic violence."[45] The court cited to the fact that "the Act itself announces that its purpose is 'to assure the victims of domestic violence the maximum protection from abuse the law can provide'" and opined that such principles "would not be served by a cramped interpretation of what constitutes a dating relationship."[46]

The *J.S.* court flatly rejected the defendant's contention that the parties were not in a dating relationship "because their relationship was purely 'professional.'"[47] Essentially, the defendant's argument was that a paid escort does not meet the act's definition of "a victim of domestic violence." The court disagreed, citing to the intended broad scope of the act and opining that payment of consideration for one's time does not preclude the payee being protected under the act.

As to the definition of dating relationship, the court went on to state that:

> most claims of a dating relationship turn on what the particular parties would view as

> a "date." "Dating" is a loose concept undoubtedly defined differently by members of different socioeconomic groups and from one generation to the next. Accordingly, although *Andrews* suggests some useful factors, courts should vigilantly guard against a slavish adherence to any formula that does not consider the parties' own understanding of their relationship as colored by socio-economic and generational influences.[48]

With their opinion, the court made clear that the construction of the act was to be extremely liberal, even in comparison to the ongoing judicial and legislative expansion of the act.

However, every case is fact sensitive. The Appellate Division set limits to the term dating relationship in the recent 2012 case of *S.K. v. J.H.*[49] In *S.K.*, the Appellate Division approved the *Andrews* factors, providing the *imprimatur* of the Appellate Division to them, while "recognizing that, if applicable, other factors unique to the parties should also be weighed."[50]

The question raised in *S.K. v. J.H.* was whether a dating relationship existed between parties who were on a cruise ship to Israel together and had no relationship prior to spending a night dancing and drinking together. While the *S.K.* court found that such interaction may have been sufficient to support a finding that the parties were on a "date, there was no evidence of anything more than this single date and, thus, no evidence of the 'dating relationship' required by the Act."[51] Therefore, the appellate court reversed. In its opinion, the court explained:

> To summarize, we hold that an interpretation of *N.J.S.A.* 2C:25-19(d) that would apply the Act to two persons who had a single date would give far too much weight to the word "dating" and too little weight to the word "relationship." If the Legislature intended to permit the Act's protections to apply to persons who had a single date, it would have defined "victim of domestic violence" as any person who has been subjected to domestic violence by a person whom the victim has dated. By requiring evidence of a "dating relationship," the Legislature undoubtedly intended something of greater frequency or longer duration than a single date.

The decision in *S.K.* shows that even the most liberally applied standards have their limits. While there is no question that courts will apply the provisions of the Prevention of Domestic Violence Act liberally, it is important for us to remember that there will be limits to what situations are governed by the act.

Practice Points

In advising clients and preparing these matters for trial, lawyers must be cognizant of the ever-broadening definitions of victims under the act. It is not enough to assume a defendant-client may escape the ramifications of the act because the relationship of the parties does not appear to constitute a classic domestic violence relationship. Inquiry into the length, duration, extent, expectations, and types of interactions the parties had are imperative in preparing to try a domestic violence case. Most importantly, even if there appears to be an air-tight defense based on the fact that the plaintiff is not a victim under the act, the savvy practitioner will have his or her client and witnesses prepared for trial because the judicial trend appears to be to expand the definition of victim under the act. ■

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Play by the Rules...but Which Ones? A Critical Analysis of the Rules that Apply in Child Protection Cases

by Allison C. Williams

You have just been retained by a father who wants to get divorced and desperately wants to vie for the title of parent of primary residence (PPR); a divorced mother who wants to modify her ex-husband's parenting time; a father who wants primary custody of the child he fathered with his high school sweetheart to whom he was never married; and a mother who has a final restraining order (FRO) against the father of her child with whom she shares joint legal and physical custody, a problematic arrangement. You know where to file, what to file, what to argue, how to proceed. In short, in all of these scenarios, you know 'the rules.'

But what happens when the divorced dad vying to be PPR is accused of sexually abusing the child? What about when the dad whose ex has a FRO against him learns the ex has willfully failed to secure medical treatment for their child? What if these abuse or neglect allegations arise during a pending matrimonial (FM), post-judgment matrimonial (FM), non-dissolution (FD) or post-FRO (FV) case involving custody and parenting time issues? The likely result is that the Division of Child Protection and Permanency (DCPP), formerly known as the Division of Youth and Family Services (DYFS), will become involved.

DCPP cases are governed by their own sets of rules—different statutes, different court rules, different case law, presumptions and legal requirements. So, when abuse or neglect allegations arise in the context of a non-DCPP case, which rules apply? The rules governing DCPP cases? The rules governing other family part case types (FMs, FDs, FVs)? Neither set of rules? Some amalgam of the two? The purpose of this article is to ponder which composite of rules best serves the penultimate goal of family part litigation—to protect the best interests of children.

An Uneasy Equation? Different Case Types Equal Different Rules

To arrive at a pragmatic approach to this query, the practitioner first must have a basic understanding of the rules governing parental access issues in the family part—in particular the rules governing matrimonial (FM) cases, both during and after a divorce judgment is entered; non-dissolution (FD) cases (*i.e.,* cases involving parents who were never married or who are not yet proceeding with a divorce action);[1] restraining order cases (*i.e.,* cases where a FRO has been entered against a party who has a child in common with the protected person who is covered by the FRO); and DCPP/DYFS (FN) cases.

Generally speaking, after the initial custody and parenting time dispute has been resolved, requests to modify the initial judgment arise in one of two ways. Either a parent files a notice of motion, in accordance with Rule 5:5-4, or files a request for a modification hearing in summary matters (*i.e.,* FDs and FVs).[2] In any case type, however, a parent may bring emergent issues to the court's attention by way of an order to show cause.

If an emergent application is filed, the parent may file pursuant to either Rule 4:52-1, or if seeking emergent relief in a summary proceeding, pursuant to Rule 4:67-1. In either event, the movant must meet the four-prong test of *Crowe v. DeGioia*, namely that: 1) irreparable harm is likely if the relief is denied; 2) the applicable underlying law is well settled; 3) the material facts are not substantially disputed, and there exists a reasonable probability of ultimate success on the merits; and 4) the balance of the hardship to the parties favors the issuance of the requested relief.[3] These criteria must be demonstrated by clear and convincing proof.[4]

If DCPP files an action seeking to restrict parental access because of alleged abuse or neglect, the agency proceeds pursuant to Rule 5:12. Though an emergent application need not be filed, typically restrictions upon parental access are sought in this fashion. When DCPP proceeds on an emergent application, Rule 5:12-1(d) requires that such applications be filed pursuant to Rule 4:52-1(a). Presumably, the DCPP cannot file pursuant to

Rule 4:67-1, since DCPP's action commences litigation and is not conducted in a summary action. While Rule 5:12-1(d) does not obviate the requirement that DCPP comply with other court rules, DCPP does not file legal briefs in support of orders to show cause seeking interim relief despite the requirements of Rule 4:52-1(c).

Use of Experts in Post-FM, FD, DV Cases

Whenever a court in its discretion, or upon application of a party, determines the disposition of an issue will be assisted by expert opinion, the court may order a person submit to such expert.[5] In FM cases, typically the parties will request experts and both parties are required to submit to and cooperate with the adverse party's expert. Even if the court appoints an expert, parties are entitled to retain their own experts.[6]

There shall be no presumption in favor of an appointed expert.[7] If the court submits its expert's report into evidence, it must be subject to cross-examination by the parties.[8] Experts are bound to render opinions directed toward a child's best interest, no matter which party retained the professional's services.[9] Experts are required to consider the applicable case law when determining a child's best interests.[10] In FV cases, this would include the presumption in favor of sole legal and physical custody being awarded to the non-abusive parent.[11]

Presumptions: Proof of Facts; Conclusions Subject to Rebuttal

Conversely, in DCPP cases use of expert reports takes on another dimension. First, reports by staff personnel *and professional consultants* may be submitted into evidence pursuant to N.J.R.E. 803(c)(6) and N.J.R.E. 801(d).[12] Conclusions drawn from these reports are treated as *prima facie* evidence, subject to rebuttal.[13] Thus, in a DCPP action the plaintiff's expert report starts out on a higher plain than the defendant(s). In DCPP actions, the court *may* order expert examinations pursuant to Rule 5:3-3, per Rule 5:12-4(c); however, the permissive, rather than compulsory, language of Rule 5:12-4(c) does allow for argument to be made to prevent the defense from obtaining an expert evaluation of an alleged abused child that has already been the subject of an examination by the division. In practice, this is rare, but not unheard of.

Thus, it is quite possible the same allegations of abuse or neglect of a child will yield different results based upon these different presumptions, standards and court rules. By way of example, if a father files an order to show cause to restrain a mother's parenting time based upon alleged abuse, the court would likely entertain an application by *both parents* to have the child evaluated by their respective experts. Even if the mother is restrained from exercising unsupervised parenting time pending receipt of expert reports and a plenary hearing on the issue, the court is not likely to *presume* the father's expert's opinion that she abused the child is correct and then require her to *rebut the presumption* in favor of the father's expert.

However, if DCPP files that same order to show cause based upon the same allegation of abuse, Rule 5:12-4(d) authorizes the trial court to rely upon DCPP's expert report as *prima facie* evidence that the mother abused the child. Further, the court could rely upon the permissive language of Rule 5:12 (rather than compulsory language of Rule 5:3-3) to deny her the right to have an expert.

Assuming the mother is allowed to have an expert opine on the ultimate issue(s) (*i.e.,* whether or not the child has been abused and if so, was it by the mother or another person) the court must still determine the extent of her parental access pending a determination of whether or not the child has been abused. In FM, FD, and FV cases, the court would likely not revisit the issue of the mother's access until the plenary hearing on the allegation of abuse occurred. In FN cases, however, parental access can be, and often is, expanded or restricted prior to the fact-finding hearing on the ultimate issue of abuse. When the access issue comes before the court, DCPP's consultant's reports constitute *prima facie* evidence, and may be relied upon by the court.[14] Competent evidence (*i.e.,* expert reports subject to cross-examination and admitted into evidence only "consistent with the rules of evidence" which otherwise would be required in FM, FD and FV cases, pursuant to Rule 5:3-3(g)) is *not* required in a DCPP action until the fact-finding hearing.[15]

The author believes it is this very discrepancy in the handling of abuse and neglect allegations between the different docket types, which causes an unacceptable inequity in the treatment of allegedly abused or neglected children in the court system—and it is submitted, one which is incompatible with the goal of affording all children in this state the court's utmost protection. This differential treatment is explored further by review of the many differences in DCPP-initiated child protection litigation (FN cases) versus parent-initiated litigation with the same objective (FM, FD, FV cases).

Applicability of General Custody Provisions Where Child Abuse or Neglect is Alleged

There are several differences between FN and non-FN cases. The most obvious distinction can be found in how the case is conducted—in open court versus a closed proceeding.

Closed Hearings

In general family part cases involving the welfare or status of a child, other than mandatory in-camera hearings, the court, on its own or a party's motion, has discretion to direct that any proceeding or severable part of a proceeding be conducted in private.[16] By contrast, in DCPP actions, all hearings and trials *shall be* conducted in private.[17] Thus, if a parent brings an action in an FM, FD, or FV case, that action will generally be a matter of public record.

Discovery and pleadings in child protective litigation may also be subject to public disclosure in an FM or FD case. Documents filed with the court in FM and FD cases and maintained by the Judiciary are subject to public access.[18] By statute, FV cases—even post-FRO modifications—are supposed to remain confidential, immune from public access.[19] While this confidentiality is not absolute, the confidentiality applies until a court rules on an application for access.[20] Within this confidentiality mandate is included custody determinations, as well as counseling and psychiatric evaluations.[21]

To avoid public disclosure of sensitive documents created during the investigation and/or treatment of alleged child abuse or neglect, a party must file an application and "the court, upon demonstration of good cause and notice to all interested parties, shall have the authority to order that a Family Part file, or any portion thereof, be sealed."[22] Conversely, in a DCPP action all records are confidential.[23] Thus, FM, FD and FV cases start with the presumption of open proceedings and access to records, the reverse is true in DCPP matters—even where DCPP investigates and/or participates in some manner in an FM, FD or FV case but does not initiate its own proceeding.

There are exceptions to the confidentiality of DCPP records. For instance, DCPP may, and upon written request *shall,* release its records to a court upon the court's determination that the records *may be* relevant to an issue before it.[24] DCPP also upon written request *shall* release its records to a parent or caregiver and counsel for the person if the parent or caregiver is involved in a DCPP matter.[25]

Notwithstanding the compulsory language of the statutory exceptions to confidentiality, DCPP routinely objects to disclosure of the records, necessitating seeking a court order.[26] Thus, if an expert conducts an evaluation, compiles third-party hearsay statements from collateral contacts and otherwise gathers discovery—information to be used at trial—in an FM, FD or FV case, that information is provided via expert report to all parties and counsel in the action. However, absent the court's choosing to release some or all of the information that may have been, in the first instance, gathered by DCPP, to the parties and/or counsel in FM, FD or FV matter, discovery is largely a crap shoot—left to the discretion of the court, with only the overarching due process and fairness mandate to guide the court.

It is not uncommon to have judges in FM, FD or FV matters review DCPP records, allow counsel—and not the parties—to review the information in court, not possess a copy of it, not show the record to the client—and then rely upon some or all of the DCPP unvetted findings in making determinations regarding custody and parenting time. This practice is particularly common in FD matters, where litigants are statistically more likely to be *pro se* and/or unable to afford private experts. As a result of the disparate rules governing DCPP matters and non-DCPP matters, the parents' access to, use of and ability to absorb, digest and discredit agency investigative findings are often *de minimus*, leaving parents handicapped in protecting their children simply by virtue of the court's overtaking that responsibility.

Appointment of Counsel for Child (Rule 5:8A)

The next area where DCPP cases differ greatly from non-DCPP cases is in attorney representation for children. In DCPP cases, law guardians (*i.e.,* attorneys for the children) are appointed. In a non-DCPP action, a law guardian and/or a guardian *ad litem* may be appointed, upon application of either party or the court's own motion. Thus, in the latter instance appointments are discretionary.

Note too that the role of a law guardian should not be confused with the role of a guardian *ad litem*. The court rules define the roles of law guardians and guardian *ad litems*.[27] Unfortunately, the language of the court rule has created some ambiguity in terms of the best interests of the child" standard applicable in family court actions.

> In all cases where custody or parenting time/visitation is an issue, the court may, on the

application of either party or the child or children in a custody or parenting time/visitation dispute, or on its own motion, appoint counsel on behalf of the child or children. Counsel shall be an attorney licensed to practice in the courts of the State of New Jersey and *shall serve as the child's lawyer. The appointment of counsel should occur when the trial court concludes that a child's best interest is not being sufficiently protected by the attorneys for the parties.* Counsel may, on an interim basis or at the conclusion of the litigation, apply for an award of fees and costs with an appropriate affidavit of services, and the trial court shall award fees and costs, assessing same against either or both of the parties.[28]

The above citation to Rule 5:8A makes clear that a law guardian is the "child's lawyer." However, the law guardian is only appointed upon the court's conclusion that "the child's best interest is not being sufficiently protected by the attorneys for the parties." This, of course, begs the question: If a law guardian is only appointed if the child's best interest is not being protected, then why would a court appoint a law guardian not to protect the child's best interest? And how, exactly, can a child's best interest be protected by virtue of having an attorney advocate his or her wishes? After all, children often desire that which is *not* in their best interests, which is why parents—and courts—make decisions for them in the first place.

The appellate court adopted and reiterated the reasoning of Justice Stewart Pollock in *Matter of M.R.*,[29] when confirming the scope of attorney representation for children in DCPP cases (DYFS):

> The Supreme Court speaking through Justice Pollock distinguished a representative attorney from a guardian ad litem by citing with approval the distinction made in a 1994 report of the Family Practice Committee:
>
> The Committee firmly believes that the role of an attorney in abuse or neglect cases and in termination of parental rights cases must be as an advocate for the child. Nothing short of zealous representation is adequate to protect a child's fundamental legal rights....[30]

This article leaves for another day whether or not the lines are blurred between "zealous advocacy" and "best interest advocacy" in DCPP cases. But, the strong language in *Matter of M.R.* regarding the role of an attorney advocate in child welfare cases may inform the request to appoint a law guardian in non-DCPP cases, but it need not, and anecdotal experience would suggest that law guardians are rarely requested or appointed in non-DCPP cases. After all, for a parent to request a law guardian, he or she must prove the child's best interests are not being sufficiently protected by the parties, which would obviously undercut his or her position that he or she was advocating the child's best interest.

What does this mean for child-related litigation, and why does it matter? By presupposing that a law guardian is required in every DCPP case (where either care and supervision or custody is sought), the law presupposes the language of Rule 5:8A suggests the child's best interests are not being served by the parties. But why would the division have filed a case if not to protect the best interests of the child? If that is not its function, or if that function is not being carried out, one could conclude their involvement in the family and in litigation is unwarranted.

This premise is not found in family law (non-DCPP) cases, as the court must first *conclude* (not assume) the child's best interests are not being protected before a law guardian will be appointed. Arguably, if the impingement upon parental autonomy and children's right of access to their parents is so significant that attorney representation for children is *always* required in DCPP cases, what exempts the non-DCPP case where such rights are equally at issue from mandatory law guardian representation? Budgetary concerns guide this analysis, as the public defender's office provides law guardians for DCPP cases. Yet, when asked why no law guardian is appointed—even on the court's own motion—in non-DCPP cases, the answer is financial, a perfectly acceptable reason to omit the additional attorney if DCPP is *not* involved.

Responsive Pleadings (Rule 5:4-3)

Another area where DCPP cases and non-DCPP cases differ is in responsive pleadings. For general family actions, the filing of an answer is governed by Rule 5:4-3(a), which provides that "a defendant in a family action shall file an answer in accordance with R. 4:5-3 or a general appearance and, without filing an answer, be heard on issues of custody of children, parenting time or visitation, alimony, child support, equitable distribution,

counsel fees and other issues incidental to the proceeding. A defendant may also file an acknowledgment of service in accordance with R. 4:4-6."

For summary (FD) actions, "the defendant need not file an answer, appearance or acknowledgment in order to be heard if the defendant appears on the return day."[31] Similarly, in DCPP cases, no formal answer to the complaint need be filed.[32] While the answering parent may feel this is an advantage—that he or she is not required to file an answer—in FD or FN cases, the disparate treatment again creates an ironic schism in the reality of the child's circumstances.

If the father accuses the mother of abusing the child in an FD case, the mother can simply show up and tell the court her version of events. The court could, and in many counties does, proceed *ex parte*. The FD applicant need only present him or herself to the Family Division, handwrite an application (so long as it is presented on the Administrative Office of the Courts-approved FD forms) and see the judge. The court may or may not inquire into service upon the adverse party. Conversely, in DCPP cases the division may only remove a child absent a court order upon a showing of "imminent risk."[33]

Eliminating the requirement of filing an answer in DCPP cases should not compel one to believe that filing an answer is *not* appropriate. An answer may still be filed. However, the fact that the failure to file an answer in an FM case may result in dismissal of pleadings, whereas no such guillotine exists in DCPP cases, implies that abuse allegations between married or divorced litigants somehow differs from abuse allegations made by the state. Again, this assumption is erroneous. Either the court, and the parties, are entitled to sufficient notice of the disputed issues, or they are not. The party making the allegation (*i.e.,* DCPP or a parent) should not determine the extent of notice necessitated by the litigation.

Discovery in FM, FV, and FD Cases—Generally Governed by Part IV Rules

Another key area where DCPP litigation and non-DCPP litigation are quite different is in discovery. The family litigant has many discovery devices available to him or her when litigating abuse allegations in an FM, FD or post-FV context. In most custody litigation, parties may opt to serve interrogatories pursuant to Rule 4:17, notice to produce documents pursuant to Rule 4:18 or serve requests for admissions pursuant to Rule 4:22-1. These discovery devices are often the key to unearthing information for use in proving abuse or neglect when one parent accuses the other.

However, in DCPP actions the parent is only entitled to receive a copy of documents upon which the division intends to rely at trial and to inspect a copy of the entire file. All other discovery is only upon leave of court and only upon good cause shown.[34] Thus, if a parent wants to seek discovery to exculpate him or herself from the division's claims, he or she must seek court permission. There is an inherent inequity in allowing one party (DCPP) to create its own evidence (*i.e.,* to interview the parents, document—however accurately or not—what is allegedly said, and then rely upon the statements *it* wrote as evidence against the parent), when the parent is not entitled to gather information to refute the alleged 'proof' absent the court allowing it.

Arguably, one interpretation of Rule 5:12-3 (discovery in DCPP actions) is that subpoena power is limited in DCPP actions, that division caseworkers cannot be called upon to answer requests for admissions, and failing same, to have facts deemed 'admitted' if they fail to answer. The application of the business records exception in DCPP matters was adopted premised upon the *"reasonably high degree of reliability as to the facts contained therein"* threshold engrafted in New Jersey case law.[35] The reliability of such evidence remains an issue to be assessed on a case-by-case basis within the trial judge's discretion.[36] This alleged "high degree of reliability" underscores the court's reliance upon the division's records and professional consultants' reports as *prima facie* evidence of abuse or neglect, subject to rebuttal.[37] Hence, by starting with the assumption of a high degree of reliability of DCPP records, the accused parent is starting the process in defense mode.

Conversely, when one parent accuses another of child abuse or neglect, the evidence offered must be on the personal knowledge of the affiant pursuant to Rule 1:6-6; there is no presumption in favor of one parent versus the other; and most starkly, the court cannot give any undue weight or presumption in favor of one expert or another, as each expert is required to render its conclusions within a reasonable degree of medical or psychological certainty.[38]

So, as the law is written, if a parent takes a child to the doctor, has reason to believe the child has been abused and immediately files an order to show cause to restrain access between the child and the other parent, that testifying doctor would give an opinion, which would be on equal footing with any contrary opinion proffered by the accused parent. However, if under this same scenario the

parent takes a child to the doctor, and the doctor makes a referral to DCPP, that doctor's opinion is now given *presumptive* weight as *prima facie evidence*, which must be rebutted by the accused parent. Same doctor, same opinion, same child, same parent, but different analysis based upon who brings the matter to the court's attention. The author believes this result is not logical.

Making the Case: Failure to Apply a Uniform Set of Rules to All Abuse/Neglect Proceedings Conflicts with Statutory Purpose of Title 9

The author believes there should be one set of rules applicable to all allegations of child abuse and neglect made in the family part. Parents should not be encouraged to use DCPP to present the alleged abuse in order to take advantage of the superior analytical presumptions, restriction on the accused parent's access to information and discovery and to ride the coattails of the agency's perceived superiority in evaluating child abuse and neglect (no matter how flawed that perception may be).

There is statutory authority for the filing of a Title 9 complaint on behalf of a private citizen, in the absence of a complaint being filed by DCPP.[39] The statute authorizes a variety of people to initiate a proceeding under the act, including a parent "or other person interested in the child";[40] an authorized agency, association, society, institution or DYFS;[41] a police officer;[42] the county prosecutor;[43] and a person acting at the court's direction.[44] The statute's authorizing a person acting at the court's direction to file such a complaint does not resolve the issue of whether leave of court need be sought prior to filing the complaint. It appears, however, that given the broad authority under subsection (a) that *any person having an interest in the child* may file the complaint, leave of court is not necessary. Further, any person having knowledge or information of a nature convinces him or her that a child is abused or neglected may file an action.[45]

The statute further authorizes any individual who is unwilling or reluctant to file his or her own complaint to request DCPP file a complaint on his or her behalf. DCPP is not authorized to interfere with the filing of such a complaint.[46] As with any complaint filed by DCPP, in a private Title 9 action, the superior court *and DCPP* must deal with imminent physical harm or actual physical harm on a priority basis.[47] This is one reason why many superior court judges will simply make the referral to DCPP, even where one parent has made allegations against the other and the court has entered an interim order restricting access between the accused parent and the child, such that no imminent risk necessitates a removal by DCPP.

Given the statutory authority for a parent, guardian or any person interested in the welfare of a child to file an action under Title 9 utilizing the broad protections of the act, one must question the logic of applying wholly different rules, regulations, statutes and presumptions, depending upon who alerts the court to the child's need for protection.

It is without a doubt that presumptions promote inequity. The case can be made for neutrality of expert opinions. In Oct. 2009, this author presented a seminar for the Institute for Continuing Legal Education of New Jersey, discussing the scope of caseworker testimony in proceedings initiated by DCPP. The focus of the seminar's article was the interpretation and application of the court rule governing admissibility of certain hearsay reports in DCPP proceedings. Therein, the high degree of reliability applied to DCPP records was questioned.

This query turned out to be quite prophetic in the sense that, the following year, the New Jersey Supreme Court raised similar questions when analyzing the weight trial courts are to give to the opinions of treating physicians who make referrals to DCPP versus paid experts who opine to rebut the presumptions afforded to DCPP-retained experts. Specifically, the Court noted:

> [t]he Division's use of a disinterested treating physician is not inconsistent with the purpose of the Rule" (referencing R. 5:12-4(d), which allows admission of forms from medical consultants of the DCPP).

So, if the New Jersey Supreme Court does not view a treating physician who makes a referral differently than a paid consultant retained by DCPP, would it not stand to reason that *all* medical professionals are therefore entitled to that *presumptive* status? And, if all medical professionals receive this presumptive status, can there really be any presumption at all?

Further, in the area of DCPP litigation that involves the greatest professional retention (*i.e.*, mental health) it would seem the same presumptive weight (if any) should be given to a treating mental health professional with years of history with a litigant on whom a referral is made, rather than a mental health professional paid by DCPP for the purpose of evaluating the parent. Is

presumptive weight really appropriate in the mental health discipline, where subjective assessments are a part of the evaluative process? What about professionals who are willing to and routinely do provide mental health assessments for DCPP *and* the defense? Shouldn't these professionals receive the highest presumption of all?

These questions present more problems than solutions. One could posit that if the primary objective of a family part judge is to exercise his or her *parens patriae* authority to ensure the health and safety of the children of the state, any differential treatment is unacceptable and inconsistent with that authority. The principles in case law can, do and must supersede the court rules where any inconsistency is identified. A court rule cannot override established case law. The Supreme Court's rulemaking authority of the New Jersey Constitution is limited to matters of procedure and practice.[48] It may not make rules concerning substantive law.[49] Therefore, a court rule cannot overrule Appellate Division decisional law on a substantive issue.

The Court Rules should follow our decisional law. Any finding of child abuse or neglect has no less significance for a family when the agent who sheds light on the alleged abuse happens to be a government agency, rather than a parent. To apply any differential treatment to abuse allegations involving the agency as opposed to those cases without agency involvement is to write out of Title 9 the statutory right of a parent or any person interested in the welfare of a child to utilize the provisions of Title 9 for the protection of children and potentially to eliminate the ability of the superior court to act upon cases in which the agency does not perceive that there is abuse or neglect, while a parent may unearth same.

For this reason, the author believes, the Family Part Practice Committee of the New Jersey Supreme Court will do a great service to the children of this state by creating uniformity in the presentation and analysis of child abuse allegations brought in the family part—no matter the parties or docket type. ■

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Endnotes

1. Many issues can be litigated in an FD case, including but not limited to partition of property; grandparent and sibling visitation cases; etc. However, for purposes of this article, FD cases will only refer to litigation involving non-married parents or non-divorcing parents.
2. *See*, Family Division's Non-Dissolution Operations Manual, Revised Edition issued Jan. 5, 2004; State of New Jersey Domestic Violence Procedures Manual, issued July 2004, amended Oct. 9, 2008.
3. 90 N.J. 126, 132-134 (1982).
4. *McKensie v. Corzine*, 396 N.J. Super. 405, 413 (App. Div 2007).
5. R. 5:3-3.
6. R. 5:3-3(h).
7. R. 5:3-3(g).
8. R. 5:3-3(g).
9. R. 5:3-3(b).
10. *Id.* R. 5:3-3(b).
11. *Grover v. Terlaje*, 379 N.J. Super. 400, 407 (App. Div. 2005).
12. *See,* R. 5:12-4(d).
13. *Id.* R. 5:12-4(d).
14. R. 5:12-4(d).
15. N.J.S.A. 9:6-8.46(b)&(c).
16. R. 5:3-2(a).
17. R. 5:12-4(b).
18. R. 1:38-1.
19. N.J.S.A. 2C:25-33. *See, also, Pepe v. Pepe*, 258 N.J. Super. 157 (Ch. Div. 1992).
20. *Id.*
21. N.J.S.A. 2C:25-33(a)(5)(a)&(d).
22. R. 5:3-2(b).
23. N.J.S.A. 9:6-8.10a.
24. N.J.S.A. 9:6-8.10a(b)(6).
25. N.J.S.A. 9:6-8.10a(b)(17)&(19).
26. N.J.S.A. 9:6-8.10a(b)(6).
27. *See*, R. 5:8A. *See*, *also, Division of Youth and Family Services v. Robert M.*, 347 N.J. Super. 44, 788 (App. Div. 2002).
28. R. 5:8A. Appointment of Counsel for Child (emphasis added).

29. 135 N.J.155 (1994).
30. *Id.* at 69.
31. *See* R. 5:4-3(b).
32. *See* R. 5:12-1(a).
33. N.J.S.A. 9:6-8.28 and -8.29. *See*, *also,* Separate and Unequal: Are children of unmarried parents disadvantaged by Summary Procedures in Non-Dissolution Actions? 32 *NJFL* 47(2011).
34. *See* R. 5:12-3
35. *In re Guardianship of Cope*, 106 N.J. Super. 336 (App. Div. 1969).
36. *Division of Youth and Family Services v. M.C. III*, 405 N.J. Super. 24 (App. Div. 2008).
37. *See* R. 5:12-4(d).
38. *See* R. 5:3-3(h).
39. N.J.S.A. 9:6-8.34.
40. N.J.S.A. 9:6-8.34(a).
41. N.J.S.A. 9:6-8.34(b).
42. N.J.S.A. 9:6-8.34(c).
43. N.J.S.A. 9:6-8.34(f).
44. N.J.S.A. 9:6-8.34(e).
45. N.J.S.A. 9:6-8.34(g).
46. N.J.S.A. 9:6-8.34.
47. N.J.S.A. 9:6-8.35.
48. *See*, Art. VI, sec. 2, par. 3.
49. *Winberry v. Salisbury*, 5 N.J. 250 (1950).