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Chair's Column

De-emphasizing Marital Lifestyle

by Brian Schwartz

In summary, the marital standard of living is the measure for assessing initial awards of alimony, as well as for reviewing any motion to modify such awards.[1]

With this pronouncement, the Supreme Court, in *Crews v. Crews,* elevated the marital standard of living from one of 13 co-equal alimony factors to, perhaps, the paramount factor in making an alimony determination on either permanent alimony or limited duration alimony.[2] Although the wave of outrage with which this opinion was initially met has been tempered to some extent by the Supreme Court's decision in *Weishaus v. Weishaus*[3] (when the Court revisited its decision in *Crews* to provide that the parties to an agreement could defer findings regarding the marital lifestyle), the declaration that the marital standard of living is a cornerstone in determining an initial award of alimony still ruffles feathers—and, frankly, defies economic logic. This emphasis on marital lifestyle is even more confounding when it is commonly accepted that, except for the rarest of cases, divorcing parties cannot both maintain a standard of living comparable to that which they enjoyed as a family unit.

It is time for the standard of living to return to its place among the other factors, instead of leading the charge.

Initially, it is important to recall that *Crews* was a post-judgment matter; that is, Ms. Crews was seeking to modify the original alimony award.[4] Unfortunately, the trial court had failed to make sufficient findings regarding the standard of living established during the marriage. Consequently, when Ms. Crews sought modification of the original alimony award—both in term and amount—the Court was unable to adequately assess whether modification was appropriate.

In the context of reviewing a request to modify alimony, the Court noted:

> The importance of establishing the standard of living experienced during the marriage cannot be overstated. It serves as the touchstone for the initial alimony award and for adjudicating later motions for modification of the alimony award when "changed circumstances" are asserted.[5]

Later, the Court repeated—and expanded—its directive:

> Identifying the marital standard of living at the time of the original divorce decree, regardless of whether a maintenance order is entered by the court or a consensual agreement is reached, becomes critical, then, to any subsequent assessment of changed circumstances when an adjustment to alimony is sought.[6]

The need for a trial court to make findings regarding the standard of living established during the marriage is clear—it is a statutory factor and a trial court must make findings (where applicable) for all of the statutory factors. But the *Crews* decision now required these findings in settled matters as well. Again, although the *Weishaus* decision allowed courts to defer findings regarding the marital lifestyle, the parties and their attorneys are required to take steps—such as maintaining each party's case information statement—to allow a reviewing court to make findings at a later date. Moreover, during *voir dire* at an uncontested hearing, and notwithstanding the reprieve from *Weishaus*, the parties are still regularly asked questions about the standard of living and whether each party believes he or she can maintain a reasonably comparable standard of living.

But why did the Court determine that this factor alone required confirmation at the time of the uncontested hearing or within the body of an agreement? Is the "length of absence from the job market" not just as important to memorialize? What about "the history of the financial or non-financial contributions to the marriage by each party including contributions to the care and education of the children and interruption of personal careers or educational opportunities"?

Frankly, there are cases in which the parties cannot even agree upon the income and/or earning capacity of the payor or the payee. These are equally important factors, both in determining the initial amount of alimony and at the time of a review. Yet, there is no 'requirement' that any agreement set forth in detail the facts related to these factors, nor does a court *voir dire* the parties on these factors.[7]

This elevation further perpetuates the perception that the standard of living is 'more important' than the other factors.

As noted above, except in rare circumstances, neither party will be able to maintain a standard of living reasonably comparable to that which was enjoyed during the marriage. Moreover, *both parties*, not just the supported spouse, are entitled to the standard of living—a point that seems to be ignored in the case law. Consequently, the emphasis on the standard of living seems entirely misplaced.

Are there circumstances in which the lifestyle of the parties should be given weight? The answer is yes. For example, in 2008, our country suffered a significant downturn in the economy. Many breadwinners lost their jobs or were forced to accept significant cuts in pay. For those who would file for divorce in 2009 or thereafter, the income available for support was often significantly less than that enjoyed during the marriage; as a result, the lifestyle enjoyed by the parties at that time reflected the reduced income. In those cases, supported spouses likely accepted a lesser amount of alimony due to then-current financial circumstances. As such, establishing the standard of living allows the supported spouse to seek an increase in alimony if/when the supporting spouse returned to the level of income that existed during the marriage.

Similarly, the standard of living needs to be determined when the income of the breadwinner is not easily discernible (*e.g.*, a business owner). In those cases where the income is not reflected in traditional documents, such as tax returns, establishing the parties' spending/budget is a necessity to 'confirm' or back into the cash flow available for support.

But in most cases—whether as decided by a court or resolved through negotiation—"the standard of living established in the marriage and the likelihood that each party can maintain a reasonably comparable standard of living" should be just another consideration in permanent and limited duration alimony cases, given no more or less weight than the other factors.

Endnotes

1. *Crews v. Crews*, 164 N.J. 11, 35 (2000).
2. Marital lifestyle is appropriately considered in either permanent alimony or limited duration alimony cases. *Carter v. Carter*, 318 N.J. Super. 34, 47-49 (App. Div. 1999); *Walles v. Walles*, 295 N.J. Super. 498, 512 (App. Div. 1996).
3. 180 N.J. 131 (2004).
4. It is also important to recall that Ms. Crews refused to participate in the trial and, as such, the matter proceeded in the form of a default hearing without her.
5. *Crews*, *supra*, 164 N.J. at 16.
6. *Id*. at 25.
7. I note that the Appellate Division in *Carter*, *supra*, 318 N.J. Super. at 44 demands that, for rehabilitative alimony, the parties must set forth the plan and expectations:

    When granting rehabilitative alimony or in approving a rehabilitative alimony provision where rehabilitative alimony is a negotiated term of a property settlement agreement, the trial judge must inquire of each party as to the parties' understanding of the rehabilitative alimony obligation. This is particularly necessary where one or both of the parties may wrongfully believe that the obligation to pay alimony will end at the conclusion of the rehabilitative period. A probing inquiry at the time the marriage is dissolved will be of utmost assistance to any other judge who may be called upon to consider a motion for modification of rehabilitative alimony.

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Editor-in-Chief's Column

Marital Settlement Agreements and Privacy Interests

by Charles F. Vuotto Jr.

Without question, divorce can be one of the most traumatic events in a person's life. Divorce frequently results in emotional upset, depression, strife, severance of personal ties and relationships, a decrease in lifestyle, loss of assets, the imposition of financial obligations, negative impacts on children and relationships with children, and health issues. Added to this list is exposure of the parties' personal affairs to the world.

The ability to keep private the totality of a family law matter gave way to the public's interest for transparency in litigated matters and court filings by way of Rule 1:38 *et seq.*, which was implemented in 2009 after the Report of the Supreme Court's Special Committee on Public Access to Court Records was issued under the leadership of Justice Barry Albin.[1]

Notwithstanding the public's right to access to court filings and litigated matters, parties should be able to keep their marital settlement agreement (MSA) out of the public eye. The author suggests that Rule 1:38 should be amended to make it clear that, should the parties jointly request it, their MSA need not be attached to the judgment of divorce or made a part of the court's file available for public view.

Before the enactment of the present form of Rule 1:38, *et seq.*, debates about open records resulted in the establishment of the special committee. The committee was directed to start with a presumption of openness of court records and was assigned the goal of balancing legitimate privacy interests against the concept of keeping the legal process transparent and open to the public.

One of the main policy considerations for public access to court records was to instill public confidence in our court system. The public has the right to know the courts are administering justice in a fair manner. The committee felt strongly public trust and confidence in the integrity of the judicial process outweighs the privacy concerns of individual litigants in most cases. As a result, the committee concluded personal information placed before the court for its consideration *in rendering a decision* must be made available for public inspection. Only by having the full record before the court can citizens fairly evaluate the effectiveness of their judicial system, and *the fairness of the court's decisions* in a particular case.

Recommendation #9 of the committee's report, however, acknowledged Family Division records should be viewed differently from records in other court divisions because of the involvement of children in family court matters, and the confidentiality of the children should be protected. Some committee members questioned whether a sufficient public interest warranted continuing the current open access to the private lives of citizens seeking matrimonial relief. However, the committee concluded these documents are central to the public's ability to understand and evaluate the legal process related to divorce and custody. Therefore, the committee concluded dissolution and non-dissolution docket records should remain presumptively open, and existing mechanisms for sealing records and closing courtrooms are sufficient to protect the interests of children. Importantly, the committee did not address the confidentiality of MSA specifically.

Ultimately, the report that was issued by Justice Albin resulted in the current form of Rule 1:38 *et seq.* Rule 1:38-3 *et seq.* provides for limited exceptions to documents that were not accessible by the public. Those documents are limited to the following:

- Family case information statements, including all attachments;
- Confidential litigant information sheets;
- Medical, psychiatric, psychological, and alcohol and drug dependency records, reports, and evaluations in matters related to child support, child custody, or parenting time determinations;

- Documents, records and transcripts related to proceedings and hearings required by the Supreme Court, or subsequent orders of the Court;
- Juvenile delinquency records and reports;
- Records of juvenile conference committees;
- Expunged juvenile records;
- Sealed juvenile records;
- Domestic violence records and reports;
- Names and addresses of victims or alleged victims of domestic violence or sexual offenses;
- Records relating to child victims of sexual assault or abuse;
- Records relating to Division of Child Protection and Permanency proceedings;
- Child custody evaluations, reports, and records;
- Paternity records and reports, except for the final judgments or birth certificates;
- Records and reports relating to child placement matters;
- Adoption records and reports;
- Records of hearings on the welfare or status of a child;
- Family, Finance and Probation division records containing information pertaining to persons receiving or ordered to pay child support, including the child(ren); custodial parents; noncustodial parents; legal guardians; putative fathers; family members and any other individuals for whom information may be collected and retained by the court;
- Records and transcripts of civil commitment proceedings.

Missing from the above list is the parties' divorce settlement agreement or MSA.

Private agreements between the parties resolving their litigation are just that—private. "It is difficult to imagine why the general public would have anything more than idle curiosity in private terms of the settlement. There is no relationship to potential public hazard or matters of public health, and unless official conduct is at issue, matters of public governance are not involved."[2] The parties' private settlement has no bearing upon the court's considerations in rendering a decision, the effectiveness of the judicial system, or the fairness of the court's decisions in a particular case. Therefore, there is no legitimate reason for making MSAs readily available for public inspection. Presumably, that explains the omission of the MSA in the list of the exceptions to disclosure in Rule 1:38-3. Nevertheless, it appears many judges routinely insist upon the submission of the MSA *in toto* at the conclusion of the uncontested divorce hearing.

There are a number of reasons, beyond privacy concerns, why the MSA should not be accessible to the public. First, the MSA is *evidence*. At every uncontested hearing, the MSA is marked as "J-1." This means it is a joint exhibit submitted by the parties and marked into evidence. Rule 1:2-3 provides, "…Following the conclusion of trial, evidence shall be returned to the proponent and so acknowledged on the record unless the court otherwise orders. The record shall note any exhibits retained by the court…." Generally, following a matrimonial or other trial in the family part, the trial court returns all exhibits to trial counsel; retaining voluminous evidence would place an unreasonable and unwieldy burden on the court.

The uncontested divorce hearing, during which time the litigants each testify on the cause of action and the procedure that led each to accept the MSA as the final resolution of all claims between them, is a trial. Granted, it is a brief proceeding, usually lacking some of the other hallmarks of a trial, such as cross-examination. But it is nonetheless a final evidentiary hearing on the grounds for divorce and each parties' waiver of his or her right to have the judge make substantive decisions, and acceptance of the MSA in lieu of giving testimony on each and every issue incident to the marriage. At the end of this trial, the evidence (*i.e.*, the MSA) should be returned to the parties, not retained by the court over the parties' objection or contrary to a specific request from the parties. The author is aware of no other type of litigation where the parties' agreement is required to be incorporated into an order of dismissal or retained by the trial court.

Most importantly, however, pursuant to a March 2005 memorandum to assignment judges, judgments and agreements should:

- Be conformed.
- If the matter has been tried to conclusion, the judgment should be stamped "tried to conclusion."
- All Judgments of Divorce (JOD) should be stamped with the Judge's name stamp and date stamped "filed."
- *When there is a Property Settlement Agreement (PSA) the JOD should contain language that states that the Court neither approves nor disapproves of the Property Settlement Agreement, but that it is*

incorporated into the Judgment of Divorce at the parties' request and is binding. The PSA is marked into evidence and entered into FACTS. Note: At the conclusion of the case, the PSA may be returned to the parties by the court upon request.
- Once the JOD is conformed, the original is retained by the court and entered into FACTS.[3] (Emphasis added)[4] (Emphasis added)

Therefore, by this memorandum, if the parties request, the PSA (or MSA) may be returned to them, not attached to the judgment of divorce and not made part of the court file.

As correctly stated by Mark Sobel in a prior column published in the *New Jersey Family Lawyer*,

> [f]amily practitioners now have been sensitized to the public nature of filed documents and the potential exposure of the contents. Furthermore, the companies employing these litigants often have separate concerns regarding the disclosure of, for example, the existence of stock options, the salary of highly paid executives, the maintenance of various retirement programs, and a host of other financial information they do not wish divulged to their competitors or the public.[5]

There are many other reasons why exposure of the parties' personal affairs by way of disclosure of their MSA to the public can cause harm to either the parties or their children. Some examples of harm are as follows:

Exposure of custody and/or parenting time issues to the community in which the parties and the children reside may cause emotional distress to the parties, and most importantly the children.

As most competently drafted MSAs contain detailed references to the parties' assets, liabilities and debts, it exposes every aspect of the parties' personal financial affairs to the public at large. This could detrimentally impact the parties in various ways, including but not limited to, identity theft or traditional forms of theft.

If the parties' agreement provides for the sale of property, along with mandatory reductions in listing price, it may place the parties at a disadvantage in negotiating a fair sale price.

Disclosure of the terms and settlement payments may encourage commencement of other lawsuits or unfair leverage or bias in obtaining similar settlement in subsequent lawsuits.

No countervailing public concern justifies the intrusive impact of allowing the public to have access to the parties' private divorce settlement. The reasons for transparency of the judicial system relate to the need to assure the public that the Judiciary is rendering decisions and judgments in a fair and impartial manner. When the parties reach a divorce settlement, they have by definition taken the decision-making authority away from the court in favor of their own negotiated agreement. Therefore, in such settled cases there should be no concern for impartiality, bias, prejudice, backroom deals, political influence, or any of the other justifiable reasons for mandating transparency in the judicial system.

The courts' treatment of the MSA varies from county to county, and from judge to judge. It is fair to say that not all judges permit incorporation of the agreement into the judgment by reference only. It is truly a county by county practice and, in fact, a judge by judge issue. Some judges insist on making the agreement part of the court's files; other judges will allow it to be incorporated by reference only; and some (very few) will permit the agreement to be sealed by the court under Rule 1:38-11. The latter approach is dubious at best. Pursuant to the applicable rule, the moving party bears the burden of proving by a preponderance of the evidence that good cause exists to seal the record. "Good cause" is defined by a two-prong test: 1) that disclosure is likely to cause a clearly defined serious injury, and 2) that the individual interest in privacy substantially outweighs the presumption of openness.[6] Needless to say, this is a difficult standard to meet, and has resulted in inconsistency.

There are some obvious advantages of attaching the agreement to the judgment of divorce. For instance, in the event the agreement is inadvertently lost or destroyed, the court has a record of it. We know, however, that the court does not maintain records in perpetuity. We also know that each party and his or her attorney usually retain a copy of the agreement. Therefore, the need for the court to safeguard this document is greatly diminished. More importantly, however, nondisclosure of such private and sensitive information may actually encourage litigants to settle because they know if a judge tries the case, the judge's findings are public.

Some judges state the court must retain the original MSA in the unlikely event the parties dispute the authenticity of the agreement proffered. Again, where four people have copies of the MSA, this concern seems unlikely. Moreover, this concern can be overcome by instructing the parties to maintain their agreements in a safe place, post-divorce. If permitted by the court, many clients readily accept this burden and opt to incorporate the agreement by reference only, thereby keeping the terms of the agreement out of the public eye unless enforcement is required.

A more common explanation for why the court insists upon maintaining the MSA is so that it has a record of support payments to be made. Again, this can be overcome simply by incorporating the support obligation into the judgment of divorce and attaching the child support guidelines worksheet for all child support cases.

In the light of the Administrative Office of the Courts' directive, the arguments set forth above and to promote consistency, it is the suggestion of the author that Rule 1:38 be modified to add to Section 1:38-3 the following:

> When the parties have reached a full and final agreement with regard to all issues in their family law matter, waived and abandoned all claims against each other that are not specifically addressed in that agreement, and jointly request that the court not attach their agreement to the final judgment or include it within the court's file, the court shall grant said request unless the court finds, for good cause, that said request should be denied. When the Agreement is not attached to the final judgment or made a part of the court's file and the parties' Agreement includes terms regarding child support or alimony, the final judgment shall include the requisite recitation pursuant to Rule 5:5-2. Further, said final judgment shall have annexed to it the child support guidelines worksheet when child support is applicable in accordance with Rule 5:6A. ■

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Endnotes

1. Report by Justice Barry Albin, http://www.judiciary.state.nj.us/publicaccess/publicaccess.pdf.
2. *See* Arthur R. Miller, Confidentiality, Protective Orders and Public Access to the Courts, 105 *Harv. L. Rev.* 427 (1991).
3. Family Automated Case Tracking System.
4. Memo to Assignment Judges on Transmitting the Dissolution Case, Manual II, Vol. A, Sec. 16 (Effective March 1, 2005; replacing Dec. 12, 2003).
5. *See* Mark H. Sobel, Confidentiality and Nondisclosure Agreements: The Prevention of Indiscriminate Disclosure, 26 *NJFL* 114.
6. Rule 1:38-11(b).

Executive Editor's Column

When Family Law Intersects With Tragedy: Potential Ethical Considerations Under *A.W. v. T.D.*

by Ronald Lieberman

What happens to the children when a motion is filed to modify custody because the custodial parent suffers from a terminal illness? Practitioners obtained some thoughtful, poignant guidance in *A.W. v. T.D.*[1] However, that case also gives rise to various questions regarding the roles and ethical issues in custody matters.

Practitioners know that when child custody issues exist, emotions often take control over dispassionate logic and factual analysis. When a custodial parent is dying, as occurred in *A.W.*, it seems unlikely that anything but emotions will control. Yet, an attorney representing either parent must serve the interest of that parent and not the entire family, while acknowledging that he or she must consider the child's welfare[2] and not mislead the court.[3] *A.W.* left open certain unanswered questions for the practitioner, both ethical and legal.

In *A.W.*, the custodial parent/mother of three children between 12 and 14 years of age had incurable stage IV breast cancer. The noncustodial parent/father sought an immediate change in custody without submitting proof that the mother's illness or condition "substantially prevent[ed] the custodial parent from continuing to satisfactorily function as a primary caretaker" for the children.[4] The motion judge did not just focus on whether "due to illness or injury, a custodial parent may no longer be able to appropriately care for a child's health, safety, and welfare,"[5] but on whether removal of the children from the custodial parent would affect the children's emotional needs because "judicial consideration of a child's needs must logically extend to emotional needs as well."[6]

The judge in *A.W.* went to great lengths to gently but stridently counsel both parents to have counseling for the children put in place to deal with the custodial parent's end-of-life issues. The judge mentioned that a change in custody was unwarranted because "the parties' children may have a tremendous emotional need to remain with defendant [mother] and to spend as much time with her as reasonably possible under the circumstances."[7] Curiously, there was no mention whatsoever of whether the children were emotionally affected by knowing their mother was dying and might have benefited from being removed from that situation. That issue should likely have been explored, and by doing so may have entailed the appointment of a mental health expert under Rule 5:3-3 or a guardian *ad litem* for the children under Rule 5:8B to represent the children's best interest.

The mental health professional or guardian *ad litem* would have an unenviable task. He or she would have to focus on the welfare of the child or children while protecting and promoting a happy childhood, all in the face of a dying parent. On top of those potentially conflicting tasks, the mental health professional or guardian *ad litem* would need to consider the family as a whole and keep the children informed of the proceedings. There is no indication in *A.W.* as to why the children were not afforded a mental health professional or guardian *ad litem*. The mother's attorney did not seek one and the father was self-represented. But a judge can appoint a mental health professional under Rule 5:3-3 or guardian *ad litem sua sponte* under Rule 5:8B.

The medical condition of the dying parent was addressed throughout the decision. The judge in *A.W.* directed that the custodial parent/mother, or one of her family members, let the noncustodial parent know "if defendant's medical condition materially worsens... [because] [t]he children's best interests require that plaintiff be kept fully advised of any significant developments and changes in circumstances…."[8] That directive calls into question whether a judge had the discretion to order a party to prospectively violate the physician-patient privilege that exists under N.J.S.A. 2A:84A-22.1 to -.7 and N.J.R.E. 506 without a concurrent (not prospective) finding that there was a legitimate need for the evidence, that the evidence was relevant, and that the information could not be obtained from any other source.[9]

After all, the noncustodial parent was the one raising the custodial parent's health as an issue, not the other way around, whereby a waiver of the privilege might have occurred under N.J.R.E. 530. Would not the children in *A.W.*, all aged 12 or older, be able to communicate to their father the existence of their mother's deteriorating condition? The case does not mention whether any objection was raised to the judge's directive.

A.W. brings to mind just what role the attorney plays for the custodial parent who is dying. Practitioners know that zealous advocacy in child custody matters needs to be tempered to allow family relationships to exist after the litigation ends. But should the attorney for the custodial parent go further and conduct a full factual investigation of the custodial parent's ability to care for the child or children, and then explore the children's emotional well-being? Does that same attorney have an obligation to seek a mental health professional or guardian for the dying client who is facing a disability?[10]

The *A.W.* case did not mention these issues, but one need not look too deeply to see how each or all of them can come to pass when a custodial parent is dying.

What if the attorney representing the dying custodial parent became aware of the fact that the custodial parent was losing his or her ability to care for the child or children? An attorney could not state that the client is doing well and is able to care for the child or children if he or she has come into information to the contrary.[11] The balance between zealous advocacy and posturing must be struck, lest harm come to the children and family.[12]

Ethical judgment in the family law arena charges the lawyer with some responsibility and accountability for resolving problems and devising the results. A lawyer who exercises ethical judgment in the practice of family law has to pay attention to the outcome, determine the family dynamics, and find a way to help the family. All of those considerations were raised in *A.W.*, and a practitioner would be well served in reviewing that case for answered and unanswered questions when sensitive family relationships are at stake. ■

Endnotes

1. 2013 N.J. Super. LEXIS 165 (Ch. Div.).
2. R.P.C. 2.1, Advisor ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social, and political facts, that may be relevant to the client's situation.").
3. R.P.C. 3.3(a), Candor to the Tribunal.
4. *A.W., supra*, 2013 N.J. Super. LEXIS at 4-5.
5. *Id*. at 5.
6. *Id*. at 8.
7. *Id*. at 9-10.
8. *Id*. at 16.
9. *Kinsella v. Kinsella*, 150 N.J. 276, 306-307 (1997).
10. R.P.C. 1.14, Client Under a Disability.
11. R.P.C. 3.4, Fairness to Opposing Party and Counsel.
12. The American Academy of Matrimonial Lawyers (AAML) publishes a voluntary code of conduct for family lawyers through its Bounds of Advocacy, including mandating that a lawyer "consider the welfare of, and seek to minimize the adverse impact of divorce on, the minor children," R. 6.1; and that an attorney "should be knowledgeable about different ways to resolve marital disputes," R. 1.4; and that a lawyer "should attempt to resolve matrimonial disputes by agreement….," R. 1.5.

Cohabitation

William W. Goodwin and Diana N. Fredericks

Decisional law is an evolutionary process, and cases addressing post-judgment cohabitation's impact on alimony obligations are no exception. The purpose of this article is to assist practitioners in deciphering this area of the law as it has evolved over the past 38 years, especially as the cases can appear conflicting at times. This review of cohabitation is especially timely in light of the Appellate Division's May 7, 2013, decision in *Reese v. Weis*,[1] which addresses two issues prior case law has not: 1) What constitutes "an economic benefit"; and 2) when does such a benefit warrant termination—rather than modification—of alimony. The goal of this article is to assist practitioners in drafting effective settlement agreements and guiding clients where post-divorce cohabitation is contemplated by the alimony recipient (or suspected by the payor).

The History of Cohabitation Case Law

Garlinger v. Garlinger[2]

In this 1975 Appellate Division case, the husband filed an order to show cause to terminate alimony based on the former wife's residency with her boyfriend. At the hearing, the wife testified she received no support from her boyfriend except occasional gifts and dinners out.[3] Following the hearing, the trial court entered an order suspending the husband's alimony obligation retroactive to when cohabitation commenced.

The former wife appealed. On appeal, the husband argued that the wife's "illicit relationship," in itself, negated his obligation to pay alimony.

While holding that "un-chastity" of a former wife did not, in and of itself, form a basis to terminate or even reduce alimony, the appellate court observed cohabitation is a factor to be considered "to the extent that it may bear upon the amount of, and the necessity for, the allowance."[4]

Thus, the Appellate Division held that the impact of cohabitation (or un-chastity) on a pre-existing alimony obligation has nothing to do with the morals of the participants in a post-marital relationship, and everything to do with their economic interdependence or lack thereof.

Five years after the *Garlinger* decision, the Supreme Court decided *Lepis*,[5] wherein the Court held an award of alimony may be modified following a divorce whenever changed circumstances substantially modified the economic conditions of the parties. Among the changed circumstances, the trial court must consider "the dependent spouse's cohabitation with another."[6] This, in effect, confirmed a place for the *Garlinger* holding in the lexicon of cohabitation in New Jersey.

Gayet v. Gayet[7]

Eight years after *Garlinger*, the issue of cohabitation made its way again to the Supreme Court. In *Gayet v. Gayet*,[8] the husband filed a post-judgment motion to terminate alimony, alleging his former wife was living with another man "as husband and wife." The trial court ordered discovery and a plenary hearing.

In a divided decision, the Court recognized there were two conflicting policies in play: The statutory provision that alimony ends upon remarriage of the payee spouse (N.J.S.A. 2A:34-25), and the rights of privacy and developing personal relationships following a divorce. The *Gayet* Court concluded the Appellate Division had properly balanced these policies in *Garlinger*. The Supreme Court famously stated: "The extent of *actual economic dependency*, not one's conduct as a cohabitant, must determine the duration of support as well as its amount…[and that] economic realities should dictate the result."[9]

The *Gayet* Court also confirmed that cohabitation constituted changed circumstances sufficient to meet the first prong of *Lepis*, thus permitting the moving party the opportunity for discovery and, if appropriate, a hearing. The majority in *Gayet* did not define cohabitation, but simply noted "we are satisfied that our Courts will have little difficulty in determining the true nature of the relationship."[10]

Frantz v. Frantz[11]

The 1992 Chancery Division case of *Frantz* involved a former wife's application to reinstate alimony, which had previously been terminated due to her cohabitation.

Interestingly, at the time of the former wife's application, she acknowledged that she was cohabiting with another man. Her argument was that neither her contributions to him, nor his to her, justified the termination of alimony.

In his ruling, Judge Mark A. Sullivan, Jr. held it would be unreasonable to place the burden of proof on the former husband, as he does not have access to the evidence necessary to support that burden. Thus, once a *prima facie* showing of cohabitation has been made, "this Court feels that the burden of proof (that the cohabitant is neither supporting nor being supported by the payee former spouse) should shift to the supported spouse."

By 1992, therefore, the New Jersey courts had laid the groundwork for cohabitation's effect on alimony and the associated burdens of proof and persuasion. However, the following issues remained unaddressed, at least at the appellate level:

1. What constitutes cohabitation sufficient to meet the first prong of *Lepis*?
2. Once cohabitation has been established, who has the burden of proof regarding whether or not alimony should be modified/terminated (while this had been addressed in *Frantz*, that was a trial court opinion)?
3. What economic data are relevant to the trial court's consideration, and how should the courts use that information to determine whether alimony should be modified and, if so, by what quantum?
4. Does the duration of the cohabitation play a role in the court's calculus?
5. Were the cohabitation to terminate, could/should alimony be reinstated at its former level?
6. If the parties to a marital settlement agreement were to include a provision to terminate alimony upon cohabitation, would it be enforced by a court of equity?

Fortunately for practitioners and their clients, case law in this state has developed in all the above areas, answering some of those questions with finality and others with at least some guidance.

Ozolins v. Ozolins[12]

In *Ozolins*, the parties were divorced in 1990, following a 25-year marriage. Their settlement agreement called for alimony in the amount of $1,500 per month on a "permanent" basis. The husband filed a motion alleging the former wife was cohabiting. The trial court ordered a plenary hearing, during which the former wife acknowledged living with a male friend for "economic reasons only."[13]

The trial court terminated alimony, holding that once the husband had made a *prima facie* showing of cohabitation the wife had the burden of proof to show that she still required alimony. Failure to do so justified a termination. On appeal, the Appellate Division for the first time addressed the issue of presumptions and burdens of proof: "There is a rebuttable presumption of changed circumstances arising upon a *prima facie* showing of cohabitation. The burden of proof, which is ordinarily on the party seeking modification, shifts to the *dependent spouse*."[14]

Accordingly, the trial court decision in *Frantz* had essentially been approved at the appellate level.

Boardman v. Boardman[15]

In *Boardman*, the breadwinner was the former wife who, at the time of trial following a 23-year marriage, earned $275,000 per year. The husband had never earned "more than a token income," despite several graduate degrees. Following a trial, the court imputed $20,000 per year in income to the husband and awarded him $2,000 per month as permanent alimony.

On appeal, the *Boardman* court focused on the lower court's decision that the wife's alimony obligation would terminate upon the husband's cohabitation with an unrelated female. Citing to *Gayet* and *Ozolins*, the Appellate Division stated:

> The law does not support the automatic termination of court-ordered alimony upon cohabitation with an unrelated female. If plaintiff cohabits with another woman, defendant will have the opportunity to seek a reduction in alimony by obtaining discovery and showing either that plaintiff's economic needs have decreased because the woman is contributing to his support, or that he is subsidizing her at defendant's expenses.[16]

Note the language that at least implies the supporting spouse has the burden of 'showing' the supported spouse no longer needs alimony in view of cohabitation. Query whether this conflicts with *Ozolins* or is simply a case of less than careful drafting of that portion of the opinion.

Melletz v. Melletz[17]

In *Melletz*, the parties were divorced in 1991. Notably, their agreement provided alimony would be suspended for any period of time during which the wife cohabi-

tated with an unrelated male. Cohabitation was liberally defined to include "generally residing together in common residence" and engaging in certain activities such as cooking meals together at the residence, maintaining clothing at the other's residence and sleeping together at the residence of one or the other.[18] The clause further provided cohabitation would exist even if the male maintained a separate residence. The clause in question specifically stated that the provision "was specifically negotiated for…" and was "a bargained for agreement."[19] The clause also provided "the economic contribution component of *Gayet* shall not be applicable and that mere cohabitation, as defined herein, shall be the basis for suspension of the husband's alimony obligation."[20]

The husband filed a motion to suspend alimony on the basis of the wife's alleged cohabitation. At the plenary hearing, the testimony revealed the husband had begun conducting surveillance of the wife's condominium unit before the uncontested hearing. Thus, the husband was aware of the wife's relationship with a male friend *prior* to the completion of the negotiations and the execution of their marital settlement agreement. Therefore, the trial court found that the cohabitation clause in the agreement was "unfair, inequitable, and unenforceable."[21]

The husband appealed. The issue before the Appellate Division was whether parties could vary the parameters of the economic contribution rule by contract. In a strongly worded opinion by Judge William Dreier, the Appellate Division affirmed the lower court and declined to enforce the clause on public policy grounds:

> Here the one sided agreement attempts to control the wife's behavior in terms of suspension of her total alimony, even though the prohibited behavior may have no economic impact on her life. This is basically an *in terrorem* clause seeking to regulate the ex-wife's otherwise legal activities.[22]

The Appellate Division continued, "[m]atters of personal preference, residence, or occupation, insofar as they do not reflect changes in income or expenses or other matter of recognized mutual concern, simply are not the business of a former spouse."[23] Accordingly, the *Melletz* court held that "apart from the economic impact upon either need or the ability to pay recognized in *Gayet*[]…the payor spouse may not through loss or suspension of statutory alimony control the social activities of the payee."[24]

Konzelman v. Konzelman[25]

In *Konzelman*, the Supreme Court was asked to construe a property settlement agreement terminating the former wife's alimony if she cohabited, and to rule upon its enforceability. Following a 27-year marriage, the parties were divorced in Oct. 1991. Their settlement agreement provided that alimony would terminate if the wife cohabited with an unrelated adult male for a period of four consecutive months.

In Feb. 1993, the husband hired private investigators who produced evidence of a third-party male residing with the former wife. The parties filed cross-motions relating to alimony and cohabitation.

After a plenary hearing, the trial court found the wife was cohabitating with her boyfriend. The evidence included surveillance, eyewitness observations, and photos establishing the boyfriend was staying at the wife's home. The trial court also considered evidence of vacations the wife and boyfriend took together paid for by the boyfriend, that the wife and boyfriend spent holidays together with their respective families, that they opened and maintained a joint savings account, that the boyfriend paid for a swimming pool at the wife's home, that the boyfriend performed maintenance at her home, and that he had the code to disarm the alarm system to gain access to her home.

Despite finding cohabitation, the trial court refused to enforce the termination clause of the settlement agreement, relying instead on *Gayet* and its progeny. The trial court found the boyfriend was providing support to the extent of $170 per week and reduced alimony from $700 per week to $530 per week. The parties filed cross-appeals.

The Appellate Division reversed and held the cohabitation clause was enforceable, stating "…there are no considerations of public policy which should prevent competent parties to a divorce from freely agreeing that if the dependent spouse enters into a new relationship which, but for the license is tantamount to a marriage, the economic consequences of the new relationship will be the same as those of a remarriage."[26]

The Supreme Court in *Konzelman* recognized two competing public policy considerations: 1) The Court's long standing policy favoring consensual agreements as a means of resolving marital controversies and the related public policy favoring the stability of arrangements, once made; and 2) the principle that settlement agreements in marital cases are enforceable *in equity*, and that "contract principals have little place in the law of domestic relations."[27]

As in *Melletz*, the issue before the *Konzelman* Court was whether an agreement to terminate alimony obligations based upon cohabitation can be enforceable without regard to the economic consequences of the new relationship.

The Court first recognized the Legislature already provided that permanent alimony terminates upon remarriage without regard to the economic consequences to the wife as a result of the new relationship.[28] The Court then cited, with approval, the language of the Appellate Division:

> [T]here are no considerations of public policy which should prevent competent parties to a divorce from freely agreeing that if the dependent spouse enters into a new relationship which, but for the license, is tantamount to a marriage, the economic consequences of the new relationship will be the same as those of remarriage.

Thus, the Supreme Court concluded that "based on minimum standards to assure their mutuality, voluntariness and fairness, cohabitation agreements may be enforced."[29]

The *Konzelman* Court made crystal clear that a termination upon cohabitation clause required more than "a mere romantic, casual or social relationship." The Court approved the Appellate Division's standard of defining cohabitation as a domestic relationship "whereby two unmarried adults live as husband and wife." [30]

In so holding, the Court also provided some guidance to lower courts, counsel and parties regarding what constitutes cohabitation. The Court used such terms as "serious," "lasting," "stable," and "enduring" in describing such relationships. The Court also identified at least some "duties and privileges" that are commonly associated with marriage that should be assessed in determining whether or not cohabitation exists. "These can include, but are not limited to, living together, intertwined finances such as joint bank accounts, shared living expenses and household chores and recognition of the relationship in the couples' social and family life."[31]

Finally, the Court recognized that the Appellate Division had declined to decide whether the four-month period specified in the *Konzelman* property settlement agreement was sufficient to justify enforcement of the provision. The Supreme Court stated instead that the trial court's finding that the wife's cohabitation "has been of long duration and was still continuing at the time of trial" was amply supported, and her relationship was, therefore, sufficiently "stable and enduring to render enforcement of the provision fair and equitable under the circumstances." [32]

Thus, the use of a '*Konzelman* clause' became relevant to practitioners.

Conlon v. Conlon[33]

The following year, a Chancery Division decision provided further guidance on the effect of cohabitation on alimony obligations. The Conlons were married in 1979 and separated in 1993. In a post-judgment motion, Judge Thomas W. Cavanagh Jr. was asked to terminate alimony as a result of the wife's alleged cohabitation. In the absence of any discovery, without a plenary hearing, and most significant, *without* a *Konzelman* clause in the underlying settlement agreement, he declined.

The settlement agreement included a 12-year term alimony obligation but was silent regarding cohabitation. During the fourth year of the payment schedule, the husband filed a motion to terminate alimony predicated upon his assertion that the wife was cohabiting with an unrelated adult male.

Judge Cavanagh rejected the husband's reasoning and denied his application.

> The *sine qua no* of the *Konzelman* decision was the contractual understanding of the parties.…The critical factor in gauging the effect of cohabitation on alimony is a review of the reduction in financial need of the dependent former spouse after appropriate discovery.…The majority opinion in *Konzelman* neither abrogated nor diminished the well-developed authority which culminated in the *Gayet* pronouncement regarding cohabitation and the modification of alimony.[34]

In rendering its decision, the *Conlon* court made two additional points: First, Judge Cavanagh noted that while a number of jurisdictions had adopted statutes equating cohabitation to remarriage for the purposes of automatic termination of alimony, New Jersey had not. Second, the court required a plenary hearing to explore what reasonable expectations, if any, the parties had at the time of their negotiations and settlement concerning cohabitation and its impact on alimony.[35]

Palmeire v. Palmeire[36]

The 2006 Appellate Division decision in *Palmeire* also involved a post-judgment application by a former husband to terminate alimony. The parties had an unusual clause in their settlement agreement providing that the husband's obligation to pay alimony would terminate upon "the wife's residing with an unrelated person or vice versa, *regardless of the financial arrangements between the wife and said unrelated person*."[37]

Suspicious that his former wife was residing with an unrelated adult male, the husband filed a motion to terminate alimony. Based upon the certifications, including the log of the husband's private investigator, the court found the wife and the third party resided together at her home, and terminated alimony. The Appellate Division reversed and remanded.

The *Palmeire* court "seriously question[ed] whether the language of the provision at issue or the proofs proffered are sufficiently clear to justify termination of alimony under the standard of enforceability recognized in *Konzelman*[]."[38] The *Palmeire* court criticized the broad language of the agreement, noting that a reasonable interpretation might justify termination of alimony were the former wife to provide shelter to an ailing relative or receive care from a live-in nurse.

Cohabitation Now…*Reese v. Weis*[39]

In a recent Appellate Division decision, the parties divorced in 1996 following a 13-year marriage that produced three children. As part of the settlement, the husband agreed to pay the wife permanent alimony. Approximately two years later, the wife jointly purchased a home with her boyfriend. The wife, her three children, the boyfriend, and his two children resided together in this home.[40]

In Aug. 2008, the husband filed an application to terminate alimony based upon the wife's long-term cohabitation. While the record is not clear, it appears the only cohabitation clause related to the obligation on the part of the husband to maintain life insurance to secure his alimony obligation. The trial court conducted a plenary hearing. The evidence revealed that while the wife and her boyfriend generally maintained separate accounts, they did have one joint account to share certain expenses. Testimony also revealed the boyfriend provided substantial lifestyle enhancements. For example, he singlehandedly paid for a $120,000 safari vacation to Africa enjoyed by the wife and her children, ski trips to Vail, trips to Greece and Italy, a trip to the Rose Bowl in California, tickets to the U.S. Open tennis tournament in New York, and a vacation to the Galapagos Islands. The boyfriend also paid certain everyday expenses, including the wife's vehicle expenses and her health insurance. He also lavished gifts upon her, including tennis lessons, designer handbags, and jewelry.

The trial court concluded the wife failed to show that her expenses were satisfied by her separate income receipts, such as her alimony, child support and other unearned income sources. The court also noted the cohabitation continued for five years longer than the underlying marriage. As a result, the trial court terminated alimony. The wife appealed the termination and the husband cross-appealed the effective date.

The Appellate Division, through Judge Marie E. Lihotz, asked and answered two questions of first impression:

1. What defines "an economic benefit"?
2. Under what circumstances does such a benefit warrant termination, rather than modification, of alimony?

The *Reese* court discussed the standard of an economic benefit, holding that the trial court must first analyze the financial arrangements between the wife and cohabitant. First, the court must determine whether or not she is receiving a *direct* economic benefit; in other words, is the cohabitant contributing to his or her necessary expenses, such as food, shelter, transportation, clothing and insurance?

Second, even if the cohabitant is not providing a direct economic benefit, the trial court must consider whether or not she is receiving an *indirect* economic benefit. A common example would be if she had moved into her cohabitant's home without having to contribute toward any of the expenses.

The *Reese* court did not stop at this analysis, providing that trial courts must also consider "more subtle economic benefits" resulting from the parties' intertwined finances:

> When the parties' financial obligation arrangements are comingled, blurring the demarcation of economic responsibility, subsidization of expenses by one party for the benefit of the other may occur…and the ability to prove economic independence may diminish or possibly disappear.[41]

The *Reese* court rejected the wife's argument that her annual expenditures justified a continued need for support because she used her alimony to satisfy her basic needs, relying upon her boyfriend to provide an enhanced (above marital) lifestyle. In affirming the trial court, the *Reese* court concluded that "taken together, the facts demonstrate significant direct and indirect economic benefits flowed from [the boyfriend] to [the wife] along with the provision of lifestyle enhancements. The records support the Trial Judge's findings that not only was [the wife] able to be relieved of certain costs and expenses, she also was able to augment her standard of living."[42] "The unequivocal testimony verified the combined family operated as a single household that did not separate the financial responsibilities of [the wife] from those of [her boyfriend]."[43]

The wife argued that she needed all of the alimony to meet the marital lifestyle, and that the funds provided by her boyfriend allowed her to live an enhanced lifestyle. The Appellate Division rejected that argument on two bases: First, she did not satisfy her burden of proof. Second, and perhaps more important, the purpose of alimony is not to allow the former spouse to live an enhanced lifestyle subsidized by a third party, but rather to live at the marital lifestyle. Thus, if a third party is providing a support sufficient to meet the marital lifestyle, alimony is no longer necessary.[44]

In its analysis, the *Reese* court moved beyond the arithmetical 'nuts and bolts,' stating that

> [i]n this regard, we note the discretionary determination to modify or terminate alimony is informed by more than the objective calculation of the specific monies provided by the cohabitant.…In determining whether an award of alimony continues to be 'fit, reasonable and just'…the Court must consider the *characteristics* of the new relationship of the dependent spouse and the cohabitant. Considerations that may be weighed when making such a determination include the length of cohabitation, the duration of receipt of the economic benefits, particularly in light of the length of the prior marriage, and whether the committed cohabiting relationship exhibits the indicia of marriage.[45]

Conclusion

As outlined above, the cohabitation cases in New Jersey can be separated into two distinct lines: Those where an anti-cohabitation clause has been incorporated into a settlement agreement, and those where one has not.

Regarding the first line of cases, *Konzelman* established that anti-cohabitation clauses are enforceable, but not *always*. Enforceability appears to depend on the language in the agreement and the nature of the post-divorce relationship between the alimony recipient and the cohabitant. Regarding the language, provisions that define the nature of the cohabitation as something less than long term and stable are likely to be viewed as inappropriately controlling and void as against public policy. Even where the appropriate *Konzelman* language is present in a settlement agreement, the trial court will carefully explore the nature and extent of the cohabitation relationship before such a termination clause is enforced.

Regarding the second line of cases, the following lessons bear repeating:

1. "Cohabitation" is a term of art. Payors whose former spouses engage in one-night stands are best advised not to waste their money on a doomed application to terminate alimony.
2. Cohabitation is best established via long-term surveillance conducted by a professional. Because this can be a significant expense, exacerbated by the significant expense of litigation, clients paying $250 per month, especially on a limited duration basis, should be encouraged to engage in a cost/benefit analysis and the uncertainty of litigation.
3. Once cohabitation is established, the burden of proof shifts to the recipient to prove he or she is not being supported by the cohabitant, nor is the cohabitant supporting him or her.
4. Because of point 3, alimony recipients who are contemplating cohabiting, yet hope to retain their full alimony award, should be counseled on the following:
   a. Maintaining joint bank accounts or joint assets of any kind should be discouraged.
   b. Overhead expenses should be shared equally and other expenses should be allocated based on consumption to the extent reasonably possible.
   c. Courts will consider the extent to which the cohabitant affords the payee the opportunity to enhance his or her lifestyle. A payee should not be surprised by a reduction in his or her alimony, even if he or she follows rules a. and b., if he or she is able to maintain a standard of living

significantly higher than that enjoyed during the marriage.

d. Proving cohabitation is not 'all about the money.' Especially when considering the possibility of terminating alimony, courts will inquire into the nature and extent of the relationship. Regarding the nature of the relationship, the courts will look to see if the parties have truly separated their finances. For example, if they have a joint checking account, is the account reconciled each month to make sure neither party subsidized the lifestyle of the other? Are credit card bills analyzed each month to ensure the party who incurred the charge paid for it with his or her separate resources? With respect to the extent, courts will compare the duration of the cohabitating relationship to that of the underlying marriage.

Over the past 30 years, the number of parties living together in monogamous relationships in the absence of marriage has increased substantially. Many of these situations arise in the context of divorced parties. Thus, it is anticipated this area of the law will continue to evolve. ■

William W. Goodwin is a senior partner with Gebhardt & Kiefer, P.C., in Clinton. Diana N. Fredericks is a junior partner in the firm.

Endnotes

1. 430 N.J. Super. 552 (App. Div. 2013).
2. 137 N.J. Super. 56 (App. Div. 1975).
3. *Garlinger*, 137 N.J. Super. at 59.
4. *Garlinger*, 137 N.J. Super. at 63.
5. *Lepis v. Lepis*, 83 N.J. 139 (1980).
6. *Lepis*, 83 N.J. at 151.
7. *Gayet v. Gayet*, 92 N.J. 149 (1983).
8. *Gayet*, 92 N.J. at 150.
9. *Gayet*, 92 N.J. at 154.
10. *Gayet*, 92 N.J. at 155.
11. 256 N.J. Super. 90 (Ch. Div. 1992).
12. 308 N.J. Super. 243 (App. Div. 1998).
13. *Ozolins*, 308 N.J. Super. at 246.
14. *Ozolins*, 308 N.J. Super. at 248-9.
15. 314 N.J. Super. 340 (App. Div. 1990).
16. *Boardman*, 314 N. J. Super. at 347.
17. 271 N.J. Super. 359 (App. Div. 1994).
18. *Melletz*, 271 N.J. Super. at 361.
19. *Melletz*, 271 N.J. Super. at 361-2.
20. *Melletz*, 271 N.J. Super. at 362.
21. *Melletz*, 271 N.J. Super. at 361.
22. *Melletz*, 271 N.J. Super at 365.
23. *Melletz*, 271 N.J. Super. at 366.
24. *Melletz*, 271 N.J. Super. at 367.
25. 158 N.J. 185 (1999).
26. *Konzelman*, 158 N.J. at 161.
27. *Lepis v. Lepis*, 83 N.J. 139, 148 (1980) (emphasis added).
28. N.J.S.A. 2A:34-25.
29. *Konzelman*, 158 N.J. at 161.
30. *Konzelman*, 158 N.J. at 202.
31. *Ibid*.
32. *Konzelman*, 158 N.J. at 203.
33. 335 N.J. Super. 638 (Ch. Div. 2000).
34. *Conlon*, 335 N.J. Super. at 650.
35. *Conlon*, 335 N.J. Super. at 651-2.
36. 388 N.J. Super. 562 (App. Div. 2006).
37. *Palmieri*, 388 N.J. Super. at 563 (emphasis added).
38. *Palmieri*, 388 N.J. Super. at 564.
39. 430 N.J. Super. 552 (App. Div. 2013).
40. *Reese*, 430 N.J. Super. at 558-9.
41. *Reese*, 430 N.J. Super. at 576.
42. *Reese*, 430 N.J. Super. at 579.
43. *Reese*, 430 N.J. Super. at 580.
44. *Reese*, 430 N.J. Super. at 579.
45. *Reese*, 430 N.J. Super. at 582.

Alimony, Palimony and Spousal Support, and New Jersey Civil Union Partners: *Windsor* Don't Fix It

by Stephanie Cañas Hunnell

It is well settled that when a married couple divorces in the state of New Jersey, a dependent spouse may seek payment of alimony from the supporting spouse.[1] If the matter is contested, one factor the courts will be required to consider in making an award of alimony is the standard of living during the marriage.[2] Indeed, an essential element of the alimony analysis is whether the supported spouse will be capable of maintaining a lifestyle or standard of living that is at least reasonably comparable to that which was enjoyed during the marriage.[3]

On Feb. 19, 2007, the New Jersey Civil Union Act became effective. The act defines civil unions as the "legally recognized union of two eligible individuals of the same sex."[4] The act amended all of New Jersey's statutes affecting marriages to include civil unions, thus purportedly providing civil union partners with all of the same protections, rights and responsibilities as heterosexual couples who elect to marry.[5] Thus, under this statutory scheme, upon the dissolution of a civil union, a dependent civil union partner would be entitled to seek 'alimony' from his or her partner.[6]

Notwithstanding the intention of the act, civil unions do not actually provide civil union partners with the same rights, protections or responsibilities as married couples. In particular, a civil union partner will not be able to benefit from paying or receiving alimony in the same manner as couples who elect to get married; a civil union partner's alimony award may be reduced or limited as a result of their inability to enter into a legally recognizable marriage; and with the amendment to the statute of frauds requiring all palimony agreements to be in writing, equitable remedies available to extend the duration of the civil union is virtually impossible absent a writing.

Alimony

The term "alimony" does not have the same meaning for civil union partners as it does for married couples, including same-sex married couples.

According to Publication 504 (2012), "alimony is a payment to or for a spouse or former spouse under a divorce or separation instrument [and]…is deductible by the payer and must be included in the spouse's or former spouse's income."

On June 26, 2013, the Supreme Court of the United States held that Article 3 of the Defense of Marriage Act, which provides that marriage is between one man and one woman,[7] is unconstitutional.[8] Thereafter, on Aug. 29, 2013, the U.S. Department of the Treasury and the Internal Revenue Service (IRS) ruled that "individuals of the same sex will be considered to be lawfully married under the Code as long as they were married in a state whose laws authorize the marriage of two individuals of the same sex, even if they are domiciled in a state that does not recognize the validity of same-sex marriages."[9] Likewise, for federal tax purposes, the terms "husband," and "wife" include individuals married to a person of the same sex if they were lawfully married in a state whose laws authorize the marriage of two individuals of the same sex, and the term "marriage" includes such marriages of individuals of the same sex.[10] Accordingly, a legally married or formerly married individual, regardless of sexual orientation, paying alimony subsequent to a divorce or separation agreement, is entitled to deduct those payments on his or her federal income tax returns. Likewise the spouse receiving those payments will be required to claim them as income.

Prior to the ruling in *Windsor v. United States*[11] and Revenue Ruling 2013-17, payments made by one same-sex 'spouse' to the other incident to divorce, could not

be deducted on his or her federal income tax return, and could be subject to federal gift tax consequences. Conversely, *Windsor* and Revenue Ruling 2013-17 have no impact on the deductibility of support payments made by a civil union partner incident to dissolution.

In case there was any doubt that a civil union is not tantamount to a marriage, Revenue Ruling 2013-17 makes clear that

> the term "marriage" does not include registered domestic partnerships, civil unions, or other similar formal relationships recognized under state law that are not denominated as a marriage under that state's law, and the terms "spouse," "husband and wife," "husband," and "wife" do not include individuals who have entered into such a formal relationship. This conclusion applies regardless of whether individuals who have entered into such relationships are of the opposite sex or the same sex.[12]

Accordingly, upon the dissolution of a civil union where one partner will be required to pay 'alimony,' that partner will not be permitted to deduct any portion of the payment from his or her tax return as alimony because it does not qualify as alimony for federal tax purposes. Practitioners must be cautious when determining the appropriate level of support because the traditional rule of thumb employed can result in unanticipated tax consequences to one or both of the partners. As a result, individuals seeking to dissolve a civil union will expend additional costs in order to retain experts to work with counsel to ensure the proper calculation of non-taxable spousal support paid and received, as well as any potential gift tax consequences.

During the Marriage Versus During the Civil Union

Since an essential element of any spousal support analysis involves a determination of the standard of living during the marriage, a court must first determine what constitutes "during the civil union." Since civil unions represent a new legal concept, the courts have only statutory law and prior family law cases to make a determination regarding what constitutes during the civil union.

The term "during the marriage" has been construed to mean the time between the date of marriage and the filing date of the complaint for divorce.[13] Most cases that discuss what constitutes during the marriage address the marriage end date. The rule that the marriage end date is the date of complaint is subject to few exceptions, and will be modified only where another end date can be definitively ascertained. For example, in *Di Giacomo*[14] the Supreme Court held that the date of an oral agreement, followed by the actual division of property between the parties, was the marriage end date. Another exception is found in *Genovese*, in which the Appellate Division held that the filing of a divorce complaint in another state, although later vacated, was "incontrovertible evidence" of the marriage end date, especially when one of the parties remarried.[15]

But how is the reverse (the marriage start date) determined? For heterosexual couples this is a non-issue because it is determined by the date of the marriage. However, for same-sex couples, who were not legally permitted to enter into a civil union in the state of New Jersey until 2007, is it fair or equitable to limit "during the civil union" only to that period from the date of the civil union to the date of the complaint for dissolution? Cases have held that for purposes of determining alimony, a marriage begins on the date of the ceremony.[16] Other cases utilize the concept of the "shared enterprise" of a marriage, holding that the shared enterprise may begin even before the actual marriage ceremony for purposes of considering equitable distribution.[17]

According to Formal Opinion 3-2007, if a same-sex couple marries in another jurisdiction, their marriage automatically converts to a New Jersey civil union when the parties enter New Jersey's jurisdiction.[18] In those cases, it would be fair to argue that the initial marriage ceremony should qualify as the civil union start date.

Based on the above, there are three supportable interpretations of the commencement of the civil union. It could be the date of the New Jersey civil union ceremony; the date of a legally entered into marriage/civil union in another jurisdiction; or, perhaps, where there is evidence of a shared enterprise and subsequent civil union or marriage.

The cases that involve long-term relationships without solemnizing their relations and only entering into a civil union shortly before a complaint for dissolution has been filed are the more interesting cases. For example, what is the civil union start date when a couple has been in a committed 20-year relationship, but only a two-year civil union as of the date of the complaint? This type of case would require the courts to consider whether it would be appropriate to 'tack-on' as much as 18 years to

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the civil union start date, and require the advocate to rely solely on principles of equity versus black letter law.

By far the most utilized argument for artificially extending the civil union start date has been the reliance on the fact that same-sex couples in New Jersey were not permitted to enter into civil unions prior to 2007 and, thus, some earlier date must be utilized in order to honor the nature of their long-term relationship, including the date of a prior domestic partnership or a commitment ceremony. On the other hand, a practitioner representing the obligor will demand reliance on the plain language of the alimony statute coupled with the fact that even if a couple was not permitted to enter into a civil union in New Jersey, they could have married or entered into a marriage-type relationship in another state, including Vermont, as early as July 1, 2000, if they actually intended to take on the bundle of rights and responsibilities associated with a marriage or civil union prior to 2007.

Despite both arguments, alimony is a product of statute and, thus, it cannot be ignored that the Legislature was aware of the fact that same-sex couples were denied the right to marry or enter into a civil union in New Jersey until 2007. Thus, when the Legislature revamped all relevant New Jersey statutes in 2007, it could have provided for some guidance regarding how to determine the civil union start date if the Legislature intended for a civil union to be artificially extended. Further, the essence of any contract is that each individual knowingly entered into that contract, agreeing to its terms. Artificially lengthening the window of the civil union by retroactively imposing a fictitious start date forces a civil union/marriage contract on an individual who did not knowingly agree to accept the corresponding responsibilities of potentially paying a greater amount of support, and for a longer period of time. Further evidence of the Legislature's intent to prevent this type of forced servitude on individuals is the amendment to the statute of frauds.

Statute of Frauds

Pursuant to N.J.S.A. 25:1(h), a promise by one party to another party in a non-martial personal relationship for the support or maintenance of the other party made during the course of the relationship or after the relationship is terminated must be in writing to be valid.[19] This year, the Appellate Division reviewed the amendment to the statute of frauds and made clear 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 independent counsel.[20] The same is true whether or not the parties entered into their relationship prior to the amendment to the statute of frauds.

Thus, the viability of cases in which a practitioner relies on a party's shared enterprise to assert spousal support based on a standard of living prior to the actual civil union ceremony is dubious, absent a promise of support memorialized in writing, since any support being ordered for a period of time accumulated prior to the civil union would be tantamount to palimony. With that said, from a practical standpoint, the family part is a court of equity and, thus, maintains discretion to fashion a remedy that is fair and equitable under the circumstances of each particular case. In fact, there has been at least one unreported opinion where the trial court determined that where there is an oral agreement for support and performance by one party, that contract will be enforced because to do otherwise "would work an inequity on the party who has performed."[21]

In that case, the parties were never married but lived together for approximately 39 years, maintained a 'marital-type' relationship where they held themselves out as husband and wife, maintained joint bank accounts, acquired joint property, filed joint tax returns, and the plaintiff hyphenated her name as Joiner-Orman. They also had four children, whom the plaintiff stayed home to raise, forfeiting her career and education. After the parties' separation in 2010, the defendant continued to provide support for the plaintiff until the end of 2012, when he married another woman. Based on the above, the defendant did not deny the existence of an agreement for support, but relied solely on the fact that it was not memorialized in writing. Accordingly, the trial court determined that to find the oral agreement unenforceable would actually work a fraud and, thus, held that "the partial or full performance exception can remove oral palimony agreements from the statute of frauds."[22]

Conclusion

Because the area of law relative to civil union dissolution and the law related to the amendment to the statute of frauds is still developing, practitioners must be cautious when counseling clients regarding what outcome they can expect from the courts. Not only can it cost same-sex civil union couples more in expert fees associated with calculating non-taxable spousal support and potential gift tax consequences, but there also exists

a real uncertainty regarding the duration of any such award based on the nature and duration of their relationship and subsequent civil union.[23] ■

Stephanie Hunnell is founding member of Hunnell Law, LLC in Belmar.

Endnotes

1. N.J.S.A. 2A:34-23(b).
2. *Crews v. Crews*, 164 N.J. 11, 16 (2000).
3. N.J.S.A. 2A:34 23(b)(4); Crews, 164 N.J. at 25.
4. Civil Union Act, Chapter 103, P.L. 2006.
5. *Id.*
6. N.J.S.A. 2A:34-23(b).
7. 1 U.S.C. § 7 (1996).
8. *United States v. Windsor*, 570 U.S. ___ (2013).
9. Rev. Rul. 2013-17.
10. *Id.*
11. *United States v. Windsor*, 570 U.S. ___ (2013).
12. *Id.*
13. *Painter v. Painter*, 65 N.J. 196, 217-18 (1974).
14. *Di Giacomo v. Di Giacomo*, 80 N.J. 155, 159 (1979).
15. *Genovese v. Genovese*, 392 N.J. Super. 215, 226 (App. Div. 2007).
16. *Painter v. Painter*, 65 N.J. 196, 217 (1974).
17. *Weiss v. Weiss*, 226 N.J. Super. 281 (App. Div. 1988).
18. Attorney General Formal Opinion 3-2007, Feb. 16, 2007, online at http://www.state.nj.us/health/vital/documents/legal_advice_ssm.pdf.
19. N.J.S.A. 25:1(h)
20. *Maeker v. Ross*, 430 N.J. Super. 79, 95 (App. Div. 2013).
21. *Joiner v. Orman*, Docket No.: FD-07-001086-13, (Ch. Div. Sept. 2013) (citations omitted).
22. *Id.*
23. The state filed an appeal on Sept. 30, 2013. A stay was filed by the state on Oct. 1, 2013. On Oct. 7, 2013, the state requested direct certification to the New Jersey Supreme Court. The superior court denied the request for a stay on Oct. 10, 2013, and the state filed an emergent appeal with the Appellant Division. On Oct. 11, 2013, the New Jersey Supreme Court granted direct certification and took jurisdiction of the stay motion. The Court denied the state's motion for a stay stating it could not overcome the reality that same-sex couples in civil unions are not treated equally under the law today. The state then withdrew its appeal.

Mediation: Preparation and Pitfalls

by Bonnie M.S. Reiss

Like it or not, mediation is here to stay.[1] Some see it as the death knell for strategic lawyering in matrimonial cases. Others use it as an opportunity to prepare less and leave the heavy lifting to the mediator. In reality, mediation requires the family lawyer to develop a new skill set to be used in addition to those already employed. Successful representation of a client in mediation requires much more communication between lawyer and client from the day the client enters the office. Decisions about when to begin mediation, selection of a mediator, and how to use the mediator can have enormous impact on the result. No doubt there is less opportunity for showmanship, but a strategic approach to mediation can produce a result that will leave the client far more satisfied.

Without alternate dispute resolution (ADR) in family matters, the judicial process would grind to a near halt. Filings outpace resolutions in most vicinages. There continues to be a shortage of judges. Few judicial appointees have family law experience and there is a steep learning curve. Caseloads are huge and the decisions can be heartbreaking. It is the rare judge who has the experience and time necessary to help forge an abiding settlement. The potential for accusations of bias, if after engaging in the settlement a judge has to try the case, can create a disincentive for the judge to roll up his or her sleeves and become a partner in the settlement process.

Once the attorneys and the litigants enter the court system, there is often more time spent waiting than either settling or litigating. Attorneys' fees are incurred and patience is tested. These realities provide more than sufficient justification to look outside the court system to resolve clients' disputes.

As if those reasons were not enough, in most cases practitioners do not have a choice about whether to opt for mediation. If custody is designated as an issue, the parties are required to appear before court personnel quite early in the process.[2] Economic mediation is mandatory if a case fails to settle at the early settlement panel (ESP).[3] Practitioners must accept the reality that mediation is a part of the world and proactively manage it to maximize its value on behalf of clients.

Begin Mediation Early

If family lawyers simply accede to mediation when it is imposed on clients by the judicial system, they do clients and the system a disservice. The timing is not optimal. Custody mediation in the courthouse happens without attorneys present. Parties often have no idea where they will be living or whether they will be working. Yet, the mediation occurs without an assessment of whether the parties are ready to finalize a custody agreement.

Custody, above all other issues, requires an understanding of the family dynamics and the balance of power between the parties. Unfortunately, the resources available do not always allow for such understanding to be gained. Sometimes the parties enter custody mediation without knowing what the other parent is seeking and are, therefore, unprepared to respond to a demand. A parent who has historically been absent may assert availability and demand midweek overnights. Litigants often fail to provide the mediator with important facts and documentation. A parent may object to school-week overnights stating that "my son has ADD," but fail to bring the child's individualized education program (IEP), or other supporting documentation that describes the child's difficulty with transition and the need for predictability. Some mediators are very directive and might say to a client, "Any judge is going to allow at least one, maybe two mid-week overnights," where a parent who formerly traveled on business reports that he or she has a "flexible schedule." As an arm of the county Judiciary, the mandate to the mediator is to get the issue settled.

Mandatory economic mediation is commenced when the ESP fails.[4] By that time, the parties have already spent many months in the court system. They have likely incurred counsel fees in connection with several case management conferences and an ESP, at the very least. Frequently, the parties have expended substantial financial and emotional capital as adversaries in *pendente lite* and discovery motions. Nevertheless, the parties may still lack information critical to a fair and complete resolution, since discovery motions are tedious for lawyers to prepare and for judges to decide. Discovery orders rarely contain self-executing remedies for non-compliance.

Thus, litigants who begin mediation via mandatory economic mediation nine or 10 months into the process often have a win/lose mindset. It is difficult for them to change perspective.

Educate Your Client Early and Often That It's About the Future, Not the Past

It is far better to begin discussing mediation seriously during the initial client interview. While practitioners must certify that the client has been informed of ADR options when the complaint for divorce is filed,[5] these options are often given short shrift. Tell the client the advantages of mediation—that they have input into the resolution as opposed to leaving the most important decisions in their lives and their children's lives to a person, no doubt well-intentioned, who may lack experience and be unfamiliar with the parties or their children. Tell the client about the time wasted sitting in court due to the overcrowded docket and ask him or her to consider the impact on their work life and time with their children. It is difficult for a litigant to go home at the end of a day spent waiting in court, having incurred legal fees, and be at his or her best with the children.

Family lawyers are aware of these pitfalls. Typically, the clients are not. For most litigants, their divorce is their first experience with the court system and they may have the expectation that they will go into court, the judge will hear their story and they will be vindicated. Thus, it is critical to educate the client to the reality that through mediation, he or she is much more likely to obtain the things most important to him or her whether it be continued residence in the home, a limit to the duration of alimony, or the painting in the hallway. A difficult, but important, part of this educational process is that the hurts and slights of the marriage have little to do with the outcome.

Mediation works best when the client is educated. The educational paradigm is different in the mediated case than in the litigated case. In the latter, the focus is on the past. What *were* the client's contributions? What *did* the parties earn? While these subjects retain importance, it is more useful to focus on the future. Encourage the client to think about where he or she sees him or herself living and working in five years. Help him or her develop goals and a plan to reach those goals, including an assessment of money and child care assistance that is likely to be necessary. Talk to the client about how old his or her children are and the quantum of energy and resources that will be required in the future for child care.

The marital residence is often an emotional issue. Litigants often claim their young child will be traumatized if required to relocate from the marital home when, in fact, it is the parent who wants to hang on to what feels secure. Family lawyers do clients a service by discussing the costs, in dollars, labor and worry. Does it make sense for the client to remain in the home? It is helpful to engage with the client in a cost-benefit analysis in which they ask: "How much do I really want it? What will it cost me to get it?" If the other spouse wishes to remain in the home, engage the client in a discussion of whether there is a benefit to the spouse or children and what he or she would need in the short term to make that happen.

Clients often think in terms of all or nothing. "I get to keep the house. Or, the house gets sold now." Mediation is a process of creating options. The attorney's role is to educate the client about the options and to encourage them to develop their own. It may be possible for a client to remain in the house for a fixed period of time. The client may be able to buy a period of time if there is a fund to make a down payment to the other spouse, who may be delaying the receipt of equity. Can the costs of carrying the house be reduced by refinancing the mortgage for a different term or a lower rate? If there is a possibility the client will have to refinance the mortgage in his or her name, have him or her contact a mortgage broker to determine what the bank will need to see. Typically, there is a period of time when the client must show income deposited into any account. This may drive how the *pendente lite* arrangement is structured.

It is also useful to teach the client to see support and asset division in terms of fungible dollars (with the impact of tax consequences) rather than what specific item he or she is getting. Of course, there will always be things to which the client has a sentimental attachment. This is a perfect scenario to employ the cost-benefit analysis discussed above.

It is important to learn as much as possible about the adverse client. Mediation works best if incentives can be offered for the other side to do what the client wants. Learning the adverse spouse's goals for the future, the timeframes for those goals, and what motivates him or her can be tremendously useful in fashioning a package deal. Practitioners may represent a supported spouse who needs more alimony than would be typical for a fixed period. The supporting spouse may be willing to provide that in return for an agreement regarding retirement age.

Try to be on the Same Page as the Adversary Procedurally

Absent an emergency, mediation should be a topic in the first conversation with an adversary. Agree on a mediator with a proven track record early in the process. If both parties are represented by counsel, it may make sense to defer filing a complaint and agree upon a cutoff date for equitable distribution. If a complaint has been filed, it may be withdrawn with an agreed upon cutoff date. This avoids trips to the courthouse for case management conferences and allows the parties to proceed at a pace that makes the most sense for the case. The mediator can shepherd the parties through the process of setting time frames for discovery, establishing litigation funds so the parties are on an even playing field and help resolve disputes as they arise via a conference call or a meeting. The parties may even give the mediator the authority to make the call on procedural matters or agree on a discovery master in a complex matter. This approach will keep the case on track without the court keeping it on track. Essentially, the court (or an arbitrator) then becomes the last resort and mediation the first resort.

Clients are sometimes skittish about withdrawing a complaint, even if there is an agreement on a cutoff date. Although the decision ultimately belongs to the client, it is worthwhile to explain the cost savings of avoiding case management conferences, the ability to settle the case at the clients' pace rather than the court's, and other cost-saving benefits of mediation. Of course, where there are issues of income that may not have been properly reported or where the parties have notoriety in the community, there is particular value to both parties in staying out of the courtroom.

Keep the Ball in the Client's Court

The essential difference between a mediated case and a litigated case is responsibility for the outcome. When a case is tried, it is the judge's call. When the client perceives him or herself as having 'lost,' it's the lawyer's fault. By contrast, in a mediated matter the parties take more responsibility for the post-divorce arrangement.

The blame game is part of many divorces, trials and four-way conferences. It is the attorney's job to persuade clients that bringing fault or blame into the decision process is not productive. The divorce process will not make a frog into a prince or princess, and any perceived shortcomings of the spouse will likely continue. A parent who did not notice whether a child's clothes were clean during the marriage is not likely to send the child's things home laundered. Therefore, family lawyers need to encourage clients to come up with options to address the problem itself. If the child does not come home with clean clothes provided for the other parent's weekend, discuss the option of keeping a basic set of clothes at the other parent's home, thereby placing the onus on the other parent to provide the children with clean clothes when they arrive for parenting time.

Practitioners need to act as a cheering section for client empowerment in the areas of life where he or she felt disempowered (perhaps using some empowerment rhetoric or referring them to some literature or a counselor). If a client has made strides in his or her divorce recovery, let him or her know that the progress is evident. Success breeds success. Noticing the client's progress breeds trust and gives practitioners more credibility when they have to communicate harsh realities that the client may not want to hear.

It's true that, in some respects, family lawyers are counselors. By encouraging clients to take responsibility and plan for the future, the likelihood of success is enhanced tremendously. Suggest the client look at alternate residences and consider employment and education options. Share personal knowledge and experience as a homeowner and parent with the client. Local community colleges often have career counselors who can be helpful.

Divorce litigants sometimes find themselves immobilized. Specific instructions that help them plan for the future can help allay fears about the future and assist them in moving forward. It is worthwhile to have a staff member investigate what is available locally to assist clients in aspects of managing their lives that are new to them, from paying bills to cooking. This approach not only engages the client in the process of planning life after divorce, it also helps them move forward emotionally by meeting and spending time with people who are not in the client's divorce inner circle.

Choosing a Mediator

Choosing a mediator requires more than looking at the court list and seeing who is available and affordable. While many lawyers have completed mediation training, some view their role as telling the parties what a neutral person thinks is fair and then trying to get the parties to agree. That is useful in some cases, but the more difficult cases require a mediator to ask focused questions about the parties' goals and motivations, actively listen to their

answers, and creatively develop options with the parties. Being a good mediator is not so much about knowing how the case should settle, but rather helping the parties use what they have built together to develop a plan for their future apart. It is worthwhile for the practitioner to ask him or herself these questions:

1. Is the proposed mediator a good listener?
2. Is he or she known for coming up with creative, out-of-the-box solutions?
3. Will the client be able to develop confidence in this person?
4. Will the mediator like the client?
5. Is the mediator accustomed to dealing with cases in the same or similar socio-economic category as the case to be presented?

With or Without Attorneys

As difficult as it is to coordinate five people's schedules, it is rarely a good idea to allow a client to go to mediation without the attorney. The attorney needs to know what happened in the session to understand where the case is going. Clients often hear what they are programmed to hear. Did the adverse party, in refusing a compromise the client requested, say something that may create other options to accomplish the same or a similar result?

More importantly, one of the pitfalls of mediation is that the power dynamics of the parties follow them into the mediation. In the office a client may appear tough, enraged, able to go one-on-one with Attila the Hun. However, face-to-face with a spouse, the client may be surprisingly timid. The mediator's job is to achieve a settlement—not to protect either of the parties. That is the attorney's job.

Make the Case to the Mediator in Writing

Too many attorneys attend a mediation bringing nothing other than a case information statement or the standard ESP form. Some need to look at their notes when asked the children's ages. The preparation demands of a mediated case are no less than a litigated case. Every attorney should prepare a mediation memo. The memo should begin with the length of the marriage; the parties' ages and any health issues; the children's ages, grades in school, health or learning challenges; and a list of the disputed issues.

After setting the stage, give the mediator the client's version of the facts and how they relate to the statutory factors regarding income, contribution, lost opportunity costs of the supported spouse, how the marriage enhanced the earning power of the employed spouse, and proofs of asset exemption (with exhibits). The memo should also include expert reports, relevant publications that educate the mediator on the business sector the wage earner is in, real estate values in the community and other data relevant to the disputed issues. Include either a proposal for settlement or a section titled "Important Settlement Considerations."

Clients will incur legal fees in connection with the preparation of a comprehensive mediation memorandum. However, this level of preparation increases the likelihood that the matter will be resolved expeditiously, thereby reducing the amount of overall legal fees. It compels the practitioner to focus on the issues and arguments, educates the mediator, shows the client and the mediator the attorney knows the case, and gives the practitioner an extra dose of credibility with the mediator. It presents an opportunity to touch on how the client feels wronged without wasting time or making it an issue in the mediation session. It sends a signal to the other side that the attorney is prepared for the mediation and if it fails will be prepared for litigation. It gives the mediator insight about what issues are most important to the client and ammunition to help persuade the other side.

Complex matrimonial matters are rarely settled in one session. Typically, the first session is shorter, just to enable the mediator to get the lay of the land. Documents will then be needed to help resolve issues that arise during the course of the mediation. If the first session yields progress but not a complete agreement, between sessions prepare a chart of the areas that appeared to be agreed upon (always with the *caveat* that there is no agreement on anything until there is an agreement on everything), as well as the issues still in dispute and where both parties stand. It may also be wise to include a "Notes" column that subtly reminds the mediator of the strength of the client's position. When the disputes are presented in such a succinct manner, it may help generate some trading with the other side. It provides an excellent starting point for the next session.

All such writings, including the memos suggested above, should contain the statement "This is Confidential Mediation Communication Pursuant to N.J.S.A. 23C."

Be the scrivener. At the end of each session, try to confirm the points tentatively resolved. Date it.

While there is a tendency to negotiate one issue at a time, do not announce the client's compromises until

there is a clear understanding of *everything* the other side is looking for. There is nothing more frustrating than formulating a package of trade-offs, having them accepted, and then being presented with additional issues where the other side is seeking further concessions.

When is the Case Settled?

This question was answered definitively on Aug. 15, 2013, when Justice Barry Albin issued his opinion in *Willingboro Mall, LTD v. 240/242 Franklin Avenue, L.L.C.*[6] This ruling, that "going forward" there is no settlement without a written memorialization of the terms executed by the parties,[7] sounded the death knell to *Harrington* in cases mediated pursuant to Rule 1:40-4(i) and the New Jersey Uniform Mediation Act.

The facts of this commercial dispute are somewhat convoluted, but not much different than those family lawyers encounter frequently. There was a sale of property, financed under a note and private mortgage. The mortgagee, Willingboro, alleged a default and filed a foreclosure action. Franklin denied the default and sought dismissal of the complaint. The parties were ordered to non-binding mediation, which consumed several hours, all on one day. Both sides had counsel present, along with Willingboro's property manager. The mediator engaged in 'shuttle diplomacy' and, ultimately, Franklin offered a sum of money in settlement of all claims, including a discharge on the mortgage. The property manager for Willingboro accepted the offer in the presence of the mediator. The mediator orally reviewed the terms with all present and Willingboro's property manager again orally authorized Willingboro's attorney to make the deal. Everyone went home before the terms were reduced to writing.[8] Three days later, Franklin's counsel advised the court by letter that the case had been settled and set forth the terms of the purported settlement. He also notified Willingboro that he was holding the settlement amount in his trust account and that it would be released upon the filing of a stipulation of dismissal and a discharge of the mortgage. Ten days later, Willingboro's attorney notified the attorney for Franklin that the settlement was rejected. Franklin filed a motion to enforce, accompanied by certifications from the mediator detailing the settlement communications. Willingboro did not object on the grounds that the communications were confidential, but requested discovery and a hearing to determine whether there was an enforceable agreement. Willingboro's property manager certified that although he had initially been told the mediation was non-binding, he was subsequently advised by counsel that the agreement was binding, and that he, therefore, needed to sign a written settlement agreement. Willingboro's motion for an evidentiary hearing was granted. During the discovery phase, both sides waived their right of confidentiality of the mediation process with the *caveat* that the information disclosed could only be used in the determination of whether there was a binding agreement, not in the underlying foreclosure action. The judge entered an order compelling the mediator's testimony with the consent of all parties, thereby allowing the disclosure of mediation communications.

The issue of confidentiality with regard to mediation communications was again raised during the evidentiary hearing—first by the mediator and, thereafter, by Willingboro, seeking to expunge all mediation communications. The trial judge found the privilege was waived and the hearing continued.

Ultimately, the judge accepted the mediator's testimony, discredited the property manager's assertions that he was pressured into accepting the settlement as attributable to "buyer's remorse," and made a determination that an agreement had been reached. The Appellate Division agreed.

In reviewing this matter, the New Jersey Supreme Court addressed two issues: The first was whether a settlement reached in mediation must be reduced to writing and signed at the time of mediation to be enforceable. The second was whether Willingboro effectively waived the mediation privilege. Justice Albin, writing for a unanimous court, reasoned that it would be inimical to the purpose of mediation, which is to promote settlement, for disputes regarding whether a settlement had been achieved to open the door to a new round of litigation. He also recognized that in order for potential for success in mediation to be maximized, the parties need assurance their communications during the proceedings will remain confidential. Without this assurance, parties will hesitate to disclose relevant information and potential accommodations. Citing *State v. Williams*[9] and the final report of the Supreme Court Task Force on Dispute Resolution,[10] Justice Albin explained:

> Confidentiality promotes candid and unrestrained discussion, a necessary component of any mediation intended to lead to settlement [citations omitted]. To this end our court and evidence rules and the Mediation Act confer a privilege on mediation communications, ensur-

ing that participant's words will not be used against them in a later proceeding.[11]

Emphasizing that the privilege is intended to be broad in its definition of a "mediation communication" as well to whom it applies, a party to a mediation has the right to block any other participant from disclosing "any statement, whether verbal or nonverbal or in a record, that occurs during a mediation or is made for the purpose of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator."[12]

There are limited exceptions to this privilege. One such exception is the "signed writing exception." Rule 1:40-4(1) requires that a settlement "shall be reduced to writing and a copy furnished to each party." Notably, the rule does not require the parties' signatures. However, the Court looked to the *Mediator's Tool Box: A Management Guide for Presumptive Roster Mediators,*[13] the statute,[14] and the evidence rule,[15] which do impose the requirement that a prerequisite to the enforceability of a mediated settlement is a signed document. The Court recognized that in some instances the settlement may be too complex for a term sheet to be drafted before the mediation session comes to a close. In those instances, "the mediation should be continued for a brief but reasonable time to allow for the signing of the settlement."[16] The Court cited the comments of the drafters of the Uniform Mediation Act, indicating that the "signed document" requirement could also be fulfilled by an email exchange between the parties in which they agree to particular provisions or to a tape recording in which they state what constitutes their agreement and signify their assent.[17] The opinion, however, is unequivocal in its mandate: "To be clear, going forward, a settlement that is reached in mediation but not reduced to a signed written agreement will not be enforceable."[18]

Another exception to the ability of a participant in a mediation to block disclosure of a mediation communication exists where there has been an express waiver of the mediation privilege. The Court in *Willingboro Mall* found that by failing to assert the privilege in its response to Franklin's enforcement motion, and choosing instead to follow Franklin's example of disclosing otherwise privileged communications, Willingboro waived its objections. Justice Albin's opinion ends with the admonition:

> Last, this case serves as a reminder that a party seeking the protection of a privilege must timely invoke the privilege. A party that not only expressly waives the mediation-communication privilege, but also discloses privileged communications, cannot later complain that it has lost the benefit of the privilege it has breached.[19]

Given the bright line rule that an agreement reached in mediation is only enforceable where it is memorialized in writing and signed by the parties, it is unlikely that the issue of waiver of the mediation privilege will arise frequently in the future, at least in the enforcement context.

In *Willingboro Mall*, the underdog won and the party holding the purse strings lost. The broad language of the holding, however, places family law litigants who do not control the purse strings at risk. A problem not addressed in Justice Albin's opinion is that of the unscrupulous litigant who participates in a mediation, leads his or her spouse to believe that progress is being made, raises new issues and delays all in an effort to find the adverse spouse's bottom line, then refuses to sign the term sheet. This results in an unnecessary incurrence of counsel fees, usually for the spouse who is least able to afford it. That spouse must make sufficient concessions to induce the adverse party (who typically controls both the purse strings and the economic information) to settle the case, or they must endure the costs of litigation. While counsel fees are part of the cost of doing business in the commercial realm, in family court litigation the party controlling the information and the purse strings has much greater control over the outcome. The mere refusal to sign the term sheet allows the more economically powerful litigant to exact concessions. The dependent spouse is faced with the Hobson's choice of making the concessions necessary to obtain the other spouse's signature or risk losing what will be gained in litigation on counsel fees. At the very least, there should be a waiver of the mediation communication privilege, in the determination of an award of counsel fees, should a case proceed to trial.

The Supreme Court's ruling in *Willingboro Mall* has a particular impact on litigants who attend custody mediation in the courthouse. Clients attend without counsel. Demands tend to be made on the spot. Mediators may feel compelled to secure the client's signatures on the memorandum of understanding at the mediation. Presiding judges may wish to require each side to submit his or her parenting plan before the mediation and sched-

ule a second courthouse custody mediation session a week after the initial one. This provides litigants with the chance to confer with counsel before signing the memorandum of understanding.

It is important in all mediations, but especially where a litigant is waiting to seek what concessions he or she can exact while fully intending to withhold agreement unless he or she is totally satisfied, to keep the momentum going. When there are long gaps between mediation sessions, leverage is gained. Even where people negotiate in good faith, a long hiatus is more likely to spawn buyer's remorse. Consider the option of a 'one-day sale' on a concession important to the litigant who may not be negotiating in good faith. Make sure the other side discloses everything they are looking for. Do not start making concessions until all issues are on the table.

The decision in *Willingboro Mall* highlights the importance of scheduling mediation sessions close in time. It is wise to begin with an initial short session to crystallize the issues and to determine what documents are necessary to resolve factual disputes, followed by longer sessions until the essential issues are addressed, and one last session to sign the term sheet, which should be within a few days of the last longer session. If at all possible, counsel should schedule all sessions to occur within a two-week period.

Another lesson in the *Willingboro Mall* holding is that if the case is settled, do not wait until a formal property settlement agreement can be drawn. Prepare a term sheet to represent the enforceable agreement. While counsel may still prefer to do a formal property settlement agreement afterward, disputes over language should not result in the necessity to renegotiate the settlement.

If a term sheet is not signed, mediation is concluded without an agreement. Nevertheless, it may serve as a springboard for further negotiations. Communications after the mediation has ended (even if identical to those in the unsuccessful mediation) may not be subject to the same limitations as those that occur during the mediation period. It remains to be determined whether the decision in *Willingboro Mall* will ultimately be extended to overrule the existing body of law governing the determination of whether a settlement has been reached in other negotiated matters. Both mediated and negotiated settlements have the same benefit to litigants and the court system. Does it make sense to have different sets of rules depending on the paradigm in which the parties are negotiating?

In an interesting commentary that appeared in the Oct. 28, 2012, edition of the *New Jersey Law Journal*, retired and highly regarded Appellate Division Judge John E. Sr., who now works actively as a mediator, and his colleague, Christopher Diaz, address some of the questions the *Willingboro Mall* ruling leaves open. They point out that complex matters often are not resolved in one sitting. Litigants need time after the session to absorb the strength or weakness of their case, and the costs. Thus, after a mediation session the mediator 'works the phones' to iron out obstacles, and often achieves agreement through telephonic shuttle diplomacy.

Scheduling conflicts then make it difficult to get everyone back into a room, particularly in multi-party cases. Such delays can cause a loss of momentum at best and buyers remorse at worst. They opine that a multiparty recorded conference call would meet the court's requirement for a writing. They also note that *Willingboro Mall* leaves open what is required when the mediator continues to participate actively in the settlement process after everyone leaves the mediation room.

Finally, the commentary highlights that the *Willingboro Mall* decision applies only to court-ordered mediations, so that the decision does not address the ability of the mediator to testify where the mediation contract is private.

If the parties follow the suggestion in this article, that mediations begin early, before a court order is entered, it is arguable that *Willingboro Mall* does not apply. In that instance, Keefe and Diaz recommend that the following provision be included in the mediation contract: "*The parties agree that all discussions concerning settlement remain confidential, and that no party shall subpoena me to testify concerning statements made by anyone during the mediation, except as to the fact of settlement and the terms of the settlement agreement.*"

Additionally, counsel should memorialize in writing that negotiations that continue or resume after an unsuccessful mediation are "not mediation pursuant to the Uniform Mediation Act or Rule 1:40-4." This may create a new paradigm called a professionally facilitated settlement proceeding, in which *Harrington, Bistricer* and *Davidson* may still be alive and well.

Arbitration of Unresolved Issues: To Agree or Not to Agree

It is common, in a complex or multi-issue case, that the mediation is successful in resolving many, but not all, of the issues in dispute. Often a mediator will suggest he or she 'make a call' that will be binding. While this may seem to be a way to end the case, there are important *caveats* to

discuss with the client, and understandings to be reached between the parties and the mediator, before consenting to such arbitration. Here are some things to consider.

Typically, when acting as an arbitrator the mediator is bound by the law. If the practitioner knows the issue is important to the client, he or she should try to reach a procedural agreement with the other side that the arbitrator's determinations will be focused on creating a settlement that is fair and reasonable overall. If the disputed issue is legal rather than factual, and is important to the client, it is unwise to leave it as the only issue subject to arbitration, particularly if the client has already made compromises on issues important to the other side. Consider holding back on an issue important to the other side in an effort to level the arbitration field and create an incentive for the other side to compromise. If there are many unresolved issues, the attorney may be better off ending the mediation rather than being bound by compromises already made, and leaving the remaining issues to be decided by the mediator.

After *Willingboro Mall* was decided, the Appellate Division was faced with a situation where the parties agreed to binding arbitration on financial issues. In *Minkowitz v. Israeli*,[20] the parties consented to the arbitrator becoming involved in pre-arbitration settlement discussions. Most substantive issues were resolved and a memorandum was prepared memorializing the agreements. Remaining were the arbitrator's and accountant's fees and an application for disclosure of documents to support the financial agreements.

One of the parties moved before the arbitrator for release of the documents and sought his recusal on remaining issues. The parties then returned to the arbitrator, who issued a final award, which was confirmed by the trial judge. Judge Marie Liholtz, writing for the Appellate Division, distinguished between the role of a mediator, which is "to take an active role in promoting candid dialogue…[and] encouraging parties to accommodate each other's interests," and the adjudicatory role of the arbitrator, inherent in which is the ability to be objective. The arbitration award was set aside and the court held, "based on our determination, absent a contract to the contrary, once a neutral assumes the role of mediator, he or she may not assume the role of arbitrator."[21]

In *N.L. v. V.M.*,[22] the Appellate Division retroactively applied the *Minkowitz* ruling where the role reversal went from arbitrator to mediator, rather than from mediator to arbitrator, as occurred in *Minkowitz*.

Importantly, in *Minkowitz* one of the parties objected to the arbitrator assuming that role after serving as the mediator. However, the decision suggests if both parties had consented the arbitration would not have been set aside. It has been argued that what occurred is no different from what happens whenever a trial judge engages in settlement discussions before the first witness is sworn, something that is becoming increasingly rare and may account for some of the backlog on the matrimonial docket. The ultimate question is whether the mediator-turned-arbitrator has been privy to information that would affect his or her impartiality. Certainly, where one party thinks so, the arbitrator should recuse him or herself.

Another approach in a complex case may be to have a separate mediator and arbitrator on board from the outset. The downside of this approach, aside from the cost, is that it permits the parties to abdicate the responsibility for making an agreement. The upside is that where there are issues, particularly legal issues, it may permit logjams to be broken by the arbitrator, with the parties returning to the mediator to conclude an agreement.

The Takeaway

1. Begin mediation early.
2. Listen to the client about what is most important long term.
3. Educate clients to take responsibility for the outcome and to look forward, not backward. When they do, give them a pat on the back.
4. Only in rare instances should the client be permitted to attend mediation without counsel.
5. Educate the mediator in writing in advance of the mediation. Give the mediator options for resolution.
6. Be the scrivener and create charts of 'tentatively resolved' and disputed issues.
7. Maintain momentum by scheduling a series of mediation sessions at the outset.
8. Make certain the other side discloses all demands before starting to make concessions.
9. Hold back on the most important issue until the other side is ready to negotiate on his or her most important issue.
10. Memorialize the deal in a term sheet with a very short window for signature.
11. If issues and finances warrant it, engage a mediator and an arbitrator from the outset.

Employing these techniques does not ensure a settlement. It does increase the likelihood that, from the

beginning, the parties approach the process by accepting the responsibility to make the decisions that will form their economic future and the well-being of their children. This alone makes the clients more likely to be invested in resolving their differences. It enhances the likelihood that the mediator will be sensitive to the client's position, that the client will trust the attorney's recommendations on the difficult issues; that the mediation will be successful; and that the client will feel well represented. That is about as good as it gets. ■

Bonnie M.S. Reiss is a partner at Paras Apy & Reiss in Red Bank.

Endnotes

1. The Uniform Mediation Act, N.J.S.A. 2A:23C-1 to 13. Mediation is also governed by Rule 1:40 to 1:40-12 and N.J.R.E. 519. Mediation in family matters is specifically governed by 1:40-5(a) as to custody matters and 1:40-5(b) as to economic issues.
2. Rule 1:40-5 (a). The sole exceptions are where there has been a preliminary or final restraining order. In matters involving domestic violence where there has been no order, child abuse or child sexual abuse, these matters cannot be addressed during the mediation and the mediator or the party can petition the court to opt out.
3. Rules 1:40-5(b) and 5:5-6 provide for referral to post-ESP economic mediation where the parties have failed to reach an accord at the ESP. The rule reflects the same limitations with regard to domestic violence matters as subsection (a). As a practical matter the early settlement panels tend to be scheduled earlier in the process, settle many fewer cases and are usually little more than a 'trailer' for post-ESP economic mediation.
4. *Id.*
5. Rule 5:4-2(h).
6. *Willingboro Mall, LTD v. 240/242 Franklin Avenue L.L.C.*, 215 N.J. 242 (2013).
7. *Id.* at 245. "To be clear, going forward, parties that intend to enforce a settlement reached at mediation must execute a signed, written agreement."
8. *Id.* at 247.
9. *Id.* at 254.
10. *Id.* at 255 *citing* N.J.S.A. 2A:23-2.
11. http://www.judiciary.state.nj.us/civil/mediators_toolbox.pdf.
12. N.J.S.A. 2A:23C-6a(i) "an agreement evidenced by a record signed by all parties to the agreement."
13. N.J.R.E. 519, embodying the same language as the statute.
14. *Willingboro Mall, supra*, at 263.
15. *Id.* at 257.
16. *Id.* at 263.
17. *Id.* at 263.
18. *Bistricer v. Bistricer*, 231 N.J. Super. 143, 151 (Ch. Div. 1987), the court held:

    The limited and strained resources of the New Jersey courts are ill used by what has occurred in this case. This court expended most of a day in settlement negotiations in one case, finally culminating at 7:00 in the evening in a probably settlement which was then confirmed the next day. Later one party seeks to have the settlement set aside because that party doesn't agree on appropriate language to "flesh out" the settlement agreement. If the New Jersey Court system permits itself to be used in such a manner, then lengthy settlement conferences in major complex cases will be a waste of time and the growing backlogs of our New Jersey courts will grow much bigger.

    Moreover, the proposition that a case is not settled until the last "i" is dotted and that last "t" is crossed on a written settlement agreement carries the germ of much mischief. A party could, in bad faith, waste the time of the court and the other litigant in protracted settlement negotiations, and then, after a "framework" has been established, wiggle out of that framework by creating a flood of new issues and questions. Conceivably that could be the case here.

    See also, *Brawer v. Brawer*, 329 N.J. Super. 273 (App. Div. 2000).

19. *Harrington v. Harrington*, 287 N.J. Super. 39 (App. Div. 1995); *Lahue v. Pio Costa*, 263 N.J. Super. 575 (App. Div. 1993); *Bistricer v. Bistricer*, 231 N.J. Super. 143 (Ch. Div. 1987); *Davidson v. Davidson*, 194 N.J. Super. 547 (Ch. Div. 1984). There is no question that *Lehr v. Afflito*, 382 N.J. Super. 376 (App. Div. 2006) continues to be good law.
20. 433 N.J Super. 111 (App. Div 2013).
21. *Id*. at 143.
22. 2013 N.J. Super. Lexis Unpub 2811 (App. Div. Nov. 21, 2013).

Commentary:
The 'New' 2013 Child Support Guidelines

by Richard A. Russell

On Sept. 1, 2013, new child support tables (Appendix IX-F) and modifications to the existing child support guidelines (Appendix IX-A) went into effect. These changes were the result of an exhaustive effort by the Child Support Subcommittee of the Family Practice Committee, which has taken place over the last four years as part of the federally required quadrennial review. Notwithstanding the nomenclature, "quadrennial" means every 10 years in New Jersey. Go figure.

Child support is a messy business. It is an effort to estimate how much money will be spent on children based solely on data gathered on adult household spending. After all, adults are the only ones with the money to buy the household consumer goods used to provide the children with what they need. In large part, what the children in the household need is co-mingled with the goods purchased for the adults.

When the child support guidelines were first mandated back in the mid-1980s, the body of science available to create guidelines existed only in broad economic theories. One of the earliest economic theories was proposed by a German statistician named Engel. In 1857, he posited that there was a relationship between what families spent on food and the cost of children in those families. Food expenditures were analyzed in relation to the amount of income and the number of children in families to arrive at a formula that was used to determine the estimated cost of the children in the household. This was the first estimator (the *Engel* estimator), which was used by experts to calculate the original child support guidelines adopted in New Jersey in 1986.[1] The science behind those original guidelines was somewhat of a mystery, not just to the public but even to the people who helped create them.

Of the various child support calculation methods that were in use in this country, the 'income shares' model was chosen by New Jersey because it was the most prevalent in use by other states, and because it seemed to be the fairest.[2] This model attempted to reconstruct the family to determine the economic level upon which child support would be based. The initial guidelines calculation required the input of the custodial parent's income and the noncustodial parent's income into the calculation process, and after passing through a mysterious sort of black box (the first worksheet), a child support award emerged. The general sense among the bar, who up to that time had fought for child support in the trenches using budgets and incomes, was that the awards generated by the original child support guidelines were high.

For about 10 years those original guidelines were used, until a revolt developed among noncustodial parents who felt the awards were too high and unfair. They began to pressure sympathetic members of the state Legislature to create guidelines by legislative fiat and to take the process entirely away from the courts. This led to the second major sustained effort by the Child Support Subcommittee to evaluate the guidelines under the guise of quadrennial review, which lasted approximately three to four years, in the mid-1990s. Although the general principle of the income shares model was retained, a significant re-evaluation of the methodology employed to accommodate overnight parenting time and add other adjustments was made, with the new revisions becoming effective in 1997.

Along with the re-evaluation of the structure in which child support was being calculated came a re-evaluation of the economic theories that went into the creation of the tables of child support awards.[3] The leading research in the country at that time (the early 1990s) was being done by Dr. David Betson of Notre Dame University, who favored an approach based on the theories of an economist by the name of Rothbarth, first published in 1943. Rothbarth had posited that the cost of children in the household was directly related to the change in what was spent on certain adult items (alcohol, tobacco, clothing and entertainment) as children were added to the household. This may seem counter-intuitive,

but as the Child Support Subcommittee learned during the most recent quadrennial review, there is some logic to this theory.

It would be fair to say that the 1997 revisions were somewhat of a success. While other states have viewed New Jersey's child support guidelines as being complicated, judges, practitioners and litigants in New Jersey viewed them as being the fairest guidelines in the country. The awards received from those 1997 tables, moreover, seemed fair and accurate. All was right with the world.

Confident that the Child Support Subcommittee had resolved the child support guidelines dilemma, yet another quadrennial review was embarked upon, which led to new tables for child support using the same methodology and the same experts used in 1997. To the subcommittee's dismay, child support awards declined. Shaken by the experience, the Child Support Subcommittee waited to see what would develop as people used the 2007 tables. There was a significant amount of concern among the bench and bar, who felt the new awards were suspect and that they may not accurately reflect the actual cost of raising children in New Jersey. However, there was little effort made by the bench or the bar to deviate from the guidelines, which were universally treated as if Rule 5:6A were titled "Child Support Straightjacket."

After 2007, one of the strongest arguments advanced by the bar for reconsidering the child support tables was that they did not seem to reflect the general rise in the cost of living that had occurred since 1997. Thinking that quadrennial might mean four years, the Child Support Subcommittee embarked almost immediately upon a complete re-evaluation of the methodology used to generate the awards tables in Appendix IX-F. In short, the subcommittee started out to reinvent the wheel. Members first looked at the various child support calculation methods currently in use in other states and arrived at the conclusion that the income shares model was still the fairest and most commonly used. The subcommittee also decided early on in the process that adjusting child support awards for overnight time along with the other 1997 adjustment factors was fair and should be retained. This left the focus of the subcommittee's work on the actual amount of the awards, which had been the cause of the most concern.

No state has the resources to conduct consumer expenditure surveys (CEXs) on the scale, and with the breadth, of those conducted by the United States Department of Labor, Bureau of Labor Statistics. The federal government is constantly conducting surveys of families and what they spend on consumer goods for a number of different reasons. The surveys are extensive and produce a huge amount of data. Depending upon what they are being used for, the federal data can be overwhelming and difficult to analyze.

To undertake this daunting task, a new expert was found in the person of Dr. William Rodgers, of Rutgers University. Dr. Rodgers had served as the chief economist for the Department of Labor. He is a Dartmouth graduate with a PhD in economics from Harvard University. He had done extensive work in child support guidelines prior to coming to New Jersey, including assisting in the drafting of the guidelines used by Virginia. His credentials are even more extensive than those of the experts previously employed by New Jersey, and he is conveniently available at Rutgers.

Economists like Dr. Rodgers tend to be more involved in the scientific process than in explaining things in laymen's terms. They express the relationship between the total household expenditures and child support in the form of complicated equations with lots of Greek letters in them. It is not easy to craft an accurate explanation for this science in understandable terms, although this author will attempt to do so.

To understand the theory of child support, one has to understand how it starts in the analysis of how adults are spending their money on co-mingled household goods. In the example often used, we all know that when a child is added to the family, they do not buy a second box of Cheerios, or one box for each child, they just buy a bigger box. Buying in bulk is taking advantage of what economists refer to as the economies of scale. The marginal cost is the measurement of the difference in expenditures by families with children versus those without children. That difference could be as basic as the difference between the cost of a small box of Cheerios and a large box of Cheerios, or a one-bedroom apartment and a two-bedroom apartment. However, there are still many gray areas.

Initially, the Child Support Subcommittee thought the general rise in the cost of living was being lost if child support awards did not rise by a similar percentage. At first the subcommittee thought it could 'fix' the tables by simply making them auto-adjust upward with a cost of living adjustment (COLA), not unlike what Rule 5:6B does to child support orders. However, the subcommittee

quickly realized the amount a family making $50,000 per year was spending on children 10 years ago would probably be the same amount as a family making $50,000 per year was spending on children today. What would change in that 10-year span would be that the family making $50,000 per year 10 years ago would hopefully be making more money today and, because of the increase in the household income, spending more money on their children. Forcing the awards higher in each income category would eventually bankrupt the family. The subcommittee decided, therefore, that making the tables of child support awards self-adjusting was not the way to go. Instead, there should be more concern over *how* families are spending their money to arrive at a fair child support award.

This is where the science of child support gets messy. What was perhaps not fully understood before was that hidden in the complicated economic equations with Greek letters, there is another dynamic in play to measure how much families spend on children. A family that adds children will spend a certain percentage more on consumer goods until they run out of money because they reach the limit of what they earn. After a family hits their own spending wall, the adults in the household must make their own hard decisions by spending less on themselves than people without children spend on themselves. This is the principle behind the Rothbarth estimator, which measures the relationship between spending on adult goods in families with, versus without, children. The marginal cost approach concept is complicated by not only measuring how much *more* families spend when they have children, but by also measuring how much *less* the parents spend on themselves. To get to the current tables, Dr. Rodgers, who is already an expert in understanding and extracting information from the federal data pool, refined the Rothbarth estimator New Jersey uses to get what he believed would be the most accurate estimates of child support based on household net income.

Despite all of this effort, child support awards are still trending downward. The Child Support Subcommittee asked Dr. Rodgers to change his assumptions and recalculate over and over, but the results were essentially the same—lower child support amounts virtually across the board.

Back to that family from 10 years ago who was making $50,000 per year and spending a certain percentage of their income on their children. The Child Support Subcommittee was happy with the child support numbers obtained in 1997, why not now? Here I think, may be the problem: When gas prices rose tenfold over the last 10 years, families had to make hard decisions. They had to decide to spend more money buying gasoline so they could get to work and keep their jobs at the expense of something else. Maybe it wasn't a 'hard' decision like that, but something like deciding they had to have a cellphone and a computer, which became more important to the household in the last 10 years than other necessities. Either way, this resulted in families changing their spending patterns. Maybe that change resulted in their spending less on their children than families did 10 years ago. Maybe measuring how much less they are spending on their own clothing is not providing accurate numbers for child support purposes when people are wearing t-shirts to church. Maybe spending patterns have changed and the theory that Rothbarth first published in 1943 is no longer viable. Maybe a new model is needed—a new economic theory.

This brings one to the reality that must be faced when the new child support awards tables in Appendix IX-F are utilized. The only data available shows a general downward trend by families when spending on children. When a side-by-side comparison is conducted of the old child support awards tables and the new ones, it is apparent that for one child the support will be slightly lower until one reaches a break even threshold of about $52,000 per year combined net, and then child support awards are higher in the upper income ranges. For two children, the new child support awards are lower, and in many cases substantially so, across all income ranges. For three children, the child support awards tend to be lower until passing about $150,000 per year combined net income, and then they rise above the old tables as combined net income is above $150,000. The results are very similar for four, five and six children, where in the lower income ranges the child support awards will be lower, but in the higher income ranges they may be the same or higher.

The new child support awards are going to concern a lot of people. They have been a matter of great concern to the people who created the child support guidelines and recommended them to the Supreme Court. The science supports these awards. However, the science is not always right. Whereas prior child support awards tables were based upon very limited and old data, the current tables are based upon over 11 years of spending data spanning the period from 2000 to the first quarter

in 2012. This covers how people spent their money during the great boom years up to 2008, the great recession years thereafter, and the slow recovery years still underway today. Even with this expanded database, the amount of child support awards resulting from the new tables are going down. Are parents getting selfish and cutting back on what they buy for their children so they can have the latest smartphone and computer tablet? Does a new benchmark need to be found to measure the cost of children? The only way to find out if the estimators that have been used and refined over the years by the economists are still viable is if attorneys look at their clients' budgets, try to make some common sense decisions regarding how much in those budgets is fairly attributable to children (using a marginal cost approach to make those assumptions), and then see if the child support calculations being received from the guidelines accurately reflect those estimations being made in real life, in real cases.

There are other technical changes made to the guidelines that will be noted when practitioners begin using the tables. There was considerable effort put into rewriting the Appendix IX-A standards and explanations, but for those who do not wish to wade through all of that language, the *Cliff Notes* are as follows:

1. All school tuition (private, public and parochial) is now a supplemental expense to be added to the child support award, as in the case of a special medical needs expense that is paid on a recurring basis.
2. All expenses for automobiles used exclusively by the child are carved out as a separate expense not included in the child support award.
3. The issue of trying to use the child support guidelines to arrive at a 50-50 parenting award is now a basis for deviation, and methodologies suggested by case law decisions such as *Wunsch-Deffler*[4] and *Benisch*[5] were not adopted.
4. The treatment of derivative benefits received from the government for dependents, where one of the parents is disabled, is treated in a new way. Government benefits paid for a child are treated as additional income to the parent generating the benefit. This has been done to eliminate an injustice where the disabled parent is the custodial parent and the receipt of the child's derivative benefit actually works as a windfall to the noncustodial parent. In order to accommodate this new treatment for derivative benefits, the worksheet had to be changed, and new instructions and calculation methods have been established.

Conclusion

In the end, the real issues created by the new guidelines remain buried in the amount of the child support awards. The bench and bar are being alerted to the concerns of the drafters for the adequacy of the calculated child support awards. This author hopes that where any reasonable explanation justifies an alteration of the amount of child support from the award calculated under the guidelines, there will be no hesitancy on the part of the bar to make the appropriate argument, nor should there be any hesitancy on the part of the bench to listen and, where appropriate, *deviate* from the guidelines. Only if people begin to think about these issues and discuss them in resolving their cases or arguing before the court, will it become clear if some new guidelines model or new economic theory (with equations with new Greek letters) needs to be found for New Jersey households. At the end of the day, this author believes, child support is supposed to reflect the cost of raising children. If the guidelines calculation does not do that, then it should be remembered that they are only guidelines.

See you in 10 years after the next quadrennial review.

Richard A. Russell is a partner in Russell & Laughlin in Ocean City.

Endnotes

1. Appendix IX-A, Para. 5.
2. Appendix IX-A, Para. 4.
3. Appendix IX-F.
4. 406 N.J. Super. 505.
5. 347 N.J. Super. 393.