New Jersey
Family Lawyer

Vol. 36, No. 4 — February 2016

Chair's Column

Time to Make a Move on Relocation Laws

by Amanda S. Trigg

As I mentioned in my last column, the past few months have included an unusual amount of travel. Coming and going, and during one particular week, traveling through six airports in seven days, made me think about how cavalierly we assume that parents and children can sustain relationships when physically separated by many miles for prolonged periods of time, perhaps because one parent sought and obtained permission to move away from the original family home. In recent years, we seem to have tacitly agreed that parents who are distanced from their own children should accept technology as a substitute for parenting time. I would be hypocritical to deny the usefulness of cellphones, texting and video chats, because I use all of those with my own child. Using those tools, however, is different from accepting them as the best means of parenting or as a reasonable solution for arranging a custodial schedule when parents no longer wish to reside together or near each other. Having those tools does not justify separating parent from child as a matter of course.

In 2001, in *McCoy v. McCoy*, New Jersey courts articulated acceptance for the idea that a parent might have to sacrifice proximity to a child and accept other options for having contact. That case involved a child with acute special needs, and those needs could be better met if the child and her mother moved to Georgia. The father, who had remarried and could not relocate to Georgia, faced a Hobson's choice of figuring out whether his daughter needed particular services and treatment more than she needed him. The court permitted the mother to relocate, citing to the availability of parenting tools such as video conferencing, which allow for virtual contact between a parent and child even when they are not physically together. This case opened the doors to acceptance of the philosophy that remote parenting could be good enough.

When you stretch a rubber band, or anything really, it weakens and eventually breaks under the tension and demand that the original amount of material cover more space. Whether married or unmarried, parents' original agreements to raise children together weaken when we add distance and tension. We should reject the casual assumption not only that technological

parenting suffices but also that: 1) we are using technology to its best advantages in adverse situations, and 2) that children's access to technology alleviates the parents' responsibilities to foster its use, and avoid its abuse, for promoting and maintaining the children's relationships with both parents.

Faced with the reality of family mobility and everyone's increasing dependence on technology, we should, at a minimum, confront the problem and adapt. In the past, parenting plans included requirements that the children telephone the noncustodial parent, and that calls from the noncustodial parent should be returned within a reasonable period of time. The custodial parent knew the frequency, consistency and duration of communication. The parents shared responsibility for facilitating communication between the parents and the children. Unfortunately, that duty burdens the children themselves now, and gives a recalcitrant parent the ability to plausibly deny that he or she is interfering with parenting contact in any way because the distanced parent can directly contact the child, and it is not the other parent's fault if the child declines the contact or refuses to respond to it.

It is time to bring our parenting agreements into the 21st century by adapting the old ideas about making and returning phone calls with agreements for the way we communicate today. For example, as a simple starting point and not as any exhaustive illustration of how we can expressly use technology to help parenting:

- *Each parent may have unlimited access to the parties' children by email, text messaging, social media and other electronic communication. Providing the children with computer and cellphone access and encouraging the children to consistently communicate with both parents using those tool is the parties' mutual obligation, as such, they agree (choose any and all that apply);*
- *Both parents shall have the children's cellphone numbers, email addresses, social media user names, and passwords to all cellphones, computers, email and social media accounts;*
- *Both parents shall require the children to contact the other at least every other day, and to respond to any calls or messages from the other parent in a timely fashion;*
- *Both parents shall have accounts on all social media utilized by any child and the child shall not be permitted to block either parent from any post or content posted by the child;*
- *If either parent becomes aware of any online activity that adversely affects the child, he or she shall notify the other immediately;*
- *The parents shall divide the cost of cellphones, cellphone service, computers and computer Internet access, for the children's benefit, as follows:*

Even better, in Dec. 2015, both the Assembly and the Senate posted a bill that would, if passed into law, be known as the New Jersey Relocation of Children Act, and would modify N.J.S.A. 9:2-2, which prevents a custodial parent from removing a child from the state of New Jersey without consent of the other parent or permission from the court. Ample case law interpreted and expanded upon that statute. Most notably, in *Baures v. Lewis*, 167 N.J. 91 (2001), the New Jersey Supreme Court enumerated 12 factors for a court to consider in establishing whether a parent who seeks to relocate with a child has met the burden of proving a good faith intent in pursuing the move, and that the move will not be harmful to the child's interest. Subsequent case law seemed to suggest a custodial parent could advance almost any sincere, good faith reason for a move, and that the removal would proceed as long as the child would not be adversely affected.

The New Jersey State Bar Association's Family Law Section spearheaded the drafting of proposed legislation to modify the current common law standards by creating statutory factors and emphasizing the child's needs. The NJSBA Board of Trustees promptly supported the concept and we moved ahead with seeking legislative sponsors for the bill. Assemblyman Troy Singleton is the primary sponsor in the Assembly. Senators Peter J. Barnes III and Linda R. Greenstein are the primary sponsors in the Senate. The factors proposed by this bill are as follows:

a. The right of the child to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child's development, except if the contact is contrary to the child's best interests;

b. The views of the child regarding relocation if the child is of appropriate age and maturity;

c. The parties' proposals for the practical arrangements for relocation, including accommodation, schooling, and employment;

d. The reasons for seeking or opposing relocation;

e. Any history of domestic violence or abuse, whether physical or psychological;

f. The history of the family, and particularly the continuity and quality of past and current care and contact arrangements, including any prior relocation;
g. Pre-existing custody and parenting time determinations;
h. The impact of granting or refusing relocation of the child, paying particular attention to the child's extended family, education, and social life;
i. The nature of the inter-parental relationships and the commitment of the applicant to support and facilitate the relationship between the child and the noncustodial parent after relocation;
j. Whether the parties' proposals for parenting time after relocation are realistic, with particular attention given to the cost to the family and the burden to the child;
k. The enforceability of parenting time provisions ordered as a condition of relocation in the state of destination;
l. The issues of mobility for family members, both seeking and opposing relocation;
m. The economic impact of relocation on both parents;
n. Any special medical, mental or educational needs of the child and the likelihood that those needs can be met at the same or better level in the state of destination than in the state of New Jersey; and
o. Any other factor the court may deem relevant under the circumstances.

The legislation further focuses upon the child by codifying remedies available if a parent relocates without consent, and prioritizes relocation cases by requiring the court to prioritize case management. The NJSBA continues to monitor the progress of this important legislation, and we hope to soon be reflecting upon its passage and implementation. ■

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Editor-in-Chief's Column

Parent Coordinators and Recommendations for Changes in Custody and Timesharing

by Charles F. Vuotto Jr.

Are some parenting coordinators overstepping their bounds? Is this 'overstepping' being facilitated by poorly drafted agreements? In April 2007, the Supreme Court approved the Parenting Coordinator Pilot Program for Bergen, Middlesex, Morris/Sussex and Union counties and adopted guidelines for the program.[1] As described in the overview section of the program standards,

> [a] Parenting Coordinator is a qualified neutral person appointed by the court, or agreed to by the parties, to facilitate the resolution of *day to day parenting issues* that frequently arise within the context of family life when parents are separated. The court may appoint a Parenting Coordinator at any time during a case involving minor children after a parenting plan has been established when the parties cannot resolve these issues on their own. The Parenting Coordinator's goal is to aid parties in monitoring the existing parenting plan, reducing misunderstandings, clarifying priorities, exploring possibilities for compromise and developing methods of communication that promote collaboration in parenting. The Parenting Coordinator's role is to facilitate decision making between the parties or make such recommendations, as may be appropriate, when the parties are unable to do so. One primary goal of the Parenting Coordinator is to empower parents to develop and utilize effective parenting skills so that they can resume the parenting and decision making role without the need for outside intervention. The Parenting Coordinator should provide guidance and direction to the parties with the primary focus on the best interests of the child by reducing conflict and fostering sound decisions that aid positive child development.[2]

The fundamental right of a parent to the care, custody and control of their children is not absolute.[3] "Indeed, the state has an obligation, under the *parens patriae* doctrine, to intervene where it is necessary to prevent harm to a child."[4] In that vein, "parties to a matrimonial dispute may agree to comply with defined obligations regarding their use of a parent coordinator (PC), *which do not violate the public policy of this State.*"[5] This means there are limitations on what parents may agree to in terms of resolving custody and timesharing disputes. A parenting coordinator "may not substitute for a judge's determination in contested parenting issues pending before the Family Part."[6] As such, the parenting coordinator guidelines (notwithstanding the termination of the pilot program) and the case law seemingly preclude a parenting coordinator from making recommendations regarding major modifications to custody and parenting time because, in this writer's opinion, it may be contrary to the public policy prohibiting a court from abdicating its decision-making authority. Therefore, to the extent that parties attempt to agree in a marital settlement agreement (MSA) or consent order to confer such authority on a PC, such provisions are problematic.

The pilot program guidelines state that, "[t]he Guidelines establish the Supreme Court's operational details for a uniform approach to appointment of PCs and imposed purposeful boundaries on the PC role and those providing PC services."[7] The guidelines specifically preclude a parenting coordinator from making "any modification to any order, judgment or decree, unless all parties agree and enter into a consent order" and limit the parenting coordinator to recommending "*minor temporary departures from a parenting plan when a situation arises that may warrant such an adjustment.*"[8] The guidelines further state that, "[i]n any particular case the Parenting Coordinator shall serve only in that role and shall not at any time serve in a dual role either as an attorney, therapist, guardian ad litem, mediator, or custody parenting time evalu-

ator."[9] Section II (C) (2) and (3) of the guidelines gave examples of the PC's authority as follows:

> (2) By way of illustration and not limitation, the Order of Appointment may authorize the Parenting Coordinator to make recommendations to the parties and/or attorneys, to implement an agreement between the parties, or to make a recommendation during time-sensitive circumstances such as:
>
> a. Time, place and manner of pick-up and drop-off of children;
> b. Child care arrangements;
> c. *Minor* alterations in parenting schedule with respect to weeknight, weekend or holiday parenting time *that do not substantially alter the court-approved parenting plan*;
> d. First and last dates for summer vacation;
> e. Schedule and conditions of telephone communication with the children;
> f. Selection and scheduling of activities;
> g. Any other issues submitted for immediate determination by agreement of the parties;
> h. Referrals to other professionals to improve family functioning.
>
> (3) The Parenting Coordinator may not make any modification to any order, judgment or decree, unless all parties agree and enter into a consent order. The Parenting Coordinator may recommend *minor temporary departures* from a parenting plan when a situation arises that may warrant such an adjustment. The parties must agree to the change or file a motion to have the recommendation reviewed by the court.[10]

The Supreme Court terminated the pilot program on Nov. 26, 2012.[11] It directed:

> While the Parenting Coordinator Pilot Program will be ending, Family Judges may continue to appoint Parenting Coordinators in specific cases in any vicinage (except in cases having a domestic violence temporary or final restraining order if (sic) effect). Parenting Coordinators so appointed will need to be qualified to serve either by consent of the parties or by the court in the same manner as other experts. While there are no specifically required forms of order of appointment, *the two model orders appended to this notice are provided for guidance*. One model order would be for use in consent situations; the other when the Parenting Coordinator is appointed on motion by the court or a party.[12]

Both model orders endeavored to carry over the limitations of the PC's authority by stating that "[t]he Parenting Coordinator shall not have authority to conduct parenting time or custody evaluations *or to make recommendations concerning said issues.*"[13] Both orders continue the prior restriction that "[t]he Parenting Coordinator shall not have the authority to change existing Orders of the Court unless the parties consent and enter into a Consent Order."[14]

New Jersey courts have consistently held that the court cannot abdicate its decision-making power regarding custody and timesharing issues to a third party. Specifically, "[t]he use of a PC may not substitute for a judge's determination in contested parenting issues pending before the Family Part."[15] Likewise, in *P.T. v. M.S.*, the Appellate Division held that the parties' agreement to waive a plenary hearing and cede the court's authority to an appointed expert psychologist was invalid.[16] "Parties cannot by agreement relieve the court of its obligation to safeguard the best interests of the child."[17] As such, "[t]he court must not abdicate its decision-making role to an expert" or any third party.[18] In *Entress*, the court reversed a trial court's transfer of custody because the trial court relied exclusively on a psychologist's letter without conducting an evidential hearing. The Appellate Division concluded: "*Clearly, the 'frustration' of a psychologist is not an exigent circumstance, nor is an unsworn uncross-examined letter from the psychologist a basis for changing custody.*"[19]

The principle that a parenting coordinator is precluded from making recommendations for major changes to custody and parenting time orders has been reinforced by several well-respected professionals, who have written on the topic. For example, in an article by John Finnerty, he states that: "Disputes about time-sharing plans or custodial designations require courts to make those determinations, usually after custodial evaluations have been completed. Parenting coordination is not intended to deal with such disputes."[20]

Aside from the express restrictions in the initial guidelines and subsequent notice terminating the program, there are real-world practical reasons why PCs should not

be permitted to make recommendations about anything but minor changes in custody and timesharing. If a PC makes recommendations, those recommendations are not confidential or privileged. By communicating recommendations, the PC may inadvertently relay (directly or indirectly) settlement positions of one or both parties on major issues of custody and timesharing. Those settlement positions and the recommendation of the PC will likely be released to the court by the favored party. Thus, permitting the PC to include recommendations on major changes in custody and timesharing will actually impede the PC process, as parties will be reluctant to advise the PC of their willingness to compromise those major issues.[21] Further, in the usual situation where a mental health professional is barred by the PC guidelines from performing. As such, his or her opinions on these major issues are almost surely 'net opinions.'

Query: Does wearing the hat of a PC cure the problem that a psychologist has rendered an opinion about the ultimate issue of custody and timesharing that he or she could not ethically do if appointed to do a child custody evaluation (CCE)? In other words, a psychologist must follow certain guidelines to perform a CCE. In the role as PC, a psychologist would not follow such guidelines because a PC is not in the shoes of an evaluator. If a psychologist renders an opinion about a major change to the custody and parenting time that is transmitted to the court without following the psychologist's ethical guidelines, is it a problem under the psychologist's own professional guidelines, even though it is done in the role as PC?

Notwithstanding all of these problems, the judge will likely receive these recommendations, possibly tainting the court's view of one or both of the parties on the major child custody issues in the case. Further, if a PC is permitted to make recommendations about major changes to custody and parenting time, it allows a litigant to circumvent the well-established standards a court must apply in determining whether a party has made a *prima facie* case for a modification of custody and parenting time. In other words, a PC might make a recommendation before a court has determined that a substantial change in circumstances has occurred that affects the general welfare of the child. The PC process is not intended to replace the legal standards for modification of custody and parenting time. Rather, the PC stands in the role to reduce conflict, increase communication and encourage compromise between the parties. If litigants are concerned a PC will modify their existing parenting time order, they will be reluctant to participate in the process and the efficacy of the PC will be compromised. The fact that the pilot program was terminated does not eliminate the underlying legitimacy of the policy reasons for the limitations in the guidelines barring PCs from making recommendations on the major issues of custody and timesharing. Thus, the guidelines are persuasive authority of the appropriate role of a parenting coordinator.

Pursuant to the above case law and the parenting coordinator guidelines, this author believes that, regardless of any agreement to the contrary, a PC should be precluded from rendering a recommendation regarding major changes to custody and timesharing, agreements or orders.

Endnotes

1. Notice to the Bar: Parenting Coordinator Pilot Program—Program Guidelines and Related Material (April 2, 2007), available at judiciary.state.nj.us/notices/2007/n070403a.pdf.
2. *Id*. (emphasis added).
3. *Fawzy v. Fawzy*, 199 N.J. 456, 474 (2009).
4. *Id*. at 474-75.
5. *Milne v. Goldberg*, 428 N.J. Super. 184, 204-205 (App. Div. 2012) (emphasis added).
6. *Id*. at 205.
7. *Milne v. Goldenberg*, 428 N.J. Super. 184, 205-206 (App. Div. 2012).
8. *Id*., § II.C(3) (emphasis added).
9. *Id*., § II.C(4).
10. *Id*., § II.C(2)-(3) (emphasis added).
11. *See* Notice to the Bar: Parenting Coordinators—Conclusion of Pilot Program, 210 *N.J.L.J.* 854 (Dec. 3, 2012), available at judiciary.state.nj.us/notices/2012/ n121126a.pdf.

12. *Id.* (emphasis added).
13. *Id*. (emphasis added).
14. *Id*.
15. *Milne*, 428 N.J. Super. at 205; *see also Parish v. Parish*, 412 N.J. Super. 39, 53 (App. Div. 2010) (holding that a court cannot defer its authority to enforce parenting time provisions to a parenting coordinator as it falls outside the sphere of the parenting coordinator's authority).
16. 325 N.J. Super. 193, 216 (App. Div. 1999).
17. *Id*. at 215.
18. *Id.* at 215-16.
19. *Entress*, 376 N.J. Super. at 133 (emphasis added).
20. John E. Finnerty, Parenting Coordination and Parenting Coordinators: CDR with Teeth, 27 *N.J.F.L.* 56 (Jan. 2007).
21. The same problem impacts minor custodial issues, but the potential for harm and prejudice to the disfavored parent on minor issues is far less and likely outweighed by other facts such as cost and judicial economy.

Executive Editor's Column

Children Can Bounce Back from Divorce with Few Scars

by Ronald G. Lieberman

Every day, family law attorneys deal with individuals who, when going through a divorce, feel as if their worlds are falling apart. If there are children involved, the clients are understandably concerned about the welfare of their children during this process. Some clients have even professed to family lawyers that they remained in unhappy marriages in an effort to protect their children from the trauma of divorce.

Recent research has shown, however, that only a relatively small percentage of children experience serious problems in the wake of divorce, or later on as adults. These researchers have rebutted the Freudian assumption that a two-parent group constitutes the minimal unit for child rearing and nurturing.[1]

Other psychologists or psychiatrists have opined that the basic functions of the family are to serve as a stable, organically integrated 'factory' in which human personalities are formed.[2]

Social learning theory emphasizes the importance of role models, focusing on parents as the initial and primary reinforcers of child behavior.[3] Children of divorce have developed poor models of conflict resolution through observing their parents.[4] "As children observe extensive conflict between parents, they may develop conflict-prone and dysfunctional relationship behaviors through modeling."[5]

There is an existing body of research on the topic of adverse affects of children of divorce. That research makes various assertions, including that: 1) children of divorce are vulnerable to acute psychiatric disturbances; 2) children of divorce become adverse to marriage; and 3) children of divorce are prone to divorce once they do marry.[6]

A problem with this research on the negative effects of divorce on children is that intact families (*i.e.*, families where there has never been a divorce) are being compared to single-parent families where divorce is also not involved, such as in the case of parents who have never been married or families where one parent has passed away. This assumption that one-parent families are monolithic does not provide an appropriate basis for comparison. This research using monolithic one-parent families does not recognize the existence of divorced, remarried units that may also affect children. In short, investigations of a so-called linkage between family structure and divorce have failed to recognize the complexity of present day families.

Studies About Effects of Divorce on Children

In a 2002 study, psychologist E. Mavis Hetherington and her then-graduate student, Anne Mitchell Elmore, found that many children experience short-term negative effects from divorce. However, those reactions typically diminish or disappear altogether by the second year after the divorce, with only a minority of children suffering longer.[7]

Hetherington followed children of divorce and children of parents who stayed together and found that 25 percent of the adults whose parents had divorced experienced social, emotional, and psychological troubles compared with only 10 percent of those whose parents remained together.[8] These findings suggest that only 15 percent of adult children from divorce experience problems over and above those from stable families.[9] No family lawyer can know whether this difference of 15 percent is caused by the divorce itself or other variables, such as poor parenting, issues of coping with the divorce by the parents, or other stressors a parent or parents feel as a result of the divorce.

Most children of divorce do well in the longer run, per a quantitative review of literature in 2001. Sociologist Paul A. Amato examined the possible effects of divorce on children several years after a divorce. His study compared children of married parents with those who experienced divorce at different ages.[10]

Amato and his team followed these children into their later childhood, adolescence or teenage years, assessing their academic achievement, emotional and behavioral problems, delinquency, self-concept, and social relationships.[11] On average, the results reflected only minor differences on all of these measures between children of divorced parents and those from intact families, suggesting the vast majority of children endure divorce well.[12]

Taken together, these studies suggest that only a small percentage of children experienced divorce-related problems. Some troubles may arise from conflict between the parents associated with the divorce, so the stress of the situation can cause the quality of parenting to suffer. Divorce frequently contributes to depression, anxiety, or substance abuse in one or both of the parents, which then can bring about difficulties in balancing work and child rearing.[13] These problems can impair a parent's ability to offer stability and love to the child or children when they are needed the most. But, those effects caused by the parents may cause what family law practitioners consider to be problems associated with the divorce, as opposed to the divorce itself causing problems for the children.

Conclusion

If a family law practitioner is a parent, he or she knows that most children are resilient and can bounce back. The studies cited in this column have shown that children of divorce can thrive, notwithstanding the divorce. Moreover, there are factors that can reduce the problems they might experience. Children fare better if parents can limit conflict associated with the divorce or minimize the child's exposure to it.[14] Children who live in the custody of at least one well-functioning parent do better than those whose primary parent is doing poorly.[15] In the latter situation, the maladjusted parent should seek professional help or consider limiting his or her parenting time with the child.[16]

In sum, it appears from studies that good parenting can also buffer against divorce-related difficulties in children. Post-divorce economic stability and social support from peers and other adults appear to be a necessary factor as well in contributing to a child's well being. Of course, certain characteristics of a child can influence his or her resilience. Some children have an easy-going temperament, and some children can more easily cope with life changes and transitions. There are studies that show that although divorce is hard and painful for children, the long-term harm is not inevitable or widespread. Children bounce back and get through this difficult situation with few, if any, battle scars, according to these studies. ■

Endnotes

1. Sigmund Freud, 1961. "Some psychical consequences of the anatomical distinctions between the sexes." In J. Strachey, Ed. and Trans., The standard edition of the complete psychological works of Sigmund Freud (Vol. 19. 1923-1925). London: Hogarth Press (original work published 1925).
2. Talcott Parsons and Robert F. Bales, 1955. *Family Socialization and Interaction Process*. Glencoe: Free Press.
3. Albert Bandura and Richard H. Walters. 1959. *Adolescent Aggression*. New York: Ronald Press; Albert Bandura and Richard H. Walters. 1963. *Social Learning and Personality Development*. New York: Holt, Rinehart and Winston.
4. M. Reese-Weber and J.H. Kahn. (2004). Familial predictors of sibling and romantic partner conflict resolution: comparing late adolescents from intact and divorced families. *Journal of Adolescence*, 28.
5. H.R. Riggio and D.A. Weiser. (2008). Attitudes toward marriage embeddedness and outcomes in personal relationships. *Personal Relationships*, 15(1).
6. Anthony E. James, 1974, *Children at Risk from Divorce: A Review. The Child and His Family: Children at Psychiatric Risk* (Vol. 3). New York: John Wiley and Sons.
7. E. Mavis Hetherington, *Social Support and the Adjustment of Children and Divorced and Remarried Families, Childhood*, (Vol. 10 No. 2 (May 1, 2003)).
8. E. Mavis Hetherington, *For Better or For Worse: Divorce Reconsidered*. (2002).
9. *Ibid*.

10. Paul R. Amato and Juliana Sobolewski, The Effects of Divorce and Marital Discord on Adult Children's Psychological Well Being. *American Psychological Review*, 66 (2001): 197; Paul R. Amato, The Consequences of Divorce for Adults and Children. *Journal of Marriage and Family*, 62 (2000): 1282.
11. *Id*.
12. *Ibid*.
13. R. Law, R. Portley, D. and Sbarra, Divorce and Death: A Meta-Analysis and Research Agenda for Clinical, Social, and Health Psychology. *Perspectives on Psychological Science*, Sept. 2011, 6: 454-474.
14. Sol R. Rappaport, Deconstructing the Impact of Divorce or Children. *Family Law Quarterly* (Vol. 47 No. 3) (Fall 2013 P. 535-578).
15. *Ibid*.
16. *Ibid*.

The Fugitive Disentitlement Doctrine: What is it, and Can it be Applied in Family Law Matters?

by Daniel H. Brown

The fugitive disentitlement doctrine was first adopted by the Supreme Court of the United States in *Molinaro v. New Jersey*.[1] Pursuant to this doctrine, "a fugitive from justice may not seek relief from the judicial system whose authority he or she evades."[2] Although this principle was originally invoked in a criminal case, it has since been held applicable to civil matters.

In *Degen v. United States*,[3] the Supreme Court held the doctrine applicable where a criminal fugitive sought not to challenge the criminal charges pending against him, but to contest a related civil matter. The Court set forth a list of five factors to consider when determining whether to extend disentitlement to a civil case against a criminal fugitive:

1. risk of delay or frustration in determining the merits of the claim;
2. unenforceability of the judgment;
3. the compromising of a criminal case by the use of civil discovery mechanisms;
4. redressing the indignity visited on the court; and
5. deterring flight by criminal defendants.[4]

In *Degen*, the Supreme Court declined to extend the doctrine to the facts of the case and held that disentitlement would be an "excessive response."[5] Since that time, the recurrent question in cases dealing with the issue of disentitlement has been whether a less harsh approach is available under the specific set of circumstances.

More recently, the New Jersey courts have made clear that the fugitive disentitlement doctrine is also applicable to family matters. Specifically, the New Jersey Supreme Court in 2002 dealt with this issue as a matter of first impression in *Matsumoto v. Matsumoto*.[6]

In *Matsumoto*, after a vacation to Japan, the husband and his mother refused to allow the parties' child to leave Japan with the wife. The husband remained in Japan with the parties' son while the wife returned to New Jersey. The husband and his mother refused to return the boy to the wife's custody, even after the issuance of orders by the trial court in Essex County compelling the boy's return and the imposition of sanctions of $1,000 per day, although the husband did ultimately return the child to the wife in accordance with the trial court's order.[7]

Criminal indictments were issued against the husband and his mother for conspiracy to interfere with child custody, interference with child custody, and child endangerment. Bench warrants were issued for the arrest of the husband and his mother for failure to appear at the arraignment.[8] Prior to the issuance of the warrants, the husband returned to the United States briefly, only to liquidate all of the parties' bank accounts, sell their cars, and ship all their furniture to Japan.[9]

The trial court entered a judgment of divorce awarding the wife the marital residence, permanent alimony, retroactive alimony, and sole custody of the child along with child support. The court also imposed compensatory and punitive damages against the husband and his mother, and awarded the wife counsel fees.[10]

The husband and his mother appealed all of the judgments against them. The Appellate Division held, in relevant part, that the refusal of the husband and his mother to comply with court orders prevented consideration of their appeals based on the fugitive disentitlement doctrine.[11] The New Jersey Supreme Court, in its analysis of whether the fugitive disentitlement doctrine applied to the circumstances before it, set forth a four-pronged test to determine whether disentitlement is an appropriate remedy:

> the party against whom the doctrine is to be invoked must be a fugitive in a civil or criminal proceeding;
>
> his or her fugitive status must have a significant connection to the issue with respect to which the doctrine is sought to be invoked;
>
> invocation of the doctrine must be necessary to enforce the judgment of the court or to avoid prejudice to the other party caused by the adversary's fugitive status; and
>
> invocation of the doctrine cannot be an excessive response.

The Court further held that "it is the flight or refusal to return in the face of judicial action that is the critical predicate to fugitive disentitlement."[12]

In its application of the test to the facts of *Matsumoto*, the Court held that the husband and his mother were, in fact, fugitives as defined by other jurisdictions and *Black's Law Dictionary*.[13] It further held that there was a sufficient connection between the husband's fugitive status and the disposition of the matrimonial estate and the alimony award, as it was the husband's dissipation of all of the marital funds, and the resulting lack of fear of losing any marital assets in the divorce action, that permitted him to remain in Japan and withhold the parties' son from the wife. Furthermore, the Court declared the husband a civil fugitive in the very appeal that was pending, since he was ordered to return the marital assets and he failed to do so.[14]

The Court then turned to whether application of the fugitive disentitlement doctrine was "necessary" to enforce the judgment of the lower court and whether disentitlement would be an "excessive response." The Court held that since the husband dissipated the entire marital estate, he had no assets remaining in New Jersey to satisfy any judgment entered against him. Disentitlement and dismissal of his appeal would, therefore, be the only way to ensure enforcement.[15]

However, the Court proposed a less harsh alternative: It permitted the husband, if he wished to appeal the lower court's judgment, to "post a bond in the full amount of the judgments pending against him to assure the enforceability thereof and to avoid prejudice to [wife]."[16] It further stated that "[i]f [husband] chooses not to post such a bond, the fugitive disentitlement doctrine will be applied to continue the dismissal of his appeal."[17]

Although the Court dismissed the husband's appeal as it related to monetary issues, it allowed the husband to proceed with his appeal as it related to the issue of child custody. The Court held that "a parent's right to the custody and companionship of his or her child is a fundamental one," and that "[s]uch a right cannot be extinguished or limited because of litigation misbehavior."[18] The Supreme Court stated it would only impose the fugitive disentitlement doctrine to issues of child custody in cases where the fugitive parent removed or hid the child.[19]

In a later case, the Appellate Division applied the principles established in *Matsumoto* in a 2008 unpublished opinion.[20] In *Jonas v. Jonas*, the trial court applied the fugitive disentitlement doctrine after the husband deliberately defied numerous court orders, purposely evaded the enforcement of those orders, and failed to appear in court despite warrants issued for his arrest.[21] As a result of his findings, the judge disregarded the husband's responding papers to the motion filed by the wife and dismissed his cross-motion without prejudice "for further consideration if defendant personally appeared before the court and posted a surety bond to cover all outstanding judgments."[22]

The Appellate Division, citing *Matsumoto*, affirmed the decision of the lower court and dismissed the husband's appeal because the trial court's decision afforded him the opportunity to post a bond to cover all the judgments against him in order to avoid disentitlement.[23]

In 2011, the Appellate Division addressed this issue once again in an unpublished opinion.[24] In *Durrani v. Durrani*, the trial court found the husband to be a significant flight risk and ordered him to surrender his passport.[25] The Appellate Division granted the husband leave to appeal. However, shortly thereafter the husband managed to leave the country using a temporary travel document.[26] As a result, the Appellate Division, using *Matsumoto*'s four-pronged test, dismissed the husband's appeal of the order requiring him to surrender his passport on the grounds that "defendant has violated that order by leaving the country and has not returned."[27]

The Court noted, however, that its decision "does not affect defendant's ultimate appeal rights nor preclude him from presenting himself to the trial court and urging whatever relief he believes appropriate."[28]

By contrast, in the unpublished opinion *Ort v. Ort*, the Appellate Division affirmed the trial court's refusal to invoke the fugitive disentitlement doctrine in a post-judgment matrimonial matter.[29] In *Ort*, the husband failed to comply with the arbitration final judgment, including failing to pay his child support obligation (there were 13 children born of the marriage, and one child remained unemancipated as of the time of appeal). A bench warrant was issued for the husband's arrest in 2008 as a result of his non-payment of support. The husband's child support arrears were set at $561,595 as of April 2012. The bench warrant could not be effectuated because the husband apparently left the country.

Nevertheless, in Feb. 2013, the husband moved to modify his child support obligation and to vacate the bench warrant. The wife opposed the application and requested that the court "not entertain or grant the defendant [husband] any affirmative relief until he personally appears before this tribunal and satisfies the condition to purge the bench warrant for his arrest."

The trial court in *Ort* reduced the husband's purge amount in an effort to encourage payment and declined to invoke the fugitive disentitlement doctrine. Not only did the court choose not to involve the fugitive disentitlement doctrine, but it did not require the husband to post a bond in order to assure the enforceability of his obligations and to avoid prejudice to the wife as a condition to allowing him to litigate, as was suggested in *Matsumoto.* The Appellate Division affirmed the trial court decision, finding the trial court acted within the considerable discretion it is afforded.

Thus, what is clear is that the fugitive disentitlement doctrine is a remedy that can be invoked in family law matters. What is also clear, however, is that it is within the discretion of the trial court whether or not to invoke that doctrine. More specifically, the trial court has broad discretion to determine if invocation of the doctrine is 'necessary' to enforce existing orders and to determine if invocation of the doctrine is 'excessive.' Based on the limited precedent in New Jersey, it is clear the doctrine will be invoked sparingly.

Thus, under what circumstances can the family law practitioner seek to invoke the fugitive disentitlement doctrine with the best chance of success? It appears the answer hinges on whether there are financial issues in dispute or custody issues in dispute.

With respect to custody issues, *Matsumoto* appears to set a bright line rule that the fugitive disentitlement doctrine will not be invoked by the courts in a custody case unless the fugitive parent has removed or hidden the child. But see the recently reported case of *Matison v. Lisnyansky* that appears to perhaps expand the application in cases involving custody issues.[30]

With respect to financial issues, there is no such bright line rule. However, it appears the practitioner would have the best chance of success by seeking invocation as alternative relief; in other words, request the defaulting party post a bond or pledge some other form of security in the full amount of his or her outstanding obligations prior to the court considering any of the defaulting parties' requests for relief. Then, request in the alternative that the court invoke the fugitive disentitlement doctrine if the defaulting party fails to post the bond or similar form of security.

The *Ort* decision makes clear that seeking invocation of the fugitive disentitlement doctrine as alternative relief does not guarantee success, but it certainly appears to be the best way of enhancing one's chances of success. ■

Daniel H. Brown is a partner with Paone, Zaleski, Brown & Murray, with offices in Woodbridge and Red Bank.

Endnotes

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4. *Id.* at 824-28.
5. *Id.* at 829.
6. *Matsumoto v. Matsumoto*, 171 N.J. 110 (2002).
7. *Id.*
8. *Id.* at 115-16.
9. *Id.* at 115.
10. *Id.* at 118.
11. *Matsumoto v. Matsumoto*, 335 N.J. Super. 174 (App. Div. 2000).
12. *Matsumoto*, 171 N.J. at 118.
13. *See id.* at 121 (*citing Empire Blue Cross & Blue Shield v. Finkelstein*, 111 F.3d 278, 281 (2d Cir. 1997) (holding that a fugitive is a "person who, having committed a crime, flees from [the] jurisdiction of [the] court where [a] crime was committed or departs from his usual place of abode and conceals himself within the district").
14. *See Matsumoto*, 171 N.J. at 130-31.
15. *Id.* at 131.
16. *Id.*

17. *Id.*
18. *Id.* at 133.
19. *Id.*
20. *See Jonas v. Jonas*, 2008 WL 239069 (App. Div. 2008).
21. *Id.* at 1.
22. *Id.*
23. *Id.* at 2.
24. *See Durrani v. Durrani*, 2011 WL 1404874 (App. Div. 2011).
25. *Id.* at 2.
26. *Id.*
27. *Id.* at 3.
28. *Id.*
29. *Ort v. Ort*, A-5406-12T1, (App. Div. 2015).
30. *Matison v. Lisnyansky*, A-5656-13T2 , (App. Div. Jan. 13, 2016).

Increased College Costs and the Need to Re-Evaluate Allocation of Contribution

by Marc R. Brown

In 1982, the Supreme Court was called upon to address the issue of parental responsibility for contributing to college costs for their children in *Newburgh v. Arrigo*.[1] In providing the basis for imposing that obligation on parents, Justice Stewart Pollock stated:

> In the past, a college education was reserved for the elite, but the vital impulse of egalitarianism has inspired the creation of a wide variety of educational institutions that provide post-secondary education for practically everyone. State, county and community colleges, as well as some private colleges and vocation schools provide educational opportunities at reasonable costs. Some parents cannot pay, some parents can pay in part, and still others can pay the entire cost of higher education for their children. In general, financially capable parents should contribute to the higher education of children who are qualified students. In appropriate circumstances, parental responsibility includes the duty to assure children of a college and even a post-graduate education such as law school.[2]

Despite the passage of time since *Newburgh* was decided, statistics show that college is perhaps more important than ever to one's future. In fact, studies show that by the year 2020 approximately two-thirds of jobs will require post high school education or training.[3] Presently, college graduates earn approximately 98 percent more than high school graduates and the unemployment rate among college graduates between 25 and 34 years of age was three percent, which equates to roughly one-half the national average.[4] Thus, one's level of education clearly correlates with the level of earnings and wealth he or she is likely to achieve over time.

That said, there is a cost associated with obtaining post-secondary education in America, and that cost has risen exponentially over the past three decades. In fact, the average cost of an undergraduate degree has increased by 1,135 percent, or over *11 fold*, since 1978, only three years prior to the Supreme Court's decision in *Newburgh*.[5] Over the same time period, the cost of living has increased approximately three fold and medical costs have increased six fold, all while the median inflation-adjusted income of American families has remained basically stagnant.[6] Thus, the cost of a college education has increased at almost four times the rate of the standard cost of living, and over *11 times the rate of increase in the average American family's income*.

There are many reasons cited as potential causes for the increase in college costs. One reason is the reduction in state and federal appropriations to state colleges. State support for public colleges and universities has decreased by 26 percent for full-time students since the early 1990s.[7] Another reason is an increase in demand for higher education. As a college degree becomes more and more vital to the American middle class, the cost of obtaining that degree continues to rise. The greater the demand, the greater the cost. Regardless of the causes, however, the reality is that the rise in college costs has led to an increased burden on parents and students alike as they struggle to meet those costs, and do so most often by taking out loans.

Between 2005 and 2011, the aggregate amount of federal student loans taken by American college students doubled and the outstanding student loan debt jumped from approximately $56 billion to $104 billion.[8] Presently, the total outstanding student loan debt in the United States is more than $1.2 trillion.[9] The average debt of graduates from a four-year nonprofit university in 2012 was $27,253, which was a 58 percent increase from the average debt upon graduation in 2005.[10] That number is even higher today.

The subsidization of rising college costs through significant debt comes at a significant price, beyond that which is financial. Recent studies reveal that 75 percent of college students report stress from tuition

and student loan challenges while in school.[11] In fact, a recent increase in the suicide rate among recent college graduates was found to be directly attributable to the stress related to defaulting on their student loans.[12] High student loan balances upon graduation also have a negative effect on the student's financial future. For instance, even assuming a young adult with student loan debt was able to afford a monthly mortgage payment on top of his or her student loan payments, high outstanding student loan balances could prevent that person from qualifying for a mortgage, or even a car loan, for many years after graduation. Likewise, a young adult with a high monthly student loan payment may not have the ability to make any substantial contribution toward his or her retirement savings until much later than previous generations, putting him or her at risk for a reduced ability to be self-supporting later in life.

The rising cost of college and the struggle concerning how to pay for it is undeniably a nationwide issue. Yet, family law practitioners and judges are in the unique position of having to address this on almost a daily basis while navigating families through the divorce and post-divorce process. In light of the prevalence of this issue within the profession, the author believes practitioners have the ability and, in fact, the obligation to protect parties and children from themselves when it comes to the college selection and financing process. While methodologies exist for addressing college and college-related financing in the context of divorce, those methodologies have not kept up with the changing times. As such, practitioners need to start adjusting those methodologies to take into consideration the potential long-term effects arising from college financing issues to achieve a more fair and realistic result for parents and children down the road.

As mentioned above, the seminal 1982 case of *Newburgh v. Arrigo* provides the current framework for analyzing a college contribution case in New Jersey.[13] In *Newburgh*, the Supreme Court provided a list of factors to be considered in analyzing and deciding a college contribution case.[14] Those factors presently include the following considerations:

1. Whether the parent, if still living with the child, would have contributed toward the cost of the requested higher education;
2. The effect of the background, values and goals of the parent, the reasonableness of the expectation of the child for higher education;
3. The amount of the contribution sought by the child for the cost of higher education;
4. The ability of the parent to pay that cost;
5. The relationship of the requested contribution to the kind of school or course of study sought by the child;
6. The financial resources of both parents;
7. The commitment to and aptitude of the child for the requested education;
8. The financial resources of the child, including assets owned individually or held in custodianship or trust;
9. The ability of the child to earn income during the school year or on vacation;
10. The availability of financial aid in the form of college grants and loans;
11. The child's relationship to the paying parent, including mutual affection and shared goals as well as responsiveness to parental advice and guidance; and
12. The relationship of the education requested to any prior training and to the overall long-range goals of the child.[15]

A review of these factors reveals that the *Newburgh* Court's focus in 1982 was on the immediate and/or current financial abilities of the parent and/or child to contribute toward college costs, while little to no focus was placed upon their long-term abilities to meet these costs. For instance, while courts are directed to look at the availability of financial aid in the form of college grants and loans when conducting a college contribution analysis, there is no acknowledgment of the fact that the amount of financial aid can change from year to year. Similarly, courts are not directed to consider the long-term ramifications arising from the assistance obtained, such as the relationship between the degree achieved and its ability to yield an income sufficient to enable the child to make the required monthly student loan payment upon graduation.

Perhaps the Court's failure to consider factors like these was a product of the times—a four-year degree, including the cost of tuition, room and board, in 1982 cost somewhere in the range of $12,000, compared to upwards of $100,000 today.[16] Alternatively, it may be due to the fact that fewer student loans were available in the past. Regardless, consideration of such factors cannot and should not be underestimated or ignored any longer. Consideration of such factors is particularly essential in today's environment when the cost of college and other forms of post-secondary education are dramatically increasing and graduates and their parents are finding themselves inundated with loan repayment obligations without adequate means to meet them.

The long-term effects of substantial student loan obligations manifest themselves in many ways, including, but not limited to, the ability of young people upon obtaining their degree to: purchase their own home; establish credit; meet reasonable and necessary living expenses; and support their family. In fact, the impact of student loans has already been acknowledged by the courts as creating such a burden as to justify a reduction in a parent's child support obligation. In *Lozner v. Lozner*, the Appellate Division upheld a trial court's decision to deviate from the child support guidelines in view of a father's $240,000 student loan debt upon graduating from law school.[17]

In evaluating this claim, the Appellate Division noted that:

> When further education is funded through student loans [ ], a legally unavoidable regular repayment obligation is created. *See U.S.C.A.* Section 523(a)(8) (specifying that student loan debt is not dischargeable in bankruptcy except for "undue hardship on the debtor and the debtor's dependents")...When determining child support, if a court were to disregard a large student loan debt, parents may be discouraged from financing further education, which may prove detrimental to their children.[18]

In support of its holding, the Appellate Division in *Lozner* also noted that Appendix IXA of the child support guidelines provides that courts are specifically permitted to consider "other factors" that may, in a particular case, cause the child support guidelines to be inapplicable or require an adjustment to a child support guidelines-based award.[19] The Appellate Division further relied on N.J.S.A. 28:34-23(a), which requires the court in establishing child support awards to consider, among other things, the reasonable debt and abilities of each child and parent. Thus, the Appellate Division concluded that debt, and more particularly student loan debt, can constitute a factor to be considered in determining whether alteration of a guidelines-based support award is appropriate, provided the parent reasonably and necessarily acquired the loan for educational purposes with the goal of improving his or her earning capacity.[20]

The significance of the Appellate Division's acknowledgement of the effect of student loans on one's ability to support his or her family in *Lozner* cannot be understated. This acknowledgement is particularly essential at the present time, in light of the increases in college or post-secondary education costs and the burden imposed by student loans obtained to fund these costs, since *Newburgh* was decided more than 33 years ago.

Notwithstanding the long-term burden student loans place upon parents and young adults alike, the current methodology for addressing contribution specifically fails to consider them. Even worse, it fails to consider the child's right to have a say in whether or not he or she wants to take on such a significant long-term burden. For example, in the recent unpublished Appellate Division decision of *Katz v. Katz*, the appellate panel declined to overturn a trial court's decision not to compel the plaintiff wife to contribute toward a $10,000 loan the defendant husband had unilaterally obtained to defray part of their eldest child's law school expenses, instead holding that the child should be responsible for that debt, as the parties had paid for the entirety of her college expenses and the first two years of law school.[21]

In so holding, the Appellate Division noted that:

> The Court did not abuse its discretion in declining to allocate half of the $10,000.00 debt that defendant incurred to assist the eldest child in defraying the cost of attending her last year of law school. *Jacoby v. Jacoby*, 427 *N.J. Super.* 109, 116 (App. Div. 2012) (stating that courts have broad discretion in allocating college expenses). We recognize that the parties were dedicated to supporting their children's college and graduate education. However, as the court noted, it was not unreasonable to require the child to assume responsibility for the loan, in light of the substantial contributions of her parents.[22]

Although the amount of the debt ascribed to the child in *Katz* was rather nominal, the child was not involved in the litigation between her parents. Nevertheless, she was compelled to assume this obligation by virtue of the court's decision. The question that arises is whether or not the child's best interests were protected. Had that loan amount been in excess of $10,000, would it have been consistent with the child's best interest to ascribe repayment responsibility to her, particularly when she was not involved in the process by which that determination was made and would have had no knowledge of how she might repay that loan in the future?

It is undisputed that the court has the ability and obligation to protect children from the actions of their parents in the context of a divorce. This obligation was acknowledged by the Appellate Division in *Sauro v. Sauro.*[23] In that matter, which involved a hotly contested and very expensive divorce, the trial court utilized some of the parties' last remaining assets to establish a $200,000 education trust fund to cover the cost of college education for their three children to protect the children from their parents' apparent desire to spend every last dime on litigation, to the children's detriment. In so doing, the trial court invoked its' *parens patriae* responsibility to protect the children from harm.

On an appeal by one of the attorneys expecting to receive payment from the same assets used to form the trust, the Appellate Division refused to overturn the trial court's actions, instead acknowledging the family part's statutory authority to enter orders providing for the "care, custody, education and maintenance of the children," and to ensure that funds will be available to cover the costs of these concerns.[24] Thus, the Appellate Division concluded the court's power in this respect includes, but is not limited to, "the creation of trusts or other security devices to assure reasonably foreseeable medical and educational expenses."[25]

Finally, the Appellate Division in *Sauro* concluded that:

> The Family Part's jurisdiction over this matter must be guided exclusively by the best interest of the children. The court's power must be used to modify the financial disruption caused by the dissolution of the marital estate, and to the extent possible, restore and promote the stability necessary for the parties to make sound parenting decisions. The Court is also obligated to protect the children of the dissolving union, who, at times, become embroiled in their parents' antagonism, and fall prey to their misguided passions.
>
> When the adults in the controversy are unable or unwilling to act in the best interest of their own children, the court must be free to act swiftly, decisively and unfettered by extraneous considerations. The establishment of judicially crafted educational trust funds is but one of a myriad of creative remedies in the court's equitable arsenal…[26]

In the context of the foregoing, it is clear that the court is obligated to protect children of divorce in situations where they are not capable of protecting themselves. The allocation of college expenses is one of those situations. It is a rare circumstance when a child is educated about the financial realities of college costs and student loans. Although there has been a movement toward including more finance-related course work in elementary, middle and high schools, parents remain the primary educators of their children regarding this issue. Yet, many parents avoid talking to their children about financial issues. Most students, when they enter college at 17 or 18 years of age, do not understand the long-term financial responsibilities they are assuming by virtue of obtaining student loans.

It is equally rare for a child to be involved when his or her parents, who in the midst of a divorce, and perhaps with the assistance of the court and their attorneys, are determining how that child's college education costs are to be funded. Parties to a divorce are primarily concerned with how they are going to put food on the table after a divorce, not whether the student loans their children will have to incur to finance college will put undue financial, or even emotional, strain on them after they graduate.

Another barrier to rational decision-making when it comes to college financing in divorce is parental guilt. In many cases, the parent who feels guilt about the divorce does not want to disappoint a child or deprive the child of the opportunity to attend the college of his or her choice. As a result, these parents impose no limits on the child and permit him or her to incur burdensome student loans to avoid further pain or disappointment. While this approach is certainly understandable, the reality is that it may not yield the best possible result for the child in the long run.

Importantly, it is not only children of divorce who have suffered as a result of the rising cost of college; parents have suffered, too. There is no doubt that parents want the best for their children. They want them to have the benefit of a college education and they also want them to pursue their education at the school of their choosing. In intact families, parents may be able to set aside funds with which to assist in the payment of their children's college education costs. When parents divorce and/or separate, however, the cost of supporting and maintaining two households is likely, in the majority of cases, to create a significant financial strain, necessitating the use of savings to meet immediate needs and obligations. As a result of this need, funds saved by parents for college during their marriage may no longer be available when the child goes off to college.

Nevertheless, since parents are generally legally obligated to contribute toward the cost of their children's college education, or may wish to do so, they may be forced to take out federal or private parent loans.

The problem is that when it comes time to repay these parent loans, the monthly payments often detract from the parent's ability to meet his or her other ongoing obligations to other children, or to themselves, and in some cases even prevents a parent from doing so. Additionally, that parent is at great risk in the event of a change in his or her circumstances, including illness affecting ability to work and earn income, loss of employment or some other justifiable diminution in income, because once these loans are obtained they do not go away until they are paid in full. These loans are due to third-party lenders and are generally non-dischargeable in bankruptcy. They are also in many respects non-modifiable, unlike a support obligation resulting from a divorce. If one is unable to pay child support for a justifiable reason, he or she can return to court and seek a modification of that obligation. However, the same individual cannot go to court and seek a modification of his or her obligation to repay the student loans he or she obtained because these obligations are owed to third-party lenders.

The anomaly is that relief is available to a parent seeking contribution from the other parent whose financial circumstances have improved subsequent to the entry of a divorce judgment. In *Weitzman v. Weitzman*, a parent who received an inheritance after his child's college education expenses were incurred was required to reimburse the other parent for a share of the expenses even though the obligation would be imposed retroactively.[27] A parent agreeing to pay for his or her child's education by virtue of student loans, however, has no recourse in the event of an involuntary deterioration in his or her circumstances, and may carry these repayment obligations well into retirement.

In light of the foregoing, it is the opinion of the author that there must be a way to address college cost allocation issues in a divorce setting that effectively balances the anticipated lack of future financial resources of the parents with the child's long-term financial and overall best interests, while allowing the child to be included in the decision-making process regarding the contribution he or she will be required to make toward his or her own education.

Following are several methods by which the author suggests parents, attorneys and courts might better balance these interests. This list is not meant to be exhaustive, but merely a starting point for a re-evaluation of the methods by which the allocation of college costs are addressed within the context of divorce:

1. Greater use of educational trust funds such as the one formed in *Sauro* using funds available for equitable distribution, either by court order or agreement, to ensure money is available for college when the time arises;
2. The imposition, by court order or agreement, of a limitation on the children's obligation to borrow money to fund his or her college costs;
3. Limiting the parents' obligation to contribute toward college costs by agreement so the parent and child can reasonably anticipate the child's expected and required contribution in advance of the college selection process;
4. Educating clients regarding the potential future effect on them and their child of their failure to limit a child in his or her college choices;
5. Providing in an agreement that potential changes in circumstances that take place during the child's attendance at college, such as increases or decreases in scholarships, grants or other aid, or a parent's involuntary loss of income or employment, may allow for a modification of the parents' obligations to contribute to college costs;
6. Emphasizing the court's *parens patriae* authority to say no to a proposed college choice if the choice may lead a child or parent to incur substantial debt;
7. Outlining the children's role and rights in the college selection process within their parents' agreement;
8. Requiring, either by court order or agreement, that parents, with the assistance of a financial planner or the like, educate their children on the long-term impact of funding education with student loans;
9. Reconsidering or reviving the Rutgers rule[28] to discourage parents and children from agreeing to or advocating for colleges that may be unaffordable; and,
10. Providing that a child may participate in mediation with his or her parents when disputes arise regarding college selection and/or allocation of costs to be incurred. ■

Marc R. Brown is a partner at the law firm Wolkstein, Von Ellen & Brown, LLC in Springfield. *The author wishes to thank Marisa Lepore Hovanec for her assistance in the preparation of this article.*

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Matrimonial Settlements and *Puder*: Imperfect Together

by Mark Biel

The purpose of this article is two-fold: First, to discuss the case law in New Jersey that addresses the effect of matrimonial settlements upon malpractice claims. (It is critically important to understand a settlement, even if placed on the record with testimony by the parties, is not a panacea that immunizes an attorney from a viable malpractice claim.) Second, to address prudent ways in which the matrimonial attorney can defend and defeat malpractice claims when brought, notwithstanding prior assent by the former client to the terms of a settlement.

Case Precendent

The seminal case is *Ziegelheim v. Apollo*.[1] Over a period of several days there was a flurry of settlement proposals and counter-proposals among the parties, their attorneys and their forensic experts, culminating in the execution of a property settlement agreement addressing issues of equitable distribution and alimony. On the same day the agreement was reached it was orally entered into the record before the trial court judge.

After the settlement was read into the record, both parties testified they understood the agreement; thought it was fair; and entered into it voluntarily. Ziegelheim thereafter filed a malpractice action against Apollo, asserting, *inter alia,* that she accepted the agreement only after she was advised that wives in her position could expect to receive no more than 10-20 percent of the marital estate if they went to trial; that she could expect to receive no more than 20 percent; claimed that Apollo's estimate was unduly pessimistic and did not comport with the advice that a reasonably competent attorney would have given under the circumstances. Had she been advised competently, she maintained she would not have accepted the settlement. She further alleged that because it took months to secure a written agreement (notwithstanding the oral representations on the record it was not until months later a written agreement was secured), she lost interest on payments that were due her pursuant to the settlement and that Apollo failed to initially reduce what was a complex settlement proposal to writing before it was placed on the record, thus compromising her ability to understand its terms.

Contemporaneously with the filing of the malpractice suit, she sought to set aside the property settlement agreement. While the motion to set aside the property settlement agreement was pending, the malpractice case was called to trial. The plaintiff voluntarily dismissed the malpractice action without prejudice. Thereafter, the family court denied the motion to set aside the agreement. The malpractice case was refiled.

After the trial court ruled in favor of Apollo on all counts, the Appellate Division affirmed the trial court by dismissing all claims except a claim in which the plaintiff alleged her attorney was negligent in convincing her to accept the agreement and that a reasonably prudent attorney would advise against accepting. Cross-petitions for certification to the Supreme Court followed and were both granted.

The Supreme Court held that a client's acceptance of a negotiated matrimonial settlement did not bar her subsequent recovery from her attorney for the negligent handling of her divorce action, recognizing that litigants rely heavily upon the professional advice of counsel when they decide whether to accept or reject offers of settlement. The Court found no reason to apply a more lenient rule to attorneys who negotiate settlements than it does to those who provide other legal services.[2] The Court further held that Ziegelheim's statement on the record that the settlement agreement was fair and the family court's denial of her motion to set the agreement aside on that basis did not collaterally estop her from litigating her subsequent malpractice claim.[3] The Court reasoned that:

> The earlier ruling did not implicate the competence of counsel and indeed was premised upon the presumptive competence of counsel.[4]

Put another way according to the Court:

> The fact that a party received a settlement that was "fair and equitable" does not necessarily mean that the party's attorney was competent or that the party would not have received a more favorable settlement had the party's incompetent attorney been competent.[5]

The Court did, however, provide both caution to overzealous litigants and didactic instructions to matrimonial attorneys, stating:

> In holding as we do today we do not open the door to malpractice suits by any and every dissatisfied party to a settlement. Many such claims could be averted if settlements were explained as a matter of record in open court in proceedings reflecting the understanding and assent of the parties…
>
> Similarly we acknowledge that attorneys who pursue reasonable strategies in handling their cases and who render reasonable advice to their clients cannot be held liable for the failure of their strategies or for any other profitable outcomes that result because their client's took their advice. The law demands that attorneys handle their cases with knowledge, skill and diligence but it does not demand that they be perfect or infallible and does not demand that they always secure optimum outcomes for their clients.[6]

These parameters continue to provide helpful guidance to the attorneys more than 20 years later. They will be further addressed in this article.

Enter *Puder*

Because the Supreme Court in *Puder* ultimately barred a former client's malpractice suit against her attorney in a matrimonial matter, the case has created both confusion and, to some degree, a false sense of reliance that once a case is settled and the client testifies to its fairness on the record a malpractice suit will be barred.[7] In fact, nothing can be further from the truth. The rationale of *Puder* is based upon a very specific fact pattern.

With a trial date looming, Puder was able to negotiate an oral settlement agreement for her client that she deemed clearly more favorable than that which had been recommended by the early settlement panel. In fact, she advised Buechel that it was a "great deal." The husband's attorney sent Puder a letter memorializing the proposed settlement agreement, and Puder immediately advised the trial court the parties had orally settled the matter and they were in the process of finalizing the written agreement. Over the next several days, the parties worked out the remaining details of the settlement. Within approximately a month, Buechel consulted with other counsel who characterized the settlement as "ridiculously inadequate." Based upon that advice, Buechel advised Puder that she would not abide by the settlement terms. She discharged Puder and retained new counsel.

Her husband moved to enforce the settlement agreement and the trial court ordered a plenary hearing on the issue. While that hearing was pending, Puder sued Buechel for unpaid legal fees and Buechel filed an answer and counterclaim alleging malpractice. Nearly two years after the purported settlement the trial court held a plenary hearing to determine whether the parties had reached a binding settlement agreement and, if so, whether the agreement was enforceable. After six days of testimony, Buechel's new counsel informed the court that Buechel had agreed to settle the case.

In fact, the new settlement was substantially similar to the disputed settlement. Detailed testimony was placed on the record, including Buechel testifying that she believed the new settlement represented a fair compromise that she accepted freely and voluntarily. In the process of questioning, Buechel testified that she was only agreeing to the settlement because she believed the trial court would find the first settlement enforceable and because she believed the second settlement wouldn't affect her status of the malpractice complaint against Puder. The judge approved the second settlement and granted a judgment of divorce to the parties.

Discovery continued in the malpractice case until, ultimately, Puder moved for summary judgment on the legal malpractice claim, arguing that Buechel, by entering into the second settlement before the validity of the first settlement was determined, had waived her right to continue this action. The Court agreed, and granted the motion for dismissal.

In a published opinion, the Appellate Division reversed and remanded, holding that the trial court erred in dismissing Buechel's malpractice counterclaim,[8] based upon the reasoning of *Ziegelheim*. In reversing, the Supreme Court held that fairness and the public policy

favoring settlements dictated that Buechel was bound by her representation to the trial court that the divorce settlement agreement was "acceptable" and "fair," and accordingly precluded her malpractice claims against Puder.[9] The Court concluded that any alleged deficiency resulting from the first settlement was ameliorated by the second settlement that Buechel deemed to be fair and equitable, and that she was bound by her "calculated decision" to resolve the dissolution of her marriage by accepting her former spouse's settlement offer, a settlement she approved in open court.[10]

Of critical importance in distinguishing *Puder* from *Ziegelheim,* the Court found that unlike *Ziegelheim,* in which the trial court had already denied the plaintiff's motion to set aside the disputed settlement, in *Puder* the malpractice suit was not her only remedy. Specifically, the "calculated decision" to accept the second settlement was negotiated by a second attorney *before* the trial court could even decide whether the first agreement was or was not enforceable.[11] As set forth by the trial court's statements on the record, the trial court could have found the first settlement to be invalid or unenforceable, which would have alleviated the need to sue Puder for malpractice.

The Supreme Court took the opportunity, in *Puder,* to discuss what was then a recent Appellate Division decision—*Newell v. Hudson*—finding the reasoning of that case to be instructive.[12] In *Newell* the plaintiff filed a malpractice claim against her former matrimonial attorney alleging the attorney's failure to conduct adequate discovery "resulted in her accepting a settlement which was woefully insufficient in terms of both alimony/spousal support and equitable distribution."[13] Both the trial court and the Appellate Division rejected the malpractice claim, concluding the plaintiff was bound by her voluntary testimony that the settlement was a fair resolution of her divorce.

In *Newell,* Hudson herself was an experienced accountant, completely familiar with all of the financial information involved in the divorce proceedings. The trial court found her to be a sophisticated party who knew fully what she was doing with respect to the divorce proceedings, and that she was even familiar with the rationale of the *Crews* decision.[14] Moreover, in discovery deposition testimony, Hudson essentially repudiated her testimony when the case was settled that it was fair and she had a full understanding of the settlement. Accordingly, the trial court invoked the doctrine of judicial estoppel.

The facts of *Newell* indicate that Hudson had reviewed the settlement carefully over approximately eight hours of negotiations between the parties, and the appellate court found:

> This is not a case where the litigant was misinformed of the criteria to be employed or was without full knowledge of the attendant facts prior to adopting her initial position… she was not an unsophisticated individual or a vulnerable litigant. It is clear from the record of the divorce proceedings that Hudson was fully familiar with the financial circumstances of the parties and the regularity of her husband's bonuses and total income and waived her right to further discovery. Hudson was unable to point to any income or assets that had not been disclosed at the time of the divorce.[15]

While the Appellate Division in *Newell* ultimately dismissed the malpractice claim, it is the rare case where ones' matrimonial client is as sophisticated and knowledgeable as Hudson, both in terms of her education and professional background as well as her specific knowledge of the operative financial facts of the case.

Recent Cases

There are two recent cases that have addressed the *Ziegelheim-Puder* dichotomy. Neither have done so in the context of a matrimonial case, but they nonetheless merit discussion.

In *Pinto v. McGovern, Provost & Colrick,* the plaintiff appealed from a summary judgment dismissal of her legal malpractice complaint against her former attorney and his law firm.[16] The dismissal was granted based upon the court finding the facts akin to the rationale of *Puder.* After settling issues between herself and her son, the plaintiff filed two actions: one being a commercial action against her son whom she alleged fraudulently induced her into signing certain deeds and one against her prior attorney for malpractice. On the eve of trial, the parties to the commercial litigation placed a settlement on the record. The transcript reflects a detailed statement of the terms and a lengthy colloquy between the plaintiff and the court regarding her understanding and voluntary acceptance of the settlement, the waiver of her right to proceed to trial and the potential impact of the settlement on her pending malpractice case. Several months later,

pursuant to a motion filed by the plaintiff's son, an order enforcing the settlement was entered.

The plaintiff's prior counsel moved for summary judgment on the malpractice complaint, arguing that the tactical decision to settle her underlying action against her son barred her legal malpractice action based upon the principles of *Puder.* The motion judge concluded that under *Puder* the plaintiff's malpractice case was barred as a matter of law. The Appellate Division concluded the plaintiff, who was represented by an attorney other than the one she sued for malpractice, settled the underlying claim against her son on the day of trial, and the judge made findings regarding her understanding, acceptance and satisfaction with the resolution of the underlying action and with its impact on the pending malpractice case.

The appellate court concluded that her claim against her previous attorney was not her only remedy. The plaintiff could have sought to vacate the agreement based upon duress or related grounds at any time during the intervening 18 months. The chancery judge could have found the initial settlement with her son to be invalid or unenforceable, enabling her to proceed to trial. The plaintiff had a full and fair opportunity to litigate her damage claim before the chancery judge but chose to settle her case.

Pinto is consistent with the precepts expressed in *Puder* that a litigant should not be permitted to maintain a malpractice complaint against a prior attorney where in the interim she knowingly and voluntarily settles the substantive issues that lead to her purported claim against the attorney and she does so knowingly and voluntarily.

In the case of *Guido v. Duane Morris, LLP,* after multiple settlement discussions the parties settled a corporate litigation matter.[17] Two years later, Joseph and Teresa Guido filed a malpractice complaint against their former attorneys, Duane Morris, alleging legal malpractice. They alleged their attorney's ineffective representation resulted in Mr. Guido being stripped of his power as a majority shareholder of the company. Initially the motion judge granted summary judgment dismissing the plaintiff's complaint against Duane Morris with prejudice, based upon the predicates of *Puder.* Thereafter, the motion judge granted the plaintiff's application for reconsideration; vacated the prior order for summary judgment and granted the motion of Duane Morris for leave to appeal.

However, unlike the malpractice claimants in both *Ziegelheim* and *Puder*, the Guidos did not seek to repudiate the settlement in the underlying action. The question became whether such an effort is a condition precedent to the filing of the malpractice action. The Appellate Division concluded that repudiation is not a condition precedent for the filing of a malpractice suit. Particularly with the passage of time, the Appellate Division opined that there was no reasonable expectation of success, even had plaintiffs filed a motion to set aside the settlement, and accordingly had no obligation to make such an application. The Court indicated:

> Reading *Ziegelheim* and *Puder* together, we understand the Supreme Court to permit malpractice claims following a settlement when there are particular facts in support of their claims of attorney's incompetence…but to preclude malpractice claims when a client merely seeks to settle a case for less than it is worth…and then seeks to recoup the difference in a malpractice action against the attorney.[18]

In *Guido* the Court found the allegations that the defendants failed to explain the long-term value and marketability implications of certain stock restrictions on the sale of the stock was sufficient for the matter to proceed forward (*i.e.*, that is there was a genuine issue of material fact).

Duane Morris appealed that decision to the Supreme Court. The Supreme Court held that to assert a legal malpractice claim a litigant need not first seek to vacate a settlement but may proceed directly against those lawyers the plaintiff asserted provided negligent advice that culminated in a settlement.[19] Importantly, the Court clarified that in *Puder* it applied equitable principles carving out what it referred to as a "limited exception" to the *Ziegelheim* standard.[20] The Court further stated:

> When viewed it is proper context—that *Puder* represents not a new rule but an equity-based exception to *Ziegelheim*'s general rule—the rule of decision applicable here is clear unless the malpractice plaintiff is to be equitably estopped from prosecuting his or her malpractice claim, the existence of a prior settlement is not a bar to the prosecution of a legal malpractice claim arising from such settlement.[21]

Accordingly the plaintiff's suit was not barred and the judgment of the Appellate Division was affirmed,

permitting the plaintiff to go forward with their malpractice suit.[22]

What can be gleaned from these decisions? A litigant shall have the right to bring a malpractice action against a former attorney even if a matrimonial settlement agreement has been executed and the litigant has acquiesced on the record to the agreement. This is so whether the client may have unsuccessfully moved on a post-judgment basis to repudiate the agreement or has not moved to repudiate the agreement. There appear to be two exceptions: The first is when, like *Puder,* a party repudiates the agreement; ultimately, with other counsel, renegotiates the agreement; testifies to the understanding and voluntary acceptance of the agreement; and thereafter seeks to sue his or her first attorney.

The second exception is when a litigant has such unique background and knowledge about the legal and factual predicates underlying a settlement to which the litigant assents in detail on the record that the litigant is now estopped from alleging a loss due to the purported malpractice of the matrimonial attorney.

Accordingly, no matrimonial attorney ought to operate under a false sense of security that once an agreement is signed and the client testifies to a full understanding of the agreement as well as its fairness, the attorney is now immunized from a successful malpractice suit. Nonetheless an attorney can and should engage in protective measures in every case to minimize that risk.

As an attorney who has been litigating matrimonial cases for over 40 years and who has served as a witness in multiple malpractice cases the author offers the following suggestions:

The Requisite of a Written Agreement

The author believes, other than the unusual case when the only thing being addressed on the record is a cause of action for divorce, a practitioner should not appear in court for a client without a written agreement. The author is mindful of Rule 5:5-9, which permits a settlement to be placed on the record and a judgment entered orally followed by a submission to the court thereafter of a proposed amended form of final judgment setting forth the terms of settlement or alternatively specifically incorporating the parties' written property settlement agreement.

Nonetheless, appearing in court without a written agreement provides fertile ground for a malpractice claim when the client thereafter asserts that there was no ability to see everything in writing before acquiescence; that the terms were not completely understood and, in fact, that there was a misunderstanding; that in the throes of negotiation on the date the matter was put through the client felt pressured by the attorney to settle; and the attorney made certain representations to the client which at least in the mind of the client proved to be untrue.

When a matter is resolved days in advance of trial there is absolutely no reason to appear in court without a written and executed agreement. When, however, as sometimes happens, the case is resolved on the day of trial the author's advice is, rather than relying on Rule 5:5-9, engage in a colloquy with the court and advise the trial judge the matter is conceptually settled and the parties and counsel wish to appear several days later with a fully executed matrimonial settlement agreement.

The author has found that in almost all instances judges will be accommodating. If a practitioner finds him or herself in a position where a judge is insistent upon placing something on the record, at a minimum the practitioner needs to present something that is handwritten and executed by both the clients and the attorneys, with the understanding that there will be a formal memorialization forthwith under Rule 5:5-9.

To this reasoning there should be one arguable exception. A practitioner may find him or herself in litigation where finally there is a settlement on the table on the eve of trial. The client wants to put the case through on that day because it has been very difficult to get the other side to the settlement table and both the practitioner and the client fear that if the matter is not put through that day an opportunity to settle will be lost. Assume the client is very satisfied with the resolution. Only the practitioner has a feel for the case, namely, whether there is validity to do what the client suggests. In those limited circumstances based upon sound judgment it may be appropriate to put the case through with an oral agreement, notwithstanding some attendant risk.

The author is not a fan of final judgments of divorce with stipulations as opposed to a matrimonial settlement agreement annexed to a final judgment of divorce, because a final judgment of divorce with stipulations generally does not express some protective provisions the author believes ought to be included in a well-crafted matrimonial settlement agreement. At a minimum, the following should be included within the agreement as acknowledged by the parties:

1. They have thoroughly read this agreement and understand all the provisions.

2. They have had ample opportunity to consult with their attorney and have asked for and been provided with answers to all questions they may have concerning their rights and obligations under this agreement, and are proceeding knowingly with a complete understanding of the agreement.
3. They are satisfied with the services of their attorney, who has fully answered all their questions, and they fully understand every aspect of the agreement.
4. The agreement resolves all non-dissolution matters known to them arising from the marital agreement but for the cause of action relating to the dissolution of the marriage.
5. There have been no representations, promises or agreements made outside of the agreement and the document contains their entire understanding.
6. They are not under duress to sign the agreement by reason of either force, threats or coercion and their judgment is not affected by illness, medicines or substances.
7. After careful consideration of all circumstances they consider the agreement to be fair and equitable to each of them.
8. They waive their rights to a trial and court adjudication of the issues that are resolved by the agreement, understanding that a judge's decision may have been better, worse or the same.
9. They understand that the agreement is final and binding and will be enforceable by a court of law.
10. They are entering into the agreement freely and voluntarily, and entirely of their own volition.

Discovery Issues

It is certainly beyond the scope of this article to address what discovery is appropriate in each case. That depends upon the complexity of the case, and may include interrogatories and supplemental interrogatories; document production notices; requests for admissions; subpoenas and depositions. At times it may be both practical and expedient to waive certain discovery, but only if there is a full understanding and acquiescence by the client regarding why that is being done. By way of example, if substantial debt has been accrued on multiple credit cards, and the client agrees the debt is all in the nature of ordinary marital expense that will be satisfied equally upon distribution of another marital asset, then it may be appropriate to dispense with an evaluation of five years of credit card charges. However, be careful to set this forth in the matrimonial settlement agreement. Specifically indicate that both parties acknowledge the credit card debt has been accrued by the parties for basic marital expenses and is a liability to be set off equally against the distribution of a certain asset, and because of this the parties agree to dispense with a forensic evaluation of debt accrual.

Similarly, if there is a piece of real estate in a location where there have been multiple sales of similar homes, it may be practical to stipulate an agreed upon value without a battle of real estate appraisers. However, if one party is retaining that asset there should follow a description in the matrimonial settlement agreement regarding specifically why the parties are both foregoing formal appraisals.

If, for example, one of the parties is a sole legal practitioner with a small general practice with a limited income, it is certainly appropriate to dispense with a practice evaluation (other than the calculation of perquisites if they are meaningful) because there assuredly is not going to be any intangible goodwill. Either in the context of a letter to the client, in the body of a matrimonial settlement agreement, or both, it is necessary to explain why a forensic valuation is not going to be conducted.

The practice tip is not just to waive certain unnecessary discovery or unnecessary valuations, but to document why those waivers are occurring.

Among the language which can be included, is the following:

> The parties have engaged in discovery, including business valuations and cash flow analysis and exchanges of other documents through interrogatory responses and subpoenas. Both parties further warrant and represent that they have disclosed to each other through counsel or through forensic accountants, all material information that would potentially affect this agreement. Each party is relying to his or her detriment upon the accuracy of these representations in accepting the terms and provisions of this agreement. In the event it is later determined by a court that either party has breached the representation upon which each relied, all legal and equitable remedies available to the other party under law may be utilized.
>
> The parties have been advised of their rights to conduct additional discovery with respect to the income, assets and financial information of

the parties during the course of the trial. Each party has made the determination after meeting with respective counsel and have had sufficient opportunity to consult with experts and it is unnecessary to engage in further litigation or discovery to resolve all economic disputes arising from the marital relationship [if continuing costs of discovery is an issue to your client it should be included as well].

Each party hereby knowingly waives his or her right to pursue any further discovery in favor of ending the instant marital dissolution proceeding upon the terms set forth herein.

Addressing Exempt/Immune Assets

Do not fail to engage in a justifiable calculation of assets that are exempt or immune from equitable distribution.[23] In a lengthy marriage a practitioner may represent a client who for many years prior to marriage had contributions made to a tax-deferred account, either from pre-tax earnings, employer contributions or both. Assuming the account now involves a rollover or multiple rollovers because prior employers are out of business and records maintained by prior administrators cannot be located can create a conundrum.

Calculations will have to be crafted, perhaps based not only upon approximations of a baseline exemption amount but the calculated market performance thereon, which would also be exempt. *If the numbers are significant, always use a forensic accountant. Obtain a written report on how the calculations are accomplished and reference that report in the matrimonial settlement agreement, acknowledging the full understanding and acceptability by the client.* Without addressing the issue in that fashion, even after a client testifies to the fairness of an agreement, the practitioner leaves him or herself open to a claim that numbers were placed in the agreement without any backup or basis.

The Active/Passive Distinction

Most equitably divided assets are passive in nature, in that the increase or decrease in value is guided by market forces rather than the efforts of one of the parties.[24] Those assets include tax-deferred accounts; life insurance cash surrender value; non-tax-deferred securities; bank accounts; other investment vehicles; and marital homes. Not only are these assets generally divided on essentially an equal basis, they are valued as of date of distribution.

Passive assets are to be distinguished from active assets, whose values may be increased (or in some instances decreased) by the active efforts of one of the parties rather than by market forces. Not only are active assets valued as of the date of complaint rather than date of distribution, they may, in some instances, be subject to significantly disproportionate distribution with the spouse actively managing those assets being entitled to a greater percentage.[25]

When there are active assets involved, in crafting a comprehensive marital settlement agreement (MSA), simply don't plug in amounts or percentages on an equitable distribution balance sheet. The author's preference is always to explain the positions of the respective parties when there is some disagreement regarding whether the asset is active or passive. Explain the valuation placed on each asset by the respective experts and then indicate the compromise figures arrived at in settling the case based upon both value active-passive dichotomy, including the differential in value of each asset in question as of the date of complaint as opposed to the date of distribution.

In doing so the practitioner has again avoided the allegation that he or she simply plugged in numbers and that alternatively he or she has engaged in a rationale, justifiable analysis.

The Recalcitrant or Enabling Client

From time to time, the matrimonial attorney will be faced with a situation where there is a substantial variance between what the practitioner deems to be a fair resolution for the client and what the client simply wants to accept. There can be a myriad of reasons for a client rejecting his or her attorney's advice. One may be that the client doesn't have the heart or stomach to continue litigation. Another may be that the client is simply an enabler. A perfect example is when the attorney views the case as clearly entitling the client to open durational alimony. The client indicates she doesn't want to "hurt" or "burden" her husband and, in fact, she has had discussions with him and wants to settle the alimony issue with payments for just a few years. The practitioner views the settlement as effectively unconscionable. What should he or she do?

There are essentially three viable options. The first is to indicate to the client that the attorney-client relationship has irretrievably broken down and withdraw from the case. The second option is to settle the case and, before a matrimonial settlement agreement is executed, provide a letter to the client recommending against settling alimony on the aforementioned basis, explaining

why and what the likely outcome would be if the case were mediated or litigated. Make sure the letter includes language that indicates that the client wishes to settle the matter despite specific legal advice. Also indicate in the letter that the client has an absolute right to confer with another attorney for a second opinion. Then have the client execute an acknowledgment form that she has read and understood the letter; that she realizes she is giving up rights to which the practitioner has advised her she is entitled; and that she nonetheless wishes to settle the case on a short-term alimony basis.

The third option is to provide such a letter coupled with a provision in the matrimonial settlement agreement itself that the client agrees to settle the alimony issues as set forth in the matrimonial settlement agreement despite the advice of her attorney.

The practice tip is that simply setting forth in a matrimonial settlement agreement an alimony calculus regarding amount and duration, without more detail, will not provide protection from a potential malpractice suit, even if the client has testified to the fairness of the agreement in open court. When the alimony runs out and memories fade, the practitioner runs the risk of being the target. That is precisely what needs to be avoided.

Justifying the Alimony: Do the Math

The author has seen numerous agreements where an alimony settlement is reduced to one point: how much and for how many years. This can create a blueprint for a potential malpractice claim. It is axiomatic that no case should ever be settled without both parties executing a case information statement (CIS). It is necessary to address the client's CIS with specificity. When representing the payee, be certain the budget is both accurate and realistic, and that it plays a material part in the alimony settlement. Engage in a calculation regarding the client's income—either actual or imputed—and what portion of the budget will be covered by the earned income. If there will be substantial non-tax-deferred investment assets distributed, engage in the calculation of that passive income and how it will aid in meeting a realistic budget. If there is going to be a reduction of the budget in due course due to, for example, the sale of a large marital home and a resultant downsizing, this should be factored in as well. If the alimony encompasses a savings component, that should likewise be part of the calculations.

Of course, if unemancipated children are involved and there is a child support component as a contribution toward household expenses, this should likewise be integrated into the consideration of budget attainment. *The rationale for the term of alimony, if not open durational, should be fully explained. Other than those cases where it is clearly unaffordable (which generally would be a small case in any event) consultation with a forensic accountant to calculate such things as net of tax availability and return on passive investments is almost always appropriate and usually necessary.*

After these tasks are accomplished, make sure there is some reference to them in the matrimonial settlement agreement. By way of illustration, language such as the following may be included:

> Plaintiff has asserted in her Case Information Statement that her budgetary needs total $7,000 per month. Defendant has suggested that the appropriate figure is $5,000 a month. Plaintiff has agreed that some budgetary adjustments can be made and for purpose of this agreement the net of tax budget is established at $6,000 per month. She has engaged in discussions with both her attorney and her forensic accountant and based upon her present level of earned income; alimony to be paid pursuant to this agreement; child support to be paid pursuant to this agreement; and estimated return of two percent (2%) on the $2 million she will retain as liquid assets she acknowledges that her net of tax budget is attainable.
>
> The parties have been married for nine and one-half (9 ½) years from date of marriage to date of complaint. Each of the parties have expressed their respective positions as to the duration of alimony, Plaintiff believing it should be for a slightly greater term than as agreed to herein and Defendant believing that it should be for a somewhat lesser term. Nonetheless in settlement of their differences they agree that a five (5) year term as expressed herein is fair and equitable.

Alimony and Equitable Distribution Tradeoffs

On some occasions there may be some negotiated tradeoffs between alimony and equitable distribution. Most practitioners have been in cases where a litigant may be willing to cede to the other party a greater portion of the equity in a marital home, defined contribution plan, defined benefit plan or some other asset in exchange

for paying a lesser amount of alimony either regarding amount, duration or both. *Unless the considerations are nominal, the same admonitions exist as applied when crafting the alimony award itself. First, use a forensic account to establish the tax-considered equivalent of the equitable distribution enhancement and what it means in relation to giving up alimony benefits.* Because alimony obviously involves IRC Section 71 and 215 taxation issues, the tradeoffs may or may not involve IRC Section 1041 tax-free advances, and in some cases the negotiations may involve accounts that may be subject to tax as well as postponed enjoyment.[26] If the numbers are significant, the practitioner should never attempt to prepare the analysis without professional assistance.

Second, the worst thing an attorney can do is fail to describe the dynamics of those trade-offs in a matrimonial settlement agreement. Be detailed and be specific regarding how the tradeoff calculus was determined and be sure the client understands and acknowledges, both in the agreement and in the testimony when the case is being put through, that the decision to effectuate those tradeoffs was done freely and voluntarily and with consultation and input from a forensic accountant.

To the extent there is an expression by the client not only that he or she understood the methodology through which the alimony calculus was reached but that he or she also played a role in structuring the resolution, the expression will provide protection from a subsequent allegation that no input was given to or provided by the client and that the amount and duration simply came out of left field without any factual or legal basis whatsoever.

Negotiating the Alimony Buyout

Alimony buyouts occur in one of two contexts: 1) at the time the divorce proceedings are being settled, or 2) on a post-judgment basis as one client approaches retirement age. *Alimony buyouts, by their very nature, are fraught with malpractice exposure. The biggest mistake an attorney can make is to provide in a matrimonial settlement agreement little more than the following: "In exchange for plaintiff receiving an extra $50,000 with respect to the division of marital assets the parties agree that neither party shall receive alimony."* Alimony buyouts involve an amalgam of several issues, including calculating a ballpark termination date if the matter were litigated; a range of figures for monthly alimony; consideration of the present day value of a lump sum payment on a tax-free basis that involves some discount; and a calculation of the buyout being a tax-free buyout rather than implicating the normal alimony provisions of IRC Sections 71 and 215.[27]

The practitioner should not try to establish those calculations without the assistance of an accomplished forensic accountant. The analysis needs to be outlined in writing by the accountant and the client needs to have a full understanding of the analysis. A reference to that analysis should be included in the matrimonial settlement agreement and when the client testifies he or she should specifically be asked about their understanding of the buyout and its acceptability. Within an acceptable range, the buyout, tax considered, should closely equate to the alimony benefits the client is otherwise waiving.

Assertion of Undisclosed Income/Assets

Consider the representation of a client whose spouse is salaried at $300,000 and, according to the client, receives significant perquisites, including unregulated use of multiple business credit cards; automobile-related expenses including a car allowance; insurance coverage; repairs and maintenance paid though the business and an EZ pass; travel expenses that in part are personal; barter arrangements with clients and more. In order to properly resolve an alimony claim, these components must be unearthed. To simply cite *Crews* and *Weishaus* language in a matrimonial agreement and reference the other spouse's income at $300,000 for alimony purposes sets the practitioner up for a malpractice claim. *In addition to identifying substantial perquisites through discovery, in most cases the practitioner will again need a forensic accountant to tally up what are, with limited exceptions, tax-free benefits.* If there are perquisites, for example, that equate to another $75,000 gross, the baseline for the alimony calculation is now $375,000, not $300,000.

Similarly, if the client indicates her spouse has significant investments in the Caymans, don't simply dismiss the assertion out of hand.

Above all, never put a case through that closes the door to the client if assets are discovered on a post-judgment basis. Always provide a provision that each party has represented under oath that they have made a complete and candid disclosure of all assets, and that in the event the disclosure is false, the other party reserves the right to move to set aside the matrimonial settlement agreement, and if successful in doing be compensated for any legal or other professional fees that may be incurred as a result of the false representation.

In conclusion, the practitioner should describe, in as much detail and clarity as possible, the blueprint for how and why certain results in the matrimonial settlement

agreement were reached. In some instances it may be by correspondence with the client, in some instances within the context of the matrimonial settlement agreement and in some instances by both. If a task is not being done, explain in writing why it is not being done (for example additional discovery) and set forth the appropriate waivers to embellish the decision. As the expression goes, make sure to "paper your file," memorializing the essence of all conferences with the client as well as with the client and experts. Don't fail to confirm what was discussed in a detailed letter to the client thereafter.

Of course, a practitioner can never fully protect him or herself from a malpractice claim, even when an agreement is clear and comprehensive and the client has testified about the agreement in open court. But by following the guidelines suggested in this article, it is possible for a practitioner to minimize a malpractice claim and, if one is filed, arm him or herself with strong defenses.[28]

Mark Biel is the senior partner at Biel, Zlotnick & Stiles, P.A. in Northfield. He gratefully acknowledges the assistance of John L. Slimm, a partner in Marshall Dennehey, in Cherry Hill, with the preparation of this article.

Endnotes

1. 28 N.J. 250 (1992).
2. *Id*. at 262.
3. *Id*. at 265.
4. *Id*. at 266.
5. *Id*. at 265.
6. *Id*. at 267.
7. *Puder v. Buechel*, 183 N.J. 428 (2005).
8. *Puder v. Buechel*, 362 N.J. Super. 479 (App. Div. 2003).
9. *Puder v. Buechel*, 183 N.J. Super. 428, 423 (2005).
10. *Id*. at 434.
11. *Ibid*.
12. *Newell v. Hudson*, 376 N.J. Super. 29 (App. Div. 2005).
13. *Id*. at 34.
14. *Ibid*.
15. *Id*. at 42-43.
16. 2008 N.J. Super. Unpub. LEXIS 2430 decided 3/21/08.
17. 202 N.J. 79 (2010).
18. *Id*. at 85.
19. *Id*. at 89. The Court nonetheless indicated that in some circumstances whether a malpractice claimant sought to vacate a prior settlement it may be relevant. *See* Ziegelheim, *supra*. at 257.
20. *Id*. at 87.
21. *Id*. at 88.
22. Upon remand there followed additional discovery. The trial judge dismissed the plaintiff's malpractice claim on a motion for summary judgment, which decision was affirmed by the Appellate Division.
23. N.J.S.A. 2A:34-23.1.
24. *Cf. Scavone v. Scavone*, 230 N.J. Super. 482, 486 (Ch. Div. 1988); *aff'd* 243 N.J. Super. 134 (App. Div. 1980); *Valentino v. Valentino*, 309 N.J. Super. 334, 338 (App. Div. 1998); and *Sculler v. Sculler*, 348 N.J. Super. 374, 378 (Ch. Div. 2001).
25. *Scavone, supra*, 230 N.J. Super. at 491-92.
26. Alimony, unless negotiated to the contrary, is taxable to the payee and conversely deductible by the payor pursuant to IRC Sections 71 and 215. A transfer of property from one spouse to another for equitable distribution purposes is usually done on a tax-free basis pursuant to IRC Section 1041. Such transfer or assignment may nonetheless implicate other tax issues pursuant to the precepts of *Orgler v. Orgler*, 237 N.J. Super. 342 (App. Div. 1989) and, thus, the need for professional advice.
27. Some of these considerations are similar to those as discussed in endnote xxvii *supra*.
28. The legal standards for proving malpractice are discussed in another article crafted by this author, Avoiding Malpractice Claims in Matrimonial Actions, *New Jersey Family Lawyer*, Vol. 34, No. 3, Dec. 2013.

No Decisions About Us Without Us: New Jersey's Youth Participation in Court Protocol and the Importance of Having Children Attend Hearings in Child Welfare Cases

by Mary Coogan, Lorraine Augostini, and Jey Rajaraman

'No decision about me without me' is the request made time and time again by children and youth living in foster care across the nation. They want to be consulted when legal decisions are made that affect them. Although they have attorneys who represent them in court, they, like other clients, want to be present when their attorneys—referred to as law guardians—argue their position and they want to hear what others have to say in court. In some jurisdictions, children and youth living in foster care routinely attend their court hearings, exercising a fundamental right enjoyed by all litigants. But what seems like common sense to the non-lawyer is often viewed by professionals involved in child abuse and neglect cases as problematic, fraught with logistical issues, and potentially traumatic for the child.[1]

However, legal scholars and proponents of children's rights nationwide have long recognized the benefits of allowing children living in foster care to be present in court and express themselves during court proceedings that have an impact on their lives.[2] And now, with the recently implemented youth participation in court protocol putting current law into practice, New Jersey does, too.

By way of the protocol's history, with funding from New Jersey's Children in Court Improvement Committee (CICIC),[3] the New Jersey Office of the Public Defender, Office of the Law Guardian (OLG),[4] collaborated with a steering committee comprised of representatives of the various entities involved in child abuse and neglect cases[5] to organize three youth summits. One statewide summit was held in 2008 and two regional summits were held in 2009. Speakers provided information regarding how other jurisdictions arrange to have children attend court hearings on an increasingly regular basis. Many of the children who participated in these summits voiced the desire to actively participate in the decisions affecting their future and to attend their court hearings.

The OLG's summits were an important first step to effectuating change aimed at enhancing youth involvement in their court hearings. After the summits concluded, the stakeholder entities and children committed to continuing to collaborate and work toward meaningful involvement of children and youth at every stage of the court proceedings.

In 2011, to further raise awareness and encourage children's participation in their court hearings, Advocates for Children of New Jersey (ACNJ) wrote and disseminated a policy brief highlighting relevant law and examining the benefits and barriers to children being involved in court proceedings.[6]

Members of the CICIC then began drafting a protocol to facilitate more children attending their permanency hearings by implementing the law that provides children with the right to notice of and opportunity to participate in their permanency hearing. At the permanency hearing, the judge reviews the long-term (or permanency) plan proposed by the New Jersey Division of Child Protection and Permanency (DCP&P, formerly the Division of Youth and Family Services). This hearing is required to take place no later than 12 months after the child enters foster care, and annually thereafter until the child is living in a permanent home.[7] After many discussions and input from all members of the CICIC, the protocol was reviewed and endorsed by the presiding judges of the family part. In July 2013, the protocol was approved by Judge Glenn A. Grant, J.A.D., acting administrative director of the New Jersey courts.[8]

As will be discussed in detail below, the protocol today provides guidance to committed stakeholders to ensure that more children attend their permanency hearings. All New Jersey vicinages are now required to

provide notice and an opportunity to appear to children living in foster care relative to their permanency hearings. The nature of these hearings is changing with the implementation of the protocol, as discussed below.

In April 2014, a pilot program began in Burlington, Essex, and Sussex counties to assess the implementation of the protocol through training provided to participants and survey data collection. As of Aug. 2015, the protocol is being implemented statewide and feedback is still being gathered through the surveys in all counties.

The protocol resulted in a revised permanency form of hearing order. This order now collects information regarding whether a child appeared in court and/or participated in the permanency hearing.

In addition, surveys completed by children and adults attending permanency hearings, including the attorneys and the parents, are providing ongoing feedback to the CICIC. The American Bar Association (ABA) Center on Children and the Law's Bar Youth Empowerment Project and the National Child Welfare Resource Center on Legal and Judicial Issues provided technical assistance to analyze survey data collected since April 2014. The first 135 children and youth completing surveys as part of the pilot program reported positive feedback. Almost all reported they were glad they came to court and said they would do so again.

This article explains how stakeholders involved in child abuse and neglect cases came together to implement laws that provide the opportunity for children living in foster care to sit at counsel table and have input into the decisions that are important to them and affect their futures.

Background and Relevant Law

Children living in foster care are considered parties in child abuse and neglect proceedings.[9] New Jersey statute requires the court to appoint independent legal counsel for children removed from their homes pursuant to an abuse and neglect complaint and placed into foster care.[10] The OLG, located within the Office of the Public Defender, provides legal representation as counsel for the child.[11]

The Title 9 complaint initiating a child abuse and neglect action is typically filed by the DCP&P. The DCP&P may also file a complaint seeking supervision of a child who remains in their home with their parents.[12] If the state subsequently initiates a guardianship complaint seeking to terminate the parents' rights, the OLG continues to provide legal representation to the child or children involved.[13] Thus, children involved in parental termination cases are statutorily entitled to an attorney to represent their interests and to make their wishes known to the court.[14]

However, unlike parents, who are routinely noticed and required to attend court reviews and hearings, attendance by children and youth at court hearings is not the norm in New Jersey. Their input is generally provided by their law guardian, their DCP&P caseworker, or a court appointed special advocate (CASA) volunteer if one is appointed by the judge. In addition, conversations that any children and youth have with the judge are typically conducted in chambers and often off the record.

Federal Law

Nationally, the trend is to allow children and youth to be a part of the decision-making process regarding their placement and living arrangements. Federal law provides this opportunity.

Organizations such as the ABA Commission on Youth at Risk, the National Association of Counsel for Children, and the National Council of Juvenile and Family Court Judges (National Council) have encouraged state and local courts to have children present at court hearings. For example, the National Council passed a resolution in 2012 stating, in part, that:

> It is the policy of the National Council of Juvenile and Family Court Judges that children of all ages should be present in court and attend each hearing, mediation, pre-trial conference and settlement conference, regardless of their age, unless the judge decides it is not safe or appropriate….[15]

The National Council resolution presumes that the best practice is to have children in court for their hearings and, if the child is not present, "the stakeholders must explain to the judge the safety or well-being reasons for the child's absence."[16]

In addition, federal law authorizes youth participation in court proceedings. Congress recognized the importance of youth having input in court proceedings when it enacted the Child and Family Services Improvement Act of 2006.[17] The act requires:

> …procedural safeguards [are] to be put in place to assure that in any permanency hearing

> held with respect to the child, including any hearing regarding the transition of the child from foster care to independent living, the court or administrative body conducting the hearing consults, in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child.[18]

Clearly, consulting with the child provides the court with more information from the child's perspective, leading to better judicial decisions and improved outcomes for children and their families.

In addition, several provisions of the federal Fostering Connections to Success and Increasing Adoptions Act of 2008[19] authorize foster youth to participate in the decisions that affect them. Under the act, youth over the age of 14 must be consulted when the court is considering legal guardianship with a relative as a permanency plan.[20] (By comparison, New Jersey law requires that a child age 12 and older must be consulted when kinship legal guardianship is being considered as the permanency plan.)[21] Under the act, a youth-directed case transition plan is required within 90 days of the youth leaving foster care, the development of which the court should monitor.[22]

New Jersey Law

Since 1999, when New Jersey adopted and implemented its version of the federal Adoption and Safe Families Act (ASFA), New Jersey law has required that all children living in foster care be given an opportunity to attend and to be heard at their permanency hearings.[23] Specifically, N.J.S.A. 30:4C-61.2(b)(2) states that a child living in foster care is entitled to written notice of the date, time and place of the permanency hearing at least 15 days prior to the hearing, and the child is entitled to attend the hearing and to submit written information to the court. However, this statute has not been implemented on a consistent basis. The protocol seeks to correct this problem.

The goals of the federal laws, the state statute, and the protocol are to engage court-involved youth in their permanency hearings, to encourage their participation in the court process and to support youth's meaningful participation in the decision-making process.

Benefits to the Judge and the Process

Having the child or youth present at a hearing helps to focus the judge on the needs of the specific child and can "highlight how quickly she is growing and just how important speedy, decisive action toward permanency is."[24] A child's or youth's appearance and demeanor, as well as verbal and non-verbal communication, can provide information and perspective to the judge and can provide the judge insight into the child's feelings, reaction, development and special needs, as well as the care the child is receiving.

Children and youth may have information that others may not have or may not have shared concerning relatives, other possible placements, and others who can provide support to the family. Children can clarify issues related to their school, their schedules, health-related issues, and therapy, and can respond directly to questions raised at court hearings, which can save time and move a case forward. These in-court observations of children and youth, taken with the reports and recommendations of the DCP&P and the attorneys, give the judge a more complete picture and enable the judge to make the best decision possible for the child or youth.[25]

In the pilot counties, 590 surveys were completed by adult stakeholders attending 135 permanency hearings, which included 301 attorneys, 116 judges, 75 caseworkers, 24 CASA supervisors, nine CASA volunteers, 21 parents/resource parents, 41 other professionals, and three volunteers. Of those responding:

- 66 percent of adults/stakeholders said there was a benefit to the youth participating.
- 52 percent of adults/stakeholders said the court had better information/more information as a result of the child's presence at the hearing.

Benefit to and Impact on the Child

Some have expressed concern about the potential negative impact that appearing in court may have upon the child or youth. There are not many research studies concerning the direct impact participating in the court hearing has upon the child. New Jersey is one of the first states gathering feedback through surveys from *all* participants, including the children.

The initial feedback from children and youth attending permanency hearings in the three pilot counties was positive. Children and youth attended 135 of the 200 permanency hearings during the six months of the pilot, and 134 completed surveys. Of those responding:

- 97 percent of the children/youth said they were glad they came.
- 89 percent felt the judge heard or understood them.

- 99 percent said they would come again.

The limited research available on this topic supports involvement of children in their permanency planning and in their court hearings.[26] One study reported that having children attend court resulted in the children having "higher levels of trust in the judge, more positive assessments of the fairness of the judge's decision and more knowledge and understanding of their case." In another study, the authors report their findings "indicate that judges can make the court experience less stressful and more comfortable for children by adopting brief and encouraging direct interactions with the children in the courtroom."[27]

Being in court can demystify the process for the youth and bolster the credibility of the law guardian and the caseworker for the child because he or she sees, first-hand, these individuals sharing the child's concerns with the judge. Having input and then listening to the rationale of the judge's decision can also help youth understand and accept the outcome if the judge disagrees with the child's position on a given issue. And the process of preparing for court and participating in the hearing helps children develop decision-making and negotiating skills needed to be self-sufficient. Too often forgotten is the negative impact on children and youth left out of the court process. Knowing that a court hearing is occurring, children and youth worry about what is happening in court, are distracted from their routine tasks, and are anxious about what is being decided about their lives.

The Youth Participation in Court Protocol

The protocol provides guidelines and assigns responsibilities to stakeholders to implement state law consistently and help ensure that children attending their permanency hearings have a positive experience and can have input in the cases that affect their lives. The result is that, whenever possible and in accordance with the child's wishes, the child may appear at his or her permanency hearing and participate in an appropriate and meaningful way.

Although the law and the protocol encourage children and youth to attend their permanency hearings, no child should be compelled to attend the court hearing. If the child does not want to come to court, he or she can still participate in other ways, including by conference call or submitting a letter or other written statement. Whether the child attends court personally or provides a written statement, their attorney is always present to advise the court of their wishes and to advance their position in the litigation.

Responsibilities of Stakeholders under the Protocol

To assure a positive experience for the child or youth, the protocol requires preparation of the child for the hearing by the law guardian, DCP&P caseworker, and the CASA volunteer, if one is assigned to the case. Bringing the child to court has implications for the hearing format itself, the language used by the attorneys and judges during the hearing, the content of what is discussed in front of the child, and the logistics of getting the child to and from the court hearing.

The protocol provides parameters for each county to develop plans that meet the needs of that particular county. For example, some counties try to limit the number of permanency hearings involving children on one day in order to minimize the amount of time children may have to wait for the hearing. One county tries to arrange visits between parents and their children and between siblings who do not live in the same home on the same day as the hearing. The CICIC recommends each vicinage form a work group, including representatives of all stakeholders, to ensure the successful implementation of the protocol within that county.

Under the protocol, the child's attorney has the primary responsibility for providing the child with notice of the upcoming permanency hearing date and preparing the child for the hearing. The protocol contemplates that the law guardian will provide the notice to the child in a face-to-face meeting. This meeting offers yet another opportunity for the child to meet with their lawyer, ask questions and confer regarding the court process. For children under the age of five, the notice will be provided to the foster parent. Following the meetings, the protocol provides that the law guardian must provide the court and the other parties with confirmation that the child was noticed and indicate whether the child wants to attend the permanency hearing.

In addition, under the protocol others can and should also talk to youth about coming to court and respond to their questions. For example, law guardians and the DCP&P caseworker should share this responsibility to make sure the youth is properly prepared for the court experience. They should also speak with, or 'debrief,' the child following the hearing to ensure the child understood what happened. This meeting should include an

assessment of any emotional impact the hearing may have had on the child. In addition, if the child has any special needs or cognitive issues, or takes medication the judge needs to be aware of, the law guardian and/or DCP&P caseworker should alert the court prior to the hearing. The law guardian may wish to involve the child's therapist in helping prepare the child for court or afterwards, to help debrief the child regarding his or her experience in court.

Transportation to and from Hearings

The protocol contemplates that stakeholders should work in collaboration to ensure a child attends court, if the child wants to come to the permanency hearing. Transportation may be an issue for a child who lives a distance from court or if members of a sibling group involved in a single case reside in different foster homes. DCP&P caseworkers have limited resources and children need company while they wait at the courthouse for the hearing to begin. The law guardian or caseworker should ask the child if there is a supportive person the child would like to invite to accompany them to court, and perhaps this individual may be able to assist with transportation. A lack of transportation should never be a barrier to a child/youth attending a permanency hearing. The DCP&P has ultimate responsibility for transportation, but may ask the foster parent (called a resource parent in New Jersey), the law guardian investigator, or the behavioral healthcare management organization to help with transportation.

Objections to the Child Attending Court

If, for any valid reason, a stakeholder has a concern about a child/youth attending the hearing or the entire hearing, an objection must be made at least five days before the permanency hearing under the protocol. However, it is recommended by the protocol that stakeholders raise objections as soon as someone has a concern rather than wait until five days before the hearing. Attorneys should try to resolve any issues out of court and, if they are unable to do so, they must request that the judge make a final decision. According to the protocol, objections shall not prevent the child's participation.

Attorneys for parents have a role to play in helping to ensure a positive experience for both the parents and the children.[28] Parents' attorneys may start by explaining to their clients that a law guardian will personally deliver notice of the hearing to children/youth over the age of five. For those under the age of five, notice will be provided to the child's resource parent. The resource parent will be encouraged to come to court. Under New Jersey law, the child's resource parent is permitted to attend court and provide a brief statement about their child's well-being pursuant to N.J.S.A. 9:6-8.19a.

Attorneys for parents may want to inform their clients that they should not assume their child's participation in court is an opportunity for visitation. Some counties have allowed visitation while others have not. An advocate should find out from the judge what will be allowed at court and then relay that information to their client.

Should a parent have a concern about their children being present at the hearing or for a portion of the hearing, the parent's attorney can file an objection under the protocol. An objection will generally not prevent the child from appearing at the hearing; rather, the parameters of the child's participation may be modified by the judge as a result of the objection.

Court Schedules and Logistical Details

Having children appear at permanency hearings will likely have an impact on the court calendars. Under the protocol, courts should take care when scheduling these hearings to allow time to complete surveys and possibly debrief the child. In addition, children might be unable to miss school to attend court, which may impact scheduling.

In addition, hearings involving children who are encouraged to participate might last longer than expected, which may result in youth having to wait outside the courtroom for their hearing to begin. Each county should consider where it might be appropriate to have children waiting before their permanency hearing or if the child will not be attending the entire hearing. Court staff must work with stakeholders if the child is to speak to the judge in chambers on the hearing date or at another scheduled time.

Pursuant to the efforts of stakeholders discussed above, the order for the permanency hearings used statewide has been amended to include space to reflect whether the child or youth attended and participated. Courtsmart, the court's digital recording system, has been enhanced statewide and should be used at every hearing to preserve the child's participation on the record. If the child wishes to speak to the judge privately, the ideal process is for the permanency hearing to begin in the courtroom, at which time the law guardian can indicate that the child wants to speak to the judge sepa-

rately. The courtroom can be cleared so the judge can have a private conversation with the child on the record. If the judge has Courtsmart in chambers, the conversation can be recorded there.

The Protocol: Inside the Courtroom

The main purpose of the child's attendance in court is to express his or her views to the court, particularly regarding the agency's permanency plan for the child/youth. At the permanency hearing, generally speaking, the child is not present in court to provide testimonial evidence to the trier of fact on a material fact in dispute. Therefore, the child or youth need not be sworn in or subject to cross-examination. In these proceedings, others, such as parents and resource parents, also provide their views to the court without being sworn in or subjected to cross-examination. Subjecting the child to the more formal process of being sworn in and cross-examined would undermine the goal of the protocol; namely, to encourage and enhance youth participation in the court process.

The Protocol: Surveys

Stakeholders and children will be asked to complete short surveys to gather feedback to continue to improve the process. Under the protocol, the law guardian helps the child complete a youth in court pre-case survey prior to the hearing.[29] This can be done while the child or children are waiting outside the courtroom. The DCP&P caseworker or CASA volunteer can assist the child in completing the survey if the law guardian is unavailable to help. The surveys should be completed at the courthouse so they can be collected by court staff. Youth should arrive a few minutes early, if possible, to have time to complete the survey with assistance.

Stakeholders will be asked to complete a survey for each permanency hearing in which a child appears. While these surveys are brief, completing them will require a short break between hearings so they can be addressed.

The child or children should complete the survey when they leave the hearing. In the instance when a youth does not appear, *only* the law guardian must complete a youth in court child did not appear post-case survey.

Stakeholders will also complete online surveys via a link once a month for more in-depth feedback. It is critical for participants to complete this more-comprehensive survey so the Administrative Office of the Courts (AOC) and the CICIC can assess the impact of implementing the protocol in each county. Feedback received from stakeholders in each county as they implement the protocol will help minimize any negative impact and improve the protocol.

Conclusion

As the protocol continues to be implemented statewide, logistical and substantive legal issues may arise in the implementation. As the survey results indicate, however, the protocol has improved outcomes for children and families in the child welfare system because children's viewpoints and their opinions are being heard directly in a structured, uniform way. As with every family docket, providing better and meaningful access to the court system will only improve the experience and participation for members of the public. This is even more important for the most vulnerable populations, specifically, children living in foster care. ■

Mary Coogan is the assistant director of the Advocates for Children of New Jersey (ACNJ). Lorraine Augostini is the assistant public defender at the New Jersey Office of the Public Defender's Office of Law Guardian. Jey Rajaraman is chief counsel of the Family Representation Project, Legal Services of New Jersey.

Endnotes

1. Child abuse and neglect cases and termination of parental rights cases are part of the children in court or CIC docket in family part. In other states, these cases are called dependency cases.

2. *See*, *e.g.*, Chartering a Better Future for Transitioning Foster Youth: Report from a National Summit on the Fostering Connections to Success Act (American Bar Association Commission on Youth at Risk, 2010, pages 28-9); A. Khoury, Seen *and* Heard: Involving Children in Dependency Court, 25 *Child Law Practice* 10 at 145-46 (American Bar Association, Dec. 2006) (*citing* the National Council of Juvenile and Family Court Judges' Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases (Spring 1995); the American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (approved 1996); the National Association of Counsel for Children American Bar Association Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases (NACC Revised Version, April 21, 1999); M.A. Krinsk and J. Rodriguez, Giving a Voice to the Voiceless—Enhancing Youth Participation in Court Proceedings, 6 *Nev. L. J.* 1302, 1305 (2005-2006); J. Jenkins, Listen to me! Empowering Youth and Courts through Increased Youth Participation in Dependency Hearings (Family Court Review, Jan. 2008) (*citing* numerous scholars); G. Hochman, A. Hochman and J. Miller, Conference on Representing Children and Families: Children's Advocacy and Justice Ten Years after Fordham (Jan. 12-14, 2006, William S. Boyd School of Law, University of Nevada, Las Vegas); Fostering the Future: Safety, Permanence, and Well-Being for Children in Foster Care (The Pew Commission on Children in Foster Care, 2004, available at pewtrusts.org/~/media/legacy/uploadedfiles/phg/content_level_pages/reports/0012pdf.pdf).
3. New Jersey's Children in Court Improvement Committee (CICIC) is the state committee charged with identification and implementation of ways to improve the court's processing of child abuse and neglect cases and termination of parental rights cases, as well as juvenile delinquency cases where the youth are living in foster care. The CICIC reports to the Administrative Office of the Courts (AOC). New Jersey's federal court improvement funds are distributed through the CICIC by way of grants for innovative projects and training. The CICIC members represent all stakeholder and stakeholder entities that work within the child protection system.
4. The OLG provides legal representation to all children who are placed into foster care. N.J.S.A 9:6-8.23.
5. These entities included the Division of Child Protection and Permanency (DCP&P, formerly Division of Youth and Family Services); Children's System of Care (formerly Division of Child Behavioral Health Services); Administrative Office of the Courts (OAC); Office of the Attorney General (OAG); Court Appointed Special Advocates of New Jersey (CASA); New Jersey State Child Placement Advisory Council; Office of Parental Representation, Office of the Public Defender; Child Welfare Clinics at Rutgers Law School–Newark and Rutgers Law School–Camden; Children's Justice Clinic at Rutgers Law School; Transitions for Youth, Institute for Families, School of Social Work at Rutgers University; Advocates for Children of New Jersey; Office of the Child Advocate; and Juvenile Justice Commission.
6. Mary Coogan and Nancy Parello, "A Child's Voice: Involving Youth in Child Protection Court Hearings," (ACNJ 2011) (available at acnj.org/downloads/2011_07_01_YouthCourtHearings.pdf).
7. N.J.S.A. 9:6-8.54.
8. The Youth Participation in Court Protocol is available on the ACNJ website at acnj.org/downloads/2015_11_12_youth_participation_in_court_protocol.pdf. Judge Grant's cover memorandum is available at acnj.org/downloads/legal_resources/2013_07_22_judge_grant_memo_approving_protocol.pdf.
9. N.J.S.A. 9:6-8.23; N.J.S.A. 30:4C-15.4; *In re Maraziti*, 233 N.J. Super. 488, 493-494 (App. Div. 1989).
10. N.J.S.A. 9:6-8.23.
11. N.J.S.A. 9:6-8.21(d); Rule 5:8B.
12. N.J.S.A. 30:4C-12.
13. *New Jersey Division of Youth and Family Services v. E.P.,* 196 N.J. at 88 (*citing* N.J.S.A. 30:4C-15.4(b)) and 113 (*citing N.J. Div. of Youth & Family Services v. Robert M.,* 347 N.J. Super. 44, 70 *certif. denied*, 174 N.J. 39 (2002)).
14. N.J.S.A. 30:4C-15.4 (b),(c); *In re M.R.*, 135 N.J. 155, 173-174 (1994).
15. Whitney Barnes, E., Khoury, A., Kelly, K., Seen, Heard, and Engaged: Children in Dependency Court Hearings, National Council of Juvenile and Family Court Judges, *Technical Assistance Bulletin*, p.4 (Aug. 2012) (available at ncjfcj.org/sites/default/files/CIC_FINAL.pdf).
16. Seen, Heard, and Engaged, pp. 5-6.
17. 109 P.L. 109, Approved Sept. 28, 2006 (120 Stat. 1233).

18. 42 U.S.C. §675(5)(C).
19. 110 P.L. 351, Approved Oct. 7, 2008 (122 Stat. 3949).
20. 110 P.L. 351 §101(d)(3)(A); 122 Stat. 3949, 3951.
21. N.J.S.A.3B:12A-6.a(7); N.J.S.A. 30:4C-61.2.
22. 42 U.S.C. §675(5)(H); Seen, Heard, and Engaged, p. 4 (*citing* the federal Administration on Children and Families Program Instruction for Fostering Connections stating that a court should monitor the development of and review this transition plan).
23. New Jersey implemented the Adoption and Safe Families Act (P.L. 105-89, ASFA) in 1999 and began conducting permanency hearings. *See* N.J.S.A. §30:4C-1 *et seq.*
24. Seen, Heard, and Engaged, p. 8.
25. *Id*. at p. 7.
26. *Id*. at p. 5.
27. V. Weisz, T. Wingrove, S. Beals, A. Faith-Slaker, Children's Participation in Foster Care Hearings, *Child Abuse & Neglect*, 35(4), 267-272 (April 2011).
28. Legal Services of New Jersey published an issue of Looking Out for Your Legal Rights concerning children's participation in court in Sept. 2014. *Looking Out*, Vol. 33 No. 7 (Sept. 2014) is available at lsnjlaw.org/Publications/Pages/Looking%20Out%20Articles/Sept14LOWeb.pdf.
29. The Youth in Court Pre-Case Survey, Youth in Court Stakeholder Post-Case Survey, Youth in Court Post-Case Survey, and Youth in Court Child Did Not Appear Post-Case Survey are available at acnj.org/downloads/legal_resources/2015_12_03_Youth_Surveys.pdf.